STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 13

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,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, ANN S. JACOBS, DON M. MILLIS, ROBERT F. SPINDELL, JR., CARRIE RIEPL, MARK L. THOMPSON, *in their official capacities as commissioners of the Wisconsin Elections Commission*; *and* MEAGAN WOLFE, *in her official capacity as administrator of the Wisconsin Elections Commission*,

Defendants.

Case No.2025CV2432

OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS OF INTERVENOR-DEFENDANTS CONGRESSMEN GLENN GROTHMAN, BRYAN STEIL, TOM TIFFANY, SCOTT FITZGERALD, DERRICK VAN ORDEN, AND TONY WIED AND INDIVIDUAL VOTERS GREGORY HUTCHESON, PATRICK KELLER, PATRICK MCCALVY, AND MIKE MOELLER

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INTRODUCTION*

Plaintiffs ask this three-judge Panel to review and overrule a final judgment issued by our State's highest court: the final judgment adopting Wisconsin's remedial congressional map in *Johnson v. Wisconsin Elections Commission* ("*WEC*"), 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 ("*Johnson II*"). This map "compl[ies] with all relevant state and federal laws," as the Wisconsin Supreme Court held when it issued this final judgment. *Id.* ¶ 25. As several Plaintiffs and their counsel previously conceded before the Wisconsin Supreme Court itself, "no other court can provide" "requested relief" against this map because the *Johnson II* map "was adopted by [the Wisconsin Supreme Court]." Dkt.60 at 320. Yet, Plaintiffs now ask this Panel to vacate the final judgment adopting the *Johnson II* map.

The previous concession by Plaintiffs and their counsel—that the Wisconsin Supreme Court is the only court in this State that can overrule its final judgment adopting the *Johnson II* map—is unquestionably correct. The Wisconsin Constitution places the Wisconsin Supreme Court at the top of the State's judicial system, meaning that no inferior state court—including this Panel—has the power to review its judgments. Because granting any relief to Plaintiffs would require overruling the *Johnson II* final judgment, the Panel is constitutionally duty-bound to deny Plaintiffs' Motion For Judgment On The Pleadings (and to dismiss the

* To avoid duplicative briefing, and for the convenience of the Court, the Congressmen and the Individual Voters' Memorandum in support of their Motion To Dismiss and their Opposition to Plaintiffs' Motion For Judgment On The Pleadings duplicate substantial portions that are relevant to both filings.

Complaint, as explained in Intervenor-Defendants the Congressmen and the Individual Voters' contemporaneously filed Motion To Dismiss).

If this Panel moves beyond that fatal defect, Plaintiffs' separation-of-powers claim raised in the present Motion here is devoid of any merit. The Wisconsin Supreme Court adopted the *Johnson II* map after applying a least-change approach, which is a recognized method for courts to adopt remedial maps. Even though this is no longer the approach that Wisconsin courts will take for state-legislative maps after *Clarke v. WEC*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370, that does not render a map adopted under the least-change approach a violation of the separation of powers. Plaintiffs do not even seem to argue that any map adopted using the least-change approach is automatically unconstitutional, but only a least-changes map that carries forward too much partisan unfairness from the prior map. Even if this Panel accepted that (utterly meritless) thesis, it would still have to deny Plaintiffs' Motion, as it is hotly contested whether the 2011 map upon which the *Johnson II* map was based has an impermissible level of partisanship as a factual matter. And if all of that were not enough, this case—unlike *Clarke*—involves a congressional map governed by the Elections Clause of the U.S. Constitution, which Clause gives state legislatures the primary authority for drawing congressional maps. This Panel throwing out a congressional map because it adheres as much as possible to the map adopted by the Legislature, based upon a separation-of-powers theory that is not even arguably grounded in any prior Wisconsin case law, would violate the Elections Clause.

This Court should deny Plaintiffs' Motion For Judgment On The Pleadings.

STATEMENT

A. The Legislature Draws A New Congressional Map For Wisconsin In 2011, And A Federal Court Dismisses A Partisan-Gerrymandering Challenge To That Map

In 2011, the Legislature enacted, and the Governor signed, Wisconsin's congressional and state-legislative maps, given the population changes in the State over the prior decade. *Johnson v. WEC*, 2021 WI 87, ¶ 4, 399 Wis. 2d 623, 967 N.W.2d 469 ("*Johnson I*"). Some plaintiffs challenged both sets of maps in *Baldus v. Members of Wisconsin Government Accountability Board*, 849 F. Supp. 2d 840 (E.D. Wis. 2012). As relevant here, *Baldus* dismissed those plaintiffs' claim that the 2011 congressional map was a partisan gerrymander. *Id.* at 853–54. *Baldus* explained that the 2011 congressional map was the product of a "bipartisan process," *id.* at 854, during which the map's Republican drafters had "consulted" with their "Democratic colleagues to discuss their preferences" and worked to "incorporate all of the feedback (not just the Republican comments) into the draft" of the map. *Id.* Certain other plaintiffs then challenged the 2011 state-legislative maps on partisan-gerrymandering grounds after *Baldus*, but those parties did not likewise challenge the 2011 congressional map on that basis. *See Gill v. Whitford*, 585 U.S. 48, 52–60 (2018); *see generally Rucho v. Common Cause*, 588 U.S. 684 (2019) (holding, after *Baldus*, that partisan-gerrymandering claims are not justiciable under the U.S. Constitution).

B. In *Johnson II*, The Wisconsin Supreme Court Adopts A New Congressional Map, While Expressly Holding That This Map Complies With All Relevant State And Federal Laws

By 2021, changes in Wisconsin's population as reflected in the 2020 Census required the State to redraw the 2011 congressional map to ensure population

equality between its eight congressional districts. *Johnson I*, 2021 WI 87, ¶ 2. After a political deadlock, the Wisconsin Supreme Court confronted the "unwelcome task" of "redraw[ing] the boundaries" of Wisconsin's congressional districts in the *Johnson* litigation. *Johnson II*, 2022 WI 14, ¶¶ 1–2. The Court ultimately adopted a new congressional map that "compl[ies] with all relevant state and federal laws." *Id.* ¶ 25.

In *Johnson I*, the Supreme Court articulated the legal standards that it would apply to adopt a new map. The Court began by identifying the relevant federal and state-law requirements for redistricting maps, including the one-person, one-vote principle and the requirements of the federal Voting Rights Act. 2021 WI 87, ¶¶ 24–38. The Court also recognized that the Elections Clause of the U.S. Constitution vests the Legislature with broad "discretion to decide how congressional elections are conducted," *id.* ¶ 12 (citing U.S. Const. art. I, § 4), which extends to the drawing and enacting of congressional redistricting maps, *see id.* ¶ 64. Next, the Court explained that it would *not* consider the partisan makeup of any map, given that "partisan fairness is a political question" and that "the Wisconsin Constitution says nothing about partisan gerrymandering." *Id.* ¶¶ 4, 39–63 (emphasis omitted; capitalization altered). *Johnson I* then held that the Court would employ a "least-change approach" for adopting remedial maps. *Id.* ¶¶ 64–79. Under that least-change approach, the Court would "us[e] the existing maps," *id.* ¶ 72—that is, the 2011 congressional map, which had been "adopted by the legislature, signed by the governor, and [had] survived judicial review by the federal courts," *id.* ¶ 64—"as a

template" for a new map "and implement[ ] only those remedies necessary to resolve constitutional or statutory deficiencies," *id.* ¶ 72 (citation omitted).

Then, in *Johnson II*, the Court clarified and applied its least-change approach to the proposed maps that the parties had submitted and adopted the Governor's proposed congressional map, which the Court found made the "least changes" of the maps submitted from 2011 map. 2022 WI 14, ¶¶ 7, 13. The Court then explained that the Governor's proposed map "complies with all relevant laws." *Id.* ¶¶ 20–21. So, "[i]n sum," the Governor's proposed congressional map "ma[d]e the least changes from existing congressional district boundaries [drawn in 2011] while complying with all relevant state and federal laws." *Id.* ¶ 25. Thus, *Johnson II* adopted "the Governor's proposed congressional . . . map[ ]," enjoined WEC "from conducting elections under the 2011 maps," and "ordered [WEC] to implement the congressional . . . map submitted by Governor Evers for all upcoming elections." *Id.* ¶ 52.

