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CIRCUIT COURT
DANE COUNTY, WI
2025CV002432

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

Elizabeth Bothfeld, et al.,

Plaintiffs,

v. Case No. 2025-CV-2432

Wisconsin Elections Commission, et al.,

Defendants.

RESPONSE OF INTERVENOR-DEFENDANTS BILLIE JOHNSON ET AL. IN OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

Plaintiffs are back in Court seeking yet again to unsettle Wisconsin's congressional districts—maps which were carefully selected and adopted by the Wisconsin Supreme Court itself in *Johnson v. Wisconsin Elections Comm'n*, 2022 WI 14, ¶ 7, 400 Wis. 2d 626, 971 N.W.2d 402. ("*Johnson II*"), after full adjudication. The Congressional maps approved by the Supreme Court were submitted by Governor Evers, and the Supreme Court expressly concluded that those maps complied "with the federal Constitution and all other applicable laws." *Id.*

Moreover, this case is not the first attempt to relitigate the Congressional maps adopted in *Johnson II*. Prior efforts—a Motion for Relief from Judgment in the original *Johnson* case, and subsequent original action petitions in *Bothfeld v. Wisconsin Elections Commission* and *Felton v. Wisconsin Elections Commission*—all were met with swift (and unanimous) rejection by the Supreme Court.

Apparently believing that "no" means "ask me again later," Plaintiffs simply filed yet another case (this one), alleging that the Supreme Court committed legal error in *Johnson II* and asserting that this three-judge panel should overrule the Supreme Court's decision in that case. The Plaintiffs nowhere explain how this Court has the authority to overrule the Supreme Court (that issue is the subject of the Johnson Intervenors' Motion to Dismiss), but instead simply press what they call a "separation-of-powers" theory as grounds for judgment on the pleadings.

The Plaintiffs' position here is that the Supreme Court's consideration of a "least changes" criterion for Congressional maps in *Johnson II*[1] was legal error based on the subsequent decision in *Clarke v. Wisconsin Elections Commission*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370, which rejected a "least changes" approach for state legislative districts. Plaintiffs argue that somehow this alleged legal error by the Supreme Court in *Johnson II* violated the separation of powers doctrine, but Plaintiffs offer no viable basis for such an implausible argument. Redistricting often—actually, almost always—involves judicial consideration of maps proposed by other branches of government and it is hardly a "separation of powers" violation to adopt a judicially minimalist approach and do no more than fix the malapportionment arising from a new census. There is no doctrine that mandates a certain number of changes. Continuity and core retention are frequently considered as an appropriate goal in redistricting.

[1] The Court in *Johnson II* said it would favor a map that moved fewer voters from one district to another over proposed maps that moved more voters from one district to another. *Johnson II*, 2022 WI 14, ¶ 7, 400 Wis. 2d 626, 971 N.W.2d 402.

Moreover, the Plaintiffs' claim overlooks critical distinctions between the Congressional maps at issue here and the state legislative maps challenged in *Clarke*. The congressional maps in *Johnson II* were not merely the product of a "least change" mandate in isolation; the Supreme Court, in fact, independently confirmed the Congressional maps full compliance with all constitutional and statutory criteria, including population equality, contiguity, and traditional redistricting principles such as core retention and preservation of communities of interest—principles rooted in decades of caselaw undisturbed by *Clarke*. No independent infirmity is alleged to exist in these maps, as existed with the noncontiguous "municipal islands" on the state legislative maps invalidated in *Clarke*.

Further, although their claim is brought as a violation of the "separation of powers," Plaintiffs have no basis for their novel claim that minimizing voter disruption equates to an unconstitutional separation of powers problem. The Court exercised judicial power, not legislative or executive power. The Plaintiffs disagree with the Supreme Court's reasoning but never explain how the Supreme Court's decision interfered with the power of another branch of government.

As the Johnson Intervenors-Defendants demonstrate herein, and in our concurrently filed Motion to Dismiss, Plaintiffs fail at every turn. Their claim, on which this motion for judgment on the pleadings is based, states no cognizable violation of separation of powers; even if it did, material factual disputes preclude judgment on the pleadings. This Panel should deny Plaintiffs' Motion for Judgment

on the Pleadings and preserve the stability that Wisconsin voters and the rule of law deserve and demand.

