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Supreme Court of Wisconsin

No. 2026AP1168

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

Plaintiff-Appellants,

vs.

WISCONSIN ELECTIONS COMMISSION; MARGE BOSTELMANN, ANN S. JACOBS, DON MILLIS, ROBERT F. SPINDELL, JR., CARRIE RIEPL, and MARK L. THOMSEN, 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,

Defendant-Respondents, and

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

Intervenor-Defendant-Respondents.

On Appeal from Dane County Circuit Court
The Honorable Julie Genovese, Mark Sanders, and Emily Lonergan
Dane County Case No. 2025-CV-2432

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STATEMENT OF THE ISSUES PRESENTED

1. Whether Wisconsin's congressional map, which this Court adopted based on the now-repudiated "least-change" criterion that required it to violate its duty to exercise neutral and independent judgment, violates the Wisconsin Constitution's separation of powers. The trial court held that only the Wisconsin Supreme Court can review its own adopted map.

2. Whether the Wisconsin Constitution permits the systematic sorting of voters into congressional districts based on their political affiliation, to the advantage of one political party over another. The trial court held that it was foreclosed from adjudicating such claims by this Court's precedent, even though the Court recently described the propriety of partisan gerrymandering as an "important and unresolved legal question" under Wisconsin law.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is scheduled for September 16, 2026. Any opinion should be published given the issues of public significance raised in this appeal.

INTRODUCTION

Five years ago, this Court committed a grave error. Tasked with adopting new congressional and state legislative maps, the Court declined to fulfill its duty to exercise neutral and independent judgment and instead chose to prioritize—over all else—making the least change possible to maps previously adopted by the political branches and widely recognized to be skewed in favor of Republican candidates. To no one's surprise, the resulting maps selected on that so-called "least change" criterion proved to be some of the most biased in the country,

systematically advantaging Republican voters at the direct expense of Democratic voters. The Court, to its credit, quickly realized this error, overturned the precedents adopting "least change," and paved the way for new state legislative maps that avoided entrenching one political party over the other. But that course correction remains incomplete: the skewed congressional map, selected under the same now-repudiated criterion as the defunct state legislative maps, remains in effect, to the ongoing detriment of Wisconsin voters.

Plaintiffs' primary claim seeks the straightforward application of this Court's controlling precedent in *Clarke v. Wisconsin Elections Commission*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.3d 370, to Wisconsin's current congressional map. The panel below believed it was powerless to do so—it held that "only the Wisconsin Supreme Court" can review and enjoin a map that it adopted. That conclusion is wrong. But even if it were not, the Court should heed the call and finish what it started: It should hold that Wisconsin's congressional map was selected based on a criterion that required this Court to abandon its role as a neutral and independent institution, in violation of the Wisconsin Constitution's separation of powers, and so must be replaced with a new map selected in accordance with traditional redistricting criteria. While many other states have redrawn congressional maps this year to seek maximal partisan advantage, Plaintiffs here seek the opposite—fair districts, drawn according to neutral criteria and this Court's binding precedent, that avoid extending the judicial imprimatur on any unearned advantage to either party.

Plaintiffs' purely legal separation-of-powers claim is ripe for judgment as a matter of law; it requires no fact-finding, no new legal

standards, and no further merits proceedings on remand or before this Court. Nor does it require the Court to decide whether the Wisconsin Constitution tolerates partisan gerrymandering by the political branches—whatever those branches may be permitted to do, the judiciary must not make the political branches' partisan scheming its own when it is called into the redistricting fray. All Plaintiffs' separation-of-powers claim requires is that this Court apply the principles it already enunciated in *Clarke* to the Court-adopted congressional map. Once the Court does so, it will become clear that the congressional map must be enjoined.

Reversal on the separation-of-powers claim would obviate any need for this Court to address Plaintiffs' partisan gerrymandering claims. But if the Court does review those claims, it should make clear that the Wisconsin Constitution does not permit district lines to be drawn to maximize the electoral influence of the supporters of one political party while diluting the influence of supporters of another. Adjudicating these claims is straightforward, as sister courts across the country have confirmed.