C. The Wisconsin Supreme Court Rejects Two Challenges To The *Johnson II* Map On Partisan-Gerrymandering And Separation-Of-Powers Grounds—Both Brought By Plaintiffs' Counsel Here

After the Wisconsin Supreme Court adopted the *Johnson II* map in March 2022, the Court subsequently rejected two separate attempts to challenge that map—both of which challenges involved Plaintiffs' counsel here.

First, on January 16, 2024, certain parties in *Johnson* who were represented by Plaintiffs' counsel in this case moved for relief from the *Johnson II* judgment, asking the Wisconsin Supreme Court to throw out the *Johnson II* map and replace it with a new one. Dkt.60 at 167–72; *see* Dkt.60 at 143–62, 163 n.6. As relevant here, that motion made three assertions: (1) that, in the Wisconsin Supreme Court's then-

recent *Clarke* decision, the Court had rejected the least-change approach adopted in *Johnson I* and applied in *Johnson II* to select the Governor's proposed map, Dkt.60 at 154; *see infra* pp.23–26 (further discussing *Clarke*); (2) that the *Johnson II* map constituted an unconstitutional "partisan" gerrymander because it was based on the 2011 map, Dkt.60 at 154; and (3) that the *Johnson II* map violates the separation-of-powers doctrine by using the "least change" approach, Dkt.60 at 155. The Supreme Court denied the motion on March 1, 2024. *See* Dkt.60 at 239–41.

Second, in May 2025, certain of Plaintiffs here, represented by their same counsel, filed an original-action petition with the Wisconsin Supreme Court that again challenged the *Johnson II* map. *See* Dkt.60 at 288–322. That petition also raised the same partisan-gerrymandering and separation-of-powers claims against the *Johnson II* map that Plaintiffs raise here and that Plaintiffs' counsel had raised in their failed motion for relief from the *Johnson II* judgment. *Compare* Dkt.60 at 288–322, *with supra* pp.5–6, *and infra* pp.7–8. As here, that petition asked for the adoption of a new remedial map on an "expedited" basis, "in time for the 2026 congressional elections." Dkt.60 at 296, 318. This original-action petition correctly stated that **because the *Johnson II* map "was adopted by [the Wisconsin Supreme Court], no other court can provide [this] requested relief."** Dkt.60 at 320. On June 25, 2025, the Supreme Court denied both that original-action petition and its companion, without explanation. *See* Dkt.60 at 448–54.

D. Plaintiffs Again Challenge The *Johnson II* Map Before This Panel, Raising The Same Partisan-Gerrymandering And Separation-Of-Powers Theories

1. Plaintiffs filed this Complaint on July 21, 2025, again challenging the *Johnson II* map under the same partisan-gerrymandering and separation-of-powers theories that they and/or their counsel had already unsuccessfully raised to the Wisconsin Supreme Court. *See* Dkt.9 ("Compl.") ¶¶ 83–97; *infra* p.9. Plaintiffs assert four counts. Count I claims that the *Johnson II* map violates the separation-of-powers doctrine because, "[b]y committing to the now-defunct least-change directive when selecting the [*Johnson II*] congressional map, the Wisconsin Supreme Court improperly substituted the partisan judgment that prevailed in the 2011 political process for its own." Compl. ¶¶ 76–82. Counts II–IV claim that the *Johnson II* map constitutes an unconstitutional partisan gerrymander under Article I, Section 1, Compl. ¶¶ 83–86 (Count II); Article I, Sections 3 and 4, Compl. ¶¶ 87–93 (Count III); and Article I, Section 22, Compl. ¶¶ 94–97 (Count IV). As a remedy, Plaintiffs request that this Panel declare that the *Johnson II* map is unconstitutional, enjoin WEC from administering it beginning with the 2026 election, and prescribe procedures for the adoption of a new map "in time for the 2026 election." Compl.26.

2. On November 25, 2025, the Wisconsin Supreme Court appointed this Panel to adjudicate this case pursuant to Wis. Stat. § 751.035. *Bothfeld v. WEC*, 2025 WI 53, 418 Wis.2d 545, 27 N.W.3d 508. The Supreme Court's order appointing this Panel did not address either the merits or the timeliness of Plaintiffs' Complaint, although it did consider and reject arguments raised by "[t]he Congressmen, the Legislature, and the amici generally" that the "complaint d[id] not fall within the scope of Wis.

Stat. § 801.50(4m)." *Id.* at 510. Further, in his separate writing to the Wisconsin Supreme Court's order, Justice Hagedorn explained that this Panel must "consider all the relevant substantive and procedural arguments [against the Complaint] in due course"—including arguments challenging Plaintiffs' "rather extraordinary plea for the circuit court to declare a 2022 decision and order of [the Supreme] [C]ourt unconstitutional." *Id.* at 511 (Hagedorn, J., concurring in part and dissenting in part); *see also id.* at 560–62 (Ziegler, J., dissenting) ("[t]his panel cannot constitutionally reconsider the [Supreme] [C]ourt's legal conclusions regarding apportionment or the congressional maps"); *id.* at 522 (R.G. Bradley, J., dissenting) ("[t]he Wisconsin Constitution plainly prohibits a circuit court . . . from adjudicating a challenge to a final judgment of the supreme court").

LEGAL STANDARD

A motion for "judgment on the pleadings is essentially a [motion for a] summary judgment decision without affidavits or other supporting documents." *McNally v. Cap. Cartage, Inc.,* 2018 WI 46, ¶ 23, 381 Wis. 2d 349, 912 N.W.2d 35; *see* Wis. Stat. § 802.06(3). Accordingly, granting judgment on the pleadings is only proper if there "are no genuine issues of material fact" and the movant is entitled to judgment as a matter of law. *McNally*, 2018 WI 46, ¶ 23.

ARGUMENT

I. As Plaintiffs Previously Conceded, An Inferior State Court Cannot Afford Plaintiffs' Any Relief Because The Wisconsin Supreme Court Adopted The *Johnson II* Map

Under the Wisconsin Constitution, the Supreme Court sits at the top of the Wisconsin State Courts, and no inferior court in this State has the power to overrule,

review, or modify the Supreme Court's judgments. Accordingly, this Panel cannot give Plaintiffs any of their requested relief, as that relief depends upon this Panel declaring that the *Johnson II* map adopted by the Supreme Court's judgment in *Johnson II* is unlawful. Certain of Plaintiffs and their counsel made this very point to the Wisconsin Supreme Court in their original-action petition filed with the Court challenging the *Johnson II* map just last year. Dkt.60 at 320.

A. To interpret the Constitution, this Panel must "examine": (1) the "plain meaning of the words" of the Constitution "in the context used"; (2) the "historical analysis of the constitutional debates and of what practices were in existence in 1848"; and (3) "[t]he earliest interpretation of this section by the legislature as manifested in the first law passed following the adoption of the constitution." *State v. Beno*, 116 Wis. 2d 122, 137, 341 N.W.2d 668 (1984). "The authoritative, and usually final, indicator of the meaning of a [constitutional] provision is the text—the actual words used." *Coulee Cath. Schs. v. Lab. & Indus. Rev. Comm'n, Dep't of Workforce Dev.*, 2009 WI 88, ¶ 57, 320 Wis. 2d 275, 768 N.W.2d 868.

Article VII of the Wisconsin Constitution creates the Wisconsin state court system. Article VII first provides that "[t]he judicial power of this state shall be vested in a unified court system consisting of one supreme court, a court of appeals, a circuit court, such trial courts of general uniform statewide jurisdiction as the legislature may create by law, and a municipal court if authorized by the legislature." Wis. Const. art. VII, § 2. Article VII then defines the jurisdiction of "[t]he supreme court," in particular, providing that the Supreme Court "shall have superintending

and administrative authority over all courts," *id.* § 3(1); "has appellate jurisdiction over all courts and may hear original actions and proceedings," *id.* § 3(2); and "may review judgments and orders of the court of appeals, may remove cases from the court of appeals and may accept cases on certification by the court of appeals," *id.* § 3(3).

