No. 2026AP1168

IN THE SUPREME COURT OF WISCONSIN

ELIZABETH BOTHFELD, JO ELLEN BURKE, MARY COLLINS, CHARLENE GAEBLER-UHING, KATHLEEN GILMORE, PAUL HAYES, SALLY HUCK, THOMAS KLOOSTERBOER, ELIZABETH LUDEMAN, GREGORY ST. ONGE AND LINDA WEAVER,

Plaintiffs-Appellants,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, ANN S. JACOBS, DON M. MILLIS, ROBERT F. SPINDELL, JR., CARRIE RIEPL, MARK L. THOMPSON AND MEAGAN WOLFE,

Defendants-Respondents,

GLENN GROTHMAN, BRYAN STEIL, TOM TIFFANY, SCOTT FITZGERALD, DERRICK VAN ORDEN, TONY WIED, GREGORY HUTCHESON, PATRICK KELLER, PATRICK MCCALVY, MIKE MOELLER, WISCONSIN STATE LEGISLATURE, BILLIE JOHNSON, CHRIS GOEBEL, AARON GUENTHER, CHARLES HANNA, TIM HIGGINS, LOU KOWIESKI, CHRIS MULLER, ERIC O'KEEFE, CRAIG ROSAND, RUTH STRECK AND RONALD ZAHN,

Intervenors-Defendants-Respondents.

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Appeal from the Dane County Circuit Court, the Honorable Julie Genovese, the Honorable Emily Lonergan, and the Honorable Mark Sanders

BRIEF OF RESPONDENT THE WISCONSIN STATE LEGISLATURE

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STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

The Court set this case for argument to be heard on September 16, 2026. Any opinion should be published given the statewide importance of the issues.

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INTRODUCTION

Plaintiffs brought this case to eliminate what they say is an unconstitutional "6-2 split favoring Republican candidates" in Wisconsin's congressional districts. R.9:22. This Court should overrule itself, Plaintiffs contend, and send more Democrats to Congress.

This Court already settled the congressional districts for the decade in the *Johnson* original action. The Court determined the current districts comply "with all relevant state and federal laws" and ordered the Wisconsin Elections Commission to use them. *Johnson v. Wis. Elections Comm'n* (*Johnson II*), 2022 WI 14, ¶¶25, 52, 400 Wis. 2d 626, 971 N.W.2d 402. The Court then declined three separate requests to re-enter the political thicket of congressional redistricting, including earlier requests by the same Plaintiffs and their same counsel presenting the same arguments.

Undeterred, Plaintiffs insist this Court should redo the congressional districts because of *Clarke v. Wisconsin Elections Commission*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370. But *Clarke* was about the State's Assembly and Senate districts—unlike this congressional case implicating the U.S. Constitution's assignment of redistricting power to "the Legislature." U.S. Const. art. I, §4, cl. 1. *Clarke* was also a follow-on original action in this Court—unlike this case asking a circuit court to override this Court's final judgment. And *Clarke* was about an express constitutional requirement that statehouse districts be "contiguous"—unlike this case about political desires appearing nowhere in the Wisconsin Constitution.

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In *Johnson II*, this Court did what was necessary to remedy the malapportionment of legislatively enacted congressional districts and no more. That deference to the existing districts kept this Court within "the bounds of ordinary judicial review." *Moore v. Harper*, 600 U.S. 1, 37 (2023). The only explanation for redistricting now would be a political one. For better or worse, the U.S. Constitution empowers state legislatures to pursue such political ends mid-decade, but not courts. Any court would dismiss Plaintiffs' nonjusticiable political pursuit. The decision below should be affirmed.

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STATEMENT OF THE CASE

A. The Legislature enacted new congressional districts in 2011. *See* 2011 Wis. Act 44. Plaintiffs challenged the districts as politically unfair and lost. *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 854 (E.D. Wis. 2012) (three-judge panel) (finding no "workable standard" to "evaluate the merits").

A decade later, the Legislature passed new legislation making very few changes to the 2011 districts. *See* 2021 Wis. Senate Bill 622; *Johnson II*, 2022 WI 14, ¶14 (2021 legislation kept 93.5% of people in existing districts). The Governor vetoed that legislation. *See* Wis. Governor's Veto Message, 2021 Senate Bill 622 (Nov. 18, 2021).

With no new districts, voters initiated an original action in this Court. They asked to enjoin the use of the 2011 districts because they were unconstitutionally malapportioned. *Johnson v. Wis. Elections Comm'n* (*Johnson I*), 2021 WI 87, ¶5, 399 Wis. 2d 623, 967 N.W.2d 469. This Court

granted the petition for an original action. There was no dispute that districts were malapportioned. *Id.* ¶¶4-6. This Court invited briefing about how to remedy the malapportionment to ensure modified districts complied with all state and federal requirements. *Id.* ¶¶6-7.

Relevant here, this Court concluded it would make the "'least change[s]' necessary" to the legislatively enacted districts from 2011. *Id.* ¶72 (plurality op.); *accord id.* ¶85 (Hagedorn, J., concurring) (concluding "[i]t is appropriate for us to start with the laws currently on the books" and make only "necessary modifications"). The only "necessary" changes to the existing districts were those required "for the maps to comport with relevant legal requirements." *Id.* ¶72 (plurality op.).

For those legal requirements, this Court *rejected* arguments that the Wisconsin Constitution required the Court to ensure the politics of "maps are fair." *Id.* ¶52 (majority op.). This Court concluded there was "no plausible grant of authority" for courts to make political determinations about the fairness of districts. *Id.* Among other problems, "no legal standards exist to limit and direct [the Court's] decisions" in that regard. *Id.*

Among the remedial plans proposed by the parties, this Court chose Governor Evers's proposal. *Johnson II*, 2022 WI 14, ¶¶13-19. The Court held the modified congressional districts "compl[ied] with all relevant state and federal laws." *Id.* ¶25. The injunction requiring the Elections Commission to use the *Johnson II* districts in congressional elections remains in place today. *Id.* ¶52.

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B. After *Johnson*, this Court commenced a new original action to revisit the State's Assembly and Senate districts. *Clarke*, 2023 WI 79. In *Clarke*, petitioners claimed the districts violated the Wisconsin Constitution's express requirement that districts be composed of "contiguous territory." Wis. Const. art. IV, §§4-5. This Court agreed and commenced remedial proceedings. The Court said it would not require parties to propose "least-change" remedies, overruling *Johnson*'s least-changes requirement. 2023 WI 79, ¶¶60-63. *Clarke* did not hold that *Johnson*'s least-change approach was unconstitutional—only that it was not prescribed by "constitutionally or statutorily mandated" redistricting criteria in state law for the state legislative districts. *Id.* ¶62.

Clarke did not disturb the congressional districts. That case was limited to express constitutional requirements for the state legislative districts. *Id.* ¶¶1-2. The Court determined the least-change approach was "in tension with" those "established districting requirements" in Article IV. *Id.* ¶63. There are no requirements for congressional districts in the Wisconsin Constitution. *Johnson II*, 2022 WI 14, ¶20. But there are in the U.S. Constitution, which assigns congressional redistricting to "the Legislature." U.S. Const. art. I, §4, cl. 1; *see id.* art. VI, cl. 2.

C. After *Clarke*, this Court declined to revisit the congressional districts three separate times. First, a group of *Johnson* intervenors, represented by Plaintiffs' counsel here, moved to reopen *Johnson* to replace the least-changes remedy chosen for the congressional districts. They argued *Clarke* rejected that "least-change approach" for the statehouse

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districts, so it should be rejected for the congressional districts too. Memo. ISO Hunter et al. Mot. for Relief from Judgment 8-10, *Johnson*, No. 2021AP1450-OA (Wis. Jan. 16, 2024). Those intervenors argued this Court's use of the least-change approach in adopting the *Johnson II* map violated the separation of powers and asked the Court to redistrict anew to eliminate alleged "unfair partisan impact." *Id.* at 26-31, 34. The Court denied the motion. Order, *Johnson*, No. 2021AP1450-OA (Wis. Mar. 1, 2024).

Second, voters petitioned for a new original action, alleging the *Johnson II* injunction left the congressional districts malapportioned. They similarly claimed that after *Clarke*, this Court's use of the least-change approach could not justify one district having one person too many and asked the Court to redistrict anew to eliminate any "partisan skew." Pet'rs' Memo. of Law 6-10, *Felton v. Wis. Elections Comm'n*, No. 2025AP999-OA (Wis. May 8, 2025). The Court denied the petition. Order, *Felton*, No. 2025AP999-OA (Wis. June 25, 2025).