BACKGROUND

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. Only at that time "the legislature drew maps, [and] the governor vetoed them[.]" *Johnson v. Wisconsin Elections Comm'n*, 2021 WI 87, ¶2, 399 Wis. 2d 623, 967 N.W.2d 469 ("*Johnson I*"). To resolve this impasse, the Wisconsin Supreme Court agreed to exercise its original jurisdiction to hear the case. *Johnson I*, 2021 WI 87, ¶6.

In the *Johnson* litigation, when the Supreme Court reviewed the then-malapportioned 2011 maps (following the 2020 census), the Court stated that it would "remedy that malapportionment, while ensuring the maps satisfy all other constitutional and statutory requirements." *Johnson I*, 2021 WI 87, ¶4. The Court began by first rejecting any partisan gerrymandering claims (the same claims brought in this action) 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, 59–60, 62 (concluding that Wis. Const. Art. I, §§ 1, 3, 4, and 22 do not provide justiciable standards for partisan gerrymandering).

Then, in *Johnson II*, the Wisconsin Supreme Court adopted Governor Evers' proposed maps finding that they "move[d] the fewest number of people into new districts" from Wisconsin's most recently adopted 2011 map. *Johnson II,* 2022 WI 14, ¶ 19.

What ensued from there has been a multi-year effort to reverse the Supreme Court's adoption of those maps. First, in January of 2024, several intervenors in the original *Johnson* litigation filed what they called a "Motion for Relief from Judgement" arguing that, in light of *Clarke*, the adoption of Congressional maps in *Johnson II* should be overturned and new maps should be selected. Motion for Relief from Judgment, *Johnson v. WEC*, No. 21AP1450-OA (Jan. 16, 2024). That motion was denied. Order Denying Motion for Relief from Judgment, *Johnson v. WEC*, No. 21AP1450-OA (Mar 1, 2024).

Last year, two separate petitions for original actions were filed with the Supreme Court. *See* Pet. for Original Action, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (filed May 7, 2025); Pet. for Original Action, *Felton v. Wis. Elections Comm'n*, No. 2025AP999-OA (filed May 8, 2025). The *Bothfeld* petition, brought by several of the same Plaintiffs here, is nearly identical in form to this action. The *Felton v. WEC* petition similarly sought to throw out the *Johnson* congressional map and replace it with something new. Both petitions were unanimously denied by the

Wisconsin Supreme Court. *Bothfeld v. WEC*, No. 2025AP996-OA (original action petition denied June 25, 2025); *Felton v WEC*, No. 2025AP999-OA (same).

Following those failed attempts, Plaintiffs filed this action in Dane County Circuit Court on July 21, 2025. (Dkt. 9). On July 22, 2025, the Dane County Clerk of Courts notified the Supreme Court of the filing and informed the Court that an action was filed under 801.50(4m) and requested that the Court appoint a panel consisting of 3 circuit court judges to hear the case.

This panel was appointed and now faces some extremely difficult challenges, including: (1) How can this Court proceed with a partisan redistricting challenge when the Supreme Court has held that such a challenge is non-justiciable? And (2) How can this Court rule that the Supreme Court committed legal error in *Johnson II* and determine that the error was so egregious as to somehow represent a separation of powers violation?

The Wisconsin Supreme Court is "the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). "Neither [the court of appeals] nor the circuit court may overrule a holding of our supreme court." *State v. Arberry*, 2017 WI App 26, ¶5, 375 Wis. 2d 179, 895 N.W.2d 100.

Likewise, lower courts have "no power to vacate or set [ ] aside" a judgment of the Supreme Court, *Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶ 50, 303 Wis. 2d 94, 735 N.W.2d 418 (quoting *Hoan v. J. Co.*, 241 Wis. 483, 485, 6 N.W.2d 185 (1942)), or do anything that "conflict[s] with the expressed or implied mandate of the

appellate court." *Id.* ¶ 32. If a party believes an order of the Supreme Court warrants modification, the proper vehicle is a motion, filed with the Supreme Court, to amend its judgment. *Id.* ¶ 48. As noted above, that was already tried—by the same lawyers in this case—and was denied. Order Denying Motion for Relief from Judgment, *Johnson v. WEC*, No. 21AP1450-OA (Mar 1, 2024).