The plain text of Article VII, *see Coulee Cath. Schs.*, 2009 WI 88, ¶ 57, places the Supreme Court at the top of the Wisconsin State Courts, with all other courts in the State below this one Supreme Court. Article VII "vest[s]" all of Wisconsin's "judicial power" in a single, "*unified* court system," with "*one* supreme court" at the head. Wis. Const. art. VII, § 2 (emphases added). Then, Article VII grants to the Supreme Court "superintending and administrative authority over *all* courts." Wis. Const. art. VII, § 3(1) (emphasis added). The import of this constitutional language—particularly the just-emphasized terms "*unified* court system," "*one* supreme court," and "authority over *all* courts," *id.* §§ 2–3 (emphases added)—is that, "[b]y the constitution," the Supreme Court has all "power to exercise fully and completely the jurisdiction of superintending control over all inferior courts," *State ex rel. Fourth Nat. Bank of Phila. v. Johnson*, 103 Wis. 591, 79 N.W. 1081, 1091–92 (1899). That is, "when the framers of the constitution speak of a supreme court, they intended to convey the idea of the highest tribunal in the judicial department of the government." *Attorney General v. Blossom*, 1 Wis. 317, 322 (1853). Thus, "[t]he constitution provides that [the Supreme Court] shall be a court of last resort[ ]—a court whose judgments, so far as they relate to state polity, are final and conclusive." *Ean v. Chi., M. & St. P. Ry. Co.*, 101 Wis. 166, 76 N.W. 329, 330 (1898).

It follows that inferior courts in the State may not sit in review of, let alone reverse, the Wisconsin Supreme Court's judgments. *See* Wis. Const. art. VII, § 3(1). This is why the Supreme Court has held—again and again, for over a century and a half—that all lower courts in the State must adhere to its judgments, while the Supreme Court alone has the power to review and overrule such judgments as it sees fit. *See, e.g.*, *Blossom*, 1 Wis. at 322 ("highest tribunal in the judicial department"); *Ean*, 76 N.W. at 330 ("final and conclusive" "judgments"); *Fourth Nat. Bank of Phila.*, 79 N.W. at 1091–92 ("full[ ] and complete[ ] [ ] jurisdiction . . . over all inferior courts"); *see also, e.g.*, *Sutter v. State, Dep't of Nat. Res.*, 69 Wis. 2d 709, 717, 233 N.W.2d 391 (1975) ("a court of last resort"); *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case."); *State v. Lira*, 2021 WI 81, ¶ 46, 399 Wis. 2d 419, 966 N.W.2d 605 (same); *Matter of Adoption of M.M.C.*, 2024 WI 18, ¶ 8, 411 Wis. 2d 389, 5 N.W.3d 238 (same); *accord State v. Arberry*, 2017 WI App 26, ¶ 5, 375 Wis. 2d 179, 895 N.W.2d 100 ("Neither [the Court of Appeals] nor the circuit court may overrule a holding of our supreme court."). The lower courts of this State "ha[ve] no power to vacate or set [ ] aside" a judgment from the Supreme Court, *Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶ 50, 303 Wis. 2d 94, 735 N.W.2d 418 (citation omitted), or even to do anything that "conflict[s] with the expressed or implied mandate of the appellate court," *id.* ¶ 32.

Gabler v. Crime Victims Rights Board, 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384, is helpful on these points. There, the Supreme Court considered the

claim that the Crime Victims Rights Board ("Board") had the authority "to take action on a complaint" alleging that a judge's judicial decision to postpone a defendant's sentencing had "violated a victim's right." *Id.* ¶ 45. In rejecting the Board's assertion of such authority, the Wisconsin Supreme Court explained that, under the Board's theory, the Board could "take action on a complaint against the Wisconsin Supreme Court" itself alleging that a judgment of the Court violated victims' rights. *Id.* That reasoning would subvert the hierarchy of the Wisconsin State Courts. *See id.* If the Board had the authority to take action on a complaint against the Supreme Court, then "the members of th[e] [Supreme] [C]ourt would need to initiate a Chapter 227 action" to challenge the Board's action, under the statutory-review regime at issue. *Id.* "But that Chapter 227 action would place a circuit court—and perhaps the intermediate court of appeals—in the absurd, *not to mention unconstitutional*, position of reviewing the Wisconsin Supreme Court's interpretation of the law." *Id.* (emphasis added). "Subjecting [the Wisconsin Supreme Court]'s decisions to review by a circuit court would obviously interfere with [its] duties and responsibilities as Wisconsin's court of last resort." *Id.* (citing, as relevant, Wis. Const. art. VII, § 3(2)).

Finally, the Wisconsin Supreme Court has no authority to alienate or delegate its supreme judicial authority over all Wisconsin State Courts to another court—even if, for some reason, the Court desired to do so. That is because "constitutional judges take no power from the constitution, [and] can take none from the legislature, to subdelegate their judicial functions." *Van Slyke v. Trempealeau Cnty. Farmers' Mut. Fire Ins. Co.*, 39 Wis. 390, 392 (1876); *see also State ex rel. Universal Processing Servs.*

of Wis., LLC v. Cir. Ct. of Milwaukee Cnty., 2017 WI 26, ¶ 75, 374 Wis. 2d 26, 892 N.W.2d 267. Only the Wisconsin Supreme Court was "elected to decide what the law is" for the entire State. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 41 n.26, 382 Wis. 2d 496, 914 N.W.2d 21 (quoting The Honorable Patience Drake Roggensack, *Elected to Decide: Is the Decision-Avoidance Doctrine of Great Weight Deference Appropriate in This Court of Last Resort?*, 89 Marq. L. Rev. 541, 542 (2006)).

B. Here, granting Plaintiffs' present Motion would require this Panel to declare unconstitutional the *Johnson II* map, as adopted by the Wisconsin Supreme Court's judgment in *Johnson II*. *See* Compl.26. That would violate the constitutional principles set out above, as this inferior Panel has "no power to vacate or set [ ] aside" a judgment from the Supreme Court. *Tietsworth*, 2007 WI 97, ¶ 50. So, because this Panel cannot constitutionally grant Plaintiffs *any* of their relief for any of their claims—including the separation-of-powers claim at issue in this Motion—it must deny Plaintiffs' Motion For Judgment On The Pleadings.

To begin, this Panel is "inferior" to the Wisconsin Supreme Court, *Fourth Nat'l Bank of Phila.*, 79 N.W. at 1092, as both a constitutional and statutory matter. The Constitution gives the Supreme Court "superintending" authority "over *all* courts." Wis. Const. art. VII, § 3(1) (emphasis added). So, the Supreme Court is "the highest tribunal in the judicial department of the government," *Blossom*, 1 Wis. at 322, which encompasses a three-judge panel of the Circuit Court authorized under Sections 801.50(4m) and 751.035(1). As a statutory matter, Sections 801.50(4m) and 751.035(1) state that the Wisconsin Supreme Court is the "appoint[ing]"

authority for this "panel," Wis. Stat. § 751.035(1), and that the Supreme Court is empowered to "hear[ ]" any "appeal from any order or decision issued by the panel," *id.* § 751.035(3).

Plaintiffs' requested relief depends entirely upon this Panel "vacat[ing]" or "set[ting] [ ] aside," *Tietsworth*, 2007 WI 97, ¶ 50, the Wisconsin Supreme Court's judgment in *Johnson II* that adopted the State's remedial congressional map and held that it complies with all relevant state and federal laws. Plaintiffs request that this inferior Panel "[d]eclare that Wisconsin's congressional map violates the separation of powers" and "order a remedy in time to take effect for the 2026 congressional elections." Dkt.44 ("Mem.") at 16; *see* Compl.26. Yet, Plaintiffs recognize that Wisconsin's current "congressional map [was] adopted by the [Wisconsin Supreme] Court" pursuant to its judgment in "*Johnson II*." Compl. ¶ 66; *see also id.* ¶¶ 56, 58; *Johnson II*, 2022 WI 14, ¶¶ 13–25. And in *Johnson II*, the Wisconsin Supreme Court found that the "proposed congressional map" it "adopt[ed]" there "compl[ies] with all relevant state and federal laws." *Johnson II*, 2022 WI 14, ¶ 25. Thus, it is indisputable here that the Supreme Court's judgment adopting the *Johnson II* congressional map is a "final and conclusive" judgment from the Wisconsin Supreme Court. *Sutter*, 69 Wis. 2d at 717; *see also Ean*, 76 N.W. at 330. As such, the Supreme Court is the only Wisconsin court that can "vacate or set [ ] aside" the Court's *Johnson II* judgment, *Tietsworth*, 2007 WI 97, ¶ 50. That is why certain of Plaintiffs and their counsel previously conceded that "no other court" other than the Wisconsin

Supreme Court could "provide [their] requested relief," given that the *Johnson II* map "was adopted by [the Wisconsin Supreme Court]." Dkt.60 at 320.

