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Appeal No. 2026AP001008

SUPREME COURT OF WISCONSIN

Wisconsin Business Leaders for Democracy, John A. Scott,
Nicholas G. Baker, Beverly Johansen, Rachel Ida Buff,
Kimberly Suhr, Sarah Lloyd, Nancy Stencil, Vikas Verma
and James T. Lyerly,

Plaintiffs-Appellants,

v.

Wisconsin Elections Commission, Marge Bostelmann,
Ann S. Jacobs, Don Millis, Robert F. Spindell, Jr.,
Carrie Riepl, Mark L. Thomsen and Meagan Wolfe,

Defendants-Respondents,

Billie Johnson, Chris Goebel, Aaron Guenther,
Charles Hanna, Tim Higgins, Lou Kowieski, Chris Muller,
Eric O'Keefe, Craig Rosand, Ruth Streck, Ronald Zahn,
Glenn Grothman, Bryan Steil, Tom Tiffany, Scott Fitzgerald,
Derrick Van Orden, Tony Wied, Gregory Hutcheson, Patrick
Keller, Patrick McCalvy, Mike Moeller
and Wisconsin State Legislature,

Intervenors-Defendants-Respondents.

On Appeal from the Circuit Court for Dane County,
Three-Judge Panel pursuant to Wis. Stat. § 751.035,
The Honorable David Conway, Michael Moran, and Patricia Baker,
Presiding
Circuit Court Case No. 2025CV2252

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Introduction

More than a century ago, this Court struck down state legislative plans that were blatant anti-competitive gerrymanders. The maps at issue in *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892), sought to “perpetuate [Democratic legislators’] ascendancy and power,” *id.* at 500 (Pinney, J., concurring), and “to preserve the political status quo,” *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 566, 126 N.W.2d 551 (1964) (describing *Cunningham*). This case is about whether the Court will now make explicit what *Cunningham* and *Zimmerman* implied: that anti-competitive gerrymandering is “a direct and palpable violation of the constitution.” *Cunningham*, 81 Wis. at 484.

Below, the circuit court declined to recognize this claim on the grounds that anti-competitive gerrymandering is equivalent to partisan gerrymandering and Article IV of Wisconsin’s Constitution does not forbid the practice. But beyond their mutual subject of redistricting, anti-competitive gerrymandering shares little in common with partisan gerrymandering. The former captures a distinct injury: the suppression of *electoral competition* instead of the pursuit of *partisan advantage*. It is proven by different evidence that is agnostic to which party wins each district. It harms all voters in artificially uncompetitive districts rather than exclusively supporters of a given party. And its remedy is a more competitive map, not necessarily one that is fairer in partisan terms.

Even if anti-competitive and partisan gerrymandering were similar, the circuit court was wrong that *Johnson v. WEC*, 2021 WI 87,

399 Wis. 2d 623, 967 N.W.2d 469 (*Johnson I*) established the non-justiciability of the latter claim. Because no litigant alleged partisan gerrymandering in *Johnson I*, this Court had no occasion to make a precedential, non-advisory ruling about its legality there. Reinforcing that understanding, this Court subsequently explained that an “extreme-partisan-gerrymandering claim present[s] an important **and unresolved** legal question.” *Clarke v. WEC*, 2023 WI 79, ¶7, 410 Wis. 2d 1, 998 N.W.2d 370 (emphasis added).

The circuit court further erred in supposing that all state constitutional limits on redistricting are contained within Article IV. Again, that view cannot be reconciled with *Clarke*. If partisan gerrymandering violates Wisconsin’s Constitution, it must do so because of legal authorities **outside** Article IV, which contains no such express limitation. That such authorities exist and have legal force is demonstrated by *Clarke*’s consideration of “other traditional districting criteria not specifically outlined in the Wisconsin ... Constitution” as well as the “partisan impact” of district plans. 2023 WI 79, ¶¶68–69. Again, these factors appear nowhere in Article IV.

This Court should therefore reverse the circuit court’s decision and affirmatively recognize anti-competitive gerrymandering as a viable claim. All the usual modes of constitutional interpretation support this recognition. Textually, redistricting that intentionally and effectively extinguishes competition flouts the principle that “governments ... deriv[e] their just powers from the consent of the governed,” Wis. Const. art. I, § 1; subverts “moderation, temperance, frugality, and virtue,” *id.* art. I, § 22; and renders the right to vote meaningless, *see id.* art. III, § 1. The drafting history of Wisconsin’s Constitution confirms its goal of

“prevent[ing] all or almost all gerrymandering.” The Struggle over Ratification, 1846–1847, at 438 (Milo M. Quaife ed., 1920) (*Racine Advocate*). The crux of gerrymandering, in turn, was seen as entrenchment in office: “keeping political power in the same hands for such long periods.” *Id.*

This Court’s precedents also condemn anti-competitive gerrymandering. The plans nullified in *Cunningham* failed to “secure a fair and just representation” precisely because they aimed to “perpetuate [Democrats’] ascendancy and power.” 81 Wis. at 500 (Pinney, J., concurring). And beyond Wisconsin’s borders, anti-competitive gerrymandering claims have proliferated. Notably, one such suit was brought by the counsel representing the Congressmen here and resulted in the invalidation of New York’s congressional map because it intended to “discourage competition” and indeed “significantly reduce[d] the number of competitive districts.” *Harkenrider v. Hochul*, 197 N.E.3d 437, 453 (N.Y. 2022) (internal punctuation omitted).

Moreover, recognizing anti-competitive gerrymandering would not “transgress the ordinary bounds of judicial review.” *Moore v. Harper*, 600 U.S. 1, 36 (2023). Those bounds are set by the usual legal tools of text, history, and precedent, all of which establish that anti-competitive gerrymandering offends Wisconsin’s Constitution. Nor are there any other procedural obstacles to Plaintiffs’ claim. Preclusion doctrines are inapplicable since no Plaintiff here was a party in the earlier *Johnson* litigation. Likewise, laches no more bars Plaintiffs’ claim than myriad other redistricting challenges launched at similar times in the decennial cycle.

Accordingly, this Court should reverse the circuit court's decision, recognize anti-competitive gerrymandering as a violation of Wisconsin's Constitution, and remand to the circuit court for further proceedings. To guide these proceedings, the Court should clarify that liability for anti-competitive gerrymandering requires proof of both (1) anti-competitive intent; and (2) anti-competitive effect relative to lawful alternative maps.

Issues Presented

1. The circuit court held that anti-competitive gerrymandering claims like Plaintiffs' "are functionally equivalent to partisan gerrymandering claims" for purposes of assessing justiciability under the political question doctrine. (App.608) Did the circuit court err by holding that anti-competitive gerrymandering claims are functionally the same as partisan gerrymandering claims?
2. The circuit court concluded that this Court has "effectively foreclosed [all constitutional challenges to Wisconsin's congressional map] by holding that Article IV contains 'the exclusive repository of state constitutional limits on redistricting.'" (App.611 (quoting *Johnson I*, 2021 WI 87, ¶63)) Did the circuit court err by holding that all state constitutional limits on redistricting are contained within Article IV of Wisconsin's Constitution?
3. Because the circuit court concluded that this Court's precedent holds "that claims of the sort Plaintiffs allege are not actionable under Wisconsin law" and that the circuit court "ha[d] no authority to modify or overrule that precedent" (App.606), it did not independently assess whether anti-competitive gerrymandering

violates Wisconsin's Constitution. Is anti-competitive gerrymandering a cognizable claim under the Wisconsin Constitution?

4. The circuit court did not consider potential objections to recognizing anti-competitive gerrymandering such as the independent state legislature theory, preclusion, and laches. Are there any procedural or other obstacles to recognizing a claim of anti-competitive gerrymandering here?

Statement Regarding Oral Argument and Publication

This case is appropriate for oral argument and publication because it presents an issue of first impression under Wisconsin law with significant statewide impact that are nearly certain to recur in the context of continuing mid-decade redistricting actions and litigation over state legislative and congressional districts during future decennial redistricting cycles.

Statement of the Case

A. Anti-competitive gerrymandering is the intentional and effective suppression of competition.

Over the last two decades, litigants in Wisconsin have feuded over allegations of *partisan* gerrymandering. This case is different. It does not involve which party is advantaged or disadvantaged by redistricting. Instead, it focuses on the *lack of competition* under Wisconsin's current congressional plan—the exceptionally high margin of victory in nearly every race. This lack of competition is deliberate; it is the result of the current plan intentionally emulating its predecessor from the 2010s, which was designed to protect incumbents and squelch

competition. The lack of competition is also glaring by any measure; in the two elections held under the current plan, the median margin of victory was close to *thirty* percentage points—a level never approached by computer-generated maps satisfying all legal criteria.

