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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.

On Appeal from the Dane County Circuit Court,
The Honorable Judges Julie Genovese, Mark Sanders, and Emily Lonergan,
Presiding, Case No. 2025CV2432

RESPONSE BRIEF OF THE JOHNSON INTERVENORS-DEFENDANTS-RESPONDENTS[1]

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ISSUES PRESENTED

1. Is this case foreclosed by *Johnson I*?

The circuit court answered yes. This Court should too.

2. Whether Plaintiffs' separation-of-powers claim fails as a matter of law?

The circuit court answered yes. This Court should too.

3. Whether Plaintiffs' partisan gerrymandering claim fails as a matter of law?

The circuit court answered yes. This Court should too.

4. Is this case barred by the Elections Clause or laches?

The circuit court did not reach these issues, but this Court should affirm the dismissal on these alternative grounds.

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INTRODUCTION

Appellants' partisan-gerrymandering claims are foreclosed by *Johnson I*, which held that such claims have no basis in the Wisconsin Constitution and are nonjusticiable political questions. Appellants do not even ask this Court to overrule those holdings, much less meet this Court's normally high bar for overcoming the doctrine of stare decisis. Even if this Court were to ignore that oversight, Appellants fail to identify anything in text, history, or precedent to support an unwritten right to a "politically fair" map. They also offer no judicially manageable standard for adjudicating such a claim; they don't even explain what would make a map "fair," or how courts are supposed to define or measure "fairness" in this context. At a minimum, Appellants have failed to meet their burden to establish these new constitutional claims, and this Court could affirm their dismissal for that reason alone.

To circumvent *Johnson I* and the lack of any text, history, or precedent supporting partisan gerrymandering claims, Appellants instead lead with a confusing "separation-of-powers" argument. Their theory is this Court somehow violated the separation of powers by the methodology it used in selecting a remedy in the *Johnson* litigation. But this Court merely exercised its judicial authority to remedy the violation before it (malapportionment), which Appellants concede was within this Court's power. And it did remedy the violation. The factors this Court considered in selecting a remedy—contiguity, compactness, population equality, jurisdictional boundaries, etc.—were neutral and independent. The Court did not give any special preference to any party's remedial proposal, ultimately selecting the Governor's over the Legislature's. The fact that *Clarke* subsequently refined the factors to consider during the *remedy* phase in future redistricting cases does not entail that the map itself is a present separation-of-powers violation. Nothing in the *Clarke* opinion supports that novel theory. This Court did not reopen *Johnson*

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or authorize mid-decade do-overs anytime this Court adjusts its remedial methodology.

This suit is also barred by laches and the U.S. Constitution's Elections Clause. The circuit court panel correctly dismissed all claims in this action, and this Court should affirm.

ORAL ARGUMENT AND PUBLICATION

The Court has already scheduled this case for oral argument, and by accepting this appeal, this Court has indicated that the case is appropriate for publication.

STATEMENT OF THE CASE

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The Elections Clause vests the power to set congressional district boundaries in the various state legislatures. Wisconsin's legislature exercises this power by establishing congressional district boundaries in the Wisconsin state statutes. *See* Wis. Stat. Ch. 3. Following the 2010 decennial census, the legislature adopted, and the governor signed into law, new congressional district lines. 2011 Wisconsin Act 44. Following the 2020 decennial census, those district lines needed to be updated again. But at that time, "the legislature drew maps, [and] the governor vetoed them[.]" *Johnson v. WEC*, 2021 WI 87, ¶ 2, 399 Wis. 2d 623, 967 N.W.2d 469 (*"Johnson I"*). To resolve this impasse, this Court exercised its original jurisdiction to hear the case. *Johnson I*, 2021 WI 87, ¶ 6.

In the *Johnson* litigation, when reviewing the then-malapportioned 2011 maps, this Court "remed[ied] that malapportionment, while ensuring the maps satisf[ied] all other constitutional and statutory requirements." *Johnson I*, 2021 WI 87, ¶ 4. The Court began by first rejecting any partisan gerrymandering claims as nonjusticiable political questions. *Id.* (explaining that partisan gerrymander claims "have no basis in the constitution or any other law

and therefore must be resolved through the political process and not by the judiciary."); *see also id.* ¶¶ 55, 60, 62 (concluding that Wis. Const. Art. I, §§ 1, 3, 4, and 22 do not say anything about partisan gerrymandering).

In this Court's second decision in the case ("*Johnson II*"), this Court adopted Governor Evers' proposed congressional maps, finding that they "move[d] the fewest number of people into new districts" from Wisconsin's most recently adopted 2011 map. *Johnson v. WEC*, 2022 WI 14, ¶ 19, 400 Wis. 2d 626, 971 N.W.2d 402.

Since then, there has been a multi-year effort to reverse this Court's adoption of those maps. First, in January of 2024, several of the intervenors in the original *Johnson* litigation filed a "Motion for Relief from Judgment," arguing that, in light of this Court's subsequent decision in *Clarke v. WEC*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370, the congressional maps adopted in *Johnson II* should be overturned and new maps should be selected. Motion for Relief from Judgment, *Johnson v. WEC*, No. 21AP1450 (Jan. 16, 2024). That motion was denied by this Court. Order Denying Motion for Relief from Judgment, *Johnson v. WEC*, No. 21AP1450 (Mar 1, 2024).

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Then last year, two separate petitions for original actions were filed with this Court, including one by many of the same Appellants here, which raised identical claims. *See* Pet. for Original Action, *Bothfeld v. WEC*, No. 2025AP996-OA (filed May 7, 2025); *see also* Pet. for Original Action, *Felton v. WEC*, No. 2025AP999-OA (filed May 8, 2025). This Court denied both petitions without dissent. Order Denying Petition, *Bothfeld v. WEC*, No. 2025AP996-OA (June 25, 2025); Order Denying Petition, *Felton v. WEC*, No. 2025AP999-OA (same).

A month later, Appellants here brought this separate action in the Dane County Circuit Court. R. 9 (July 21, 2025). On November 25, 2025,

this Court appointed a three-judge panel to hear this case. *Bothfeld v. WEC*, 2025 WI 53. R. 59. The Legislature, various Congressmen, and several of the original petitioners from the *Johnson* litigation (the "*Johnson* Respondents") intervened in that proceeding and moved to dismiss. App. 6.