Third, Plaintiffs here, represented by the same counsel, petitioned for a new original action, alleging the congressional districts adopted in *Johnson II* were politically unfair. They claimed this Court's use of the least-change approach perpetuated a "partisan gerrymander" and violated the "separation of powers." Memo. of Law ISO Pet. 15-41, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (Wis. May 7, 2025). And they asked this Court to redistrict anew to create more congressional seats for Democrats. *See id.* at 23, 40-41; Pet. for an Original Action ¶¶66-68, 93.e, *Bothfeld*, No. 2025AP996-OA (Wis. May 7, 2025) (hereinafter, "Bothfeld

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Pet."). The Court denied the petition. Order, *Bothfeld*, No. 2025AP996-OA (Wis. June 25, 2025).

C. Plaintiffs then initiated this action in the circuit court in July 2025—more than 3 years after the *Johnson II* injunction, nearly 14 years after the enactment of Act 44, and after 3 failed attempts to convince this Court to revisit *Johnson II*. Their complaint was a near carbon copy of their rejected petition for an original action. *Compare* R.9, *with* Bothfeld Pet. Their complaint alleged that Wisconsin's congressional districts are an unconstitutional "partisan gerrymande[r]" and violate "separation-of-powers principles" after *Clarke*. R.9:6-8. Plaintiffs faulted the *Johnson II* districts for looking too much like the legislatively enacted 2011 districts, claiming this Court "improperly substituted" the judgment of the 2011 Legislature "for its own" and thus perpetuated the districts' alleged unfairness. R.9:13-18, 20-23. Plaintiffs asked the circuit court to declare the *Johnson II* districts unconstitutional, enjoin their use in future elections, and adopt a new "lawful congressional map" under the standards "adopted in *Clarke*," R.9:26—that is, "consider partisan impact," *Clarke*, 2023 WI 79, ¶¶69-71. As in their rejected petition for an original action, Plaintiffs asked the court to eliminate any "pro-Republican skew." *See* R.9:7-8, 21-22.

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Because Plaintiffs challenged Wisconsin's congressional districts, this Court convened a three-judge panel. *Bothfeld v. Wis. Elections Comm'n*, 2025 WI 53, 418 Wis. 2d 545, 550, 27 N.W.3d 508; *accord* Wis. Stat. §751.035. Justice Hagedorn, concurring in part, observed how Plaintiffs' complaint made "the rather extraordinary plea for the circuit court to declare a 2022 decision

and order of this court"—that is, the *Johnson II* injunction—"unconstitutional." 418 Wis. 2d at 551-52. He emphasized that issue was for the circuit court to decide in the first instance. *Id.* at 552. With proceedings back before the three-judge panel, the Legislature intervened, moved to dismiss, and opposed Plaintiffs' motion for judgment on the pleadings on the separation-of-powers claim.

D. The circuit court denied Plaintiffs' motion and dismissed Plaintiffs' suit. The panel first considered its "authority" under §751.035. App.10 Declining to "assume" any "endowment of additional powers" beyond those of "a circuit court," the panel concluded that it "possesses no authority to supersede decisions of the Wisconsin Supreme Court." *Id.*

The circuit court rejected Plaintiffs' separation-of-powers theory, finding "no basis to find the current congressional map invalid." App.14. The court explained that *Clarke* rejected the least-change approach for "the state legislative maps" not because of "a separation-of-powers violation" but "because it lacked an agreed definition and scope." App.13. The panel declined "to read into *Clarke* an analysis that it does not contain" and could not "conclude on its own that our highest court in the *Johnson II* decision violated the separation-of-powers doctrine." App.14. The court also held that Plaintiffs' partisan gerrymandering claims presented a nonjusticiable political question "barred by *Johnson I*." App.20. *Johnson I* held "beyond a doubt" that "there is no such right" to partisan fairness in the Wisconsin Constitution. App.19. And "*Clarke* did not overrule th[at] holding." App.20.

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ARGUMENT

I. This Court should affirm because circuit courts do not override this Court's final judgments.

The Court should affirm for the simple reason that circuit courts cannot "overrule," "modify," or otherwise disturb this Court's final judgments. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Affirming on these grounds avoids further involvement in the "inherently political and partisan endeavor" of redistricting. Order 14, *Johnson*, 2021AP1450-OA (Wis. Sept. 22, 2021) (Dallet, J., joined by Walsh Bradley and Karofsky, JJ., dissenting). The Court need only reaffirm its constitutional supremacy and superintending authority "over all courts," Wis. Const. art. VII, §3, without even reaching the merits of Plaintiffs' political claims.

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Plaintiffs undersell the extraordinary posture of this litigation. The congressional districts they challenge exist by virtue of this Court's permanent injunction issued in *Johnson II*. *See* 2022 WI 14, ¶52. This Court held those districts "compl[y] with all relevant state and federal laws." *Id.* ¶25; *see also id.* ¶7 ("Governor Evers' submission complies with the federal Constitution and all other applicable laws."). The Court's final judgment orders the Elections Commission to use those districts "for all upcoming elections" and "until new maps are enacted into law or a court otherwise directs." *Id.* ¶52. Despite all that, Plaintiffs went to circuit court for a declaration that this Court's final judgment was unconstitutional and asked for a superseding injunction.

Plaintiffs cannot explain their "extraordinary plea" for the circuit court to override this Court's still-binding injunction. *Bothfeld*, 418 Wis. 2d at 551-52 (Hagedorn, J., concurring in part, dissenting in part). There was no basis to ask that inferior court to *enjoin* the Elections Commission from using the districts this Court ordered it to use. *But see* R.9:26. Their complaint "place[d] a circuit court … in the absurd, not to mention unconstitutional, position of reviewing the Wisconsin Supreme Court's interpretation of the law." *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶45, 376 Wis. 2d 147, 897 N.W.2d 384. There was no change in law (such as a supervening U.S. Supreme Court decision) and no new facts (such as an intervening census) that could warrant revisiting the congressional districts. *Cf. Wis. Legis. v. Wis. Elections Comm'n*, 595 U.S. 398 (2022) (per curiam) (reversing *Johnson II* with respect to state legislative districts); *Perry v. Perez*, 565 U.S. 388, 392 (2012). Whatever Plaintiffs think about the existing districts, a final judgment of this Court requires the Elections Commission to use them. *Johnson II*, 2022 WI 14, ¶¶25, 52. And even after *Clarke*, this Court declined to revisit that still-binding injunction three times. *Supra* pp.16-18.

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This Court's *Johnson II* judgment remains "final and conclusive." *Ean v. Chi., Milwaukee & St. Paul Ry.*, 101 Wis. 166, 76 N.W. 329, 330 (1898). The Elections Commission must obey the *Johnson II* injunction. *See Cline v. Whitaker*, 144 Wis. 439, 129 N.W. 400, 400-01 (1911); *State ex rel. Fowler v. Cir. Ct. of Green Lake Cnty.*, 98 Wis. 143, 73 N.W. 788, 790 (1898). Circuit courts have "no power to vacate" it. *Tietsworth v. Harley-Davidson*, 2007 WI 97, ¶50, 303 Wis. 2d 94, 735 N.W.2d 418. "Subjecting this court's decisions to review

by a circuit court would obviously interfere with [its] duties and responsibilities as Wisconsin's court of last resort." *Gabler*, 2017 WI 67, ¶45.

Plaintiffs, represented by the same counsel, said so themselves last year. In their failed petition for an original action, they implored this Court to grant the petition because "no other court can provide Petitioners' requested relief" against the *Johnson II* "map that was adopted by this Court." Bothfeld Pet. ¶98. By Plaintiffs' own logic, the denial of that petition should have marked the end of the road. But they went to the circuit court anyway, as though that court (and the Elections Commission) could ignore the *Johnson II* injunction.[1] There is no reconciling Plaintiffs' extraordinary request with their earlier representations to this Court.

If Plaintiffs wanted to undo the *Johnson II* districts, Plaintiffs needed to initiate proceedings in *this Court*, not the circuit court. Ordinarily, the "sole remedy" to challenge an injunction is "by motion to vacate the injunction" in the same case—here, *Johnson*. *Fowler*, 73 N.W. at 790; *see* Wis. Stat. §806.07. Plaintiffs' same counsel tried that route and failed just after *Clarke*. *Supra* pp.16-17. Alternatively, parties have petitioned for a follow-on original action to revisit this Court's redistricting decisions. *See Clarke*, 2023 WI 79, ¶54. Plaintiffs and their same counsel tried that route and failed too. *Supra* pp.17-18. The *Johnson II* injunction therefore "must be obeyed while in

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[1] For this reason, Plaintiffs' observation (at 16 n.3) that the denial of an original action is not precedential is neither here nor there. Redistricting litigation "is, by definition, publici juris, implicating the sovereign rights of the people," and well-suited for an original action. *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶17, 249 Wis. 2d 706, 639 N.W.2d 537. This Court thus exercised its original jurisdiction in *Johnson*, and the circuit court could not unwind that final judgment.

existence." *Fowler*, 73 N.W. at 790. There was no basis for Plaintiffs' circuit court action to override this Court's final judgment.