Anti-competitive gerrymandering benefits Democratic and Republican officeholders alike, who cruise to reelection because of it. At the same time, all voters are harmed by being placed in districts carefully crafted to minimize the competitiveness of elections. One consequence of anti-competitive gerrymandering is lack of accountability. Incumbents in highly uncompetitive districts effectively cannot be ousted regardless of their performance in office. A related implication is non-responsiveness. Officeholders who face no genuine electoral threat have little incentive to serve their constituents' needs and interests.

B. Wisconsin's 2011 congressional plan was an anti-competitive gerrymander.

Following each decennial census, Wisconsin must adopt new congressional districts. See U.S. Const. art. I, §§ 1–2; *Johnson v. WEC*, 2022 WI 14, ¶1, 400 Wis. 2d 626, 971 N.W.2d 402 (*Johnson II*). In 2011, incumbent members of Wisconsin's delegation to the U.S. House of Representatives—five Republicans and three Democrats—collaboratively updated the boundaries of Wisconsin's eight congressional districts after the 2010 census. The Governor's office and both chambers of the Wisconsin Legislature were then under Republican control. Republican state officeholders thus had wide latitude in establishing new district maps for Wisconsin's state legislature and congressional delegation, yet they deferred to their congressional

counterparts with respect to the congressional map. (App.65–66 ¶¶55–59¹)

Then-Representative Paul Ryan’s office took the lead in designing that new congressional map. His staff solicited information from all members of Wisconsin’s congressional delegation, including each member’s desired changes. This was, a federal court later found, “a significantly more bipartisan process” than that used to draw Wisconsin’s 2011 state legislative maps. *Baldus v. Members of Wis. Gov’t Accountability Bd.*, 849 F. Supp. 2d 840, 854 (E.D. Wis. 2012). For the congressional map, the line-drawer incorporated “all of the feedback (not just the Republican comments),” including the “preferences” of the three Democrats in the delegation. *Id.* The line-drawer also “avoided putting incumbents together in the same district, and he did not flip districts from majority-Democrat to majority-Republican or vice versa.” *Id.* These changes to district boundaries intentionally made districts less competitive, deliberately insulating each incumbent from electoral competition. (App.66–67 ¶¶60–64)

On August 9, 2011, Governor Walker signed 2011 Wis. Act 44 into law. Congressional races over the ensuing decade became, as intended, highly uncompetitive. The median margin of victory in these races never dropped below twenty percentage points in any election. In 2016, the median margin of victory spiked to well above thirty points. Only a single congressional race over Act 44’s entire lifespan (District 3 in 2020) was decided by fewer than ten points. This level of uncompetitiveness would

¹ This brief refers to the operative complaint, Plaintiffs’ (corrected) First Amended Complaint for Declaratory and Injunctive Relief, App.46–77 (filed January 8, 2026), as “Complaint” or “Compl.”

not have arisen from a neutral line-drawing process that did not aim to suppress competition. Maps created that way would have been more competitive overall than Act 44 and would have included more individually competitive districts. In the decade after Wisconsin's 2011 congressional map was adopted, *no* incumbent lost a U.S. House of Representatives race in Wisconsin. (App.66 ¶63)

C. Wisconsin's current congressional plan is an anti-competitive gerrymander.

After the 2020 census, the Wisconsin Legislature passed a bill drawing new congressional districts, which the Governor vetoed. In March 2022, this Court broke the impasse and adopted the eight congressional districts currently in effect. *See Johnson II*, 2022 WI 14. In choosing that congressional map, the Court relied primarily on the “least change” criterion it had endorsed in an earlier opinion in the case. *See id.*, ¶¶7, 11–15 & n.7, 19, 25; *Johnson I*, 2021 WI 87, ¶¶72–79.

This Court's use of the “least change” approach, which kept 94.5% of Wisconsinites in the districts they occupied under 2011 Wisconsin Act 44, necessarily perpetuated the features—and flaws—of the 2011 congressional map, including its intentional and effective effort to suppress competition. (App.67 ¶64) Across the sixteen races held under the plan in 2022 and 2024, the median margin of victory was nearly thirty percentage points, a margin far exceeding any threshold for competitiveness. Only District 3 saw races decided by fewer than ten percentage points. Compared to maps created through a neutral line-drawing process not aimed at stifling competition, Wisconsin's current plan is also a stark outlier. Seven of the eight districts in the plan are outliers as well in their relative lack of competition. (App.52–53 ¶11)

D. New Plaintiffs bring a claim of first impression under Wisconsin law.

The eight individual Plaintiffs are citizens and qualified Wisconsin voters; the ninth, Plaintiff James Lyerly, will be eligible to vote by November 2026. (App.54–59 ¶¶16–33) At least one Plaintiff resides in each of Wisconsin’s congressional districts.² (App.56-59 ¶¶24, 27, 32) Each individual Plaintiff intends to vote, at their current residence, in the 2026 and future congressional elections. All allege that Wisconsin’s anti-competitive gerrymander effectively disenfranchises them in congressional elections, thereby violating their constitutional rights. (*Id.* ¶¶24–33)

Plaintiff Wisconsin Business Leaders for Democracy (WBLD³) is a bipartisan, unincorporated association of business leaders headquartered in Glendale, Wisconsin. (App.54 ¶16) WBLD seeks equitable access to voting; non-partisan, transparent election policy; and unbiased representation. (*Id.*) Increasing electoral competitiveness is a core principle that WBLD pursues through public education, policy advocacy, and litigation. (*Id.* ¶17) WBLD as an association and its members as individuals are harmed by Wisconsin’s anti-competitive gerrymander, which makes recruiting talent to Wisconsin businesses more difficult. (App.55-56 ¶21) WBLD and its members are further

² The following individual Plaintiffs reside in the following congressional districts: Scott, First (App.57 ¶25); Baker, Second (*id.* ¶26); Johansen and Verma, Third (App.57–59 ¶¶26, 32); Buff, Fourth (App.57 ¶26); Suhr, Fifth (App.58 ¶29); Lloyd, Sixth (*id.* ¶30); Stencil, Seventh (*id.* ¶31); Lyerly, Eighth (App.59 ¶33). Plaintiff Lyerly, a minor until September 2026, is represented in this action by his Court-appointed guardian ad litem, Attorney Rachel E. Snyder. *See* App.247, Order Appointing Guardian Ad Litem (Jan. 20, 2026).

³ After this paragraph, this brief refers to Plaintiffs-Appellants collectively as “WBLD.”

harmed by Wisconsin's anti-competitive gerrymander because it removes incentives for members of Congress to address obstacles to economic growth. In addition, by effectively disenfranchising many Wisconsin voters in congressional elections, the anti-competitive gerrymander undermines WBLD's commitment to free, fair, and regular elections. (App.56 ¶22)

WBLD commenced this action on July 8, 2025. (App.5–38) WBLD's Complaint brought their anti-competitive gerrymandering claim in three separate counts, each alleging a distinct constitutional violation:

- Count I, alleging a violation of the inherent rights guaranteed by Article I, Section 1 of Wisconsin's Constitution. (App.71–73 ¶¶84–95)
- Count II, alleging a violation of the free government promise in Article I, Section 22 of Wisconsin's Constitution. (App.73–74 ¶¶96–103)
- Count III, alleging a violation of the right to vote guaranteed by Article III of Wisconsin's Constitution. (App.74–75 ¶¶104–10)

No Plaintiff in this action was a party in *Johnson II*. Nor was WBLD's theory of anti-competitive gerrymandering raised there. Additionally, this was the first case in which this Court implemented a procedure, enacted in 2011, requiring it to appoint a three-judge panel to adjudicate a challenge to electoral districts. *See Wis. Bus. Leaders for Democracy v. WEC*, 2025 WI 52, 418 Wis. 2d 520, 27 N.W.3d 522.

Three non-parties—the Wisconsin State Legislature, six Republican Congressmen, and the petitioners in *Johnson v. WEC*—intervened as defendants. (App.39-42) The circuit court set a trial date

in April 2027 that, should WBLD prevail, would allow relief in time to implement a new map for the 2028 congressional election. (App.43-45; App.119-33, 140-43)⁴

On January 8, 2026, WBLD filed its (corrected) First Amended Complaint, which added Plaintiff Lyerly but otherwise did not alter WBLD's allegations. (App.46–77) On January 15, each Intervenor separately moved to dismiss. (App.78–106, 145–246) WBLD responded on February 10 (App.248–556) and the Intervenor's replied on February 24 (App.557–98).