The three-judge panel denied Plaintiffs' motion for judgment on the pleadings and granted intervenors' motions to dismiss and dismissed this action in its entirety, concluding, correctly, that this case is foreclosed by this Court's decision in *Johnson I*. This appeal followed.

STANDARD OF REVIEW

The *Johnson* Respondents agree with the Appellants that 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.

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ARGUMENT

I. The Circuit Court Correctly Held that the Congressional Map Does Not Violate the Separation of Powers

Appellants' lead argument asserts that Wisconsin's current congressional map violates the separation of powers because the Court selected it under the "least-change" criterion later repudiated in *Clarke v. WEC*, 2023 WI 79.

The separation-of-powers doctrine prohibits one branch from abdicating its core powers to another branch. *Tetra Tech EC, Inc. v. Wis. Dept. of Revenue*, 2018 WI 75, ¶ 48, 382 Wis. 2d 496, 914 N.W.2d 21. The judiciary's core power is to "interpret[ ] and apply[ ] laws made and enforced by coordinate branches of state government." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 37, 376 Wis. 2d 147, 897 N.W.2d 384. This Court's use of least-change was an exercise of judicial restraint, not

an abdication of its independence or the adoption of a non-neutral approach to the law.

Appellants are wrong to assert the Court gave up its independence when it adopted the remedial maps in *Johnson*. This Court independently assessed "the constitutional confines of [its] judicial authority," recognized that the Legislature (not the Courts) holds the core power to draw congressional maps, and chose a remedial methodology that remedied only the identified legal defect (malapportionment), while otherwise preserving the policy choices embodied in a map that was enshrined in state statute. *Johnson I*, ¶¶ 12, 64, 72, 73. Rather than ceding core judicial power, least-change *honored* the Legislature's core authority and minimized judicial intrusion into political line drawing to the greatest extent possible. That's consistent with separation-of-powers, not a violation of the doctrine.

Even though this Court has reversed itself and held that the least change approach was error, that still does not equate it to an unconstitutional abdication of core judicial power. The panel correctly recognized this distinction, and this Court should uphold the dismissal.

Appellants' "neutrality" argument fares no better. In *Clarke,* this Court explained that courts must remain politically neutral and should avoid selecting remedial maps "designed to advantage one political party over another." *Clarke*, ¶¶ 70, 71. *Clarke* did not hold that a methodology which uses an existing map as a starting point is inherently non-neutral, nor did it equate neutrality with a judicial duty to erase any prior legislative policy choice which may have partisan effect. Least-change, even though now rejected by this Court, nevertheless limited the judiciary's opportunity to substitute its own political preferences for those of the political branches and actually increases the courts' neutrality.

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The separation of powers doctrine is not offended in any way by this Court's prior use of the least-change approach.

A. Appellants Misunderstand the Difference Between a Remedy and Legal Violation

Appellants' separation-of-powers argument is based upon a fundamental misunderstanding of the difference between a legal violation and a remedy. The "least change" approach adopted in the *Johnson* litigation was solely a *remedial* methodology that this Court adopted to resolve the malapportionment resulting from population shifts. *Johnson I*, 2021 WI 87, ¶¶ 18, 81. The violation, which was undisputed, was the malapportionment. *Id*. ¶ 2.

Similarly, in *Clarke*, the violation was non-contiguity in the state legislative maps. 2023 WI 79, ¶¶ 10–35. Having found that violation, the Court turned to remedy, and this is what prompted replacing *Johnson I*'s "least change" remedial framework. *Id.* ¶¶ 56–71 (a section entitled, "IV. REMEDY"). But nothing in *Clarke* suggests, much less held, that the remedial approach in *Johnson I* was, itself, an independent constitutional violation. If it were, the Court could have written a much shorter opinion, without any analysis of contiguity. Indeed, some parties in *Clarke* even raised a similar argument, but the Court declined to address it. *Id*. ¶ 7 (noting the argument that the maps "were created via a process that violated the separation of powers"). Appellants cite no authority whatsoever for the proposition that a subsequent refinement of remedial considerations thereby transforms any prior remedy into a separation of powers violation.

That idea does not even make sense. Appellants do not dispute that this Court was the proper branch to remedy the malapportionment in *Johnson*, given the impasse in the other two branches. Nor do they dispute that this Court did, in fact, remedy the malapportionment. This

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Court evaluated all submissions equally under neutral criteria, and ultimately selected Governor Evers' submission, not the Legislature's.

B. *Clarke* Affects Future Remedies in Redistricting Cases But Provides No Support for a Separation of Powers Claim

The Appellants' separation of powers argument also misunderstands the legal impact of *Clarke* on the remedy implemented in *Johnson II*. In *Clarke*, this Court overruled "any portions of *Johnson I, Johnson II, and Johnson III* that mandate a least change approach." 2023 WI 79, ¶ 63. The Court rejected the least-change approach used in *Johnson* because it was "unworkable in practice," given that multiple members of the Court disagreed on what "least change" meant. *Id.*, ¶¶ 61–63 (noting different definitions). Going forward, this Court determined that judicial map selection would be guided by a range of factors, including population equality, contiguity, compactness, respect for political boundaries, and communities of interest. *Id.*, ¶¶ 64–69. Some of these were constitutionally required, but others, like "reducing municipal splits," were merely "traditional redistricting criteria," even though "not specifically outlined in the Wisconsin or United States Constitution." *Id.* ¶ 68.

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While the Court held that it would also consider partisan impact as "one of many factors" in selecting a remedy, it did not hold that consideration of this factor is constitutionally required, either as a matter of separation of powers or of any other constitutional requirement. *Id.* ¶¶ 69–71. Instead, the Court specifically contrasted this factor with constitutional requirements, stating that "consideration of partisan impact will not supersede constitutionally mandated criteria such as equal apportionment or contiguity." *Id.* ¶ 71. And, at the beginning of this section, the Court noted that it "declined to hear the

issue of whether extreme partisan gerrymandering violates the Wisconsin Constitution." *Id.* ¶ 69.

Thus, nothing in *Clarke* held, or even suggests, that a congressional map selected without considering partisan impact is any kind of constitutional violation, much less a separation of powers violation. *Clarke* did not reopen the *Johnson* judgment. It did not declare the existing congressional map unconstitutional. It did not order the Wisconsin Elections Commission to stop administering elections under that map, and it did not invite lower courts to treat a clarification of remedial doctrine as grounds for a mid-decade do-over.