This Court may affirm the dismissal of Plaintiffs' suit on those grounds without reaching the merits. *State v. Alles*, 106 Wis. 2d 368, 391-92, 316 N.W.2d 378 (1982); *Koestler v. Pollard*, 162 Wis. 2d 797, 809 n.8, 471 N.W.2d 7 (1991). The circuit court was right to conclude that it "possesses no authority to supersede decisions" of this Court and to dismiss this case. App.10; *see Cook*, 208 Wis. 2d at 189; *cf. Wis. Voter All. v. Secord*, 2025 WI 2, ¶¶3, 40, 414 Wis. 2d 348, 15 N.W.3d 872 (reversing for "patent violation of *Cook*" and declining to "thwart the 'principles of predictability, certainty and finality'").

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II. The circuit court correctly dismissed Plaintiffs' separation-of-powers claim.

Plaintiffs contend that *Clarke* requires vacatur of the *Johnson II* injunction. They claim that in adopting the current congressional districts, this Court "substitute[d] a prior political map for constitutional analysis." Appellants' Opening Br.23 (hereinafter, "Br."). Remarkably, Plaintiffs posit that the congressional map has a "constitutional defect" given "*Clarke*'s constitutional reasoning." Br.19. And they insist the *Johnson II* injunction "cannot be constitutionally enforced in future elections." Br.28. Nothing in *Clarke* suggests some constitutional defect in the existing congressional districts.

A. Plaintiffs misread *Clarke*.

As the circuit court observed, Plaintiffs "read into *Clarke* an analysis that it does not contain." App.14. Nowhere does *Clarke* say least-changes remedies violate separation of powers. *Clarke* referenced "separation of powers" only in *declining* to address the petitioners' separation-of-powers arguments. 2023 WI 79, ¶3 n.8; *cf. Chamberlain v. Milwaukee & Miss. R.R.*, 11 Wis. 238, 250 (1860) (rejecting argument that an earlier case "settled" a legal question where the "court was not called on to examine the question, nor does the opinion assume to examine or decide it").

Clarke addressed the State's Assembly and Senate districts, not the congressional districts. *See* 2023 WI 79, ¶¶1-2. The Court held the statehouse districts did not "consist of contiguous territory" contrary to the express requirement in Article IV, Sections 4 and 5. *Id.* ¶¶10-35. The Court then discussed how to remedy that constitutional violation. *See id.* ¶¶56-71. It said only that it would "not consider least change" for the remedial proceedings, *id.* ¶60, and that least-changes should not be "mandate[d]," as it was in *Johnson*, because that approach was "unworkable in practice," *id.* ¶63.

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Nowhere did *Clarke* hold that a least-changes remedy was unconstitutional. *Contra* Br.19, 28 (purporting to quote *Clarke*, 2023 WI 79, ¶62). Plaintiffs' quoted portion of *Clarke* simply observed that *Johnson* should not have *required* the least-changes metric, since it was "judicially-created" rather than "derived from the [state] constitutional text" and thus could not "supersede the [state] constitution." 2023 WI 79, ¶62. What part

of the state constitution? The express contiguity requirement for state legislative districts at issue in *Clarke*. *Id.* ¶¶65-66.

Clarke never described the least-changes methodology as a "constitutional defect." *Contra* Br.19. Far from Plaintiffs' assertions, *Clarke* said it was "[c]onceivabl[e]" to have a "constitutionally or statutorily mandated" "least change" redistricting criterion. 2023 WI 79, ¶62. *Clarke* agreed "least change" considerations still "could be relevant" and "balanced with other factors" in other cases. *Id.* The Court simply declined to do so when remedying the contiguity violation for the statehouse districts. *Id.*

B. Deferring to the existing congressional districts respects the separation of powers.

Plaintiffs have the constitutional concerns backwards. The separation of powers ensures "no branch" of government "arrogate[s] to itself control over the other" or "exercise[s] the power committed by the constitution to another." *State v. Holmes*, 106 Wis. 2d 31, 42, 315 N.W.2d 703 (1982). The Wisconsin Constitution vests the "legislative power" in the Legislature, Wis. Const. art. IV, §1, and the "judicial power" in the judiciary, *id.* art. VII, §2. The Legislature cannot "usurp constitutionally vested judicial power," *Gabler*, 2017 WI 67, ¶43, just as the judiciary cannot "usurp a power which our democracy has lodged in its elected legislature," *State ex rel. Neelen v. Lucas*, 24 Wis. 2d 262, 268, 128 N.W.2d 425 (1964); *see also Wagner Mobil, Inc. v. City of Madison*, 190 Wis. 2d 585, 594, 527 N.W.2d 301 (1995) ("it is not the function of this court to usurp the role of the legislature").

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For congressional redistricting specifically, the separation of powers is clear: "the Legislature" draws congressional districts, U.S. Const. art. I, §4, cl. 1, and "state courts do not have free rein" if those districts become the subject of litigation, *Moore*, 600 U.S. at 34. Courts cannot redraw congressional districts anew as though they are a "super-legislature." *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 528-29, 576 N.W.2d 245 (1998); *see White v. Weiser*, 412 U.S. 783, 795 (1973) (courts "honor state policies in the context of congressional reapportionment").

1. The federal Elections Clause assigns congressional redistricting to "the Legislature." U.S. Const. art. I, §4, cl. 1; *see Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 7 (2024) ("Redistricting constitutes a traditional domain of state legislative authority." (citing U.S. Const. art. I, §4, cl. 1)). When a state court must remedy a legal defect in congressional districts, it "must follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature." *Branch v. Smith*, 538 U.S. 254, 274 (2003) (cleaned up); *see White*, 412 U.S. at 795.

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Johnson's least-changes approach respects the assignment of power to "the Legislature" for congressional redistricting. To remedy the malapportionment of the 2011 districts, the Court did not redistrict anew as if it were the Legislature. It did only what was "necessary" to equalize the population of each district. *Johnson II*, 2022 WI 14, ¶11. By limiting modifications of the existing districts "to those necessary to cure" the malapportionment, this Court "appropriate[ly]" honored "state political

policy" inherent in the 2011 legislation. *Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam). There is nothing unusual about that least-changes approach for congressional redistricting. *See, e.g.*, *Norelli v. Sec'y of State*, 175 N.H. 186, 201-02, 292 A.3d 458 (2022) (per curiam) (adopting least-change and explaining the "limited judicial role" in redistricting "simply to 'remedy the constitutional deficiencies in the existing'" districts "appl[ies] with as much, if not more, force" for "congressional redistricting"); *accord Hippert v. Ritchie*, 813 N.W.2d 391, 397 (Minn. 2012) ("our adoption of a least-change congressional plan is consistent with the legal principles governing a judicially created redistricting plan").

Plaintiffs contend that courts "must avoid adopting" the "political choices" from "a prior map." Br.20. But that mistakes the Court's role in this congressional redistricting case. The Court's only role is remedying a constitutional violation (*e.g.*, malapportionment or racial discrimination). Beyond that, courts "defer to the legislative judgments" expressed in the enacted plan. *Upham*, 456 U.S. at 40-41. Courts must "take guidance from the State's recently enacted plan in drafting an interim plan"—even if the enacted plan is "itself unenforceable"—because that plan "reflects the States's policy judgments." *Perry*, 565 U.S. at 393, 396 (vacating court-drawn map for failing "to give any deference to the Legislature's enacted plan"); *see, e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 79 (1997) (courts "should be guided by the legislative policies underlying the existing plan"). Courts must not "intrude upon state policy any more than necessary" when "fashioning relief appropriate to remedy" any constitutional violations in

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"congressional districts." *White*, 412 U.S. at 795-96. Courts cannot transgress those "bounds of ordinary judicial review" and "intrude upon the role specifically reserved to state legislatures." *Moore*, 600 U.S. at 37.

Plaintiffs claim there was no legitimate "case for deference" in *Johnson* because "the political branches fail[ed] to enact any map of their own," so there was "no 'recently enacted state plan to which' the court could defer." Br.23. But that ignores Act 44—the congressional districts "adopted by the legislature" and "signed by the governor," which "survived judicial review by the federal courts." *Johnson I*, 2021 WI 87, ¶64. Act 44 remains "the law on the books" today. *Id.* ¶84 (Hagedorn, J., concurring); *see* Wis. Stat. §§3.11-3.18. State and federal courts routinely start with the existing districts as a template when remedying malapportionment after a census. *See, e.g.*, *Alexander v. Taylor*, 2002 OK 59, ¶23, 51 P.3d 1204 (using the legislature's existing plan as the "starting point" because courts "should be guided by the legislative policies underlying the existing plan"); *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 664 (D.S.C. 2002) (three-judge panel) (adjusting "existing congressional districts" as needed "to correct the population deviations"); *accord Norelli*, 175 N.H. at 201-02.