The decision below should be reversed. Judgment should be entered in favor of Plaintiffs on their separation-of-powers claim, and the Wisconsin Elections Commission and its members should be permanently enjoined from administering elections under the current congressional map after 2026. Alternatively, the Court should reverse the dismissal of Plaintiffs' partisan gerrymandering claims and remand for further proceedings.

STATEMENT OF THE CASE

I. The Court selected congressional and state legislative maps with the "least change" from highly skewed maps previously adopted by the political branches.

In 2011, Wisconsin's Republican-controlled legislature and Republican governor enacted a congressional map designed to "maximize the chances for Republicans to be elected." *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 846 (E.D. Wis. 2012). Their plan bore fruit: over the following decade, Republicans consistently secured a disproportionate share of congressional seats relative to their statewide vote totals. Compl. ¶¶ 43–44. Traditional measures of partisan fairness, including the efficiency gap (a metric that quantifies the percentage of "wasted" votes), revealed a significant partisan bias far surpassing what could be attributed to Wisconsin's natural political geography. *Id.* ¶ 45.

By 2021, voters had had enough. The Democratic Governor—elected on a promise to end the Republicans' partisan gerrymandering—vetoed an attempt by the Republican-controlled legislature (itself a creature of the skewed maps) to perpetuate the same partisan advantage with newly gerrymandered congressional and legislative maps. *See Johnson v. Wis. Elections Comm'n ("Johnson I"),* 2021 WI 87, ¶¶ 4, 9, 399 Wis. 2d 623, 967 N.W.2d 469. Since population changes reflected in the 2020 census rendered the old maps malapportioned, and the legislative process failed to correct that constitutional defect, the task of adopting new maps fell to this Court. *See id.* ¶ 20.

The Court's initial task was to determine the criteria that it would use to select new maps. First, the Court forswore any consideration of

districts' partisan composition. *Id.* ¶ 39. Second, it pledged to adopt maps that made the "least change" to the district configurations enacted in 2011. *Id.* ¶¶ 72–73. The Court was well aware of the inevitable result of prioritizing least-change above all else: It acknowledged widely held concerns that the 2011 maps were infected with partisan bias, but dismissed concerns that using those maps as "a starting point perpetuates a partisan gerrymander." *Id.* ¶ 76. Three Justices urged a different course, warning that having "stepped out of our traditional judicial role and into 'the political thicket' of redistricting, it is vital that this court remain neutral and nonpartisan." *Id.* ¶ 88 (Dallet, J., dissenting). But the majority nonetheless chose to prioritize adherence to the 2011 maps, which "all but guarantee[d]" that the Court would not remain faithful to its institutional obligations. *Id.*

As a result, what the Republican-controlled Legislature could not accomplish through the political process, it wound up achieving through the courts. With "least change" as its guide, the Court ultimately adopted a new congressional map that almost perfectly replicated the Legislature's gerrymandered map from 2011—94.5% of Wisconsin's voters were reassigned to their then-existing congressional district. *See Johnson v. Wis. Elections Comm'n* ("*Johnson II*"), 2022 WI 14, ¶ 7, 400 Wis.3d 626, 971 N.W.3d 402, *rev'd on other grounds sub nom.*, *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398 (2022); *see also id.* ("The first question is which map most complies with our least-change directive.").[1] The Court likewise adopted state legislative maps that

[1] Although the selected map was submitted in litigation by the Governor, the Court had previously rejected the Governor's request to score maps according to partisan fairness. *See Johnson I*, 2021 WI 87, ¶ 76. Accordingly, all of the proposed

made "minimal changes" from the prior maps. *Johnson v. Wisconsin Elections Comm'n* ("*Johnson III*"), 2022 WI 19, ¶ 3, 401 Wis.3d 198, 972 N.W.2d 559.

As anticipated, nonpartisan evaluators ranked the congressional map adopted by this Court as one of the most distorted in the nation. One organization reviewed four different objective metrics of partisan fairness and found on each one that the map was more skewed than almost any other state's; another neutral evaluator graded the map's partisan fairness with an "F." Compl. ¶¶ 69–70, 72. The partisan skew is also exhibited by the map's efficiency gap, which is nearly *twice* as high as the 2011 map's—itself the most biased congressional map Wisconsin had seen in modern history. *Id.* ¶¶ 68, 71.