Even if *Clarke* had held that this Court's consideration of partisan impact was a constitutional requirement—and it did not—that does not mean that the *map itself* is unconstitutional. Take a simple example. Let's say the Court in *Johnson* failed to consider population equality, but the map that the Court selected nevertheless had districts with equal population. The mere failure to consider that factor does not make the districts malapportioned; that would have to be separately proven. So too here.

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The distinction between the congressional maps challenged here and the state legislative maps at issue in *Clarke* is also critical. Unlike the state legislative maps, which contained non-contiguous "municipal islands" that were found to independently violate the Wisconsin Constitution, the congressional map here has no such issue. In fact, in *Johnson II,* the Court independently confirmed that the selected congressional plan achieved population equality, maintained contiguity, and complied with traditional redistricting principles—including core retention and preservation of communities of interest—principles that *Clarke* left undisturbed. *Johnson II*, 2022 WI 14, ¶¶ 19–25. Appellants' attempt to treat *Clarke*'s later refinement of remedial methodology as

grounds to invalidate a map that otherwise fully complies with the law would convert every doctrinal clarification into a mid-decade do-over.

The distinction between prospectively refining remedial standards and retrospectively invalidating final judgments is fundamental. Courts routinely adjust the criteria that will govern future exercises of their equitable powers without thereby voiding every single prior exercise of that equitable power under the old criteria. *Clark* itself carefully limited the scope of its overruling to the "least change approach." 2023 WI 79, ¶ 24. It left intact the finality of the remedial maps already selected under that approach. Treating *Clarke* as an automatic trigger for new maps would erase that limitation and produce perpetual instability: every single future change in any redistricting doctrine would reopen settled maps, undermine reliance interests of voters and candidates, and convert this Court's remedial judgments into temporary decrees subject to perpetual litigation.

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Appellants ignore that a court can (1) adopt a map under the criteria which were then in force; and (2) later decide that different criteria will govern the next time the judiciary is called upon to resolve a redistricting impasse. The fact that those criteria would not be used again in the same way in a future remedial map selection does not mean the Court had surrendered its independent judgment.

Clarke treated least-change as a mistaken approach to the *remedial* task, not as a separation-of-powers violation that rendered the resulting maps void. This Court's discussion of neutrality and independence appears in the section explaining how courts should select maps *going forward*. *Id.* ¶¶ 56–71. It does not characterize the *Johnson* maps as products of unconstitutional abdication. If this Court had intended that sweeping consequence, it could easily have said so.

C. The Circuit Court Correctly Denied the Motion for Judgment on the Pleadings

Judgment on the pleadings is appropriate only when the pleadings establish that the moving party is entitled to judgment as a matter of law and no genuine issue of material fact remains. *McNally v. Cap. Cartage, Inc.*, 2018 WI 46, ¶¶ 23–25, 381 Wis. 2d 349, 912 N.W.2d 35. Plaintiffs' separation-of-powers claim fails that standard, and the circuit court correctly denied the motion for judgment on the pleadings.

Even accepting every factual allegation as true, *Clarke* does not render the current congressional map unconstitutional. As explained, *Clarke* prospectively overruled the least-change methodology for future remedial map selections. Nothing in *Clarke* retroactively declared that the continued use of the remedy from *Johnson* violated the separation of powers.

Independently, the circuit court panel lacked authority to grant the relief that the Plaintiffs sought. A circuit court panel may not "overrule, modify or withdraw language from a previous supreme court case." *Cook v. Cook*, 208 Wis. 2d 166, ¶ 51, 560 N.W.2d 246 (1997). Lower courts have "no power to vacate or set aside" a judgment of this Court. *Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶ 50, 303 Wis. 2d 94, 735 N.W.2d 418.

That hierarchical limit, of course, does not end the analysis. This Court should itself decline to invalidate the existing map for the reasons discussed herein. *Clarke* refined the standards to govern future remedial selections; it did not itself create new constitutional violations of existing maps. Treating every subsequent clarification of remedial doctrine as grounds to reopen a settled judgment would destroy finality, undermine reliance interests of voters and candidates, and invite perpetual litigation over district maps.

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Plaintiffs' repeated attempts to relitigate these maps have been uniformly rejected by courts in our state. This Court should not allow this collateral attack on its final judgment. The circuit court properly denied the motion for judgment on the pleadings and dismissed the separation-of-powers claim, and this Court should affirm.

II. The Circuit Court Correctly Dismissed Appellants' Partisan Gerrymandering Claims

A. *Johnson I* Resolves This Appeal, and Appellants Make No Case to Overrule it

In *Johnson I*, this Court held that "partisan gerrymandering" claims are not viable for two separate reasons. First, unlike some other state constitutions, "the Wisconsin Constitution says nothing about partisan gerrymandering." 2021 WI 87, ¶¶ 53–63. Instead, the "only Wisconsin constitutional limits" on redistricting, the "exclusive repository," are found in Article IV, specifically "Sections 3, 4, and 5." *Id.* ¶ 63. Second, and relatedly, this Court held that partisan gerrymandering claims involve "non-justiciable" "political questions," consistent with the United States Supreme Court's holding in *Rucho v. Common Cause*, 588 U.S. 684 (2019). 2021 WI 87 ¶¶ 40–52. As both this Court and the Supreme Court correctly recognized, there are no "judicially manageable standards" to resolve such claims—"what constitutes a 'fair' map poses an entirely subjective question with no governing standards grounded in law." *Id.* ¶ 44. Moreover, because "the task of redistricting is expressly assigned to the legislature," reassigning that task "to the judiciary to determine whether maps are fair" would "recast this court as a policymaking body rather than a law-declaring one." *Id.* ¶ 52.