Nor can Plaintiffs complain that this Court's deference in *Johnson II* was "excessive." Br.24; *see White*, 412 U.S. at 796 (holding court erred in rejecting proposed congressional plan that "most clearly approximated the reapportionment plan of the state legislature" and instead imposed a plan that "ignored legislative districting policy" and had a "very different political impact, on the State"); *see also, e.g.*, *North Carolina v. Covington*, 585

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U.S. 969, 978-79 (2018) (per curiam) (holding court exceeded its "proper role" in redistricting when it "'disregard[ed] the political program of' [the] state legislature" and "redrew" districts more than necessary to remedy its race-discrimination finding); *Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971) (holding court "erred in so broadly brushing aside state apportionment policy"). This Court's judicial task in *Johnson* was to remedy the malapportionment of the 2011 districts. The Court completed that judicial task, concluding the modified districts complied with "all relevant state and federal laws." *Johnson II*, 2022 WI 14, ¶25. And by taking a least-changes approach, the Court was sure not to "pre-empt the legislative task" of redistricting, *White*, 412 U.S. at 795, that the Elections Clause expects.

2. Likewise, the Wisconsin Constitution limits the judicial power to adjudicating concrete constitutional claims, not acting as a "super-legislature." *Flynn*, 216 Wis. 2d at 528-29; *see State v. Williams*, 2012 WI 59, ¶¶35-36, 341 Wis. 2d 191, 814 N.W.2d 460. In *Johnson*, the Court did what was "necessary" to redress the unconstitutional malapportionment of the existing districts. *Johnson II*, 2022 WI 14, ¶11. The Court did not encroach on the legislative power to redistrict by redrawing districts from scratch. Courts do not legislate. *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶¶35-36, 387 Wis. 2d 511, 929 N.W.2d 209; *State ex rel. McCarty v. Gattner*, 240 Wis. 548, 555, 4 N.W.2d 153 (1942) ("It is beyond the power of the court to legislate … ."); *accord Johnson I*, 2021 WI 87, ¶72 (plurality op.) (observing the least-change approach is simply "a convenient way to describe" the Wisconsin Constitution's limitations on the judicial power); *id.* ¶85

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(Hagedorn, J., concurring) (noting Court's "limited judicial power to remedy the constitutional violations").

Put another way, *Johnson* ended with an injunction, not new legislation. The *Johnson II* injunction was an exercise of "judicial power vested by the Constitution in courts." *State ex rel. Milwaukee Med. Coll. v. Chittenden*, 127 Wis. 468, 107 N.W. 500, 511 (1906). By making only necessary changes to the existing districts, the Court was sure not to "exceed the effect of the constitutional violation." *State ex rel. Memmel v. Mundy*, 75 Wis. 2d 276, 288-89, 249 N.W.2d 573 (1977); *see also State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 736 (1892) (Pinney, J., concurring) ("the writ of injunction under our constitution is … of a strictly judicial nature," ensuring the Court's equitable power does not become "the exercise of political power").

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Plaintiffs fault the Court for not starting from scratch, ignoring the Legislature's last-enacted districts. *See* Br.22-24. But the framers entrusted the "inherently political" and "policy decisions" in redistricting to the Legislature. *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537; *accord Rucho v. Common Cause*, 588 U.S. 684, 701 (2019). Redistricting "is strictly a legislative power." *Cunningham*, 51 N.W. at 737 (Pinney, J., concurring). To ask this Court to remake those political decisions anew is to ask this Court to "exercise … legislative power," *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35, 56 (1892), which it "may not do," *Town of Remington v. Wood County*, 238 Wis. 172, 298 N.W. 591, 595 (1941); *accord Donaldson v. Bd. of Comm'rs of Rock-Koshkonong Lake Dist.*, 2004 WI 67,

¶48, 272 Wis. 2d 146, 680 N.W.2d 762. Plaintiffs' insistence that this Court was compelled to do more than remedy the unconstitutional malapportionment flouts "fundamental principles of our constitutional government" that "confine legislative powers to the legislature." *Goodland v. Zimmerman*, 243 Wis. 459, 466-67, 10 N.W.2d 180 (1943).

3. Plaintiffs' contrary arguments misunderstand the nature of the judicial power. This Court has never said the least-changes approach was unconstitutional. *Supra* II.A. As for the *Johnson II* congressional districts specifically, the least-changes approach was "neutral" and preserved "judicial independence." *Contra* Br.20-24.

a. *Johnson II*'s approach was neutral. When the 2011 districts became the subject of litigation in *Johnson*, this Court did "not have free rein." *Moore*, 600 U.S. at 34. The "most neutral way" this Court could have resolved the malapportionment of the congressional districts was "by taking the [existing] reapportionment plan as a template and adjusting it for population deviations." *Baumgart v. Wendelberger*, 2002 WL 34127471, at *7 (E.D. Wis. May 30) (three-judge panel). By sticking to its judicial role, this Court was "not endors[ing] the policy choices of the political branches." *Johnson I*, 2021 WI 87, ¶78. *Contra* Br.21. It was just remedying a malapportionment claim as other courts have done. *Supra* II.B.1 (collecting cases).

Nothing in *Clarke* is to the contrary. Nowhere in *Clarke*'s discussion of a least-changes remedy did this Court say that remedy was not "neutral." *See* 2023 WI 79, ¶¶61-63. Later in the decision, this Court said it would

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"consider partisan impact when evaluating remedial maps" to ensure "political neutrality." *Id*. ¶¶69-70.[2] Even then, the Court did not say it would be *unconstitutional* for a Court to decline to consider "partisan impact" as *Johnson* did. *See id.* ¶¶70-71 (distinguishing "partisan impact" considerations from "constitutionally mandated" redistricting requirements).

If there is any "neutrality" problem here, it is the absence of neutrality apparent in Plaintiffs' requested relief. They want this Court to redraw lines to send more Democrats to Congress. *See* R.9:21-22. Any "use [of] equitable authority to reallocate political power in Wisconsin" would "not [be] a neutral undertaking." *Johnson I*, 2021 WI 87, ¶86 (Hagedorn, J., concurring); *see Jensen*, 2002 WI 13, ¶12 (explaining "judicial neutrality" requires courts not to deliberately disturb the State's existing political balance). Plaintiffs' disagreement with the politics of the 2011 districts is not this Court's problem to solve. The framers gave that political power to the Legislatures of each State. *Infra* III.B.1.

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[2] The Court was never able to define those metrics for the statehouse districts. *See, e.g.*, *Clarke*, 2023 WI 79, ¶161 (Ziegler, C.J., dissenting); *id.* ¶294 (Hagedorn, J., dissenting). Parties vigorously debated what "political neutrality" meant. *E.g.*, Resp. Remedial Br. of Wis. Legis. et al. 15, *Clarke*, No. 2023AP1399-OA (Wis. Jan. 22, 2024) (arguing proposals that "move millions of Wisconsinites *precisely because* of the 'partisan impact'" or that "target" and pair "*dozens* of Republican incumbents" are not "neutral"); Resp. Br. of Billie Johnson et al. 8, *Clarke*, No. 2023AP1399-OA (Wis. Jan. 22, 2024) (arguing "any political neutrality measure must account for the natural political geography of the state"); Governor Tony Evers' Resp. Br.21, *Clarke*, No. 2023AP1399-OA (Wis. Jan. 22, 2024) (arguing parties "conflate partisan *neutrality* with partisan *proportionality*"); Wright Pet'rs' Resp. Br.8, *Clarke*, No. 2023AP1399-OA (Wis. Jan. 22, 2024) (arguing proposal projecting large "Republican advantages in the Assembly and Senate … despite Wisconsin's evenly divided electorate" was not neutral). The litigation was mooted by new legislation before any standard could be settled. *See* Order, *Clarke*, No. 2023AP1399-OA (Wis. Sept. 24, 2024).

b. Plaintiffs' cited cases about the judiciary's "independent judgment," Br.20, are likewise inapposite. They concern judicial deference to administrative agencies on questions of law, such as what the Legislature meant when it allowed the Wisconsin Department of Revenue to impose taxes for "processing" goods. *Tetra Tech v. Wis. Dept. of Rev.*, 2018 WI 75, ¶¶1, 55, 58, 382 Wis. 2d 496, 914 N.W.2d 21; *see also Gabler*, 2017 WI 67, ¶¶1-2 (holding an "executive branch entity" possessing the "authority to pass judgment and impose discipline on a judge's exercise of core judicial powers" violates separation of powers). In *Tetra Tech*, this Court stopped deferring to *agencies*' interpretations of statutes. 2018 WI 75, ¶¶55, 58. Agency deference (or lack thereof) has nothing to do with this redistricting litigation. At no point in *Johnson* did this Court "cede" any judicial power to "apply the law" as necessary to remedy the malapportionment of the 2011 congressional districts—for example, by deferring to some hypothetical Elections Commission's position that districts were not malapportioned. *Contra id.* ¶54. The Court exercised the judicial power by remedying the constitutional violation found and doing no more.