On April 28, 2026, the circuit court issued its Memorandum and Order dismissing, with prejudice, WBLD's Complaint for failure to state a claim upon which relief can be granted. (App.599-611) The court based its dismissal on its understanding of this Court's ruling in *Johnson I*. Specifically, the court reached two over-arching conclusions:

- **First**, that anti-competitive gerrymandering claims like WBLD's "are functionally equivalent to partisan gerrymandering claims" for purposes of analyzing whether the claims are barred by the political question doctrine. (App.608) The circuit court dismissed the claims for that reason, stating it was applying this Court's holdings in *Johnson I*. (App.608–09)
- **Second**, that in *Johnson I* this Court "effectively foreclosed [all constitutional challenges to the congressional map] by holding that Article IV contains 'the exclusive repository of state constitutional limits on redistricting.'" (App.611 (quoting *Johnson I*, 2021 WI 87, ¶63))

⁴ The circuit court is holding the trial date during this appeal. (App.615)

That same day, WBLD filed a Notice of Appeal to this Court. (App.612–14) On May 29, this Court issued an order stating it would decide this appeal. (App.616–28)

Standard of Review

This appeal involves questions of constitutional and statutory interpretation, which this court reviews *de novo*. *Wis. State Legislature v. Wis. Dep't of Pub. Instruction*, 2025 WI 27, ¶15, 416 Wis. 2d 611, 22 N.W.3d 932.

Argument

I. This Court should reverse the circuit court's holding that anti-competitive gerrymandering claims are "functionally equivalent" to partisan gerrymandering claims and thus barred by *Johnson I*.

The circuit court's first reason for dismissing WBLD's complaint was that anti-competitive and partisan gerrymandering are essentially the same. Because partisan gerrymandering, the court believed, was rendered non-justiciable by this Court's decision in *Johnson I*, it reasoned that anti-competitive gerrymandering must also be non-justiciable. (App.606-09) That reasoning is doubly flawed. **First**, anti-competitive and partisan gerrymandering are distinct claims. **Second**, *Johnson I* does not foreclose partisan gerrymandering claims.

A. The circuit court conflated the distinct claims of anti-competitive and partisan gerrymandering.

Far from being "functionally equivalent" (App.608), anti-competitive and partisan gerrymandering differ in their underlying injuries, parties harmed, standards for liability, and proper remedies. Anti-competitive gerrymandering is thus conceptually and legally unlike

partisan gerrymandering. So whatever *Johnson I* might have said about partisan gerrymandering cannot render anti-competitive gerrymandering non-justiciable.

Start with the essence of each theory. Partisan gerrymandering is commonly defined as “draw[ing] district lines to ‘pack’ and ‘crack’ voters likely to support the disfavored party,” thereby unfairly boosting the number of seats won by the line-drawing party. *Rucho v. Common Cause*, 588 U.S. 684, 730 (2019) (Kagan, J., dissenting). In contrast, the crux of anti-competitive gerrymandering is that competition is lower than under a neutral map. Candidates prevail by larger margins; fewer districts are competitive; less legislative turnover occurs; and core democratic values like accountability and responsiveness are undermined. Put another way, in partisan gerrymandering litigation, **which party** wins districts is the paramount issue. But the core of an anti-competitive gerrymandering case is districts’ **competitiveness**, regardless of their winners.

Partisan and anti-competitive gerrymandering also diverge in their respective legal standards. The usual test for partisan gerrymandering zeroes in on partisan skew: Is it intentional? Is it large and durable? Can it be justified by any legitimate factor? *See, e.g., Rucho*, 588 U.S. at 735 (Kagan, J., dissenting). Conversely, WBLD’s proposed test for anti-competitive gerrymandering makes no reference to a plan’s partisan tilt. Rather, it asks (1) whether line-drawers purposefully suppressed competition; and (2) whether the challenged plan is materially less competitive than lawful alternative maps created without considering election results. (App.70 ¶79) To answer these

questions, the core evidence in partisan gerrymandering litigation—about a plan’s partisan bias relative to other maps—is wholly irrelevant.

Partisan and anti-competitive gerrymandering further differ in whom they injure. Partisan gerrymandering victimizes voters who support, and candidates who affiliate with, the targeted party by diminishing their “collective representation in the legislature.” *Gill v. Whitford*, 585 U.S. 48, 68 (2018) (internal punctuation omitted). Anti-competitive gerrymandering, however, injures *all* voters—regardless of party affiliation—placed in deliberately less competitive districts. In these districts, voters’ choices at the polls matter less, or even not at all. These districts’ legislators also have less incentive to represent their constituents effectively because they are nearly certain to retain their seats no matter what they do.

Partisan and anti-competitive gerrymandering claims seek distinct remedies as well. The appropriate relief after a partisan gerrymander has been identified is a map that does not skew in either party’s favor. *Cf. Clarke*, 2023 WI 79, ¶70 (courts “do not have free license to enact maps that privilege one political party over another”). For an anti-competitive gerrymander, though, the proper remedy is a map that does not artificially inhibit competition. Most (let alone all) districts need not be competitive, but a remedial map should be similar in its overall competitiveness to lawful alternatives.

In its brief discussion, the circuit court failed to mention any of these contrasts, instead simply stating that, “[i]n a two-party system, partisan fairness and competitiveness are correlated: a more competitive map is typically a fairer map, whereas less competition usually means less partisan fairness.” (App.608) But that conclusory assertion not only

failed to accept the Complaint’s allegations as true but is also incorrect. Partisan fairness and competition are empirically *uncorrelated*. See, e.g., Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 Stan. L. Rev. 1503, 1524 (2018) (analyzing state house plans over a fifty-year period and finding “no meaningful relationship between electoral competitiveness and the magnitude of [plans’ partisan bias]”).

The circuit court also erred in opining that “[t]he objective of both theories” is the same, namely “to change ‘the partisan makeup of districts.’” (App.608) As explained above, partisan and anti-competitive gerrymandering claims have very different goals. A partisan gerrymandering claim seeks a plan more neutral in its treatment of the major parties so that neither wins an unfairly large share of seats. Conversely, an anti-competitive gerrymandering claim aspires to make districts more competitive—to give voters greater choice and agency—regardless of which party wins those seats.

Additionally, when the *Johnson I* lead opinion referred to “the partisan makeup of districts,” it did so with respect to partisan fairness—not competition. The lead opinion criticized “claims that courts should judge maps for *partisan fairness*.” 2021 WI 87, ¶39 (lead op.) (emphasis added). The lead opinion also noted the supposed absence of “judicially manageable standards by which we could determine the *fairness* of the partisan makeup of districts,” as well as the alleged lack of any right “to a particular *partisan configuration*.” *Id.* (emphases added). The lead opinion concluded: “Because *partisan fairness* presents a purely political question, we will not consider it.” *Id.* (emphasis added). These excerpts show that the lead opinion was

contemplating only partisan fairness when it mentioned districts' partisan makeup. It was not alluding to districts' competitiveness, a factor neither raised by the parties nor addressed by the Court.

The circuit court went further astray when it commented that “the competitiveness of a district is difficult to ascertain due to the fluctuating nature of political identity and the lack of party registration.” (App.608) The court cited no evidence in support of this empirical claim about the difficulty of determining district competitiveness. Had the court allowed the case to proceed, WBLD would have demonstrated that reliable methods exist for evaluating district competitiveness—and lead to the same conclusion about the stark lack of competition in Wisconsin's congressional districts. WBLD also pointed out below that numerous courts have assessed district competitiveness without finding this inquiry unworkable. The circuit court failed to engage with any of these precedents—one involving a successful anti-competitive gerrymandering claim brought by the Congressmen's own counsel. *See Harkenrider*, 197 N.E.3d at 452–53.

In a similar vein, the circuit court wrote: “the competitiveness of a map poses the same type of ‘subjective question ...’ as the fairness of a map.” (App.608 (quoting *Johnson I*, 2021 WI 87, ¶44)) Again, this claim about the unmanageability of analyzing competitiveness was unaccompanied by any evidence. And again, had the suit proceeded, WBLD would have shown that competitiveness is substantially *easier* to ascertain objectively than partisan fairness. While there are many measures of partisan fairness, competitiveness can be determined only relative to lawful alternative maps; there is no arithmetical ideal of competitiveness for plans or districts. Whether for plans or districts,

competitiveness is also generally evaluated using a single metric: the margin of victory of the prevailing candidate. There is no disagreement that “[t]he ‘traditional’ measure of competitiveness” is “the simple difference in vote shares between the winner and the runner-up.” Gary W. Cox et al., *Measuring the Competitiveness of Elections*, 28 Pol. Analysis 168, 169 (2020).