Gabler is a helpful analog here. Had the Board in *Gabler* taken action against a judgment of the Wisconsin Supreme Court, that would have resulted in Justices of the Wisconsin Supreme Court initiating a Chapter 227 proceeding in the Circuit Court against the Board—meaning that "a circuit court" would be "in the absurd, *not to mention unconstitutional*, position of reviewing the Wisconsin Supreme Court's interpretation of the law." 2017 WI 67, ¶ 45 (emphasis added). Similarly, here, Plaintiffs' Motion puts this Panel "in the absurd, not to mention unconstitutional, position of reviewing the Wisconsin Supreme Court's," *id.*, judgment adopting the *Johnson II* congressional map, Compl.26. Like the hypothetical Circuit Court that *Gabler* described, this Panel has no constitutional power to review any judgment of the Wisconsin Supreme Court, including the *Johnson II* judgment.

Finally, the Supreme Court's order appointing this Panel to adjudicate this case, *see Bothfeld*, 2025 WI 53, does not alter this constitutional analysis. In that order, the Court held that Sections 801.50(4m) and 751.035 "require[ ]" it "to appoint a three-judge panel and to select a venue for th[is] action." *Id.* at 510. Thus, after the Court considered and rejected arguments that Plaintiffs' Complaint did not trigger Sections 801.50(4m) and 751.035, the Court proceeded to fulfill its statutory duty without addressing any other issues. *See id.* Justice Hagedorn's separate writing—which the majority did not disagree with in any respect—makes this point, noting that any merits "issues are not yet [the Supreme Court]'s to decide," given its

"limited" "role at this stage." *Id.* (Hagedorn, J., concurring in part and dissenting in part). Instead, this "circuit court panel will consider all the relevant substantive and procedural arguments in due course." *Id.* And the Court's order appointing this Panel clearly did not delegate to this inferior court the authority to overrule the *Johnson II* judgment, *see generally Bothfeld*, 2025 WI 53—something the Court could not do, in any event, *Van Slyke*, 39 Wis. at 392; *Universal Processing Servs.*, 2017 WI 26, ¶ 75; *Tetra Tech*, 2018 WI 75, ¶ 41.

C. Plaintiffs make only the feeblest of attempts to argue that this Panel has the authority to review the Supreme Court's judgment in *Johnson II*. *See* Mem.9. Plaintiffs cite Wis. Stat. § 753.03, Mem.9, which provides, in part, that Circuit Courts have "all the powers . . . necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice," Wis. Stat. § 753.03. But Section 753.03 defines the Circuit Court's powers with reference to "article VII of the constitution," *id.*, and Article VII makes the Circuit Courts *inferior to* the Supreme Court, *supra* pp.13–14. Plaintiffs' citation (without discussion) of Article VII, Section 8 of the Wisconsin Constitution, Mem.9—which provides that the Circuit Courts have "original jurisdiction" in "all matters" "[e]xcept as otherwise provided by law," Wis. Const. art. VII, § 8—fails for the same reason. Article VII, Sections 2 and 3 establish the Supreme Court as "the highest tribunal in the judicial department," over both the Circuit Courts and all other courts, which means that Circuit Courts cannot exercise their jurisdiction by overruling the Supreme Court's judgments. *Blossom*, 1 Wis. at 321–22.

Plaintiffs also claim that *Clarke* overruled *Johnson* and "prohibit[ed]" use of the least-change approach, Mem.9, but that does not help them with regard to this Panel's authority. Even if Plaintiffs were correct that *Clarke* overruled *Johnson*'s least-change approach as to congressional maps, *but see infra* pp.23–26, *Clarke* did not overrule the *judgment* of *Johnson II* adopting a congressional map. Indeed, the congressional map was not even at issue in *Clarke*. This judgment from *Johnson II* adopting the congressional map is one that this Panel has no authority to disturb. That is why, again, certain Plaintiffs and their counsel conceded in their previous original-action petition filed with the Wisconsin Supreme Court that "no other court" besides the Supreme Court "can provide [their] requested relief" because the *Johnson II* map "was adopted by [that] Court." Dkt.60 at 320.

II. Plaintiffs Are Also Not Entitled To Judgment As A Matter Of Law On Their Separation-Of-Powers Claim On The Merits

In their Memorandum, Plaintiffs claim that they are entitled to judgment on the pleadings as to their separation-of-powers claim because, by using the least-change approach to select the *Johnson II* map, the Wisconsin Supreme Court failed to exercise its own neutral and independent judgment by perpetuating the allegedly partisan 2011 congressional map, thereby violating the separation of powers. Mem.8–15. As explained below, Plaintiffs' separation-of-powers theory is wrong as a matter of law, so Plaintiffs are not entitled to judgment on the pleadings as to their separation-of-powers claim. *Infra* Part II.A.1. At a minimum, Plaintiffs' separation-of-powers claim depends upon the same extensive questions of fact going to whether

the 2011 congressional map was too partisan to begin with, precluding Plaintiffs from obtaining judgment on the pleadings here for this reason as well. *Infra* Part II.B.

A. A Map Adopted Using A Least-Change Approach Is Not Thereby Unconstitutional Under The Separation-Of-Powers Doctrine

Plaintiffs claim that the Wisconsin Supreme Court's selection of the *Johnson II* congressional map violated the Constitution's separation-of-powers doctrine because the Court "improperly substituted" its own neutral and independent judgment for the unlawful "the partisan judgment" of the political branches "that prevailed in the 2011 political process" to create Wisconsin's 2011 congressional map. Mem.9. Plaintiffs' separation-of-powers theory finds no grounding in any constitutional text or caselaw.

1. The Wisconsin Constitution "creates three separate coordinate branches of government" and "vest[s]" each "with a specific core governmental power." *Evers v. Marklein*, 2024 WI 31, ¶ 9, 412 Wis. 2d 525, 8 N.W.3d 395 ("*Marklein I*") (citation omitted). The Wisconsin Constitution provides that "[t]he legislative power shall be vested in a senate and assembly; [t]he executive power shall be vested in a governor; and [t]he judicial power of this state shall be vested in a unified court system." *Id.* (citations omitted); *see* Wis. Const. art. IV, § 1; *id.* art. V, § 1; *id.* art. VII, § 2. "Implicit in this tripartite division" of powers in the Constitution is "the separation of powers doctrine." *Gabler*, 2017 WI 67, ¶ 11 (brackets omitted; citations omitted).

The Wisconsin Supreme Court recognizes that each of the three branches of government possesses both "core powers" and "shared powers" under the Constitution. *Marklein I*, 2024 WI 31, ¶ 10 (citation omitted). "Core powers" are the "zones of authority constitutionally established for each branch of government upon

which any other branch of government is prohibited from intruding." *Id.* (citations omitted). "Core powers . . . are not for sharing"; "*any* exercise of authority [of one branch's core powers] by another branch of government is unconstitutional." *Id.* (citations omitted). "[S]hared powers," in contrast, "lie at the intersections of the[ ] exclusive core constitutional powers" and may be exercised by multiple branches, so long as one branch does not unduly burden or substantially interfere with another. *Id.* ¶ 11 (citations omitted); *see State v. Horn*, 226 Wis. 2d 637, 644, 594 N.W.2d 772 (1999).

The separation-of-powers doctrine also prohibits a branch from "abdicating core power" to allow another branch to exercise it. *Tetra Tech*, 2018 WI 75, ¶ 48 (lead op. of Kelly, J.) (citing *In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 503, 236 N.W. 717 (1931)). The "coordinate branches of the government should not abdicate or permit others to infringe upon such powers as are exclusively committed to them by the constitution." *Gabler*, 2017 WI 67, ¶ 31 (citations omitted; alterations omitted).