Because this Court does not have the legal authority to grant the legal relief the Plaintiffs want, the Court cannot grant Plaintiffs' motion for judgment on the pleadings.[2] But in the rest of this brief, we will show that the Plaintiffs are not entitled to judgment on the pleadings even if this Court could consider the issue.

STANDARD OF REVIEW

Wisconsin Stat. § 802.06(3) governs motions for judgment on the pleadings. "A judgment on the pleadings is essentially a summary judgment minus affidavits and other supporting documents. Thus, a motion for judgment on the pleadings contemplates the first two steps of summary judgment methodology. We first examine the complaint to determine whether a claim has been stated. If so, we then turn to the responsive pleading to determine whether material factual issues exist." *Com. Mortg. & Fin. Co. v. Clerk of Cir. Ct.*, 2004 WI App 204, ¶ 10, 276 Wis. 2d 846, 689 N.W.2d 74.

[2] As the Johnson Intervenors explain in our Motion to Dismiss filed simultaneously with this response, the Plaintiffs' claims are also an improper collateral attack on a judgment of the Supreme Court, barred by laches, and granting the relief they seek would violate federal law and the U.S. Constitution.

ARGUMENT

Plaintiffs' motion for judgment on the pleadings is limited to their first claim for relief, alleging that the Supreme Court's adoption of the current Congressional maps in *Johnson II* was a violation of the separation of powers. *See* Dkt. 43 (moving for judgment on the pleadings "as to Count I in their Complaint."). First, they fail to state a claim on which relief could be granted. Second, even if they did, factual issues necessarily exist in this case and so the motion is improper and must be denied.

I. Claim I fails to state a claim, and the motion should be denied.

As to the first step of a judgment on the pleadings analysis, the Court looks to the complaint to determine if a claim has been stated.

Plaintiffs' first claim (and the only claim they seek Judgment on the pleadings on) is based on the Wisconsin Constitution's separation of powers doctrine. Plaintiffs argue that the separation of powers doctrine was violated because "the Wisconsin Supreme Court improperly substituted the partisan judgment that prevailed in the 2011 political process for its own." Compl., Dkt. 9, ¶ 80. But that's simply incorrect. In *Johnson*, separate from considering a "least changes" criterion, the Court *also* found the map complied with *all* state and federal laws, and there is no separation of powers claim that can be made here.

A. The Congressional maps adopted by the Supreme Court comply with all state and federal laws and eliminating the "least change" mandate does not change that.

First, the congressional maps adopted by the Wisconsin Supreme Court comply with all state and federal laws. Plaintiffs do not attempt to claim otherwise. Instead, Plaintiffs misapply *Clarke*, to argue that it requires throwing out of the Congressional

maps – something the Supreme Court, itself, has explicitly declined to do multiple times.

The "least changes" approach applied as part of the *Johnson* court's remedial process sought the minimum modifications necessary to the existing maps in state law to achieve compliance with legal requirements for districts (e.g., population equality, contiguity, and federal law). This approach aimed to promote judicial restraint and respect the political branches' policy choices, not to replace them.

The Supreme Court's opinion in *Clarke* overruled "any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach." *Clarke*, 2023 WI 79, ¶63 (emphasis added). Of course, overturning a mandate is a far cry from saying a legal principle may never be used and has itself become unlawful. And that understanding makes sense as the principles underlying "least changes" are equally relevant under other traditional redistricting criteria. In eliminating the "mandate" for "least change" in *Clarke*, the Supreme Court made clear that "no majority of the court agreed on what least change actually meant, the concept amounted to little more than an unclear assortment of possible redistricting metrics." *Clarke*, 2023 WI 79, ¶61. But in *Johnson II*, the Court made clear exactly which redistricting metric it was going to use: core retention. *Johnson II*, 2022 WI 14, ¶7 ("With only eight districts, core retention—a measure of voters who remain in their prior districts—is the best metric of least change . . .").