The circuit court correctly recognized that *Johnson I* forecloses Appellants' partisan gerrymandering claims. Indeed, this Court in *Johnson I* squarely held that Sections 1, 3, 4, and 22 of Article I—the

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exact constitutional provisions Appellants invoke here—neither create a right to "partisan fairness" nor impose any "additional requirements" on redistricting. 2021 WI 87, ¶ 63; App. 19. Indeed, "Article I, Section 1 … has nothing to say about partisan gerrymanders." *Id.* ¶ 55. Likewise, Sections 3 and 4 of Article I "do not inform redistricting challenges" because "[n]othing about the shape of a district infringes anyone's ability to speak, publish, assemble, or petition." *Id.* ¶¶ 59–60. Finally, Article I, Section 22 "does not supply" "a legal standard of partisan 'fairness.'" *Id.* ¶ 62. This Court's holding that "partisan fairness" is a non-justiciable political question, *id.* ¶¶ 40–52, also separately precludes Appellants' partisan gerrymandering claims. App. 19.

While *Clarke v. WEC*, overruled parts of *Johnson I*, it did not overrule the parts that resolve this case. 2023 WI 79, ¶¶ 24 (overruling any "passing statements about the contiguity requirements"), 63 (overruling "any portions … that mandate a least change approach").

This Court has "repeatedly recognized the importance of stare decisis to the rule of law." *State v. Johnson*, 2023 WI 39, ¶ 19, 407 Wis. 2d 195, 990 N.W.2d 174; *State v. Prado*, 2021 WI 64, ¶ 67, 397 Wis. 2d 719, 960 N.W.2d 869. Stare decisis ensures that "cases are grounded in the law, not in the will of individual members of the court." *State v. Roberson*, 2019 WI 102, ¶ 97, 389 Wis. 2d 190, 935 N.W.2d 813 (Dallet, J., dissenting). Overruling a case requires a "compelling 'special justification,'" *Prado*, 2021 WI 64, ¶ 68; *Johnson*, 2023 WI 39, ¶ 19, and a "change in the membership of the court" does not suffice. *Bartholomew v. Wis. Patients Comp. Fund & Compare Health Servs. Ins. Corp.*, 2006 WI 91, ¶ 32, 293 Wis. 2d 38, 717 N.W.2d 216; *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶ 95, 264 Wis. 2d 60, 665 N.W.2d 257.

Appellants do not even *ask* this Court to overrule *Johnson I*. Accordingly, their brief does not contain any argument, whatsoever, that

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there is any "special justification" for overruling these parts of *Johnson I*. This Court "do[es] not step out of [its] neutral role to develop or construct arguments for parties; it is up to them to make their case." *Evers v. Marklein*, 2025 WI 36, ¶ 3 n.4, 417 Wis. 2d 453, 22 N.W.3d 789 (quoting *Halter v. WIAA*, 2025 WI 10, ¶ 22, 415 Wis. 2d 384, 19 N.W.3d 58). Without a request or argument for doing so, this Court ordinarily "decline[s] to overrule or revisit [prior cases] on [its] own initiative." *St. Augustine Sch. v. Taylor*, 2021 WI 70, ¶ 37, 398 Wis. 2d 92, 961 N.W.2d 635. This Court should not overrule *Johnson I* sua sponte, especially without a request to do so.

Appellants briefly argue that a single sentence in *Clarke* already "repudiated" the twenty-four paragraphs of analysis in *Johnson I* that are discussed above. Opening Br. 30. But *Clarke explicitly* overruled multiple other "portions" of *Johnson I*, 2023 WI 79, ¶¶ 24, 63, so if this Court meant to overrule other parts as well, it would have said so. Moreover, as the circuit court correctly recognized, nothing in the *Clarke* opinion "repudiates," or even directly responds to, the relevant analysis in *Johnson I*, nor did *Clarke* "hold that partisan gerrymandering claims are independent causes of action." App. 20.

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Johnson I forecloses the partisan gerrymandering claims, and this Court should affirm the dismissal of those claims on that basis.

B. Appellants Fail to Identify Any Text, History, or Precedent for a New Partisan Gerrymandering Claim under the Wisconsin Constitution

Even if this Court were to set *Johnson I* aside, Appellants have no persuasive textual, historical, or precedent-based argument for their partisan gerrymandering claims. Appellants ask this Court to recognize new constitutional claims that have never been recognized by this Court before (and were effectively rejected just a few years ago). That is a big ask, and it requires a strong basis in text, history, or precedent.

Appellants do not come close. Indeed, they barely engage with the constitutional text they invoke, they do not make any historical argument whatsoever, and the cases they cite are inapposite.

This Court has "underscored that any argument based on the Wisconsin Constitution must actually be grounded in the Wisconsin Constitution." *State v. Halverson*, 2021 WI 7, ¶ 24, 395 Wis. 2d 385, 953 N.W.2d 847. Constitutional claims must be "supported by its text or historical meaning." *State v. Roberson*, 2019 WI 102, ¶ 56, 389 Wis. 2d 190, 935 N.W.2d 813. The "focus [is] on the language of the adopted text and historical evidence [of its meaning] including 'the practices at the time the constitution was adopted, debates over adoption of a given provision, and early legislative interpretation as evidenced by the first laws passed following the adoption." *Halverson*, 2021 WI 7, ¶ 22; *State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶¶ 12, 44, 402 Wis. 2d 539, 976 N.W.2d 821. And this Court "ha[s] understood from early on that our role is not to use the constitution to create new rights and protections that are not there, but to ascertain and enforce the rights and protections that are already there, fixed by the people in the text of the constitution." *Wis. Just. Initiative, Inc. v. WEC*, 2023 WI 38, ¶ 18, 407 Wis. 2d 87, 990 N.W.2d 122. "Where [the] constitution needs updating, the people may do so through constitutional amendment or constitutional convention; that authority has not been given to [the Court]." *Id.*

Importantly, this Court has long recognized that "the challenger in a constitutional claim has the burden of proof." *Prehn*, 2022 WI 50, ¶ 44 (quoting *Soc'y Ins. v. Lab. & Indus. Rev. Comm'n*, 2010 WI 68, ¶ 27, 326 Wis. 2d 444, 786 N.W.2d 385). This is a "high burden." *E.g.*, *State v. Smith*, 2010 WI 16, ¶ 18, 323 Wis. 2d 377, 780 N.W.2d 90. And the "lack of [a] fully developed argument" based on the text or "historical research" about the "original meaning" of that text "is fatal to the [challenger's]

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position." *Prehn*, 2022 WI 50, ¶ 44. How much more so when the claim is for a novel constitutional theory.