It is thus no surprise that Republicans expanded their majority in the State's congressional delegation upon implementation of the Court's least-change map, capturing six of the eight seats in both the 2022 and 2024 general elections, even though approximately half of Wisconsinites voted for Democrats in those elections. *Id.* ¶¶ 73–74. In short, constricted by its commitment to least-change, the Court adopted a congressional map that preserved—and intensified—the 2011 partisan skew.

II. The Court acknowledged its mistake and overruled the least-change criterion.

The state legislative maps lasted only a single election cycle. In 2023, in adjudicating a challenge to those maps' compliance with the

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congressional maps submitted for review in *Johnson* were skewed by the least-change mandate, in contravention of the Governor's and other parties' preferences, and the map submitted by the Governor pursuant to that mandate scored highest on "core retention," which the majority deemed "the best metric of least change." *Johnson II*, 2022 WI 14, ¶ 7.

state Constitution, the Court expressly "overrule[d] any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach." *Clarke*, 2023 WI 79, ¶ 63. The Court recognized that the least-change standard did not comport with "other requirements and considerations essential to the mapmaking process," many of which derive from constitutional and statutory requirements: equalizing population size, following county and other local boundary lines, ensuring contiguity and compactness, complying with federal law, avoiding municipal splits, preserving communities of interest, and minimizing partisan skew. *Id.* ¶¶ 62, 64–69. These "traditional districting criteria," the Court explained—and not adherence to maps previously adopted by the political branches—must guide the judiciary whenever it is called upon to select new districting maps. *Id.* ¶¶ 64–69.

The Court also held that *Johnson I*'s "politically mindless" commitment to the least-change criterion violated the judiciary's duty to serve as a "politically neutral and independent institution." *Id.* ¶ 71 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)). It explained that while the legislative and executive branches are "political by nature," the judicial branch must "remain politically neutral" to avoid producing "grossly gerrymandered results." *Id.* ¶¶ 70–71. Further repudiating *Johnson I*, the Court ruled that the judiciary *must* consider partisan impact to avoid "enact[ing] maps that privilege one political party over another." *Id.* ¶ 70. In other words, "judges should not select a plan that seeks partisan advantage . . . even if they would not be entitled to invalidate an enacted plan that did so." *Id.* (quoting *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 12, 249 Wis. 2d 706, 639 N.W.2d 537). Ultimately, the Court held, "[w]e cannot allow a judicially-created

metric, not derived from the constitutional text, to supersede the constitution." *Id.* ¶ 62.

The Court enjoined the use of the state legislative maps for the 2024 elections, *id.* ¶ 77, and the political branches eventually agreed to remedial maps. But since only the state legislative maps were before the Court in *Clarke*, Wisconsin's congressional map—selected based on the same improper criterion as the state legislative maps—remained in force.[2]

III. Plaintiffs seek to replace the congressional map that was adopted based on the now-repudiated least-change criterion.

In May 2025, Plaintiffs here petitioned the Wisconsin Supreme Court for leave to commence an original action challenging the State's highly skewed congressional map. The petitioners argued an original action was warranted because the Court's prior adoption of the current congressional map "delivered the Republican Party an astounding advantage that even the political process could not deliver" through adherence to a least-change criterion that had since been overruled. Memorandum of Law Supporting Petition for Original Action at 13, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (Wis. May 7, 2025). The petitioners pointed out that the Court acknowledged the mistake with respect to Wisconsin's state legislative maps and thus urged the Court to "complete the course correction" by enjoining the

[2] On January 16, 2024, certain intervenors in *Johnson* sought to re-open those proceedings in light of *Clarke*; the Court denied the intervenors' motion without comment, with Justice Protasiewicz declining to participate because she "was not a member of the [*Johnson*] court." Order of Justice Protasiewicz Declining to Participate and Denying Recusal Motion at 1, *Johnson v. Wis. Election Comm'n*, No. 2021AP1450-OA (Wis. March 1, 2024).

continued use of the State's congressional map. *Id.* The Court denied the petition without comment. *See* Order at 2, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (Wis. June 25, 2025).[3]