Core retention is undisputedly an element of traditional redistricting principles, and it is widely acknowledged that a goal of core retention is moving as

few voters as possible into new districts and that doing so serves legitimate state interests. *See, e.g., Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758, 764, 133 S.Ct. 3, (2012); *see also Karcher v. Daggett*, 462 U.S. 725, 740, 103 S.Ct. 2653 (1983).

Other Courts have acted similarly. Without mentioning "least changes" as a legal requirement and long before the Wisconsin Supreme Court articulated it in *Johnson*, the U.S. District Court panel in the 2002 redistricting litigation noted that it "undertook its redistricting endeavor in the most neutral way it could conceive—by taking the 1992 reapportionment plan as a template and adjusting it for population deviations." *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at * 7 (E.D. Wis. May 30. 2002), amended, No. 01-C-0121, 2002 WL 34127473 (E.D. Wis. July 11, 2002). Other courts have done similar. *Prosser v. Elections Bd.*, 793 F. Supp. 859, 870–71 (W.D. Wis. 1992) (basing its court-drawn plan on the "two best submitted plans," and "creat[ing] the least perturbation in the [current] political balance of the state."); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F.Supp.2d 840, 849, 852 (E.D. Wis. 2012) (moving the fewest number of people and minimizing senate disenfranchisement is preferable). But Plaintiffs' position is that applying these long-standing principles amounts to a violation of the separation of powers. That's nonsense.

But we need not stop there. Maintaining communities of interest is another traditional redistricting principle that implicates a "least changes"-like approach. Many communities of interest have voted together for extended periods of time and keeping those communities together in newly adopted maps during a

reapportionment is facilitated by making the fewest changes necessary to the existing map. *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 636 (E.D. Wis. 1982) ("Closely related to the goal of maintaining the integrity of county and municipal lines is the objective of preserving identifiable communities of interest in redistricting.").

Courts must follow and apply such traditional and long-implemented redistricting principles, regardless of whether any "least changes" approach has been considered or not. The result of adopting maps under those traditional redistricting principles is not a violation of the separation of powers, but rather the application of long-standing judicial precedent reflective of the judiciary's limited role in the redistricting process. This is why our Supreme Court, separately and independently, determined that the Congressional maps adopted in that case complied with *all other* state and federal laws. *Johnson II*, 2022 WI 14, ¶ 25.

Another important distinction between these Congressional maps and the state legislative maps challenged in *Clarke* is that the Congressional maps here fully comply with the law, whereas the state legislative maps challenged in *Clarke* were found to be noncontiguous due to the existence of "municipal islands." But unlike those state maps in *Clarke*, there is no independent constitutional infirmity with Wisconsin's Congressional maps, and Plaintiffs have alleged none. Plaintiffs simply want this Panel to impose its will over that of the Supreme Court.

There is no basis in the law for such a request, and the motion for Judgment on the Pleadings should be denied.

B. There is no cognizable separation-of-powers claim that could be brought.

Clarke came before the Wisconsin Supreme Court on a petition for leave to file an original action challenging the state legislative districts adopted by the court in the *Johnson* litigation. The Petitioners in *Clarke* initially brought three claims: (1) a partisan gerrymander claim; (2) a "contiguity" claim against the court-adopted state legislative districts; and (3) a separation of powers claim. The Court granted the Petition in part and took the case on claims 2 and 3 only.

Ultimately, the Supreme Court decided the case entirely on the contiguity issue and never reached the separation of powers issue at all. *Clarke*, 2023 WI 79, ¶ 3, n.8. Plaintiffs here try to revive that claim and apply it to the state's Congressional maps, asking this panel to overturn the Supreme Court's judgment on those maps. Plaintiffs frame this as a "separation of powers" violation. But they do not cite any conflict between any of the branches of government, instead they argue that the Wisconsin Supreme Court decision in *Johnson* amounts to "acquiescing to the partisan goals embedded in a prior decade's districting map" and "abdicates" the core judicial power. Dkt 44:10. But that's wrong for several reasons.