Appellants invoke Article I, §§ 1, 3, 4, and 22, but these provisions say nothing whatsoever about districts, redistricting, gerrymandering, or partisan fairness.

Start with Article I, § 1. That provision reads: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const. art. I, § 1. There is no mention of anything related to districts. The supposed "right" to a map that achieves some level of "partisan fairness" clearly does not fit within the rights to "life, liberty, and the pursuit of happiness." Nor is it related in any way to "free[dom]" or "independen[ce]."

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Appellants attempt to ground their partisan gerrymandering claim in the right to "equality under the law." Opening Br. 30–32. Yet the maps do not create separate "classes" of voters or give "special privileges" or rights to some voters and not others. All voters, regardless of which party or candidates they vote for, are placed in one district and get one vote for one congressional candidate. *Id.* Moreover, all votes have "equal weight" under the map, *Rucho*, 588 U.S. at 708–09, given that the districts are "close to perfect equality," population-wise. *Johnson II*, 2022 WI 14, ¶ 21. Appellants do not argue otherwise.

Instead, their equality theory "invariably sound[s] in a desire for proportional representation," the idea that "groups with a certain level of political support should enjoy a commensurate level of political power and influence." *Rucho*, 588 U.S. at 704. The Supreme Court has long recognized that the Equal Protection Clause of the United States Constitution "does not require proportional representation," *id.* at 705

(quoting *Mobile v. Bolden*, 446 U.S. 55, 75–76 (1980) (plurality opinion)), and this Court has treated Wisconsin's equal protection guarantee as "coextensive" with the Fourteenth Amendment's. *E.g.*, *Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 35, 383 Wis. 2d 1, 914 N.W.2d 678. Appellants do not make any persuasive case based on text, history, or precedent that Wisconsin's equal protection guarantee is different in this context and does require "proportional representation." In fact, the very nature of single-member, winner-take-all districts necessarily means that a party can get nearly half of the votes and still lose, failing to elect its candidate(s).

None of the cases Appellants cite remotely support a "partisan gerrymandering" claim under Article I, § 1. *Christoph v. City of Chilton*, 205 Wis. 418, 237 N.W. 134 (1931), considered a law related to detaching agricultural lands from cities—but only one class of cities, and only lots of a certain size. *Black v. State*, 113 Wis. 205, 89 N.W. 522 (1902), was a challenge to certain classifications in an estate tax. *State ex rel. Binner v. Buer*, 174 Wis. 120, 182 N.W. 855 (1921), involved a law making some elections in Milwaukee County non-partisan, and the Court upheld it.

Three of the cases Appellants cite are about population equality, which is not relevant here. *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 132 N.W.2d 249 (1965), held that this principle applies to districts for electing county supervisors, and invalidated a law resulting in vast population disparities, up to "69 to one" in Dane County. 26 Wis. 2d at 47. *La Crosse Cnty. v. City of La Crosse*, 108 Wis. 2d 560, 562, 322 N.W.2d 531 (Wis. Ct. App. 1982), briefly repeated the point that "[t]he principle of population equality applies as well to county and local legislative elections," but otherwise considered unrelated procedural challenges to county supervisory districts. Finally, *State ex rel. Atty. General v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 725 (1892), was a challenge brought under Article IV, §§ 3–5 of the Wisconsin Constitution, and the

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primary claim was based on large population disparities: two to one between senate districts, and over *six to one* between assembly districts. As the Supreme Court has recognized, "[i]t hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support." *Rucho*, 588 U.S. at 708.

Next, Appellants invoke the rights to free speech and association under Sections 3 and 4 of Article I. Opening Br. 32–33. No one disputes that these rights are "fundamental to our democracy," *id*. (citations omitted), but Appellants fail to logically connect these individual rights to a partisan gerrymandering claim. The shape of congressional districts obviously does not stop anyone from speaking or associating with others to advocate for a candidate or political party. Appellants argue that the map makes it harder to "translate" political speech and association into "electoral success," Opening Br. 33, but they cite no authority whatsoever to support the proposition that the right to speak or associate guarantees any level of "success" in the goal of the speech or association. That idea would have far-reaching consequences, well outside the districting context. Nor do Appellants cite any authority, from Wisconsin or anywhere else, locating a partisan gerrymandering claim in a right to speak or associate. And Appellants make no argument based on the historical meaning of the rights they invoke.

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Finally, Appellants turn to Article I, § 22, but that provision is not helpful to them either. Opening Br. 34–36. It reads, "[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. Again, no mention whatsoever of districts, gerrymandering, or elections. As with their other theories, Appellants don't make any serious attempt to

connect a partisan gerrymandering claim to any specific text in this provision, nor do they provide any historical argument as to the original meaning of this provision. They merely assert, in a single paragraph, that partisan gerrymandering is "obnoxious to the notion of a free government." Opening Br. 36. That is just a policy argument, not legal analysis. And the only two cases they cite are not relevant: *Christoph*, discussed above, was about detaching agricultural land from cities; and *Stierle v. Rohmeyer*, 218 Wis. 149, 260 N.W. 647 (1935), involved an extreme penalty for minor procedural violations when a mortgagee attempted to redeem a mortgage.

Further undermining Appellants' position, the Wisconsin Constitution does contain multiple provisions that directly address districting, namely in Article IV, Sections 3, 4, and 5. If the Wisconsin Constitution was intended to provide a right to a map that is "politically fair" enough, surely the drafters would have included something in the very provisions addressing districting. The fact that they did not strongly undercuts Appellants' new claim.

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In short, Appellants do not come anywhere near establishing a constitutional claim for "partisan gerrymandering." The burden is on them to show, through text, history, or precedent, that such a right exists. They have not met their burden, and this Court should affirm the dismissal of their claims for that reason alone.

C. Appellants Do Not Offer a Judicially Manageable Standard for Judging When a Map is Too Partisan

Even if the Wisconsin Constitution could be read to prohibit partisan gerrymandering (and it cannot), the practical reality is that Appellants' legal theory is unworkable and unmanageable. Courts simply are not equipped to do the job Appellants want them to do. These

are political questions for the political branches to grapple with. The proposed standard for adjudicating these claims is not manageable.