Regarding the judiciary's core power, it is "the judiciary's exclusive responsibility to exercise judgment in cases and controversies arising under the law" and "to say what the law is" as it resolves such disputes. *Id.* ¶ 37 (citations omitted). Thus, the core power of the Wisconsin State Courts is the "interpret[ation] and appl[ication] [of] laws made and enforced by coordinate branches of state government" and "the ultimate adjudicative authority . . . to finally decide rights and responsibilities as between individuals." *Id.* (citations omitted); *see also, e.g.*, *State v.*

Williams, 2012 WI 59, ¶ 36, 341 Wis.2d 191, 814 N.W.2d 460; *State v. Van Brocklin*, 194 Wis. 441, 443, 217 N.W. 277 (1927). "[O]nly the judiciary," not some other branch or body, "may authoritatively interpret and apply the law in cases before [the] courts," *Tetra Tech*, 2018 WI 75, ¶ 54 (lead op. of Kelly, J.)—and "[n]o aspect of the judicial power is more fundamental," *Gabler*, 2017 WI 67, ¶ 37.

Tetra Tech shows what an impermissible abdication or delegation of the judiciary's core power looks like. There, the Court rejected the judiciary's longstanding "practice of deferring to administrative agencies' conclusions of law," under the so-called "'great weight' deference" doctrine. 2018 WI 75, ¶¶ 2–3 & n.2 (lead op. of Kelly, J.). When triggered, "'great weight' deference" required courts to defer both to an administrative agency's interpretation of a statute, so long as it was "merely [ ] reasonable," and to an agency's "application of a [ ] statute to the found facts." *Id.* ¶ 55 (emphasis omitted). "'[G]reat weight' deference" "cede[d] to the agency" the court's "power to authoritatively interpret the law . . . and apply the law to the case before [the court]," including because it forced the courts to "arrive at the legal issues involved in the case with an *a priori* commitment to letting the agency decide them." *Id.* But "the power to interpret and apply the law in the case at bar is an exclusively judicial power"—that is, a "core" power of the judiciary, *id.*—thus "'great weight' deference" constituted an "abdication of core judicial power," in violation of the separation-of-powers, *id.* ¶ 58; *see also id.* ¶ 64. This deference doctrine, in short, interfered with the judiciary's core responsibility "to say what the

law is." *Id.* ¶ 50 (citations omitted). *Tetra Tech*'s repudiation of the "'great weight' deference" doctrine remedied that separation-of-powers violation. *See id.* ¶¶ 82–84.

2. Here, the Wisconsin Supreme Court's application of the least-change approach to adopt the *Johnson II* map does not even arguably violate the Wisconsin Constitution's separation-of-powers principles.

In *Johnson I*, the Wisconsin Supreme Court held that it would employ a "least-change approach" for adopting remedial maps for the State for the 2020 cycle. 2021 WI 87, ¶¶ 64–81. As relevant here, that approach required the Court to "us[e] the existing map[ ] as a template" for a new remedial congressional map "and implement[ ] only those remedies necessary to resolve constitutional or statutory deficiencies" in the then-existing 2011 congressional map. *Id.* ¶ 72 (citation omitted). The 2011 congressional map had been "adopted by the legislature, signed by the governor, and survived judicial review by the federal courts." *Id.* ¶ 64. Further, the Elections Clause of the U.S. Constitution vests the Legislature with broad "discretion to decide how congressional elections are conducted," *id.* ¶ 12 (citing U.S. Const. art. I, § 4), including as to the drawing of congressional redistricting maps, *see id.* ¶ 64. Thus, the Court's least-change approach simply "remed[ied] the constitutional defects in the existing plan"—that is, its malapportionment, *id.* ¶ 66—without "intrud[ing] upon the constitutional prerogatives of the political branches," *id.* ¶ 64. This approach has "general acceptance among reasonable jurists" and "was applied in numerous cases during the last two redistricting cycles." *Id.* ¶ 73 (collecting cases).

Johnson I's adoption of the least-change approach is not an unconstitutional abdication of the judiciary's core power—rather, this approach was simply an interpretation of how the Court would draw a remedial map. As the Congressmen and Individual Voters explain below, the U.S. Constitution's Elections Clause *required* the Wisconsin Supreme Court to follow a least-change approach like that in *Johnson I* when adopting remedial congressional maps, given that clause's vesting of the power to regulate federal elections in state legislatures, *infra* Part III—a point that *Johnson I* itself recognized, *see* 2021 WI 87, ¶¶ 12, 64. But to the extent that *Johnson I*'s least-change approach as to congressional maps also rested upon the Court's interpretation of Wisconsin law, the Court's adoption of this approach reflected the Court's view of the proper judicial method for adopting remedial redistricting maps, *see id.* ¶¶ 72–78, which method had "general acceptance among reasonable jurists" and widespread usage in "numerous cases," *id.* ¶ 73. Although the Wisconsin Supreme Court has subsequently adopted a different method for choosing remedial state-legislative maps in *Clarke*, 2023 WI 79, *see infra* pp.23–26, that does not even arguably make the Court's prior endorsement of the least-change approach in *Johnson I* a violation of the separation of powers.

Johnson I's endorsement of the least-change approach bears no resemblance to an abdication of judicial power at issue in any other case in Wisconsin history. Consider *Tetra Tech*, where the Court repudiated the "'great weight' deference" doctrine that had applied when the courts were reviewing agency interpretations and applications of the law. 2018 WI 75, ¶ 55 (lead op. of Kelly, J.). That doctrine

compelled the courts to defer to administrative agencies over the meaning of the law, abdicating the judiciary's core "power to authoritatively interpret . . . and apply the law" in the cases before it. *Id.* In other words, the "'great weight' deference" doctrine required the judiciary to abandon its core responsibility to "say what the law is." *Id.* ¶ 50 (citations omitted). In sharp contrast, *Johnson I* adopted the "least change" approach because of the Court's own independent assessment of "[t]he constitutional confines of [its own] judicial authority." 2021 WI 87, ¶ 64. It is the Legislature, not the Court, that has the core power to draw congressional redistricting maps—including because the U.S. Constitution's Elections Clause vests state legislatures with such authority. *See id.* ¶¶ 12, 64. So, the Court adopting a remedial congressional redistricting map that hews closely to a map that the Legislature has adopted (while fixing legal deficiencies like malapportionment) honors the Legislature's core authority. It does not somehow "cede," *Tetra Tech*, 2018 WI 75, ¶ 55 (lead op. of Kelly, J.), or "abdicat[e]" to the Legislature the judiciary's "core judicial power" to determine the meaning of the law, *id.* ¶ 58.

The Wisconsin Supreme Court's decision in *Clarke*, 2023 WI 79, does not affect this separation-of-powers analysis, as not a word in *Clarke* rested on the separation-of-powers doctrine. In *Clarke*, the petitioners claimed that the remedial state legislative maps adopted in *Johnson III* violated the Wisconsin Constitution's contiguity requirement. *Clarke*, 2023 WI 79, ¶¶ 2–3 & n.8 (noting that petitioners had also claimed that the process of adopting the maps violated the separation of powers, but not adjudicating this claim). In the liability section of its opinion, *Clarke*

sided with the petitioners on their contiguity claim and declared the *Johnson III* state legislative maps unconstitutional. *Id.* ¶¶ 10–35. Then, in the remedies section of its opinion, *id.* ¶¶ 56–76, *Clarke* explained that it was "overrul[ing] any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach" when "adopting remedial maps" and endorsing different redistricting "principles that will guide the court's process in adopting remedial maps," *id.* ¶ 63; *see id.* ¶¶ 60–63.

Clarke did not hold that a map adopted under the least-change approach violates the separation-of-powers doctrine based upon the use of least-changes. *See generally id.* ¶¶ 10–35 (liability portion), ¶¶ 56–76 (remedial portion). Instead, *Clarke* decided only that, going forward, the Court would not utilize the *Johnson* least-change approach when adopting remedial state-legislative maps. *See id.* ¶¶ 56–76 (remedial portion). That is just a change in legal doctrine, based upon the Court's experience over "the course of the *Johnson* litigation" and the Court seeing the application of this approach "in practice." *Id.* ¶ 63. This kind of change reflects the Court's ability to "benefit" from "history" and reconsider a prior decision, *Evers v. Marklein*, 2025 WI 36, ¶¶ 26, 36–39, 417 Wis. 2d 453, 22 N.W.3d 789, which is not a violation of the separation of powers under any case or doctrine.

3. In their Motion For Judgment On The Pleadings, Plaintiffs claim that *Johnson*'s adoption of the least-change approach violates the separation-of-powers doctrine because it required the Wisconsin Supreme Court to abdicate its own neutral and independent judgment and assume the partisan judgment of the political branches latent in the 2011 congressional map, thereby perpetuating that map's

alleged partisanship. Mem.8–15. Tellingly, however, Plaintiffs make little attempt to ground their separation-of-powers theory on the Wisconsin Supreme Court's precedent in this area. *Compare* Mem.10, *with* Mem.11–15.