Lastly, the circuit court mused that “the Wisconsin Constitution’s delegation of redistricting authority to the legislature must also permit anti-competitive intent if it permits partisan intent.” (App.608) But this is another *ipse dixit*. Anti-competitive intent—the desire to suppress competition—plainly differs from partisan intent—the purpose of benefiting one party to the detriment of its rival. Even if the *Johnson I* lead opinion was right that partisan intent is permissible under Wisconsin’s Constitution, it does not follow that anti-competitive intent is valid. The legal question is simply distinct. In briefing below, WBLD produced copious evidence establishing that Wisconsin’s Constitution does not countenance—indeed forbids—anti-competitive intent. *See, e.g., Zimmerman*, 22 Wis. 2d at 566 (noting that this Court previously “condemned gerrymandering” taking the form of “a desire to preserve the political status quo”); *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 23, 128 N.W. 1041 (1910) (holding that a statute would be unconstitutional if “the purpose of the law” was “perpetuating [a party’s] supremacy”). Once more, the circuit court failed to cite, let alone distinguish, any of these authorities.

Accordingly, the circuit court gravely erred by equating anti-competitive and partisan gerrymandering. These practices fundamentally diverge, as do the legal theories that target these

separate redistricting abuses. Because of this divergence, the views of the *Johnson I* lead opinion do not control this case. Whether or not Wisconsin's Constitution prohibits partisan gerrymandering, the justiciability of anti-competitive gerrymandering must be—but was not—independently considered.

B. The circuit court wrongly held that *Johnson I* established the non-justiciability of partisan gerrymandering claims.

Even if anti-competitive and partisan gerrymandering were comparable, the circuit court was wrong to think that the justiciability of the latter claim has been determined by this Court. In support of this position, the circuit court cited only *Johnson I*. (App.606-09) But no party in that litigation brought a claim of, or presented evidence on, partisan gerrymandering. No party did so because *Johnson I* was about which plans this Court would adopt given the impasse of the political branches. The case did *not* involve a partisan gerrymandering challenge to any plan.

As Justice Dallet noted in dissent, “because [the Court] ha[d] no partisan-gerrymandering claim before [it],” the lead opinion’s comments about this legal theory were simply “an advisory opinion” carrying no precedential weight. *Johnson I*, 2021 WI 87, ¶103 (Dallet, J., dissenting). The Court “may not give advisory opinions nor pass upon uncertain or contingent situations.” *City of Milwaukee v. Milwaukee Cnty.*, 256 Wis. 580, 583, 42 N.W.2d 276 (1950); *see also, e.g., State v. Steffes*, 2013 WI 53, ¶27, 347 Wis. 2d 683, 832 N.W.2d 101 (“[T]his Court does not issue advisory opinions Rather, it is our job to adjudicate the dispute in front of us.”). Moreover, if the Court *does* purport to hand down an advisory opinion, that ruling is not dispositive in future cases. To the

contrary, “an advisory opinion is ... an interpretation of the law *without binding effect*.” *State v. Field*, 118 Wis. 2d 269, 288, 347 N.W.2d 365 (1984) (internal punctuation omitted).

Any doubt about the status of partisan gerrymandering claims after *Johnson I* was dispelled in *Clarke*. An “extreme-partisan-gerrymandering claim,” the Court explained, “present[s] an important *and unresolved* legal question.” 2023 WI 79, ¶7 (emphasis added); see also *Clarke v. WEC*, 2023 WI 70, 409 Wis. 2d 372, 375, 995 N.W.2d 779 (partisan gerrymandering “raise[s] important *and unresolved* questions of statewide significance” (emphasis added)). Precisely because the *Johnson I* lead opinion’s discussion of partisanship was non-precedential, the *Clarke* Court was free to endorse “partisan impact” as a remedial factor without overruling any of *Johnson I*. 2023 WI 79, ¶¶69–71. By contrast, the *Clarke* Court *did* overrule the portion of *Johnson I* embracing “least change” because that part of the decision was *not* an advisory opinion. *Id.*, ¶63.

In a footnote, the circuit court characterized as “cursory” this Court’s statement about the unresolved status of partisan gerrymandering claims. (App.608) But that statement mirrored the Court’s earlier description of these claims when it agreed to hear the case. *Clarke*, 2023 WI 70, 409 Wis. 2d at 375. And the two dissenting Justices certainly did not see the statement as a throwaway line. See *Clarke*, 2023 WI 79, ¶112 (Ziegler, C.J., dissenting); *id.*, ¶276 n.3 (Hagedorn, J., dissenting). Regardless, as the circuit court conceded, it was not “at liberty to disregard the Court’s statements.” (App.609) The *Clarke* Court’s statements postdated, and so overrode, any conflicting language in *Johnson I*, and mean that the justiciability of partisan

gerrymandering claims remains an open question. The circuit court therefore erred in concluding that the non-justiciability of anti-competitive gerrymandering claims is dictated by the supposed unavailability of partisan gerrymandering claims under Wisconsin's Constitution.

II. This Court should reverse the circuit court's holding that all state constitutional limits on redistricting are contained within Article IV.

The circuit court's second reason for dismissing WBLD's complaint was that its anti-competitive gerrymandering theory is based on state constitutional provisions outside Article IV while, in the court's view, "Article IV contains 'the exclusive repository of state constitutional limits on redistricting.'" (App.611 (quoting *Johnson I*, 2021 WI 87, ¶63)) But that position is again irreconcilable with this Court's subsequent decision in *Clarke*. Confining state constitutional constraints on redistricting to Article IV would also lead to the untenable conclusion that Wisconsin's Constitution has nothing to say about congressional redistricting.

The petition that commenced the *Clarke* litigation explicitly alleged that Wisconsin's state legislative maps violated Article I, Sections 1, 3, 4, and 22 of Wisconsin's Constitution as well as the separation-of-powers principle inherent in that charter. (See App.631–32, 665–71.) If Article IV were really the sole repository of state constitutional checks on redistricting, then these claims should have been immediately rejected on that basis. But they were not. Instead, as discussed above, this Court twice characterized these non-Article IV claims as "important and unresolved." *Clarke*, 2023 WI 79, ¶7; *Clarke*, 2023 WI 70, 409 Wis. 2d at 375. This repeated characterization makes

clear, at least, that “the basic requirements set out in Article IV” do not necessarily exhaust the Wisconsin Constitution’s treatment of redistricting. *Clarke*, 2023 WI 79, ¶65.

After finding rampant constitutional violations in *Clarke* (in the form of dozens of non-contiguous districts), this Court further endorsed remedial principles drawn from neither federal law nor Article IV. The Court stated that it would “consider other traditional districting criteria not specifically outlined in the Wisconsin ... Constitution,” including “reducing municipal splits and preserving communities of interest.” *Id.*, ¶68. The Court also decided to “consider partisan impact when evaluating remedial maps.” *Id.*, ¶69. These choices by the Court would be incomprehensible if all state constitutional limits on redistricting were truly set forth in Article IV. *Clarke* makes sense only if Wisconsin’s Constitution addresses redistricting **both** specifically in Article IV **and** more generally in provisions of Articles I and III.

A powerful structural argument confirms this understanding. Article IV is the “legislative” section of Wisconsin’s Constitution, delineating the Legislature’s powers, apportionment, mode of election, rules, and so forth. But Article IV is entirely silent about Wisconsin’s **congressional** districts. Indeed, it mentions the United States Congress only to state that members of Congress are ineligible to hold seats in the Legislature. *See* Wis. Const. art. IV, § 13. Consequently, if Article IV contained all the Wisconsin Constitution’s redistricting constraints, then that charter would not regulate congressional redistricting **at all**. Staggering malapportionment, blatantly non-contiguous districts, utter disregard for counties, municipalities, and other communities, gerrymandering of all types—these abuses and more would be perfectly

consistent with Wisconsin’s Constitution. This cannot be, and this Court should correct the circuit court’s contrary holding and the intolerable implication that congressional redistricting in Wisconsin is a zone unreached by state constitutional law.

III. Anti-competitive gerrymandering is a cognizable and manageable claim under Wisconsin’s Constitution.

Because it wrongly believed its hands to be tied by *Johnson I*, the circuit court did not address WBLD’s “comprehensive and historically-based argument for why the Wisconsin Constitution prohibits anti-competitive gerrymandering.” (App.609–10) This Court is precluded by neither *Johnson I* nor any other decision from considering whether anti-competitive gerrymandering violates Wisconsin’s Constitution. Using standard tools of constitutional interpretation—text, history, and precedent—the Court should recognize anti-competitive gerrymandering as a viable claim and clarify that liability on this ground requires proof of both (1) anti-competitive intent; and (2) anti-competitive effect relative to lawful alternative maps.