As this Court is well aware, one of the main reasons that partisan gerrymandering claims were found to be non-justiciable was the lack of any "judicially manageable standards for deciding such claims." *Rucho*, 588 U.S. at 691; *Johnson I*, 2021 WI 87, ¶ 41. Indeed, parties and academics struggled for "several decades" trying to come up with judicially manageable standards for evaluating such claims, but none work. 588 U.S. at 699–703.

Given that history, it is incumbent upon Appellants to explain to this Court how their new claim can practically be applied. Yet they devote only two-and-a-half pages to that question, and they don't even propose a clear test. Opening Br. 36–38. They simply assert that "manageable standards exist" and that the circuit court on remand can "develop" them. Opening Br. 38. But with nothing in the constitutional text, history, or precedent to guide it, the court would simply be making it up on the fly.

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Previous proposals have failed because they all required courts to decide how much partisanship is the "right" amount with "no legal standards discernible in the Constitution." *Rucho*, 588 U.S. at 686. Indeed, there are many difficult questions to which Appellants have no answers.

The first is how to measure the "partisan fairness" of a map. *See Rucho*, 588 U.S. at 706 (discussing various conflicting theories of "what fairness looks like in this context"). For example, in *Wisconsin Business Leaders*, No. 26AP1008, the companion case to this one, the plaintiffs argue that the map should be more "competitive." But if all of the districts were as competitive as possible and matched the statewide vote, "even a narrow statewide preference for either party would produce an

overwhelming majority for the winning party," creating an even bigger partisan divide between seats and statewide vote share. *Rucho*, 588 U.S. at 706 (quoting *Davis v. Bandemer*, 478 U.S. 109, 130 (1986) (plurality op.)). In other words, different theories of "fairness" are directly at odds with one another—even the two before this Court in the two cases.

Next, how are courts supposed to disaggregate the effects of the map from everything else that goes into election results, including the candidates, issues, parties, geography, turnout, political messaging, strategy, ground-game, etc.? The result of any given election is a complex mix of these factors, even the weather or other events occurring on election day. If one party does particularly well in an election cycle or series of election cycles due to the nuances of that political moment, does that become evidence that the map itself is a partisan gerrymander? How do courts separate these factors from the effects of the map?

Third, as the Court recognized in *Rucho* and this Court recognized in *Johnson*, "the 'natural political geography' of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts." 588 U.S. at 707; *Johnson I*, 2021 WI 87, ¶ 48 (noting the same in Wisconsin). How are courts supposed to measure the effects of geography and incorporate this into the analysis? Is a politically "fair" map one that matches the natural geography of the state? Or does the map need to be drawn to *overcome* the effects of natural geography to achieve a result more closely aligned with the statewide vote share? How closely aligned?

And how many elections are needed to compare the partisan fairness of the current map, however measured, with alternatives? 1? 2? 5? Should they be averaged? Is one election that results in a "fair" split of congressional seats enough to save a map? Or does one sufficiently "unfair" result doom a map? Or should outliers be excluded?

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Even if those questions were answered, what is the threshold below which a map becomes unconstitutional? Does the existing map have to exceed the average results of randomly generated maps? Or the median? Or does it have to fall within some range of the mean or median? What range? Some percentage? A standard deviation or two? How is this Court, or any court, supposed to select a threshold? Nothing in the Constitution supplies a threshold, so the courts would be making it up, effectively legislating from the bench.

Appellants offer no answers to the questions above. They briefly represent that, if this Court reverses and remands, they will argue for a test based solely on whether the map "subordinates" traditional redistricting criteria (compactness, contiguity, maintaining political subdivisions, etc.) to "partisan advantage." Opening Br. 38. But this only raises more questions. What does it mean to "subordinate" one criterion to another? The process of drawing maps inherently involves tradeoffs between competing criteria, and it's almost always possible to improve one criterion at the expense of another. Take compactness and preserving municipalities, for example. A map can nearly always improve compactness by splitting more municipalities. Conversely, a map can reduce splits by sacrificing compactness. Unless a map is optimizing exclusively for one or the other, every map is, in some sense, "subordinating" each consideration to the other by accounting for both. And even if the "subordination" concept could be coherently defined, how much "subordination" is too much?

Appellants also briefly suggest that the courts could adopt a three-part test based on intent, effects, and causation. Opening Br. 38. But intent is also problematic, especially in the unique circumstances of this case. For example, whose intent matters? As this Court is well aware, the current congressional map was proposed by Governor Evers and adopted by four members of this Court in *Johnson II*. 2022 WI 14, ¶¶ 13–

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25. So, does Governor Evers' intent control? Or is this Court's intent relevant, since it selected between the proposed alternatives? Or is it some combination? Courts selecting maps in the exercise of their own equitable powers to remedy malapportionment do not act with partisan intent; they act to ensure constitutional obligations are fulfilled. *Johnson I*, 2021 WI 87, ¶ 4. If this Court's intent controls, then Appellants' claim should immediately fail under that test.

Appellants appear to believe that the Court should disregard intervening events and evaluate intent based on the prior, now-replaced map, *see* Opening Br. 11, but they don't justify that leap. And even if this Court were to follow Appellants down that unusual path to intent, there are still difficult questions about whose intent matters. Is it the congressional delegation in place back in 2011, only one member of which (Gwen Moore) is still in Congress? Or the staffers who helped put together the maps? *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 846 (E.D. Wis. 2012). Or is it the intent of the legislature in place at the time that adopted the bill containing the congressional map? *Id.* And how is one supposed to determine the intent of a multi-member body, whose members may have had different motivations?

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As for the cases Appellants cite from other states, Opening Br. 37, these rely on unique constitutional provisions, amendments, ballot initiatives, or constitutional history with no analogue in Wisconsin. *In re Senate Jt. Resol. of Legis. Apportionment 1176*, 83 So. 3d 597, 598–99 (Fla. 2012) (discussing Florida's "Fair Districts Amendment"); *see League of Women Voters of Utah v. Utah State Legislature*, 2024 UT 21, ¶¶ 20–33, 554 P.3d 872 (discussing Utah's "Proposition 4" ballot initiative, which the trial court later applied); *League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737, 802–14 (2018) (relying on the Pennsylvania Constitution's "free and equal elections clause"); *Grisham*

v. Van Soelen, 2023-NMSC-027, ¶¶ 22–34, 539 P.3d 272 (relying in part on the New Mexico Constitution's "Freedom of Elections Clause"); *Matter of 2021 Redistricting Cases*, 528 P.3d 40, 53–57 (Alaska 2023) (finding "[a]mple evidence" from Alaska's constitutional history that the framers "inten[ded] to protect against gerrymandering.").