Instead of developing a separation-of-powers argument that relies upon established case law, Plaintiffs rest their Motion largely upon a misinterpretation of *Clarke*. *See* Mem.8–12. In Plaintiffs' view, *Clarke* held that the "least change approach was incompatible with the judicial role and supersedes the constitution." Mem.8 (citing *Clarke*, 2023 WI 79, ¶¶ 60–63, 69–71); *see also* Mem.9–12, 15. From that premise, Plaintiffs then claim that, after *Clarke*, *Johnson II*'s application of the least-change approach to adopt the *Johnson II* map "violated the Court's dual obligations of neutrality and independence." Mem.11–12. Plaintiffs' understanding and application of *Clarke* is wrong.

Contrary to Plaintiffs' claims, *Clarke* did *not* hold that all maps adopted via the least-change approach violate the judicial role and so are unconstitutional. *See* 2023 WI 79, ¶¶ 56–76; *see supra* pp.23–24 (discussing *Clarke*). Rather, *Clarke* decided only that courts would no longer use the least-change approach to adopt remedial state-legislative maps going forward. *See* 2023 WI 79, ¶¶ 56–76. This is clear from the structure of the *Clarke* opinion. *Clarke*'s overruling of *Johnson I*'s least-change approach to drawing remedial state-legislative maps is found *only* in the remedies section of the Court's opinion, not in the liability section of the opinion. *Id.* ¶¶ 56, 60–63. That shows that *Clarke*'s new process for adopting remedial maps—a process that is different than *Johnson I*'s least-change approach—is *only* relevant

after a court has determined that a challenged map is illegal. *See id.* ¶¶ 56–76. **Had *Clarke* decided that a map adopted under the least-change approach thus violated the Constitution's separation-of-powers doctrine, the Court would have included its discussion of the least-change approach in the liability portion of its opinion—not solely in the remedies portion**.

Clarke is also distinguishable for the additional reason that it only addressed the process for adopting remedial state-legislative maps, rather than remedial congressional maps like the *Johnson II* map. *See generally id.* ¶¶ 56–76 (remedial portion). *Clarke* did not opine on whether its remedial holding—that, going forward, courts may not use the *Johnson I* least-change approach when adopting remedial state-legislative maps to remedy a legal violation—would also apply to the adoption of remedial congressional maps. And *Clarke* had good reason not to confront that question, given that *Clarke*'s rejection of the least-changes approach as a remedy would violate the U.S. Constitution's Elections Clause if applied to remedial congressional maps, as explained below. *Infra* Part III.

Plaintiffs' other efforts to shoehorn this case into the separation-of-powers doctrine also fail, especially considering that their theory bears no resemblance to any separation-of-powers case in Wisconsin history. Plaintiffs claim that *Johnson I*'s least-change approach reflects "undue deference to other branches" by "acquiescing to the partisan goals embedded in a prior decade's districting map." Mem.10; *see also* Mem.13 (claiming that the least-change approach makes the judicial branch "complicit" in the political "schemes" of the political branches). But *Johnson I*'s

adoption of the least-change approach did not turn on any notion of "deference" to the legal decisions of another branch or body, as in *Tetra Tech*. *Compare Tetra Tech*, 2018 WI 75, ¶ 56 (lead op. of Kelly, J.), *with Johnson I*, 2021 WI 87, ¶¶ 64–81; *supra* pp.3–5. Nor does it require "endors[ing] the policy choices of the political branches." *Johnson I*, 2021 WI 87, ¶ 78. Rather, the least-change approach is simply a "general[ly] accept[ed]" method of judicial decision-making in this area, *id.* ¶ 73, that does not turn on "political considerations" or "practical political consequences," *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 436–37, 424 N.W.2d 385 (1988). Plaintiffs also assert that "deferring to political actors no longer in office abdicates the judiciary's responsibility to act with independence." Mem.13–14. But, as *Johnson I* explained, the 2011 congressional map was "codified as [a] statute[ ], without a sunset provision, and ha[d] not been supplanted by new law." 2021 WI 87, ¶ 72 n.8. The constitutional judicial role compels the court not to disturb unnecessarily the political judgments reflected in such a map, just as it compels a court not to disturb unnecessarily the political judgments reflected in other statutes enacted by legislators no longer in office.

B. Alternatively, Plaintiffs' Separation-Of-Powers Claim Depends Upon Disputes Of Material Fact

As explained above, Plaintiffs claim that *Johnson*'s adoption of a congressional map under a least-change approach violates the separation-of-powers doctrine because the Wisconsin Supreme Court abdicated its own judgment by adopting a map that perpetuates some illegality latent in a prior map. *See supra* pp.17, 24 (citing Mem.8–15). In this case, Plaintiffs allege that the only illegality that the *Johnson II*

map carried forward was the allegedly impermissibly high partisanship of the 2011 congressional map. *See* Mem.9, 11–12. That is, Plaintiffs claim that the Supreme Court violated the separation of powers because it adopted a map that embodied "the partisan judgment that prevailed in the 2011 political process," Mem.9, lending the Court's "imprimatur to [ ] partisan manipulation" rather than "neutrality and independence," Mem.12.

The Congressmen and Individual Voters explain in their contemporaneously filed Motion To Dismiss that Plaintiffs' separation-of-powers claim fails because it is a nonjusticiable political question under *Johnson I*, 2021 WI 87, ¶¶ 40–63. However, if this Panel were to conclude that Plaintiffs' separation-of-powers claim was justiciable, it must still deny Plaintiffs' Motion For Judgment because whether Plaintiffs are entitled to any relief on this claim depends upon heavily contested factual disputes. *McNally*, 2018 WI 46, ¶ 23. Specifically, to adjudicate Plaintiffs' separation-of-powers theory, the Panel would have to decide whether, as a factual matter, the partisanship of the 2011 map was "excessive," under whatever standards this Court articulates for purposes of adjudicating Plaintiffs' separation-of-powers theory. This requires "extensive fact-finding (if not a full-scale) trial," *Clarke*, 409 Wis. 2d at 375, meaning that the Panel cannot resolve this claim at the pleadings stage, *see McNally*, 2018 WI 46, ¶ 23. Notably, the only court to have reviewed the 2011 congressional map concluded that it was the product of a "bipartisan" process, *Baldus*, 849 F. Supp. 2d at 853–54, and *Johnson II* adopted Governor Evers' proposed congressional map based upon the 2011 map, 2022 WI 14, ¶¶ 13–25. Indeed,

Plaintiffs appeared to concede this point at the Panel's scheduling conference late last year with respect to the adjudication of their self-styled "partisan gerrymandering claims," as Plaintiffs agreed that those claims were "fact-based, warranting discovery, and potentially a trial." Second Decl. Of Kevin M. LeRoy, Ex.1 at 7–8.

III. Granting Plaintiffs Relief Would Violate The U.S. Constitution's Elections Clause

The U.S. Constitution's Elections Clause vests the power to draw congressional maps in state legislatures (unless superseded by an act of Congress), a power that the Legislature exercised when it enacted the 2011 congressional map. The Wisconsin Supreme Court properly preserved these legislative choices under the Elections Clause by tailoring the 2011 congressional map using a "least changes" approach, which approach respects "the ordinary bounds of judicial review" and does not "arrogate to [the Court] the power vested in state legislatures to regulate federal elections." *Moore v. Harper*, 600 U.S. 1, 36 (2023). Here, Plaintiffs claim that the judiciary's preservation of the 2011 congressional map's core features violates Wisconsin's separation-of-powers doctrine. Yet, if this Panel grants relief under that novel claim, it would have to conclude that the Wisconsin Supreme Court failed a state-constitutional obligation to divest the Legislature of its Elections Clause power to draw congressional maps. No "fair reading" of state law supports such a conclusion, thus it would violate the Elections Clause to grant relief under Plaintiffs' theory. *Id.* (citation omitted).