A. The constitutional text supports recognizing an anti-competitive gerrymandering claim.

“[C]onstitutional analysis begins with the text.” *Wis. Just. Initiative, Inc. v. WEC*, 2023 WI 38, ¶30, 407 Wis. 2d 87, 990 N.W.2d 122. The hallmarks of the textual provisions invoked by WBLD’s complaint—Article I, Section 1; Article I, Section 22; and Article III—are that they are written at a high level of generality and announce abstract principles rather than granular rules. *See, e.g., id.*, ¶106 (Dallet, J., concurring) (Wisconsin’s Constitution contains “many clauses declaring broad principles in general terms”). The question thus is not whether these

provisions explicitly mention anti-competitive gerrymandering but whether the values they embody bar redistricting with the intent and effect of stifling competition.

Among other things, Article I, Section 1 states that “[a]ll people are born equally free and independent,” that they possess “certain inherent rights,” and that, “to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.” Wis. Const. art. I, § 1. This provision is plainly “worded in dramatically different ways” from the Fourteenth Amendment to the U.S. Constitution. *Matter of Adoption of M.M.C.*, 2024 WI 18, ¶55, 411 Wis. 2d 389, 5 N.W.3d 238 (Dallet, J., concurring). In particular, Article I, Section 1 “provid[es] broader protections for individual liberties,” *id.*, ¶50, and “declares unequivocally that all Wisconsinites have ‘inherent rights,’” *id.*, ¶55. *See also, e.g., id.*, ¶57 (Article I, Section 1 is “a statement of revolutionary, republican, egalitarian ideology.” (internal punctuation omitted)); *Black v. State*, 113 Wis. 205, 226, 89 N.W. 522 (1902) (Cassoday, C. J., concurring) (Article I, Section 1 is “broad enough to cover every principle of natural right, of abstract justice”).

The sweeping aspirations of Article I, Section 1 are incompatible with anti-competitive gerrymandering. “All people are” *not* “equally free and independent” when some of them are placed in districts deliberately designed to render voting meaningless. When this occurs, citizens’ “inherent rights” to participate fully in elections, to be represented by legislators responsive to their concerns, and to hold legislators accountable for their records, are abridged. Anti-competitive gerrymandering seeks not “to secure these rights” but to subvert them.

Rather than reflecting “the consent of the governed,” the practice aims to make the will of the electorate irrelevant.

Similar reasoning applies to Article I, Section 22, which states that “[t]he blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles.” Wis. Const. art. I, § 22. More than a century ago, this Court characterized this provision as “our constitutional guaranty as to a firm adherence to the fundamental principles of justice.” *State ex rel. Milwaukee Med. Coll. v. Chittenden*, 127 Wis. 468, 506, 107 N.W. 500 (1906). The Court added that Article I, Section 22 is an “implied prohibition” of any “exercise of the lawmaking power” inconsistent with the provision. *Id.* at 521; *see also, e.g., Ekern v. McGovern*, 154 Wis. 157, 262, 142 N.W. 595 (1913) (Article I, Section 22 is a “check[] upon abuse of power”).

Again, the sweeping language of Article I, Section 22 is irreconcilable with anti-competitive gerrymandering. “The blessings of a free government” are squandered when districts are purposefully drawn to suppress competition and ensure incumbents’ reelection. This activity is the antithesis of—not “a firm adherence to”—“justice, moderation, temperance, frugality and virtue.” Instead of “recurr[ing] to fundamental principles” like electoral participation, responsiveness to constituents, and accountability for legislators’ records, anti-competitive gerrymandering undermines these core values.

Wisconsin’s Constitution is distinguished as well by its vigorous protection of the right to vote. An entire article addresses “suffrage” and states explicitly that each “qualified elector” “may vote” in elections at all levels. Wis. Const. art. III, § 1(2). This right is “one of the most

important” because “[i]f citizens are deprived of that right ... we will soon cease to be a Democracy.” *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949); *see also, e.g., McGrael*, 144 Wis. at 14 (the franchise is “the substructure upon which our whole constitutional system is bottomed”). Notably, the right to vote encompasses not only casting a ballot but also associating with likeminded citizens and participating in competitive elections. “[I]nherent therein[] exists a right of persons to combine according to their political beliefs” to “effect a desired political end.” *McGrael*, 144 Wis. at 16. Legislation that “promote[s] the supremacy of the [party] in power,” “perpetuat[es] its supremacy,” or provides “less opportunity [to other parties] for ... competition for the favor of voters at large,” is therefore unconstitutional. *Id.* at 23.

McGrael involved a ballot access regulation but could as easily have been speaking about anti-competitive gerrymandering. The essence of the practice is that it negates voters’ ability to “effect a desired political end.” *Id.* at 16. Voters may still “combine according to their political beliefs”—but their association becomes pointless when election results are preordained. *Id.* Anti-competitive gerrymandering likewise “promote[s] the supremacy of the [party] in power” within a district crafted to be safe, “perpetuat[es] its supremacy,” and provides “less opportunity [to other parties] for ... competition” in that district. *Id.* at 23. In fact, district lines can be more entrenching than most ballot access rules. *McGrael* makes clear, then, that redistricting can violate Article III.

Of course, these constitutional provisions do not refer by name to anti-competitive gerrymandering. But that retort commits an error

against which this Court has long warned: construing broad constitutional terms narrowly and without attention to their underlying purposes. “Constitutions deal with general principles and policies, and do not usually descend to a specification of particulars,” explained the Court in 1890. *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8*, 76 Wis. 177, 199, 44 N.W. 967 (1890). “[T]hese words in the constitution are not to receive an unduly ‘limited’ construction,” the Court reiterated in 1902 with respect to Article I, Section 1. *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 533, 90 N.W. 1098 (1902). Elaborating on this theme in 1906, the Court faulted observers who “fail[ed] to appreciate the far-reaching purpose of the general constitutional declarations, the necessity ... of a broad, rather than strict construction of those general terms.” *Milwaukee Med. Coll.*, 127 Wis. at 517. This “idea that the general declared purposes of the Constitution ... are only meaningless ‘glittering generalities’” has been “condemned ... for all time.” *Id.*

B. History shows that Wisconsin’s Constitution was meant to prevent anti-competitive practices of all kinds.

Just as the text of Wisconsin’s Constitution supports recognizing WBLD’s anti-competitive gerrymandering claim, so, too, does the history of the drafting of that charter. This history reveals that both those who wrote it and those who debated its ratification expected Wisconsin’s Constitution to thwart gerrymandering. This history is also replete with evidence that few practices troubled Wisconsin’s framers more than elected officials wielding the power of the state to entrench themselves in office. Anti-competitive gerrymandering therefore realizes one of the framers’ worst fears.

As is well known, it took two conventions for Wisconsin to approve its state constitution. Voters rejected the charter drafted by the 1846 convention and subsequently ratified the constitution proposed by the 1847–48 convention. However, because the documents are similar, courts “consider the debates of both 1846 and 1847–48 in [their] analysis.” *Thompson v. Craney*, 199 Wis. 2d 674, 685 n.5, 546 N.W.2d 123 (1996).

One difference between the constitutions is that the former would have required more populous counties to elect their legislators at large (instead of using single-member districts). Observers sharply criticized this choice because it would “make the legislature a place of bargain and intrigue” as factions fought to control bigger delegations. *The Movement for Statehood, 1845–1846*, at 298 (Milo M. Quaife ed., 1918) (*Racine Advocate*). In contrast, an “advantage of the district system is that it prevents what is called gerrymandering.” *Id.* at 300.

In the leadup to the 1848 convention, commentators repeated their backing for single-member districts. Drawn properly, they “prevent[] all or almost all gerrymandering by legislatures” and “give[] to the minority as near as possible the exact representation it ought to have.” *The Struggle over Ratification, 1846–1847*, *supra*, at 438 (*Racine Advocate*). “Another advantage of the district system is that it prevents [parties] from keeping political power in the same hands for such long periods” *Id.* Such perpetuation of power is the core of anti-competitive gerrymandering.

During the 1848 convention, the drafters indeed decided to switch from at-large elections to single-member districts designed pursuant to a series of criteria. Other approaches, said Charles Dunn, “would open a

door to gerrymandering, which ought to be kept closed.” *Journal of the Convention to Form a Constitution for the State of Wisconsin* 382 (1848). In contrast, according to George Lakin, carefully crafted districts were “in accordance with the purest principles of democracy,” because they acknowledged that “a minority [had] rights, and rights which ought to be respected.” *Id.* at 384.