Shortly thereafter, Plaintiffs brought the underlying action in Dane County Circuit Court challenging Wisconsin's congressional map. Plaintiffs raised two independent sets of claims. *First*, they alleged that the congressional map violates the separation of powers and is unlawful because it was drawn based on the least-change criterion subsequently repudiated by this Court. Compl. ¶¶ 76–82 (citing *Clarke*, 2023 WI 79, ¶¶ 62–63). In other words, irrespective of whether the *political branches* could have validly enacted the challenged congressional map, Plaintiffs alleged it was improper for *the Court*—a neutral and independent institution—to select that map based on blind deference to the political branches. *Second*, Plaintiffs alleged that the congressional map is an unconstitutional partisan gerrymander because it "impermissibly disadvantages voters based on their political views and partisan affiliation" in violation of the Wisconsin Constitution's guarantees of equal protection, free speech and association, and free government. *Id.* ¶¶ 1, 83–97.

[3] The denial of a petition for original action generally has no precedential value. *See Petition of Heil*, 230 Wis. 428, 448, 284 N.W. 42 (1938) ("[A]pplications to this court for the exercise of its original jurisdiction which are denied, of which there have been a goodly number, do not for obvious reasons find their way into the reports save in a few exceptional cases.").

Plaintiffs petitioned this Court on July 22, 2025, to appoint a three-judge court to hear the matter under Wis. Stat. § 751.035, which governs actions like this one that "challenge the apportionment of any congressional or state legislative district," Wis. Stat. § 801.50(4m). The Court empaneled the court below on November 25, 2025. Order, *Bothfeld v. Wis. Elections Comm'n*, No. 2025XX1438 (Wis. Nov. 25, 2025).

Plaintiffs moved for judgment on the pleadings on their purely legal separation-of-powers claim, arguing they were entitled to judgment as a matter of law based on this Court's decision in *Clarke* overruling the least-change criterion that was indisputably used to select the challenged congressional map. *See* Mem. Supp. Pls.' Mot. for J. on the Pleadings at 8–9, *Bothfeld v. Wis. Elections Comm'n*, No. 25CV2432 (Dane Cnty. Cir. Ct. Sept. 5, 2025). As Plaintiffs explained, their separation-of-powers claim was ripe for judgment as a matter of law because it required no fact-finding—indeed, "[t]he facts relevant to th[at] motion are beyond dispute and set forth in judicially noticeable court decisions." *Id*. at 3. Plaintiffs did not move for judgment on their partisan gerrymandering claims, which they intended to support with expert reports in due course.

The panel ultimately denied Plaintiffs' motion for judgment on the pleadings and instead granted motions to dismiss filed by three groups of intervenor-defendants. *See* App.4, Order Granting Mot. Dismiss, No. 2025CV2432, *Bothfeld v. Wis. Elections Comm'n* (Dane Cnty. Cir. Ct. Mar. 31, 2026).[4] On Plaintiffs' separation-of-powers claim, the panel

[4] The named Defendants—the Wisconsin Elections Commission and its commissioners and administrator—have taken no position on Plaintiffs' claims. The three groups of Intervenor-Defendants are (i) Republican Congressmen Glenn

opined that its hands were tied because "only the Wisconsin Supreme Court" can disturb a map that was adopted by that Court; the panel held a lower court "possesses no authority" to do so. App.10, 15. On Plaintiffs' partisan gerrymandering claims, the panel noted that it lacked "clear direction" from this Court as to justiciability, pointing to "differing approaches" to the issue in recent Wisconsin Supreme Court opinions. App.16–19. Though the panel emphasized that it "[wa]s not endorsing the current congressional map," it concluded it "cannot assume" partisan gerrymandering claims are justiciable in light of this Court's statements in *Johnson I*, and it thus dismissed those claims as well. App.20–21; *see also* App.20 (concluding "only the Wisconsin Supreme Court" can hold partisan gerrymandering claims are justiciable).

Plaintiffs noticed a timely appeal to this Court on May 15, 2026. *See* Wis. Stat § 751.035(3) ("An appeal from any order or decision issued by the panel assigned pursuant to sub. (1) may be heard by the supreme court and may not be heard by a court of appeals for any district."). Over a motion to dismiss by Johnson Intervenors, this Court accepted the appeal. Order at 1–2, *Bothfeld v. Wis. Elections Comm'n*, 2026AP1168 (Wis. June 11, 2026).