A. Under the Elections Clause, "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the*

Legislature thereof." U.S. Const. art. I, § 4 (emphasis added). "[T]he Elections Clause expressly vests power to carry out its provisions in '*the Legislature*' of each State," reflecting "a deliberate choice that [courts] must respect." *Moore*, 600 U.S. at 34 (emphasis added). The Elections Clause also provides that Congress "may at any time by law make or alter such Regulations." U.S. Const. art. I, § 4. Under that authority, Congress has provided that, "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment," and if there is no change to the number of Representatives, then Representatives "shall be elected from the districts then prescribed by the law of such State." 2 U.S.C. § 2a(c). When the state legislature fails to redistrict, the districts then in effect remain. *Id.*

To respect a state legislature's exercise of its federal authority under the Elections Clause, state-court remedies may only correct any defect and adopt a least-changes map. *See White v. Weiser*, 412 U.S. 783, 794–95 (1973) ("[J]udicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so."). Courts must "honor state policies in the context of congressional reapportionment," "as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature." *Id.* at 795. "[A]s a general rule, [courts] should be guided by the legislative policies underlying the existing plan, to the extent those policies do not lead to violations" of federal law. *See Abrams v. Johnson*, 521 U.S. 74, 79 (1997). Therefore, making

changes that go beyond remedying violations necessarily alters those legislative policies enacted under a state legislature's Elections Clause authority. *See id.* at 99.

While "the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law," its grant of authority to state *legislatures* to regulate federal elections means that "state *courts* do not have free rein" to determine whether a congressional map satisfies state law. *Moore*, 600 U.S. at 34 (emphasis added). Thus, as the U.S. Supreme Court explained in *Moore*, state courts called upon to adjudicate state-law challenges to congressional maps must take care to "ensure that [their] interpretations of [state] law do not evade federal law," *id.*, by "read[ing] state law in such a manner as to circumvent federal constitutional provisions," *id.* at 35. Otherwise, state courts would "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, thereby "intrud[ing] upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution," *id.* at 37.

Justice Kavanaugh provided additional guidance on how the federal judiciary would determine that a "state court's interpretation of state law in a case implicating the Elections Clause" exceeds the bounds of "ordinary state court review." *Id.* at 38 (Kavanaugh, J., concurring). A state court may not "'impermissibly distort[ ]' state law 'beyond what a fair reading required,'" *id.* at 38 (citation omitted). When applying this standard, federal courts reviewing state court interpretations of state law "necessarily must examine the law of the State as it existed prior to the action of

the [state] court." *Id.* at 38 (citation omitted). Applying this "straightforward standard," *id.* at 39, will "ensure that state court interpretations of" state law governing federal election cases "do not evade federal law," *id.* at 34 (majority op.).

B. The Elections Clause forecloses Plaintiffs' claim because, under this Clause, the Wisconsin Supreme Court was required to adopt a least-changes remedial congressional map to avoid usurping the Legislature's Elections Clause authority, and no fair reading of Wisconsin's separation-of-powers doctrine permits this Court to jettison such a map. The Supreme Court approved a least-changes map in *Johnson II*, which means it complied with the Elections Clause by upholding the Legislature's policy choices. Congress' exercise of its Elections Clause power confirms that when the number of districts in a State remains the same, those districts must remain until the state legislature changes them. Plaintiffs claim that the Supreme Court violated its "responsibility to act with independence," Mem.13, by adopting a least-changes map in *Johnson II*. But the Elections Clause requires that this Court abide by the 2011 legislative choices the current congressional map preserves to the extent possible, and adopting Plaintiffs' separation of powers theory would "transgress the ordinary bounds of judicial review." *Moore*, 600 U.S. at 36.

The *Johnson II* map (proposed by Governor Evers) is a least-changes map that preserves 94.5% of the 2011 congressional map. The Wisconsin Supreme Court determined that because that map "moves the fewest number of people into new districts" it reflected the least-changes from the 2011 congressional map. *Johnson II*, 2022 WI 14, ¶¶ 15, 19. Specifically, the Court found that the *Johnson II* map

remedied the population equality deficiency while retaining 94.5% of the 2011 congressional map's policy choices. *Id.* ¶ 14. After noting that the "Wisconsin Constitution contains no explicit requirements related to congressional redistricting," it held that the *Johnson II* map "complies with all relevant laws." *Id.* ¶ 20.

A least-changes remedial map for congressional districts is necessary under the Elections Clause because that Clause vests the power to enact legislative maps with state legislatures—not courts—which is "a deliberate choice that [courts] must respect." *Moore*, 600 U.S. at 34. Judicial relief is only appropriate to bring a map into compliance with "constitutional requisites." *White*, 412 U.S. at 794–95. And when required to remedy any deficiency—such as a violation of the one person, one vote requirement due to population changes during a decade—the U.S. Supreme Court instructs courts to retain "the legislative policies underlying the existing plan." *See Abrams*, 521 U.S. at 79. The Wisconsin Supreme Court abided by these limits on state power over the Legislature's exercise of its Elections Clause powers by only remedying the 2011 congressional map to ensure population equality and preserving 94.5% of the 2011 congressional map, which cured the unconstitutional, unequal population as between the congressional districts. *Johnson II*, 2022 WI 14, ¶ 14.

Congress, authorized by the Elections Clause, also requires the least changes to congressional districts until the Legislature enacts a new map. Congress established via federal statute that when a State has "no change" in its apportionment—*i.e.*, population changes do not require an "increase" or "decrease" "in the number of Representatives" allocated to that State—the Elections Clause

requires that "Representatives [ ] shall be elected from the districts then prescribed by the law of such State" until that "State is redistricted in the manner provided by the law." 2 U.S.C. § 2a(c). No such change in apportionment has occurred in Wisconsin since the adoption of the *Johnson II* map, and Wisconsin law provides that only the Legislature may redistrict the State. *See Johnson II,* 2022 WI 14, ¶ 20; *see also Johnson I*, 2021 WI 87, ¶¶ 51–52. Until the Legislature exercises its Elections Clause authority to redistrict the whole State, courts must preserve existing districts when remedying any constitutional deficiency. *See* 2 U.S.C. § 2a(c). *Johnson II* did exactly this to the extent possible by adopting the congressional map that "ma[d]e the least changes from existing congressional district boundaries while complying with all relevant state and federal laws," *Johnson II,* 2022 WI 14, ¶ 25, to "remain in effect until new maps" can be "enacted into law" by the Legislature, *id.* ¶ 52.

Adopting Plaintiffs' theory that the separation-of-powers doctrine requires throwing out the *Johnson II* map because it adheres as much as practicable to the prior map adopted by the Legislature is so out of line with the "exist[ing]" "law of [Wisconsin]" that it would "'impermissibly distort[ ]' state law" far "'beyond what a fair reading required,'" *Moore*, 600 U.S. at 38–39 (Kavanaugh, J., concurring) (citation omitted), thereby "transgress[ing] the ordinary bounds of judicial review" in clear violation of the Elections Clause under *Moore*, *id.* at 36 (majority op.). Plaintiffs ask this inferior circuit court Panel to take the unprecedented step of declaring unconstitutional and redrawing a congressional map that the Wisconsin Supreme Court adopted and held "compl[ies] with all relevant state and federal laws,"

Johnson II, 2022 WI 14, ¶ 25, because of the method the Court used in adopting that map, *see* Mem.12–16. That unprecedented result violates *Moore* because it would "'impermissibly distort[ ]' state law 'beyond what a fair reading required,'" *Moore*, 600 U.S. at 38 (Kavanaugh, J., concurring) (citation omitted), in at least three ways.

First, the Wisconsin Supreme Court has established that the "only" basis for courts to alter a duly enacted legislative map is "when it becomes absolutely necessary to" remedy a constitutional or statutory deficiency in the map itself. *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 571, 126 N.W.2d 551 (1964); *see Johnson II*, 2022 WI 14, ¶ 11. The Wisconsin Supreme Court has already determined that the *Johnson II* map complies with all substantive requirements for congressional redistricting, 2022 WI 14, ¶ 20, and all relevant law, *id.* ¶ 25. Because there is no "constitutional or statutory deficienc[y]," *id.* ¶ 11 (citation omitted), in the *Johnson II* map for this Panel to correct, overturning the map because the Wisconsin Supreme Court used the least-change approach to adopt it would "'distort[ ]' state law" and exceed the bounds of "ordinary state court review," in violation of the Elections Clause, *Moore*, 600 U.S. at 38 (Kavanaugh, J., concurring) (citation omitted).