Notably, when the 1848 convention debated congressional districting, John Rountree inveighed against a proposal to create two safe Democratic districts: a compact one in the southeast and a sprawling one in the rest of the state. This configuration was advanced because, in other possible maps, “the western district would not present so heavy and decided a [Democratic] party majority.” *Id.* at 566. But “such [electoral] considerations,” said Rountree, should “find [no] lodgment in [the drafters’] thoughts,” since they were “not placed here to form [D]emocratic districts.” *Id.* Concluding his broadside, Rountree predicted that, at “the very first opportunity that the people may have, they will correct this evil.” *Id.* at 567. His forecast proved accurate when, later that same year, Wisconsin was apportioned a third congressional seat and the Legislature drew more competitive districts that enabled two non-Democrats to win close races. *See* Alexander McDonald Thomson, *A Political History of Wisconsin* 62 (1900).

Widening the lens beyond redistricting, Wisconsin’s constitutional history brims with materials criticizing anti-competitive practices and lauding popular sovereignty. The very reason why Wisconsin sought statehood was that territorial status “deprived [the people] of the proper exercise of their legitimate sovereignty.” *The Movement for Statehood, 1845–1846, supra*, at 67 (1846 report of the select joint committee on

state government). Under statehood, “every department of the government will be held accountable to the people, and dishonesty will be more likely to meet its just rebuke at the ballot box.” *Id.* at 68.

Democratic accountability was also why many observers favored electing judges. “Frequent accountability to the people is well calculated to remind [judges] that they are not, as some would feign wish to be, lords of the land,” said James Lewis at the 1848 convention. *Journal of the Convention, supra*, at 406. “A representative democracy secures its efficacy by holding its [judges] accountable to the people through the ballot box,” agreed A.D. Smith in his review of an 1847 speech. *The Struggle over Ratification, 1846–1847, supra*, at 583.

Wisconsin’s framers similarly justified their preference for short terms in office on anti-entrenchment grounds. “Another objection to long terms,” said E.V. Whiton at the 1848 convention, is that they allow an officeholder “to gather around him a clique of politicians, and to fortify himself against competitors.” *Journal of the Convention, supra*, at 55. By comparison, short terms are less conducive to such tactics. Per Byron Kilbourn, they “impress the officer with a consciousness of his responsibility to the people.” *Id.* at 56.

The framers’ rationale for limiting the total number of governmental positions, too, was to frustrate politicians intent on staying in power. “[A] government which establishes numerous and unnecessary offices and officers” does so “not for the people, but the office holders.” *The Struggle over Ratification, 1846–1847, supra*, at 594 (Isaac Walker). These proliferating positions “place[] in [politicians’] hands the machinery and means to perpetuate their official existence.” *Id.*

Finally, the framers generally preferred popular election of officeholders to appointment. Appointment “tends to create a central power, around which all the corruption of office seekers is centered ... and the mere tool of party is exalted to posts of honor and responsibility.” *The Movement for Statehood, 1845–1846, supra*, at 185–86 (B. Butterfield). Conversely, when “the people ... retain in their own hands the sacred right of nominating and electing every public officer,” “all officers shall be accountable to the people for their stewardship.” *Id.* at 186.

Nor was hostility to anti-competitive gerrymandering solely a feature of Wisconsin’s founding. In 1982, Governor Lee Dreyfus vetoed a district plan precisely because it sought to suppress competition. In his veto message the governor cited “electoral competitiveness” as a reason for rejecting the plan. 1982 Wis. Senate Journal, Regular Session, Vol. 3, at 2157. Districts “so weighted toward incumbent re-election” precluded “serious competition,” thereby “undercut[ting] the basic tenet of democracy that people can periodically influence their government through meaningful elections.” *Id.*

In sum, ample evidence shows that WBLD’s claim is deeply historically rooted. Because Wisconsin’s framers cherished popular sovereignty and democratic accountability, they fiercely objected to policies that eroded these values. Anti-competitive gerrymandering epitomizes the practices the framers crafted the Constitution to prevent.

C. This Court’s precedent condemns anti-competitive gerrymandering.

Consistent with Wisconsin’s constitutional text and history, this Court has invalidated both anti-competitive gerrymandering and other

means through which officeholders entrench themselves and shirk accountability. In *Cunningham*, the Court confronted legislative maps drawn by Democrats “to perpetuate their ascendancy and power.” 81 Wis. at 500 (Pinney, J., concurring). These maps were highly malapportioned, disregarded traditional criteria, and pursued a “private end foreign to constitutional duty”—namely, keeping Democrats in office. *Id.* at 484 (majority opinion). The Court thus struck down the maps, deeming them “a direct and palpable violation of the constitution.” *Id.* The constitution “was adopted upon the express ground that [it] would prevent the legislature from gerrymandering the state.” *Id.* By prohibiting gerrymandering, the constitution safeguarded “[t]he right of the people to make their own laws through their own representatives.” *Id.*

In *Zimmerman*, the Court confirmed the significance of its ruling in *Cunningham*. The Court indeed “condemned gerrymandering” in *Cunningham*. 22 Wis. 2d at 566. Moreover, it recognized that “gerrymandering” can be partisan—“to preserve partisan political advantage”—and/or anti-competitive—“to preserve the political status quo.” *Id.* And the specific maps at issue in *Cunningham* had both partisan and anti-competitive objectives, being “designed to preserve the power of the majority party.” *Id.*

The Court said little about redistricting between the 1960s and the current cycle, but it displayed its concern about policies that diminish accountability in other contexts. In *State v. Johnson*, 176 Wis. 107, 186 N.W. 729 (1922), the Court explained why the Constitution bans sheriffs from running for successive terms. “[T]he sheriff ha[s] extraordinary powers which could be exercised for the purpose of influencing the

electors, and thereby perpetuating himself in office.” *Id.* at 116. More recently, in *Evers v. Marklein*, 2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395, the Court struck down a statute that authorized a legislative committee unilaterally to halt certain expenditures. This law “disrupt[ed] ... governmental accountability” and “undermine[d] democratic governance” by allowing “the legislature [to] avoid[] the political judgments necessary to appropriate funds with greater specificity.” *Id.*, ¶29.

To be sure, the Court has not yet explicitly recognized anti-competitive gerrymandering as a distinct claim. However, the Court’s decision in *Cunningham* was driven by its aversion to legislators using redistricting “to perpetuate their ascendancy and power.” 81 Wis. at 500 (Pinney, J., concurring). *Cunningham* also dovetails with the Court’s condemnations of anti-competitive practices in other areas. Curbing anti-competitive gerrymandering would therefore be a natural extension of the Court’s pro-democracy jurisprudence.

D. Anti-competitive gerrymandering claims are proliferating elsewhere.

Wisconsin’s own constitutional text, history, and precedent are the pillars of WBLD’s legal theory. Developments in other states demonstrate that, although WBLD’s anti-competitive gerrymandering theory presents an issue of first impression in Wisconsin, these claims are far from novel and increasingly common. Moreover, courts elsewhere have developed manageable standards for adjudicating these claims that may be helpful to this Court.

Consider first a New York case litigated by the Congressmen’s counsel. In *Harkenrider*, the plaintiffs argued that New York’s

congressional plan aimed “to discourage competition.” 197 N.E.3d at 452. New York’s highest court, the Court of Appeals, agreed—based on the same kind of evidence that WBLD seeks to introduce here. *See id.* at 453. This evidence compared the enacted districts to thousands of computer-generated analogues. According to these simulations, “four [R]epublican-leaning districts [were] less competitive” in reality than in expectation, “rendering the next ... nine districts less competitive in favor of [D]emocrats.” *Harkenrider v. Hochul*, 167 N.Y.S.3d 659, 666 (App. Div. 2022).

Florida’s Supreme Court likewise nullified a state senate plan that sought to favor incumbent legislators. *See In re Senate Jt. Resolution of Legis. Apportionment 1176*, 83 So. 3d 597 (Fla. 2012). Under that plan, “none of the incumbents would run against another incumbent.” *Id.* at 654. “[A]t least some incumbents [were] given large percentages of their prior constituencies.” *Id.* And the new districts were renumbered “in order to allow incumbents to be eligible to serve longer than they would have otherwise.” *Id.* The court subsequently invalidated numerous congressional districts, including one drawn to entrench an incumbent. “The Legislature’s configuration” of this district “had the effect of benefitting the long-time incumbent of the district, Congresswoman Corrine Brown.” *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 403 (Fla. 2015).