In short, given the long history of failed attempts to provide workable standards, as recognized in *Rucho* and *Johnson I*, and given that Appellants ask this Court to recognize a new constitutional claim in Wisconsin, they needed to provide this Court with a workable test, yet they fail to do so. Without one, the parties (and the circuit court) will not have any clarity on what they are trying to prove or disprove. This Court should affirm the dismissal of Plaintiffs' claim for this reason as well.

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III. This Lawsuit Is Procedurally Improper

A. Appellants' Claim Is Barred by Laches

Laches is a "well-settled doctrine" that applies to bar relief "when a claimant's failure to promptly bring a claim causes prejudice to the party having to defend against that claim." *Trump v. Biden*, 2020 WI 91, ¶ 10, 394 Wis. 2d 629, 951 N.W.2d 568; *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶ 11, 393 Wis. 2d 308, 946 N.W.2d 101. And laches "has particular import in the election context," where unreasonable delay causes "obvious and immense" prejudice to "election officials, [ ] candidates, … and to voters statewide." *Trump*, 2020 WI 91, ¶¶ 11–12.

Appellants argue that laches is unavailable altogether, or in the alternative, that none of the elements of laches are met here. Both arguments fail. Laches remains fully available in this challenge, and all three elements are satisfied. The Court may affirm dismissal on this independent ground.

1. Laches Applies to Prospective Redistricting Challenges

First, Appellants contend that laches is "categorically inapplicable to constitutional claims seeking prospective relief." Appellants Br. at 38. They argue laches can never be applied "[w]here a court can offer relief for a future election." *Id.* at 39. That is incorrect.

Courts have applied laches to bar tardy redistricting challenges because "voters have come to know their districts and candidates, and will be confused by change," and because Court-ordered redistricting can result in "voter confusion, instability, dislocation, and financial and logistical burden on the state." *Fouts v. Harris,* 88 F. Supp.2d 1351, 1354–55 (S.D. Fla. 1999), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000); *White v. Daniel,* 909 F.2d 99, 104 (4th Cir. 1990); *see also Knox v. Milwaukee Cnty. Bd. of Elections Comm'rs*, 581 F. Supp. 399, 405, 408 (E.D. Wis. 1984) (applying laches and denying motion for a preliminary injunction in a Milwaukee County redistricting lawsuit).

The other federal cases cited by Appellants on this point are all inapposite. *Navarro v. Neal*, 716 F.3d 425 (7th Cir. 2013), involved ballot access, not redistricting, and there the Seventh Circuit expressly affirmed the application of laches to the claim for injunctive relief, stating that "[t]he plaintiffs do not dispute that the district court properly invoked the doctrine of laches to dismiss their claim for injunctive relief. Nor could they reasonably dispute this, given their almost ten-week delay in filing suit despite the imminence of the November 6 general election." *Id*. at 429. The Court's reversal in *Navarro* centered solely on Defendants' failure to show prejudice, not on any principle that laches is categorically barred when prospective relief is requested. *Id*.

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Env't Def. Fund v. Marsh, 651 F.2d 983 (5th Cir. 1981), is equally unavailing. First, this was a case involving environmental law, and the laches analysis Appellants cite to was limited to a footnote where the Fifth Circuit explained that "[t]he concept of undue prejudice, an essential element in a defense of laches, is normally inapplicable when the relief is prospective." *Id.* at 1005 n.32. But that footnote has no connection to elections or redistricting claims; and the Court's qualifier "normally" itself refutes any absolute rule.

League of Women Voters of Mich. v. Benson, 373 F. Supp. 3d 867 (E.D. Mich. 2019). In *Benson*, the Eastern District of Michigan's entire laches analysis rested on its conclusion that partisan gerrymandering claims were ongoing and justiciable. *Id.* at 908–909. But *Benson* was vacated in *Chatfield v. League of Women Voters of Mich.*, 589 U.S. 1031 (2019), in light of *Rucho*, 588 U.S. 684. It has no value here, and the fact that Appellants rely on a vacated district court decision underscores the absence of support for their argument.

Finally, *Thomas v. Bryant*, 366 F. Supp. 3d 786 (S.D. Miss. 2019), cuts against Appellants' argument. There, the court recognized that laches can be available in redistricting cases, characterizing it as "best considered as a defense to last-minute requests for injunctive relief." *Id.* at 803. It declined to apply the doctrine only because the plaintiffs brought a narrow, single district claim sixteen months before the next election. Critically, the court distinguished its case from another case, *Maxwell v. Foster*, where laches was properly applied because "the plaintiffs had inexplicably delayed a suit seeking to declare the entire state legislative map unconstitutional." *Id.* at 804 (citing *Maxwell v. Foster*, No. 98-1378, 1999 WL 33507675, at *4 (W.D. La. Nov. 24, 1999)). Ultimately, *Thomas* suggests that laches can properly bar claims seeking to invalidate an entire map years after its adoption. That is exactly what Appellants attempt here.

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The cases cited by Appellants simply do not twist in the way they want them to twist.

2. All Elements of Laches Are Satisfied Here

There are three elements to a laches claim: "unreasonable delay, lack of knowledge a claim would be brought, and prejudice." *Brennan*, 2020 WI 69, ¶ 11. Once each element is proven, "application of laches is left to the sound discretion of the court asked to apply this equitable bar." *Id*. ¶12. All three elements are met here.

i. Unreasonable Delay

First, unreasonable delay. Appellants' separation-of-powers theory rests on this Court's use of the least-change approach in *Johnson II* to select the current congressional map. That map has been in continuous use since 2022. Even accepting Appellants' contention that the claims only "arose" with *Clarke*'s December 22, 2023, repudiation of least-change, the delay remains unreasonable.

After *Clarke*, several of the intervenors in the original *Johnson* litigation sought to re-open the *Johnson* judgment. The Court denied that request in March of 2024. Order Denying Motion for Relief from Judgment, *Johnson v. WEC*, No. 21AP1450-OA (Mar 1, 2024). After that, another 14 months passed before several of the Appellants here filed an original action with this Court in May 2025, making nearly identical claims, which was denied by this Court. Appellants waited another month after that denial and brought this action in circuit court last July. By that point, two elections had occurred under the map and a third was underway which will take place this fall. That is an unreasonable delay. *Knox*, 581 F. Supp. at 404 (unreasonable delay when challenge was brought "22 months after the adoption of the final plan.").