Second, granting Plaintiffs relief under their separation-of-powers theory would disregard the Wisconsin Supreme Court's instruction for courts to follow "the legislative policies underlying the existing plan." *Abrams*, 521 U.S. at 79; *see White*, 412 U.S. at 795 (courts must follow "statutory and constitutional provisions" that express "state policies in the context of congressional reapportionment"). Plaintiffs claim that the *Johnson II* Court violated the separation-of-powers by respecting the

Legislature's prior policy choices and preserving 94.5% of the 2011 congressional map while making only necessary revisions to remedy the malapportionment constitutional defect in the congressional map because those choices are too partisan. *See* Mem.12–13. But the Elections Clause vests the Legislature—not courts—with broad "discretion to decide how congressional elections are conducted," *Johnson I*, 2021 WI 87, ¶ 12 (citing U.S. Const. art. I, § 4), including the drawing of congressional maps, *see id.* ¶ 64, such that the courts "lack the authority to make the political decisions that the Legislature and the Governor can make through their enactment of redistricting legislation," *id.* ¶ 71. Going "further than necessary to remedy [a map's] current legal deficiencies" by questioning those political judgments of the other branches "would intrude upon the constitutional prerogatives of the political branches and unsettle the constitutional allocation of power." *Id.* ¶ 64. Accordingly, reading *Clarke*'s rejection of the least-change approach as for the drawing of remedial state-legislative maps as a greenlight for this Panel to question the Legislature's prior political choices in congressional map drawing and "make its own political judgment," *id.* ¶ 45 (citing *Rucho*, 541 U.S. at 705) (alteration omitted), would impermissibly "read state law in such a manner as to circumvent federal constitutional provisions," *Moore*, 600 U.S. at 35.

Finally, Plaintiffs' separation-of-powers theory "impermissibly distort[s]" Wisconsin law "in a federal election case," *id.* at 38 & n.1 (Kavanaugh, J., concurring), because it asks *this Panel* to overturn a decision of the Wisconsin Supreme Court in violation of fundamental precepts of Wisconsin law. No inferior court—including this

Panel—may "vacate or set [ ] aside," *Tietsworth*, 2007 WI 97, ¶ 50 (citation omitted), a "final and conclusive" decision of the Wisconsin Supreme Court, *Sutter*, 69 Wis. 2d at 717. The decision in *Clarke* undermines *Johnson II's* reliance on adopting a least-changes map—at least with respect to remedial state legislative maps, *supra* pp.23–26—but it does not change the conclusive outcome that the Wisconsin Supreme Court concluded that the *Johnson II* map complies with relevant law and must be used by WEC, 2022 WI 14, ¶ 25. Any decision by this Panel to redraw the congressional map would be a *de facto* revision to that conclusive opinion. This Panel should reject such an approach that would "transgress the ordinary bounds of judicial review" and violate the Elections Clause under *Moore*, 600 U.S. at 36 (majority op.).

IV. Laches Bars Plaintiffs' Challenge To The *Johnson II* Map

A. Laches bars a claim "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. Laches applies where: "(1) a party unreasonably delays in bringing a claim; (2) a second party lacks knowledge that the first party would raise that claim; and (3) the second party is prejudiced by the delay." *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶ 12, 393 Wis. 2d 308, 946 N.W.2d 101. Whether laches applies is a "question of law" appropriate for determination at the pleadings stage. *See id.* Application of laches is particularly appropriate in "election-related matters" where "[e]xtreme diligence and promptness are required" because unreasonable delay can cause "obvious and immense" prejudice to "election officials, [ ] candidates . . . and to voters statewide." *Trump*, 2020 WI 91, ¶¶ 11–12 (citation omitted); *accord Trump v. WEC*, 983 F.3d 919, 925 (7th Cir. 2020).

B. Each of the three elements for laches is met here.

First, Plaintiffs' long, unexplained "delay[ ] in bringing" their Complaint is "unreasonabl[e]," *Brennan*, 2020 WI 69, ¶ 14, and flouts their "special duty to bring" election-related "claims in a timely manner," *Trump*, 2020 WI 91, ¶ 30. Plaintiffs contend that the *Johnson II* map violates the separation of powers because, by applying the least-change approach to adopt that map, Compl. ¶ 11, *Johnson II* carried forward the "partisan bias" allegedly "baked into the 2011 map," Compl. ¶ 51. Given that the Wisconsin Supreme Court adopted the *Johnson II* map on March 1, 2022, Plaintiffs could have brought this over three-and-a-half years ago, at least. *Johnson II*, 2022 WI 14, ¶¶ 13–25. And while Plaintiffs claim that the *Clarke* decision is what "overruled" the "least change" approach, Mem.8, that does not help them either, as the Court issued *Clarke* over two years ago in December 2023, *see generally*, 2023 WI 79. Plaintiffs offer no explanation for their failure to bring this lawsuit immediately after *Clarke* was decided, even as certain of Plaintiffs and/or their counsel had challenged the *Johnson II* map twice before the Wisconsin Supreme Court after *Clarke* had issued. *Supra* pp.5–6.

Second, the Congressmen and Individual Voters "lack[ed] knowledge that [Plaintiffs] would raise th[eir] claim[s]." *Brennan*, 2020 WI 69, ¶ 12. No one could have anticipated that Plaintiffs would wait over three years after *Johnson II* (and even two years after *Clarke*) to bring this challenge to the *Johnson II* map. *Supra* pp.7–8. That is especially so given that Plaintiffs brought this suit mere weeks after the Supreme Court rejected an original-action petition raising these same claims

brought by certain of Plaintiffs and their counsel, while conceding that only the Supreme Court had authority to modify the *Johnson II* map. *Supra* pp.5–6.

Third, the public and the Congressmen and Individual Voters would suffer "obvious and immense" prejudice from allowing Plaintiffs' unreasonably delayed suit to proceed. *Trump*, 2020 WI 91, ¶¶ 11–12 (citation omitted); *see Brennan*, 2020 WI 69, ¶ 14. The Wisconsin Supreme Court resolved this case over three years ago when it adopted the *Johnson II* map, and all parties expected that map to govern for this decade. *See Johnson II*, 2022 WI 14, ¶ 52; Dkt.60 at 295, 318 (certain of Plaintiffs and their counsel stating that the "map remains in effect for the 2026, 2028, and 2030 congressional elections"). The Supreme Court has *twice* rejected additional challenges to the *Johnson II* map—including from certain of Plaintiffs and their counsel—reaffirming that expectation. *Supra* pp.5–6. Revisiting the *Johnson II* map now would disturb these settled expectations among "election officials, [ ] candidates" and "voters statewide," *Trump*, 2020 WI 91, ¶¶ 11–12 (citation omitted), while also forcing the political branches back into a contentious redistricting fight over the congressional districting map, *see Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999); *accord* Dkt.60 at 454–59 (Governor Evers stating that "it would be a mistake" to replace the *Johnson II* congressional map and "draw new electoral maps" in Wisconsin). Finally, the Congressmen and Individual Voters spent years investing time and resources in reliance on the *Johnson II* districts. They "know their districts" and redrawing the map now would cause "obvious and immense prejudice," *Trump*,

2020 WI 91, ¶¶ 11–12 (citation omitted), including "voter confusion, instability, [and] dislocation," *Fouts*, 88 F. Supp. 2d at 1354.

Finally, while *Clarke* rejected a laches defense, the circumstances there are distinguishable from the case here. *Clarke* declined to apply laches to a challenge to *Johnson III*'s state-legislative maps filed in August 2023, which was "less than a year-and-a-half after *Johnson III*." 2023 WI 79, ¶ 42. That was not "unreasonable delay," *Clarke* held, because "Petitioners decided to request relief" before "the soonest elections for which relief could be granted." *Id.* *Clarke* likewise held that the delay caused no "prejudice," as the only claimed prejudice from the responses was "litigation costs" and a generalized "disruption to the status quo," which the Court deemed insufficient. *Id.* ¶ 43. But here, Plaintiffs waited to sue for more than three-and-a-half years after *Johnson II* adopted the map at issue, and more than two years after *Clarke* itself. *Supra* pp.7–8. Unlike in *Clarke*, there is substantial prejudice from this delay. *Supra* pp.23–26, 39.

CONCLUSION

This Court should deny Plaintiffs' Motion For Judgment On The Pleadings.

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Respectfully submitted,

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