Anti-competitive gerrymandering claims have been brought in several more states. In *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission*, 208 P.3d 676 (Ariz. 2009), the plaintiffs alleged that the mapmakers “did not sufficiently favor competitive districts” because they “created only four competitive

districts” versus the seven that could have been formed. *Id.* at 682. In *Gonzalez v. State Apportionment Commission*, 53 A.3d 1230 (N.J. App. Div. 2012), the plaintiffs challenged state legislative plans’ “lack of competitive districts”—a “flaw [that] can lead to voter apathy when one’s vote is rendered meaningless.” *Id.* at 1254. And in *In re Colorado Independent Legislative Redistricting Commission*, 513 P.3d 352 (Colo. 2021), the plaintiffs objected to state legislative plans that “did not maximize the districts’ competitiveness.” *Id.* at 365. Notably, Colorado’s Supreme Court rejected this claim because an ensemble of computer-generated maps (like the one WBLD aims to present here) indicated that the enacted districts “fell within the expected statistical ranges for competitiveness.” *Id.*

Courts that have found *partisan* gerrymandering unlawful have identified and decried anti-competitive gerrymandering, too. In *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022), *overruled in later appeal*, 886 S.E.2d 393 (N.C. 2023), North Carolina’s Supreme Court compared the enacted congressional plan to computer-generated maps. Among the simulated maps, not one packed Democratic voters into the three most-Democratic districts to the same extent as the enacted plan. *See id.* at 553. Similarly, no simulated map had as many “Republican voters in the next seven districts—i.e., the [potentially] competitive districts.” *Id.* (internal punctuation omitted). In *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194 (Md. Cir. Ct. Mar. 25, 2022) (App.680–724), the court also compared the enacted congressional districts to computer-generated analogues. “[A] pattern that appear[ed] again and again” was that what would “otherwise [have been] Republican competitive districts [were] drawn out of that Republican competitive range into an area where

Democrats [were] almost guaranteed to” prevail. *Id.* at *31 (internal punctuation omitted).

In *Adams v. DeWine*, 195 N.E.3d 74 (Ohio 2022), Ohio’s Supreme Court considered the state’s defense that its congressional plan should be upheld because the plan was pro-competitive. *See id.* at 80–81. The court was unconvinced because “the enacted plan [was] not nearly as competitive as [defendants] claim[ed].” *Id.* at 86. While defendants asserted that the plan had seven competitive districts, in fact, it had “only two or three competitive districts.” *Id.* And in *Matter of 2021 Redistricting Cases*, 528 P.3d 40 (Alaska 2023), Alaska’s Supreme Court struck down two state senate districts near Anchorage. “[A] highly competitive district” could have been created in the neighborhood of Muldoon. *Id.* at 92 (internal punctuation omitted). Instead, Muldoon was split in two, and this area had “two firmly Republican Senate districts rather than one” Republican district and one competitive district. *Id.* at 93.

Of course, out-of-state decisions are relevant only insofar as they are persuasive. These cases amply demonstrate, though, that this Court would be joining a nationwide trend, not setting off alone, by recognizing WBLD’s anti-competitive gerrymandering claim.

E. Anti-competitive gerrymandering is a judicially manageable claim.

To establish liability for anti-competitive gerrymandering, WBLD is prepared to prove both anti-competitive *intent* and anti-competitive *effect*. *Cf., e.g., Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality) (endorsing a partisan gerrymandering standard with intent and effect prongs). The intent prong limits judicial intervention to situations where

line-drawers purposefully inhibit competition. It exculpates mapmakers (like commissions or courts) who accidentally stumble into anti-competitive outcomes. Likewise, the effect prong precludes liability where anti-competitive gerrymanderers fail to achieve their goals. While not much conduct “has ‘the purpose of x ’ but fails to have ‘the effect of x ,” this scenario is plausible enough to “justif[y] the separate existence” of each prong. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 332 (2000).

As in other redistricting contexts, anti-competitive intent can be demonstrated through “direct evidence,” “circumstantial evidence,” or “a mix of both.” *Cooper v. Harris*, 581 U.S. 285, 291 (2017) (internal punctuation omitted). “Direct evidence often comes in the form of a relevant state actor’s express acknowledgment” that reducing competition “played a role in the drawing of district lines.” *Alexander v. S.C. State Conf. NAACP*, 602 U.S. 1, 8 (2024). Circumstantial evidence can involve “a district’s shape and demographics,” *Cooper*, 581 U.S. at 291 (internal punctuation omitted), as well as “alternative map[s]” that do not aim to dampen competition but do satisfy all other criteria, *Alexander*, 602 U.S. at 10.

In recent partisan gerrymandering cases, *partisan* effect has typically been shown by comparing the enacted plan to many computer-generated maps. *See, e.g., Rucho*, 588 U.S. at 737–39 (Kagan, J., dissenting); *Harper*, 868 S.E.2d at 516–22; *Adams*, 195 N.E.3d at 86–87. The same approach can be harnessed to illustrate *anti-competitive* effect—with the slight modification that measures of competitiveness, not partisan bias, must be calculated for both the enacted plan and the simulated maps. The “traditional” such metric is the margin of victory: “the simple difference in vote shares between the winner and the runner-

up,” in a particular district and/or averaged across all districts. Cox et al., *supra*, at 169. A related method is to deem a district competitive if it meets a certain condition (like a margin of victory below ten percentage points); these designations can then be aggregated to determine the overall volume of competitive districts. *See, e.g.*, Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. Pol. 75, 75 (2006).

Measures of competitiveness can be computed for both individual districts and an entire district plan. By the same token, anti-competitive gerrymandering can be a district-specific or a plan-wide claim. Here, WBLD makes both allegations: that Wisconsin’s congressional plan as a whole is more uncompetitive than the vast majority of computer-generated maps; and that several districts are more uncompetitive than most simulated districts that correspond to them. (See App.52–53, 68–70 ¶¶11, 69, 78.)

The above test is plainly manageable. It borrows the intent-and-effect framework that has been employed for decades to adjudicate partisan gerrymandering claims. *See, e.g.*, *Bandemer*, 478 U.S. at 127 (plurality). It relies on the “extreme outlier approach”—“using advanced computing technology to randomly generate a large collection of districting plans” and then “see[ing] where the State’s actual plan falls on the spectrum”—which is the gold standard in contemporary redistricting litigation. *Rucho*, 588 U.S. at 737–38 (Kagan, J., dissenting). And courts have already demonstrated that they can reliably assess both anti-competitive intent, *see, e.g.*, *League of Women Voters of Fla.*, 172 So. 3d at 403; *In re Senate Jt. Resolution of Legis. Apportionment 1176*, 83 So. 3d at 654, and anti-competitive effect

through comparison with computer-generated maps, *see, e.g., In re Colo. Indep. Legis. Redistricting Comm'n*, 513 P.3d at 365; *Szeliga*, 2022 WL 2132194, at *31; *Harkenrider*, 197 N.E.3d at 453; *Harper*, 868 S.E.2d at 553.

Beyond recognizing WBLD's claim, then, this Court should hold that liability for anti-competitive gerrymandering requires proof of both (1) anti-competitive intent; and (2) anti-competitive effect relative to lawful alternative maps. On remand, the parties could present evidence and develop arguments as to whether these elements are satisfied here.

IV. Other objections to WBLD's anti-competitive gerrymandering claim are unavailing.

Below, Intervenors-Defendants raised several additional objections to WBLD's anti-competitive gerrymandering claim. None has merit.

A. The federal Elections Clause does not bar WBLD's claim.

Below, Intervenors-Defendants contended that recognizing an anti-competitive gerrymandering claim would violate the federal Elections Clause as interpreted in *Moore v. Harper*, 600 U.S. 1 (2023). That argument rests on a fundamental mischaracterization of *Moore* and federal Elections Clause jurisprudence. Nothing in *Moore* precludes this Court from recognizing a claim that, while one of first impression in this state, is firmly rooted in the text, structure, and history of Wisconsin's Constitution—and, critically, in principles derived from this Court's own precedent. Rather, *Moore* stands for the unremarkable proposition that “[t]he Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review.” *Id.* at 22. Following *Moore*,

this Court is authorized to do exactly what it routinely does: review legislative enactments, including congressional redistricting statutes, for compliance with Wisconsin's Constitution. The federal Elections Clause is no barrier to WBLD's claim.

1. Intervenor-Defendants' interpretation of *Moore* is the one the U.S. Supreme Court rejected.

The Elections Clause argument against WBLD's claim rests on a premise conclusively repudiated in *Moore*: that there exists a federal interest in shielding a state legislature's congressional district plan from state judicial scrutiny. *Moore* considered the scope of a state court's authority to enforce state-law limitations on a state legislature's drawing of congressional districts. *Id.* at 8–9. The dispute arose after North Carolina's Supreme Court construed provisions of its own state constitution to impose limits on partisan gerrymandering in congressional maps. *Id.* On appeal, North Carolina's legislature argued that the federal Elections Clause—which provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof,” U.S. Const. art. I, § 4—“vests state legislatures with authority to set rules governing federal elections free from restrictions imposed under state law.” *Id.* at 9–10. The U.S. Supreme Court rejected that contention, instead confirming that, consistent with longstanding precedent and centuries of unbroken historical practice, “[s]tate courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause.” *Id.* at 37.