By acting with "restraint" and resting its decision on "constitutional principles, not judicial will," *Johnson II* preserved the "independence of the judiciary." *Flynn*, 216 Wis. 2d at 528. It is Plaintiffs' request—that the judiciary redistrict anew to strike a different political balance—that would undermine "judicial independence." *League of Women Voters*, 2019 WI 75, ¶34.

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III. The circuit court correctly dismissed Plaintiffs' partisan gerrymandering claims.

This Court already held that the Wisconsin Constitution confers "no plausible grant of authority" for courts to referee the politics of districts. *Johnson I*, 2021 WI 87, ¶¶39-63. The federal and state constitutions assign redistricting to state legislatures. History shows that Congress, not courts, may check partisan manipulation by state legislatures. Absent congressional legislation or a constitutional amendment, the Wisconsin Constitution confers no authority for courts to decide what is fair in redistricting.

A. *Johnson I* forecloses Plaintiffs' claims.

The circuit court correctly dismissed Plaintiffs' political challenge as nonjusticiable and not cognizable. App.19-20. In *Johnson I*, this Court held "[t]he Wisconsin Constitution contains 'no plausible grant of authority' to the judiciary to determine whether maps are fair to the major parties." 2021 WI 87, ¶52. It provides "no legal standards" for courts to decide "what constitutes a 'fair' map" or "a 'fair' partisan divide." *Id.* ¶¶44-45.

1. *Johnson I* held the Wisconsin Constitution contains no plausible grant of authority for courts to referee the political fairness of districts.

Johnson I rejected the same constitutional theories Plaintiffs present here. Br.30-36. Section 1 "has nothing to say about partisan gerrymanders." *Johnson I*, 2021 WI 87, ¶55. The declaration that all people are "equally free" holds true "irrespective of how district lines are drawn," as "[v]oters retain their freedom to choose among candidates." *Id.* ¶¶54-55. Nor do Sections 3

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or 4 "inform redistricting challenges." *Id.* ¶59. "Nothing about the shape of a district infringes anyone's ability to speak, publish, assemble, or petition," as "citizens remain free" to engage in expressive political activities "[e]ven after the most severe partisan gerrymanders." *Id.* ¶60. And Section 22 does not provide "an open invitation to the judiciary" to "fabricate a legal standard of partisan 'fairness,'" which would flout principles of "moderation" and "temperance." *Id.* ¶62. "To construe Article I, Sections 1, 3, 4, or 22 as a reservoir of additional requirements would violate axiomatic principles of interpretation, while plunging this court into the political thicket lurking beyond its constitutional boundaries." *Id.* ¶63 (citation omitted). Article IV is "the exclusive repository of state constitutional limits on redistricting." *Id.*

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These are precedential holdings of this Court, contrary to Plaintiffs' assertion that partisan gerrymandering claims are "not settled" and "not precluded by this Court's precedent." Br.30. The circuit court correctly rejected Plaintiffs' retelling that *Johnson I*'s interpretation of these constitutional provisions was only advisory. App.19. There was no way for this Court to hold the congressional districts complied with all state and federal law, *see Johnson II*, 2022 WI 14, ¶25, without first deciding what state law required (or did not require) with respect to districts' political makeup.

Johnson I is a "binding decision." *State v. Kruse*, 101 Wis. 2d 387, 392, 305 N.W.2d 85 (1981). When this Court "deliberately take[s] up and decide[s] an issue central to the disposition of a case, it is considered precedential." *Wis. Just. Initiative v. Wis. Elections Comm'n*, 2023 WI 38, ¶142,

407 Wis. 2d 87, 990 N.W.2d 122 (Hagedorn, J., concurring). From the start in *Johnson*, intervening parties told this Court that the existing districts were gerrymandered. They "ask[ed] [the Court] to redraw the maps to allocate districts equally between th[e] dominant parties." *Johnson I*, 2021 WI 87, ¶2; *e.g.*, Mot. to Intervene of Black Leaders Organizing for Communities et al. ¶10, *Johnson*, No. 2021AP1450-OA (Wis. Sept. 24, 2021) (intervening "to advocate for their interests in securing nonpartisan, fair … districts"). In response, the Court invited briefing specifically addressing whether it was required to consider "the partisan makeup of districts" as part of the legal requirements for districts. 2021 WI 87, ¶7. The Court concluded: "We *hold* … the partisan makeup of districts does not implicate any justiciable or cognizable right." *Id.* ¶8 (plurality op.) (emphasis added); *accord id.* ¶82 n.4 (Hagedorn, J., concurring). The Court found no "right to partisan fairness in Article I, Sections 1, 3, 4, or 22 of the Wisconsin Constitution." *Id.* ¶53 (majority op.). Article IV provides "discrete requirements governing redistricting" for statehouse districts, none of which say anything about partisan fairness. *Id.* ¶63.

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2. *Clarke* did not disturb *Johnson I*'s nonjusticiability holding.

Nothing in *Clarke* "repudiated" those holdings. *Contra* Br.30. As the circuit court recognized, "*Clarke* did not overrule the holding in *Johnson I* that partisan gerrymandering is a nonjusticiable political question." App.20. And *Clarke* "did not hold that partisan gerrymandering claims are independent causes of action." *Id.* Accepting Plaintiffs' "end run around stare decisis" by reading *Clarke* to say something it did not say would

"undermin[e] our common law tradition of fidelity to precedent." *Est. of Genrich v. OHIC Ins.*, 2009 WI 67, ¶85, 318 Wis. 2d 553, 769 N.W.2d 481 (Walsh Bradley, J., concurring in part, dissenting in part).

Unlike this challenge to congressional districts, *Clarke* involved only the statehouse districts and thus did not implicate the federal Elections Clause. 2023 WI 79, ¶3; *infra* V. *Clarke* revisited the statehouse districts after finding they violated Article IV's express contiguity requirement, 2023 WI 79, ¶¶10-35, not unspoken emanations about partisan fairness. And *Clarke* overruled only part of *Johnson*—the rule that remedies *must* make only "least change[s]" to existing statehouse districts. *Id.* ¶¶61-63 ("[W]e overrule any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach.").

Clarke did not disturb *Johnson I*'s interpretation of the Wisconsin Constitution as providing "no plausible grant of authority" to referee the politics of districts. *Johnson I*, 2021 WI 87, ¶52. Nor did *Clarke* disturb *Johnson I*'s conclusions that there is no "right to partisan fairness in Article I, Sections 1, 3, 4, or 22 of the Wisconsin Constitution," *id.* ¶53, and those provisions provide no "judicially manageable standards" to adjudicate alleged partisan unfairness, *id.* ¶39. *Clarke* expressly "declined to hear the issue of whether extreme partisan gerrymandering violates the Wisconsin Constitution." 2023 WI 79, ¶69. *Clarke* did "not decide whether a party may challenge an enacted map on those grounds." *Id*. Even when *Clarke* explained the Court would consider the "partisan impact" of proposed remedies, *Clarke* did *not* include "partisan impact" among the "established districting requirements

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set out in state and federal law." *Id.* ¶63. Rather, this Court *distinguished* considerations of "partisan impact" that it said it would make for the statehouse districts in *Clarke* from the "established districting requirements" in the Wisconsin Constitution. *Id.*; *see id.* ¶71 ("consideration of partisan impact will not supersede constitutionally mandated criteria"). *Clarke* leaves no reason to doubt the congressional districts complied with all state and federal law before *Clarke* and after. *See Johnson II*, 2022 WI 14, ¶25.

3. Plaintiffs offer no judicial basis to overrule *Johnson I*.

The only explanation for Plaintiffs' desire to revisit *Johnson* is politics. This Court's membership changed, and so Plaintiffs want another crack at the congressional districts. But this Court does not overturn precedent "merely because the composition of the court has changed." *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶95, 264 Wis. 2d 60, 665 N.W.2d 257; *see also, e.g.*, *State v. Roberson*, 2019 WI 102, ¶97, 389 Wis. 2d 190, 935 N.W.2d 813 (Dallet, J., dissenting). This Court "scrupulously" follows "the doctrine of stare decisis" as part of its "abiding respect for the rule of law." *Johnson Controls*, 2003 WI 108, ¶94. Any other rule, and "deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results." *Hennessy v. Wells Fargo Bank*, 2022 WI 2, ¶27, 400 Wis. 2d 50, 968 N.W.2d 684 Discarding settled precedent "raises serious concerns as to whether the court is implementing principles founded in the law rather than in the proclivities of individuals." *Progressive N. Ins. v. Romanshek*, 2005 WI 67, ¶42, 281 Wis. 2d 300, 697 N.W.2d 417 (cleaned up).