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; (ii) individual voters Billie Johnson, Chris Goebel, Aaron Guenther, Charles Hanna, Tim Higgins, Lou Kowieski, Chris Muller, Eric O'Keefe, Craig Rosand, Ruth Streck and Ronald Zahn ("Johnson Intervenors"); and (iii) the Wisconsin State Legislature.

ARGUMENT

I. The panel erred in dismissing rather than granting judgment for Plaintiffs on their separation of powers claim.

This Court has already repudiated the least-change principle on which the operative congressional map is based. "A court's adoption of a plan that represents one political party's idea of how district boundaries should be drawn," the Court explained, "does not conform to the principle of judicial independence and neutrality." *Clarke*, 2023 WI 79, ¶ 70 (quoting *Maestas v. Hall*, 2012-NMSC-006, ¶ 29, 274 P.3d 66). The straightforward application of *Clarke*'s holding resolves this appeal as a matter of law. Wisconsin's current congressional map was indisputably selected based on that now-defunct least-change criterion. *See Johnson II*, 2022 WI 14, ¶ 74 (requiring that the map "reflect the least change necessary" from the prior decade's plan). And because that "judicially-created metric not derived from the constitutional text" "cannot . . . supersede the constitution," *Clarke*, 2023 WI 79 ¶ 62, the congressional map chosen based on the now-unlawful criterion must be replaced with a new map free of any constitutional defect. This Court should reverse, clarify that *Clarke*'s constitutional reasoning applies to the current congressional map, and direct entry of judgment for Plaintiffs on their separation-of-powers claim.[5]

[5] As set forth below, *infra* §B.3, a ruling in Plaintiffs' favor on their separation-of-powers claim would resolve this case as a matter of law, obviate the need for further fact-finding or any further proceedings on either set of pending gerrymandering claims brought against the congressional map, and allow the case to proceed directly to the adoption of a new congressional map.

A. The least-change criterion used to select Wisconsin's congressional map violates the separation of powers.

Separation-of-powers principles inherent in Wisconsin's system of divided governance require the judiciary to independently exercise its authority. Wisconsin's Constitution "created three branches of government, each with distinct functions and powers, and the separation of powers doctrine is implicit in this tripartite division." *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 11, 376 Wis. 2d 147, 897 N.W.2d 384 (citation modified). The "judicial power" is vested in the Wisconsin courts, *id.* ¶ 46, and the separation-of-powers doctrine accordingly "prevents [courts] from abdicating [their] core power," *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 48, 382 Wis. 2d 496, 914 N.W.2d 21.

As this Court recently held, that power confers twin duties on the judiciary: to be "neutral and independent." *Clarke*, 2023 WI 79, ¶ 71; *see also Gabler*, 2017 WI 67, ¶ 46 (holding judiciary has "an exclusive responsibility to exercise independent judgment in cases over which [the judiciary] preside[s]"). But the methodology that spawned the current congressional map is neither neutral nor independent. First, by requiring courts to preserve the partisan effects of a prior map while refusing to consider partisan impact, least-change risks entrenching the very political choices the judiciary must avoid adopting as its own. Second, by making adherence to a prior political map the controlling objective, least-change displaces the court's responsibility to exercise independent judgment under constitutional and traditional redistricting criteria.

1. The least-change criterion is not neutral.

Ignoring partisan impact is not neutral. Quite the opposite: "it is not possible to remain neutral and independent by failing to consider partisan impact entirely." *Clarke*, 2023 WI 79, ¶ 71. To remain "neutral," courts have an affirmative duty to ensure the maps they adopt do not deliver unearned electoral windfalls to a political party. *Id.* Otherwise, a "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results." *Id.* (internal quotation omitted)*; see also Johnson I*, 2021 WI 87, ¶ 93 (Dallet, J., dissenting) ("[T]he least-change approach is not the 'neutral standard' the majority/lead opinion portrays it as. Rather, applying that approach to 2011's maps affirmatively perpetuates the partisan agenda of politicians no longer in power."); *Good v. Austin*, 800 F. Supp. 557, 566–67 (E.D. Mich. 1992) (analyzing "political fairness" of court-drawn plan because it was "apparent that a districting map devised entirely according to nonpolitical criteria could inadvertently result in a plan that unfairly favored one political party over the other").