The Supreme Court reiterated that, as in other contexts where state-court interpretations of state law might implicate rights protected under the federal Constitution, federal courts retain “an obligation to ensure that state court interpretations of that law do not evade federal law.” *Id.* at 34. There is always “the concern that state courts might read state law in such a manner as to circumvent federal constitutional provisions.” *Id.* at 29. Thus, the Court left the door open for federal intervention if a state court were to “transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections.” *Id.* at 36. But the Court reaffirmed the authority of state courts to interpret and enforce state constitutional provisions when reviewing a legislature’s congressional district plan: the “power vested in state legislatures” by the Elections Clause always remains “subject to constraints set forth in the State Constitution.” *Id.* at 25.

Under *Moore*, state courts therefore remain free to interpret and enforce state law, including in cases involving federal elections, provided that a state court’s decision does not infringe upon federally protected rights. And the Court **rejected** the argument that the Elections Clause confers upon a state legislature some federally cognizable interest in evading a state court’s exercise of its own power of judicial review. *See id.* at 37. Thus, there is no basis for the assertion that *Moore* requires state courts to abstain from adjudicating state constitutional challenges to congressional districts. That argument perpetuates the error—swiftly reversed on appeal—made by the **only court anywhere** to hold that a state law regulating federal elections violated the Elections Clause: it “relies primarily on concurring and dissenting opinions in various United

States Supreme Court decisions, but fails to apply binding precedent from that Court itself.” *Republican Nat’l Comm. v. Eternal Vigilance Action, Inc.*, 321 Ga. 771, 792 (2025).

Unsurprisingly, *Moore* has not ushered in a sea change in the relationship between state and federal courts. Before *Moore*, state courts routinely exercised their powers of judicial review to enforce state constitutional constraints on the legislature’s congressional redistricting authority. *See, e.g., Harkenrider*, 167 N.Y.S.3d at 664, *aff’d as modified*, 38 N.Y.3d 494 (holding congressional map to be unlawful gerrymander under state constitution); *League of Women Voters v. Commw.*, 645 Pa. 1, 123 (2018) (same); *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (Colo. 2003) (holding that state constitution forbids legislature from engaging in mid-cycle congressional redistricting); *Pearson v. Koster*, 367 S.W.3d 36, 48 (Mo. 2012) (congressional district plan subject to state constitution’s contiguity and compactness requirements). Since *Moore*, no court anywhere has held that a state court’s interpretation of its own state law violates the Elections Clause. *See, e.g., Mont. Democratic Party v. Jacobsen*, 416 Mont. 44, 65 n.7, *cert. denied sub nom. Jacobsen v. Mont. Democratic Party*, 145 S. Ct. 1125 (2025) (“wholly reject[ing]” the argument that the Elections Clause prohibited the court’s interpretation of various Montana election laws); *accord Genser v. Butler Cnty. Bd. of Elections*, 325 A.3d 458, 461 (Pa. 2024), *cert. denied sub nom. Republican Nat’l Comm. v. Genser*, 145 S. Ct. 2778 (2025); *Eternal Vigilance Action*, 321 Ga. at 792 (legislature’s delegation of authority to state elections board did not violate Elections Clause); *League of Women Voters of Utah v. Utah State Legis.*, 554 P.3d 872, 921 (Utah 2024) (state courts possess authority to interpret state constitutional provisions when reviewing

congressional district plans); *Grisham v. Van Soelen*, 539 P.3d 272, 285 (N.M. 2023) (same); *Graham v. Sec’y of State Michael Adams*, 684 S.W.3d 663, 693 (Ky. 2023) (same). That is unsurprising: the Court in *Moore* rejected the invitation to subject state courts to unprecedented federal constraints of the kind the opposing parties will request here.

2. Recognizing WBLD’s anti-competitive gerrymandering claim does not transgress the ordinary bounds of judicial review.

Although *Moore* stated that the Elections Clause could be implicated by a state court decision that “transgress[es] the ordinary bounds of judicial review,” 600 U.S. at 36, it did not define those “bounds.” But the Court, in *Moore* and elsewhere, has made clear what they are not. Even if the Elections Clause authorizes federal review of a state court’s interpretation of state law under some extreme circumstances, they are not present here.

Intervenors-Defendants contended below that Wisconsin courts would violate the Elections Clause by recognizing WBLD’s anti-competitive gerrymandering claim because the theory is one of first impression in Wisconsin. (See App.103-05, 164, 195-202.) Not so. Embracing a claim or theory of first impression does not render a court’s decision an improper usurpation of legislative lawmaking authority: it is simply what courts here and elsewhere do when presented with new legal claims they determine are meritorious. In *Johnson I*, this Court held, for the first time, that court-drawn remedial districts must make the “least change” from previous districts and that the Court would not consider the likely partisanship of the new districts. 2021 WI 87, ¶¶72–74, 76–78. Although later reversed by *Clarke*, those holdings in *Johnson I* did not raise federal constitutional issues simply because they decided

issues of first impression under state law; the majority and concurring opinions reflected the ordinary application of the interpretive tools and methods this Court customarily uses to resolve disputes. *See* Anna K. Jessurun et. al., *Moore v. Harper, Evasion, and the Ordinary Bounds of Judicial Review*, 66 B.C. L. Rev. 1295, 1339 (2025) (explaining that *Moore* requires assessing a state court’s reasoning within the context of that state’s interpretive tradition). While WBLD here asks this Court to recognize an anti-competitive gerrymandering claim for the first time, WBLD’s theory is firmly rooted in standard modes of constitutional interpretation in Wisconsin—arguing from the constitutional text and history, *see supra* Part III.A.–B.; from Wisconsin Supreme Court precedent, *see supra* Part III.C.; from cases in sister states, *see supra* Part III.D.; and offering a manageable standard that constrains judicial discretion, *see supra* Part III.E. Whatever the merits of WBLD’s theory, WBLD’s approach to arguing it renders *Moore* inapplicable.

B. Preclusion does not bar WBLD’s claim.

WBLD’s claim is not precluded because no Plaintiff was a party in *Johnson*. (*See* <https://wscca.wicourts.gov/case/2021AP001450>) Moreover, the claim at issue here—anti-competitive gerrymandering—was never adjudicated during that, or any other, prior litigation. It is true that parties to prior lawsuits cannot challenge a final judgment through collateral attack. *In re Brianca M.W.*, 2007 WI 30, ¶28, 299 Wis. 2d 637, 728 N.W.2d 652. But while as a proposed intervenor WBLD brought this claim before this Court, the claim was not adjudicated. (App.679) Claim preclusion requires identity of parties or their privies and a final judgment on the merits; issue preclusion likewise requires actual litigation and determination of the issue sought to be precluded. *Clarke*,

2023 WI 79, ¶¶44–48. Neither requirement is present here. Because neither *Johnson* nor *Bothfeld* adjudicated WBLD’s anti-competitive gerrymandering claim, no preclusion doctrine (nor judicial estoppel) applies. *See id.*, ¶¶44–50.

C. Laches does not bar WBLD’s claim.

Nor does the doctrine of laches bar WBLD’s claim. Laches is an appropriate defense when a claimant’s unreasonable delay bringing a claim prejudices the defendant. *Sawyer v. Midelfort*, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999). Specifically, the court must find that (1) the plaintiff unreasonably delayed in bringing a claim; (2) the defendant lacked knowledge that the plaintiff would raise that claim; and (3) the defendant is prejudiced by the delay. *Clarke*, 2023 WI 79, ¶41.

Here, WBLD challenges the continued use of districts that allegedly suppress electoral competition in violation of Wisconsin’s Constitution. Each election conducted under the challenged map perpetuates that injury. Because WBLD seeks prospective relief for elections several years away, this case differs fundamentally from election cases where litigants seek relief immediately before an election. Also, WEC had prior knowledge of this claim through *Bothfeld*. Moreover, it is not possible for Plaintiff Lyerly to have sat on his rights as he could not have brought his claim earlier since 2026 will be the first congressional election he can vote in. For all these reasons, laches does not apply. *See Clarke*, 2023 WI 79, ¶¶41–43.

Conclusion

For the reasons stated above, this Court should reverse the circuit court’s decision, hold that WBLD’s anti-competitive gerrymandering claim is cognizable, and remand for further proceedings.

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**CERTIFICATION OF COMPLIANCE WITH
WIS. STAT. § 809.19(8g)(a)**

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 10,929 words.

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CERTIFICATION

I hereby certify that filed with this motion, as a separate document, is an appendix that complies with Wis. Stat. § (Rule) 809.62(2)(f) and § (Rule) 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the findings or opinion of the circuit court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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