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The words "stare decisis" appear nowhere in Plaintiffs' brief. They present no "special justification" required to overrule *Johnson I*. *Johnson Controls*, 2003 WI 108, ¶96. The relevant provisions of the Wisconsin Constitution are unchanged. There have been no "changes or developments in the law" that could "have undermined the rationale behind" *Johnson I*'s holdings on partisan unfairness, nor any "newly ascertained facts," nor any intervening precedents calling into question its "coherence and consistency." *Id.* ¶98. *Johnson I*'s rule that courts should stay out of politics is by definition workable. *Id.* ¶99. Repeating the same arguments that *Johnson I* rejected is not enough. *See, e.g.*, *Schultz v. Natwick*, 2002 WI 125, ¶38, 257 Wis. 2d 19, 653 N.W.2d 266. Plaintiffs have offered no reason for this Court to overturn what it held in *Johnson I*: "Claims of political unfairness in the maps present political questions, not legal ones," and "must be resolved through the political process and not by the judiciary." 2021 WI 87, ¶4.

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B. Partisan gerrymandering claims remain nonjusticiable.

Text and history confirm what *Johnson I* already held: partisan gerrymandering claims present nonjusticiable political questions. The federal and state constitutions commit redistricting to the Legislature. *See Baker v. Carr*, 369 U.S. 186, 217 (1962); *In re John Doe Proceeding*, 2004 WI 65, ¶25, 272 Wis. 2d 208, 680 N.W.2d 792. History confirms concerns of partisanship in congressional redistricting are left for Congress, not the courts. And absent some constitutional amendment, there are no "judicially discoverable and manageable standards" in either the state or federal

constitutions for this Court to adjudicate political unfairness in redistricting. *Baker*, 369 U.S. at 217.

1. The federal and state constitutions assign redistricting to "the Legislature." U.S. Const. art. I, §4, cl. 1; *see* Wis. Const. art. IV, §3; *see also* Wis. Const. art. XIV, §10 (1848) (apportioning Wisconsin's first congressional districts "until otherwise provided by law") (repealed 1982). "[R]eapportionment is primarily a matter for legislative consideration and determination," *Reynolds v. Sims*, 377 U.S. 533, 586 (1964), and "state legislatures have 'primary jurisdiction' over legislative reapportionment," *White*, 412 U.S. at 795; *accord Fish Creek Park Co. v. Village of Bayside*, 274 Wis. 533, 537, 80 N.W.2d 437 (1957) ("apportionment" is "the duty of the legislature"). The framers "entrusted this decennial exercise to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other." *Jensen*, 2002 WI 13, ¶10.

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2. No history suggests courts were ever the appropriate branch of state government to resolve accusations of gerrymandering. "Partisan collisions over districting" date back to "the colonial legislatures." Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* 21 (2013) (hereinafter, "Engstrom"); *see* Elmer C. Griffith, *The Rise and Development of the Gerrymander* 25-29 (1907) (recounting gerrymanders in colonial Virginia, Pennsylvania, and North Carolina) (hereinafter, "Griffith"). The federal framers chose a political solution, tasking "the

Legislature" of each State to regulate congressional elections. U.S. Const. art. I, §4, cl. 1. The framers understood that state legislatures would, in Madison's words, "mould their regulations as to favor the candidates they wished to succeed." 2 Records of the Federal Convention of 1787, at 241. So they gave Congress the power to "make or alter" any regulations of congressional elections. U.S. Const. art. I, §4, cl. 1.

After ratification, state legislatures continued to pursue political goals with single-member districts or at-large elections. Engstrom 22-25. In New Jersey, Federalists and Anti-Federalists tried to maximize their partisan advantage with at-large elections. *Id.* at 27-28. In Virginia, George Washington and the Federalists accused Patrick Henry and the Anti-Federalists of manipulating district lines to prevent James Madison's election to the First Congress. Griffith 31-37. The moniker "gerrymandering" was born in 1812 when Massachusetts Governor Elbridge Gerry signed a bill carving state and congressional districts into "fantastic shapes," one of which resembled a salamander, to aid his party. *Id.* at 17-19, 74-77. As the Elections Clause anticipates, Congress addressed intensifying partisanship with the Apportionment Act of 1842, requiring single-member "districts composed of contiguous territory," Act of June 25, 1842, ch. 47, 5 Stat. 491, in "an attempt to forbid the practice of the gerrymander," Griffith 12. Amid that history there was never any suggestion that "courts had a role to play" in redistricting or "any indication that the Framers had ever heard of courts doing such a thing." *Rucho*, 588 U.S. at 699.

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Wisconsin's framers likewise understood that concerns of partisanship in apportioning were left to the political process. Delegates to the constitutional convention casually dismissed complaints that the State's first two congressional districts were "partial, and unjust," not "fair and equitable," and a "grand design" of "political considerations" to "secure two democratic districts." Journal of the Convention to Form a Constitution for the State of Wisconsin 565-66, 568 (1848) (Delegate Rountree). Delegates never suggested courts should resolve that dispute. They understood it was left to "the people" to address it come "the apportionment" after the 1850 census. *Id.* at 567 (Delegate Rountree). And no recorded debate on Article I, Sections 1, 3, 4, or 22 suggests those provisions create a right to partisan fairness or relate to redistricting at all.

For the next 100 years, this Court consciously avoided "judicial usurpation of the legislative function with respect to the apportionment." *State ex rel. Bowman v. Dammann*, 209 Wis. 21, 243 N.W. 481, 485 (1932); *accord State ex rel. Broughton v. Zimmerman*, 261 Wis. 398, 410, 52 N.W.2d 903 (1952). This Court long refused to impose "a plan for such apportionment" as a remedy to malapportionment because it "disclaim[ed] any and all legislative functions." *Lamb*, 53 N.W. at 58. Even after this Court began offering remedies for malapportionment, it insisted the political branches first have "further opportunity … to enact a valid plan" because "[s]uch policy choices … ought … to be made through the legislative process." *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 570, 126 N.W.2d 551 (1964);

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accord State ex rel. Reynolds v. Zimmerman, 23 Wis. 2d 606, 606, 128 N.W.2d 16 (1964).

3. The Wisconsin Constitution provides no judicially manageable standard for assessing alleged partisan unfairness. Whether a redistricting plan is "too partisan" or "fair enough" cannot be "judged in terms of simple arithmetic." *Fortson v. Dorsey*, 379 U.S. 433, 440 (1965) (Harlan, J., concurring). Courts cannot "even begin to answer the determinative question: 'How much is too much?'" *Rucho*, 588 U.S. at 707. "At what point does permissible partisanship become unconstitutional?" *Id.* In assessing partisanship, how should courts count independents or split-ticket voters? *Johnson I*, 2021 WI 87, ¶43. The Wisconsin Constitution provides no discernable legal standards for answering such questions to divine what is "fair." *Id.* ¶44. There is no principal that would "meaningfully constrain the discretion of the courts." *Rucho*, 588 U.S. at 706.

Unsurprisingly Plaintiffs propose no judicially manageable standard. They urge this Court to hold "that manageable standards *exist*" without "decid[ing] the precise standards that should be applied." Br.37. That shoot-first, ask-questions-later approach flouts "[o]ne of the most obvious limitations" on the judicial power—"that judicial action must be governed by *standard*, by *rule*." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality op.); *cf. Stop the Beach Renourishment v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 716 (2010) (plurality op.) ("One cannot know whether a … claim is invalid without knowing what standard it has failed to meet."). The North Carolina Supreme Court tried that approach, only to reverse course after the remedial

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process proved unworkable. *See Harper v. Hall*, 384 N.C. 292, 312-13, 886 S.E.2d 393 (2023) (explaining the majority that deemed partisan gerrymandering justiciable later "could not delineate a particular set of metrics that would identify a constitutional redistricting map"). And such an approach elides the hard question. The question is not whether "manageable standards *exist*" in political science literature. Br.37. The question is where they appear in the Wisconsin Constitution for "courts to apply." *Rucho*, 588 U.S. at 719. Nowhere. *See Johnson I*, 2021 WI 87, ¶¶39-63.

As a fallback, Plaintiffs offer an "effects-based standard" requiring Plaintiffs to show traditional redistricting criteria were "subordinated" for "partisan advantage." Br.38. But even "traditional criteria" can "unavoidably have significant political effect, whether intended or not." *Rucho*, 588 U.S. at 707. And Plaintiffs' standard still does not answer "the original unanswerable question": "How much political … effect is too much?" *Id.* at 716. Plaintiffs' standard suggests politics is simply off limits in redistricting. But nothing in the Wisconsin Constitution—and certainly nothing in the federal Constitution—says so. *See Johnson I*, 2021 WI 87, ¶¶39-63. Politics are "inseparable" from redistricting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973); *see Jensen*, 2002 WI 13, ¶10 ("inherently political"). The framers understood the role of politics when they assigned redistricting to legislatures. *Rucho*, 588 U.S. at 696-99; *supra* III.B.1-2. "To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities." *Rucho*, 588 U.S. at 701.