The judiciary's duty to steadfastly avoid selecting maps with partisan bias is distinct from any dispute over the limits that apply to partisan gerrymandering by the political branches. As *Clarke* explained, "even if [courts] would not be entitled to invalidate an enacted plan" as a partisan gerrymander, courts themselves—when called to engage in redistricting—must still avoid "select[ing] a plan that seeks [a] partisan advantage." 2023 WI 79, ¶ 70 (quoting *Jensen*, 2002 WI 13, ¶ 12); *see also Prosser v. Elections Bd.*, 793 F. Supp. 859, 867 (W.D. Wis. 1992) (same). That is because courts' "political neutrality must be maintained regardless of whether a case involves an extreme partisan

gerrymandering challenge." *Clarke*, 2023 WI 79, ¶ 70. "Whatever role politics may legitimately play in the decisions and maneuverings of the legislative and executive branches, if those branches cannot reach a political resolution and the dispute spills over into" court, "the resolution must be judicial, not political." *Id.* (quoting *Peterson v. Borst*, 786 N.E.2d 668, 673 (Ind. 2003)); *Burling v. Chandler*, 148 N.H. 143, 156, 804 A.2d 471(2002) (devising its own redistricting plan because "[e]ach plan ha[d] calculated partisan political consequences").

In short: regardless of whether the political branches may draw maps for partisan advantage, the judiciary must carefully ensure it does not become complicit in such schemes. Maintaining a "non-partisan judiciary goes to the very core of democracy and to established principles of separation of powers." *Johnson III*, 2022 WI 19, ¶ 184, n.18 (Karofsky, J., dissenting). And it "should be beyond dispute that . . . a non-partisan court, cannot implement a map with blatantly partisan motivations." *Id.* (citing *Johnson II*, 2022 WI 14, ¶93 (Dallet, J., dissenting)).

2. The least-change criterion is not compatible with judicial independence.

Deferring to political actors no longer in office also abdicates the judiciary's responsibility to act with independence. This Court's duty to exercise independent judgment is especially important in redistricting cases, which require this Court to resolve disputes between the political branches.

When doing so, courts "must consider numerous constitutional requirements." *Clarke*, 2023 WI 79, ¶ 62; *see also id.* ¶¶ 64–69 (listing requirements). Since the least-change approach's guiding light is similarity to prior maps, it suppresses courts' independent consideration

of these "established districting requirements." *Id.* ¶ 63; *see also Johnson I*, 2021 WI 87, ¶ 88 (Dallet, J., dissenting) ("The upshot" of least change "is to elevate outdated partisan choices over neutral redistricting criteria."); *Carter v. Chapman*, 672 Pa. 172, 201–202, 270 A.3d 444 (2022) (applying "traditional core criteria" to adopt a map that is "superior or comparable" to all other submitted after being "thrust into the position of choosing a redistricting plan due to the political stalemate between the Legislature and the Governor"); *Hippert v. Ritchie*, 813 N.W.2d 391, 395 (Minn. 2012) (adopting a remedial plan by utilizing "redistricting principles that advance the interests of the collective public good and preserve the public's confidence and perception of fairness in the redistricting process"). A court cannot exercise the requisite independent judgment when it has committed itself in advance to a metric that substitutes a prior political map for constitutional analysis.

The least-change blinders to partisan fairness are even more harmful to the separation of powers when—as in 2021—the political branches fail to enact any map of their own. While some deference to the political branches may be appropriate when a court reviews a districting map enacted by the political branches, *see, e.g.*, *Graham v. Thornburgh*, 207 F. Supp. 2d 1280, 1296 (D. Kan. 2002), the case for deference disappears when there is no "recently enacted state plan to which" the court could defer, *Perry v. Perez*, 565 U.S. 388, 396 (2012) (explaining that where "there [i]s no recently enacted state plan to which the District Court could turn," a court is "perhaps compelled to design an interim map based on its own notion of the public good" (citing *Balderas v. Texas*, No. 6:01-CV-158, 2001 WL 36403750, at *3 (E.D. Tex. Nov. 14, 2001)

(considering "partisan outcome[s]" in devising congressional redistricting plan when political branches were at a stalemate), *summarily aff'd*, 536 U.S. 919 (2002))); *see also Hippert v. Ritchie*, 813 N.W.2d 374, 380 n.6 (Minn. 2012) (finding deference appropriate only to a redistricting plan "that has been duly enacted by the state's legislative and executive branches of government"). In other words, when the Court is not faced with the question of whether "some enacted plan [is] constitutional," but rather what plan the court should "promulgate in order to rectify the admitted constitutional violation," courts must seek the "best plan," not defer to the political branches. *Prosser*, 793 F. Supp. at 865.