First, to succeed on separation of powers argument, the challenger must demonstrate that the judicial action invaded the exclusive core powers of the legislative or executive branch, or that it "unduly burden[ed] or substantially interfere[d] with either branch" such that the Supreme Court's decision "has impermissibly intruded on the constitutional power of the other branch." *State v.*

Horn, 226 Wis.2d 637, 645, 594 N.W.2d 772 (1999). Only then is there a separation of powers violation. *Id.*

For example, the Wisconsin Supreme Court has identified the legislative process itself and internal legislative procedures as exclusive to the legislative branch. *See, League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, 387 Wis.2d 511, 929 N.W.2d 209 (2019). Any judicial interference with these exclusive legislative powers would violate separation of powers under Wisconsin law, but nothing like that is alleged here.

Plaintiffs have cited no Wisconsin case law supporting the notion that a prior decision of the Supreme Court violates the separation of powers doctrine when it did not interfere with any legislative or executive power. That is not surprising because that is simply not how the separation of powers doctrine works.

Further, neither Wisconsin nor federal law imposes a duty to consider partisan fairness in the way the Plaintiffs seek, and so failing to do so could not trigger any kind of separation of powers violation. The *Johnson* Court's decision *not* to consider partisan outcomes was not an abdication of its duties, but instead an appropriate acknowledgement of the proper limited role of the judiciary and the reality that partisan fairness claims are nonjusticiable.

Instead, what the Supreme Court did in *Johnson* was entirely consistent with the proper role of the judiciary to fix the identified constitutional violation and to do nothing more. *Gill v. Whitford*, 585 U.S. 48, 138 S. Ct. 1916, 1930 (2018) ("[A] plaintiff's remedy must be 'limited to the inadequacy that produced [his] injury in

fact.'") (citation omitted); *Serv. Emps. Int'l Union Loc. 1 v. Vos*, 2020 WI 67, ¶ 47, 393 Wis. 2d 38, 946 N.W.2d 35 ("It goes to the appropriate reach of the judicial power to say what the law is, and to craft a remedy appropriately tailored to any constitutional violation."); *State ex rel. Memmel v. Mundy*, 75 Wis. 2d 276, 288–89, 249 N.W.2d 573 (1977) ("The extent of an equitable remedy is determined by and may not properly exceed the effect of the constitutional violation.").

Even if this Court disagrees with that view of judicial restraint, it is not this Court's role to correct the Supreme Court and it is definitely not a separation of powers issue.

II. Alternatively, if Claim I does state a claim, then material factual issues exist as to that claim, and so the motion should be denied.

In addition to the legal authority issue raised above and the conclusion that there is no genuine separation of powers issue here, Plaintiffs' motion for judgment on the pleadings must be denied based upon the numerous contested factual assertions on which its claim depends.

Plaintiffs argue that the Wisconsin Supreme Court in selecting the Congressional maps in *Johnson* had "improperly substituted the partisan judgment that prevailed in the 2011 political process for its own." Dkt. 9, ¶80. But that claim necessarily involves a host of factual allegations and disputes, including but not limited to: (1) were there partisan judgments that prevailed in 2011?; (2) What were those alleged partisan judgments?; (3) Were the individual justices on the Supreme Court in *Johnson* aware of any such alleged partisan judgments and, if so, how did that affect their decision?; (4) How do the alleged partisan judgments affect the maps

as they exist today? These claims are based on facts by the Plaintiffs that were alleged and denied by the Johnson Intervenors. *Compare, e.g.,* Compl., Dkt. 9, ¶ 1, 2, 11, 42, 82 to Ans., Dkt. 120 (denying those same paragraphs).

When the federal court panel reviewed those 2011 Congressional maps, they noted that the congressional maps were the product of a "bipartisan process" that "incorporate[d] … feedback" from Democratic and Republican members of Congress, "avoided putting incumbents together in the same district," and "did not flip districts from majority-Democrat to majority-Republican or *vice versa*." *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 854 (E.D. Wis. 2012) (per curiam) (emphasis in original).

Are those findings by that panel to be relitigated here, fifteen years after the fact? Apparently so, if the Plaintiffs are allowed to proceed, but the point is that they will have to be relitigated for the Plaintiffs to prevail and that means a trial and not judgment on the pleadings.

Plaintiffs' "separation of powers" claim is legally unsound, and even if it were allowed to move forward, would still be inappropriate for judgment on the pleadings because it would require substantial factual development.

CONCLUSION

This Court should deny the motion for judgment on the pleadings.

Dated: January 12, 2026

Respectfully Submitted,

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