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Regarding Appellants' partisan gerrymandering claim, their whole theory there relates back to how the map was adopted *back in 2011*. Opening Br. 12–13; R. 9, ¶¶ 35–56. Although that map has since been replaced, Appellants' claim here is that its alleged flaws were "perpetuated" in 2021. R. 9, ¶¶ 56, 75. Yet no fewer than *seven* congressional elections have occurred during the fourteen years since the supposed constitutional violation in 2011: 2012, 2014, 2016, 2018, 2020, 2022, and 2024. Courts have found similar delay—even much less delay—to be unreasonable in redistricting cases. *Fouts*, 88 F. Supp. 2d at 1354 (7 years, 4 elections); *White*, 909 F.2d at 102–103 (17 years).

Appellants' reliance on *Clarke*'s rejection of laches is misplaced. The petitioners there filed within a timeframe that still permitted relief before the next election cycle and did so after elections that were too imminent for practical judicial intervention. *Clarke*, 2023 WI 79, ¶ 42. Here, Appellants' delay was longer and was not constrained by any comparable practical barrier to earlier filing.

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ii. Lack of Knowledge

Neither the Defendants nor the intervenors (voters, the Congressmen, the Legislature, etc.) had any reason to believe this claim would be brought many years and seven elections after it could have been filed. This element is easily satisfied. *See Trump*, 2020 WI 91, ¶ 23; *Brennan*, 2020 WI 69, ¶ 18.

iii. Prejudice

Appellants' unreasonable delay causes multiple kinds of prejudice. First, courts have recognized that long-delayed redistricting cases prejudice voters, who "have come to know their districts and candidates, and will be confused by change." *Fouts*, 88 F. Supp. 2d at 1354; *White*, 909 F.2d at 104 ("two reapportionments within a short period of two years would greatly prejudice the County and its citizens by creating

instability and dislocation in the electoral system"); *see also Reynolds v. Sims*, 377 U.S. 533, 583 (1964) ("Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system."). The current representatives will be prejudiced in the same way, having come to know their districts and constituencies. The state—and its taxpayers—will also be prejudiced by the "financial and logistical burden" caused by rinse-and-repeat redistricting. *E.g.*, *Fouts*, 88 F. Supp. 2d at 1354; *White*, 909 F.2d at 104 (emphasizing "great financial and logistical burdens").

Finally, Appellants' unreasonable delay causes "evidentiary prejudice." *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 33, 389 Wis. 2d 516, 936 N.W.2d 587. As noted above, one of the "tests" Appellants briefly propose includes an intent prong. But proving or disproving intent is much more difficult fifteen years after the fact. This Court has recognized that "the loss of evidence," the unavailability of a witness, and the "unreliability of memories" are "precisely the kind of thing[s] laches is aimed at." *Wren*, 2019 WI 110, ¶¶ 33–34.

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* * *

The Appellants waited far too long to bring their claim to the courts, and laches applies.

While the circuit court did not reach this issue, the *Johnson* Respondents (and other Intervenors) raised it below, R.139:9–12, and this Court can affirm on that alternative basis. *See* Wis. Stat. § 809.62(3m)(b)1.

B. Adopting Appellants' Novel Theory to Replace the Map Would Violate the Elections Clause

Article I, Section 4, of the United States Constitution vests in State *Legislatures* the authority to "prescribe" the "times, places and manner

of holding elections for Senators and Representatives." In *Moore v. Harper*, 600 U.S. 1 (2023), the United States Supreme Court recognized that, while "the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein." 600 U.S. at 34. State courts "may not 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.

Wisconsin elects members of Congress to represent single-member geographic districts. This is a substantive choice based on the notion that while land doesn't vote, electoral communities of interest are geographically defined. We could elect representatives by other demarcations—income, education level, even party affiliation (with each party getting a number of congressional members equal to their proportion of the statewide vote—but neither state nor federal law permits this.

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Simple logic and elementary mathematics make clear that, even maps drawn without consideration of partisanship may result in a congressional delegation with a partisan composition that does not match the partisan outcome in statewide elections. This will happen whenever the voters for each political party are not evenly distributed across the state. Any argument that a Court should draw district lines that seek to compensate for a state's political landscape so that the aggregate outcome of district elections more closely matches the outcome in statewide elections is in conflict with the single-member geographic districts that state and federal law require. "Partisan affiliation" is not the basis upon which we elect members of Congress.

Whether a court is asked to ensure "partisan fairness" or "competitiveness," drawing maps to more closely conform district outcomes to statewide outcomes requires courts to make political judgments and to draw maps designed to force outcomes that match the

current political appeals and strategies of the parties. When, for example, a court decides to add tranches of urban voters to an otherwise compact and contiguous suburban district in order to make a seat more "competitive" or to get another potential seat for one of the parties in the pursuit of "fairness," it is injecting itself into the political process. It is saying that the parties need not change their appeals to become more attractive. It is providing them with voters who match their existing appeals. It is giving them the voters they want, so they need not attract the voters they need.

This is not within the normal bounds of judicial review. It is judicial engineering that departs from the policy choices embedded in single-member geographic districts. Seeking "partisan fairness" unavoidably plunges the judiciary into political judgment and temptation. It is not what courts do. It "transgress[es] the ordinary bounds of judicial review" and "arrogate[s] to [the courts] the power vested in state legislatures to regulate federal elections." *Moore*, 600 U.S. at 36.

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While Courts have a role to play in resolving impasses in the redistricting process, as this Court did when it selected the congressional maps in *Johnson*, that role is limited. Taking a mid-decade second bite at the apple through a novel and never-before-recognized legal theory would "transgress the ordinary bounds of judicial review" in a way that would violate the elections clause, especially given the lack of any basis for Appellants' claims.

CONCLUSION

This Court should affirm the circuit court's order dismissing this case.

Dated: August 20, 2026.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), (c) for a brief produced with a proportional serif font. The length of this brief is 8,994 words.

Dated: August 20, 2026.

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