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There is no plausible grant of authority for the judiciary to pick sides in deciding what is the "fair" partisan division in districts. *Johnson I*, 2021 WI 87, ¶45. Should it be a "proportionality" standard that allots each major party "its 'appropriate' share of 'safe' seats"? *Rucho*, 588 U.S. at 706. Or a standard requiring as many "competitive" districts as possible? *Id.* Or more homogenous districts matching "the policy preferences of the median legislator and those of the median voter"? James A. Gardner, *What Is "Fair" Partisan Representation, and How Can It Be Constitutionalized?*, 90 Marq. L. Rev. 555, 563 (2007). Absent some constitutional direction, these are imponderable questions for a court. It is not for the courts to dictate "the 'correct' theories of democratic representation" or "the 'best' electoral systems for securing truly 'representative' government." *Holder v. Hall*, 512 U.S. 874, 913 (1994) (Thomas, J., concurring in judgment). Plaintiffs' disagreement with the politics of districts "is properly pursued within the political realm not in courts of law." *League of Women Voters*, 2019 WI 75, ¶28.

4. Plaintiffs would have this Court rely on "other state courts," Br.37, but none has Wisconsin's Constitution. Florida amended its constitution to add a "Fair Districts Amendment … to eliminate … partisan political gerrymandering." *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363, 369 (Fla. 2015). *Grisham v. Van Soelen* read the New Mexico Constitution's Equal Protection Clause "together with" its "Freedom of Elections Clause," "Popular Sovereignty Clause," and "Right of Self-Government Clause." 2023-NMSC-027, ¶¶23, 26, 539 P.3d 272. *Szeliga v. Lamone* arose under the Maryland Constitution's "Free Elections Clause." 2022 WL 2132194, at *43

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(Md. Cir. Ct. Mar. 25). *League of Women Voters v. Commonwealth* arose under the Pennsylvania Constitution's "Free and Equal Elections Clause." 645 Pa. 1, 8, 178 A.3d 737 (2018). The Alaska Supreme Court relied on "[a]mple evidence" from constitutional conventions that "reflect considerable focus on limiting gerrymandering." *In re 2021 Redistricting Cases*, 528 P.3d 40, 53, 56 (Alaska 2023). And while Utah passed a redistricting citizens' initiative ("Proposition 4") with redistricting rules to "completely prohibi[t]" partisan gerrymandering, the Utah Supreme Court refused to decide whether partisan gerrymandering would be justiciable absent that initiative. *League of Women Voters of Utah v. Utah State Legis.*, 2024 UT 21, ¶¶224-26, 554 P.3d 872.

If Plaintiffs want "fair districts," their solution lies in a constitutional amendment or congressional legislation, not a court case. The "authority" to update the Wisconsin Constitution "has not been given" to this Court. *Wis. Just. Initiative*, 2023 WI 38, ¶18. Such "policy choices" are left "to the people" for them "to govern themselves." *Id.* ¶¶21, 28.

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IV. Plaintiffs' claims are barred by laches.

A. Having waited more than 3 years after *Johnson II* and 14 years after Act 44, Plaintiffs "unreasonably delayed in bringing the suit," *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶14, 393 Wis. 2d 308, 946 N.W.2d 101, flouting their "special duty to bring" election-related "claims in a timely manner," *Trump v. Biden*, 2020 WI 91, ¶30, 394 Wis. 2d 629, 951 N.W.2d 568. Their decision to "sleep on their rights" is unreasonable and unexplained.

State ex rel. Wren v. Richardson, 2019 WI 110, ¶14, 389 Wis. 2d 516, 936 N.W.2d 587.

Plaintiffs' delay is calculated from the time they "knew or should have known" of their "potential claim." *Id.* ¶21. Plaintiffs knew or should have known of their partisan gerrymandering claims nearly 14 years before they sued with the passage of Act 44. R.9:13, 21; *see* R.9:14 ("Those [political] considerations were readily apparent in the congressional map."). Their complaint detailed elections and events from 2011 following the enactment of Act 44 and alleged *Johnson II* simply perpetuated that alleged unfairness. R.9:7-8, 14, 16, 21-22. And Plaintiffs knew or should have known of their separation-of-powers claim nearly 4 years before they sued after *Johnson I* required proposed remedies making least changes to the existing districts. *See* R.9:17-18. Even if this Court's 2024 decision denying the motion to reopen the congressional districts were the relevant benchmark, Plaintiffs do not justify waiting another *16 months* to file this action. *Contra* Br.41.

As to the other laches factors, no party could have anticipated Plaintiffs' years-delayed claims in circuit court, especially when they just told this Court that only it has the power to revisit the *Johnson II* injunction. Bothfeld Pet. ¶98; *see Brennan*, 2020 WI 69, ¶18. And Plaintiffs' untimeliness prejudices everyone, far beyond "litigation costs." *Contra* Br.42. If Plaintiffs prevail, redistricting will begin anew now, and then again after the 2030 census, "creating instability and dislocation in the electoral system" and "great financial and logistical burdens." *White v. Daniel*, 909 F.2d 99, 104 (4th Cir. 1990). Voters who "have come to know their districts and candidates …

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will be confused by change." *Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000); *accord Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). There's no justification for Plaintiffs' years-delayed collateral attack.

B. Plaintiffs say laches is "categorically inapplicable" because they assert "constitutional claims seeking prospective relief." Br.38. But "redistricting challenges are subject to the doctrine of laches because of the ten-year expiration date of electoral districts." *Chestnut v. Merrill*, 377 F. Supp. 3d 1308, 1314 (N.D. Ala. 2019). Plaintiffs cannot wait multiple election cycles to challenge Wisconsin's congressional districts, already settled by earlier litigation, just as plaintiffs could not wait multiple election cycles to challenge Alabama's congressional districts in the *Chestnut* litigation, which sought "solely prospective relief." *Id.*; *see, e.g.*, *White*, 909 F.2d at 102-05 (applying laches to prospective redistricting challenge); *Sanders v. Dooly County*, 245 F.3d 1289, 1290-91 (11th Cir. 2001) (per curiam) (holding equal-protection redistricting claims "seeking injunctive relief" were "laches-barred"); *Fouts*, 88 F. Supp. 2d at 1353 (holding laches barred "challenge [to] the constitutionality" of Florida's congressional districts).

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Plaintiffs' cited cases do not hold otherwise. *Clarke* did not announce a categorial rule that "laches is unavailable" in "districting challenges." *Contra* Br.39. Nor did *Clarke*'s rejection of laches mean there is *no* time limit to bring claims; the delay there just was "not unreasonable." 2023 WI 79, ¶42. Plaintiffs' delay here is. As for *Navarro v. Neal*, "plaintiffs d[id] not dispute that the district court properly invoked the doctrine of laches to

dismiss their claim for injunctive relief," and the court cited approvingly another election-law decision applying laches. 716 F.3d 425, 429 (7th Cir. 2013) (citing *Fulani v. Hogsett*, 917 F.2d 1028 (7th Cir. 1990)).

"Federal courts across the country have" *not* "endorsed" Plaintiffs' view. *Contra* Br.39. They have rejected it. *See, e.g.*, *Maxwell v. Foster*, 1999 WL 33507675, at *1 (W.D. La. Nov. 24) (rejecting argument that laches is "not applicable to constitutional violations" in redistricting); *Knox v. Milwaukee Cnty. Bd. of Elections Comm'rs*, 581 F. Supp. 399, 405 (E.D. Wis. 1984) (holding the "defense of laches is well established" in redistricting challenges "to enjoin elections"). *Environmental Defense Fund v. Marsh* was not even a redistricting case. 651 F.2d 983 (5th Cir. 1981). And the U.S. Supreme Court stayed and then vacated the judgment in *League of Women Voters of Michigan v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich.), *stayed*, 587 U.S. 1024, *vacated sub nom. Chatfield v. League of Women Voters of Mich.*, 589 U.S. 1031 (2019). Other state courts have rejected Plaintiffs' view. *See, e.g.*, *McCombie v. Ill. State Bd. of Elections*, 2025 IL 131480, ¶4, 269 N.E.3d 699 (per curiam) (holding laches barred action for injunctive relief "filed more than three years, and two election cycles, after the redistricting map was enacted"). This Court should too.

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V. Plaintiffs invite this Court to violate the Elections Clause.

Plaintiffs nowhere address the federal Elections Clause. *See* U.S. Const. art. I, §4, cl. 1. When a congressional redistricting dispute comes before state courts—for instance, numerical malapportionment or racial gerrymandering claims—they "do not have free rein" to redistrict anew.

Moore, 600 U.S. at 34. So as not to transgress the Elections Clause, state courts must abide by "the ordinary bounds of judicial review." *Id.* at 36. This Court respected that line by deferring to the Legislature's 2011 congressional districts and making only necessary changes to remedy the unconstitutional malapportionment in *Johnson*. *Supra* II.B.1.

Unlike *Johnson*, Plaintiffs here asked the circuit court to redistrict anew. They insisted the court strike a new political balance by eliminating the "6-2 split favoring Republican candidates" to ensure "partisan fairness." R.9:21-22. And they asked for that redraw despite *Johnson I*'s interpretation of relevant constitutional provisions and despite *Johnson II*'s holding that the existing congressional districts comply with all state and federal law. *Johnson I*, 2021 WI 87, ¶¶39-63; *Johnson II*, 2022 WI 14, ¶25. It is hard to imagine a better opportunity for the U.S. Supreme Court to clarify when a state court "exceed[s] the bounds of ordinary judicial review." *Moore*, 600 U.S. at 37.

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A. Start with the highly unusual posture of this case. Plaintiffs challenge the *Johnson II* districts for looking *too much* like the districts last enacted by the Legislature. R.9:16-18. But this Court already held those districts "compl[y] with all relevant state and federal laws" before ordering the Elections Commission to use them. *Johnson II*, 2022 WI 14, ¶¶25, 52. That the districts made only necessary changes to the 2011 districts is a feature, not a bug, given the Elections Clause's assignment of redistricting authority to "the Legislature." *Supra* II.B.1, III.B.1; *see also Upham*, 456 U.S. at 42 (court-ordered plan should not change "more than [is] necessary to meet the

specific constitutional violations involved"). This Court's deference to the last duly enacted plan kept the Court within "the bounds of ordinary judicial review." *Moore*, 600 U.S. at 37.

And yet, Plaintiffs asked an inferior court to declare *Johnson II*'s deference to legislatively enacted districts was unconstitutional. R.9:26. For starters, the circuit court was powerless to enter such relief. *Supra* I. And while this Court may make exceptions for such collateral attacks and remedial rules involving the statehouse districts, *see Clarke*, 2023 WI 79, ¶¶51-55, 61-63, the Court's power here is constrained by the federal Elections Clause. For congressional districts, "state courts do not have free rein." *Moore*, 600 U.S. at 34.

There has been no intervening change to the Wisconsin Constitution and no intervening census that could explain abandoning the *Johnson II* injunction. Plaintiffs' dissatisfaction with election results under a court-adopted remedial plan, *see* R.9:21-22, does not give them a constitutional case to complain of judicial neutrality or independence. Claims of political unfairness remain nonjusticiable and not cognizable. *Johnson I*, 2021 WI 87, ¶¶39-63; *supra* III. All that has changed is this Court's membership, which is no basis for this Court to conclude that the Court's judgment and injunction in *Johnson II* violated the separation of powers or that the Wisconsin Constitution *now* authorizes the judiciary to referee the political makeup of districts even if they could not before. *Johnson Controls*, 2003 WI 108, ¶95. Redrawing districts to create "partisan fairness" or an "eve[n] split" between the two major parties, R.9:21—a political exercise—would

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make this court "no more than a super-legislature," *Flynn*, 216 Wis. 2d at 528-29, arrogating the actual Legislature's congressional redistricting power, *Moore*, 600 U.S. at 36-37. Abstaining is especially warranted here, given campaign statements that districts were "wrong"[3] and "need[ed] to change"[4] so that "Democrats" could "win two additional US House seats."[5]

B. Entertaining Plaintiffs' political dispute would abandon the ordinary trappings of judicial proceedings. It would require overlooking longstanding common-law doctrines like laches or preclusion, "exceed[ing] the bounds of ordinary judicial review." *Moore*, 600 U.S. at 37.

1. In addition to flouting the doctrine of laches, *supra* IV, Plaintiffs' suit also flouts elementary rules disfavoring repeat litigation and prohibiting collateral attacks on final judgments. *Johnson II* settled the congressional districts for the decade. Every branch of the Wisconsin government and many interested Wisconsinites participated. *See Johnson I*, 2021 WI 87, ¶6. That original action was "by definition, publici juris, implicating the sovereign rights of the people of this state." *Jensen*, 2002 WI 13, ¶17. But Plaintiffs now return to this Court, asserting "ongoing detriment of Wisconsin voters." Br.9.

Allowing this collateral attack on *Johnson II* would "disrupt the finality of prior judgments," "undermine confidence in the integrity of our

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[3] Channel 3000 / News 3 Now, *Wisconsin Supreme Court debate presented by News 3 Now and WisPolitics*, at 29:40-29:49, YouTube (Mar. 21, 2023), https://bit.ly/3HAtZtv.

[4] Matt Mencarini, *How could the 2023 Wisconsin Supreme Court election impact medical malpractice lawsuits?*, PBS Wis. (Mar. 31, 2023), https://perma.cc/V87K-LC4C.

[5] Order App'x A, *Felton*, No. 2025AP999-OA (Wis. May 15, 2025) (Grassl Bradley, J., dissenting).

procedures," and "delay and impair the orderly administration of justice." *Oneida Cnty. Dep't of Soc. Servs. v. Nicole W.*, 2007 WI 30, ¶28, 299 Wis. 2d 637, 728 N.W.2d 652. An "order or judgment," even if Plaintiffs think it "erroneous," "is not subject to collateral attack." *Stimson v. Munsen*, 251 Wis. 41, 44, 27 N.W.2d 896 (1947). The *Johnson II* judgment is final. *See Kriesel v. Kriesel*, 35 Wis. 2d 134, 139, 150 N.W.2d 416 (1967) (recognizing "settled law that a judgment of a court which had jurisdiction … cannot be impeached and is immune from and not subject to collateral attack," even if "patently erroneous"). The Wisconsin Constitution limits the Legislature to "only one" redistricting "within the same census period." *State ex rel. Smith v. Zimmerman*, 266 Wis. 307, 312, 63 N.W.2d 52 (1954). The same goes for Plaintiffs' desire for repeat redistricting by this Court.

2. Finally, Plaintiffs not only assume they will prevail but also assume this case can proceed at lightning speed on remand. Even though the circuit court dismissed their complaint, they insist they can obtain a new congressional map for "the 2028 elections" on either of their claims. Br.43.

Plaintiffs claim a favorable ruling on their separation-of-powers claim would "obviate the need for further fact-finding" and "allow the case to proceed directly to the adoption of a new congressional map." Br.19 n.5. But they downplay the extensiveness and complexities of their desired remedial proceedings. Plaintiffs seek "fair districts, drawn according to neutral criteria," Br.9, and want a court to consider "partisan impact in adopting remedial maps," R.9:15 (quoting *Clarke*, 2023 WI 79, ¶70). *Clarke* never

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answered what it even means for courts to be "politically neutral" while they "consider partisan impact." 2023 WI 79, ¶¶69-70; *supra* pp.31-32 & n.2.

Answering what is "politically neutral"—however defined—would raise a host of factual disputes, entailing experts in fields ranging from demography to political science to mathematics and requiring discovery. *E.g., Harper v. Hall*, 380 N.C. 317, 333-44, 868 S.E.2d 499 (2022) (describing parties' nine experts); *Whitford v. Nichol*, 180 F. Supp. 3d 583, 591-97 (W.D. Wis. 2016) (finding "fact issues that need to be resolved at trial" regarding efficiency gap). Such factual disputes can only be resolved with a trial-type "evidentiary hearing." *See, e.g.*, *Indus. Roofing Servs. v. Marquardt*, 2007 WI 19, ¶66 n.13, 299 Wis. 2d 81, 726 N.W.2d 898.

Plaintiffs' suggested timing would be particularly outrageous if their partisan gerrymandering claims went forward. As Plaintiffs recognized, those claims "are fact-based, warranting discovery," R.137:8, where Plaintiffs would offer "expert reports," Br.17, to be followed by "a trial," R.137:8; *see Clarke v. Wis. Elections Comm'n*, 2023 WI 70, 409 Wis. 2d 372, 375, 995 N.W.2d 779 (recognizing partisan gerrymandering claims require "extensive fact-finding (if not a full-scale trial)"); *see also, e.g.*, *Singleton v. Allen*, ___ F. Supp. 3d ___, 2026 WL 1469518, at *8 (N.D. Ala. May 26) (noting 11 trial days with live testimony from 23 witnesses including 13 experts, designated testimony from 28 more witnesses, 790 exhibits, and 840 pages of post-trial briefing). And that extensive liability phase would be followed by the similarly extensive remedial phase described above and a U.S. Supreme Court appeal, if warranted.

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Taken together, these departures from ordinary judicial review would confirm that Plaintiffs' suit is a political endeavor, not a judicial one. Granting relief would accordingly "transgress the ordinary bounds of judicial review," "arrogate … power vested in state legislatures to regulate federal elections," and run afoul of the federal Elections Clause. *Moore*, 600 U.S. at 36; *accord id.* at 38 (Kavanaugh, J., concurring).

CONCLUSION

The Court should affirm the dismissal of Plaintiffs' complaint.

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Dated: August 20, 2026

Respectfully submitted,

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CERTIFICATION REGARDING LENGTH AND FORM

I certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c). Excluding the portions of this brief that may be excluded, the length of this brief is 10,945 words as calculated by Microsoft Word.

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