Moreover, even if some deference to a decade-old map were warranted, excessive judicial deference violates the separation of powers. *See Tetra Tech*, 2018 WI 75, ¶ 63 (emphasizing that "[c]eding judicial power" by giving "great weight" deference to agencies is "from a separation of powers perspective, unacceptably problematic"). The deference embedded in the least-change criterion was clearly excessive: As *Clarke* observed, the *Johnson* Court did not follow a "cabined" view that treats least-change as one of many relevant factors but instead made least-change its "overarching approach" to redistricting. *Clarke*, 2023 WI 79, ¶ 62. That degree of judicial deference cannot be squared with the Wisconsin Constitution's separation of powers.

B. The panel had no basis to dismiss Plaintiffs' separation-of-powers claim.

The panel's refusal to apply *Clarke* to the current congressional map rested on three errors, each independently warranting reversal. First, contrary to the panel's understanding, *Clarke*'s repudiation of

least-change applies to all maps adopted pursuant to that methodology, including the current congressional map. Second, *Clarke* necessarily endorsed the constitutional principles underlying Plaintiffs' separation-of-powers argument, even if it did not use that precise terminology. Third, the panel possessed authority to assess the map adopted in *Johnson II* in light of this Court's explicit overruling of that opinion in *Clarke*. And even if it did not, this Court has undisputed authority to correct its own prior decision in this direct appeal.

1. This Court's disavowal of the least-change criterion applies to all judicially adopted remedial maps.

The panel's reluctance to apply *Clarke* reflected its confusion about that decision's scope. According to the panel, "[w]ithout a clear holding from the Wisconsin Supreme Court that the abandonment of the least-change methodology applies to more than the crafting of remedial maps, this Panel has no basis to find the current congressional map invalid." App.14. But the challenged congressional map *is* a remedial map, to which the *Clarke* holding indisputably applies. And *Clarke* is clear; remedial maps may not be based on least-change.

First, the fact that *Clarke* discussed least-change and partisan fairness in the "remedy" section of its order does not somehow immunize the map adopted in *Johnson*. *Contra id.* *Clarke* announced a rule for remedial proceedings, and *Johnson* violated that rule *in remedial proceedings*. *See Johnson II*, 2022 WI 14, ¶ 7 (adopting remedial map).

Second, there is no principled reason to confine *Clarke*'s rejection of least-change to *future* remedial proceedings. This Court explicitly overruled "any portions of *Johnson I*, *Johnson II*, and *Johnson III* that

mandate a least change approach." *Clarke*, 2023 WI 79 ¶ 63. There is no way to read the *Johnson* opinions as simultaneously overruled and permanently binding. And as long as the *Johnson* map remains in effect, it continues to present a live constitutional violation—inflicting ongoing harm every two years—requiring correction. *See Smith v. Clinton*, 687 F. Supp. 1310, 1313 (E.D. Ark. 1988) (recognizing that redistricting injuries are continuing, "suffered anew" with each election held under the unlawful map).

Third, *Clarke*'s invalidation of state legislative maps for violating the Constitution's contiguity requirement did not implicitly bless their separate violation of judicial neutrality and independence. *Clarke* had no need to enumerate an exhaustive list of defects with the challenged maps because such redundancy was not necessary to relieve plaintiffs' injury—whether the maps failed for one reason or many, they would need to be replaced. The Court's more comprehensive analysis necessarily followed in its discussion of how the judiciary should replace unlawful maps. There, it announced a clear rule against any commitment to least-change, explicitly "overrul[ing]" the application of least-change in *Johnson*. *Clarke*, 2023 WI 79, ¶ 63. No more was needed to convey that *Johnson*'s adoption of maps according to least-change was fatally defective.

2. *Clarke* endorsed the constitutional principles underlying Plaintiffs' separation-of-powers claim.

The panel's semantic objection that "the *Clarke* decision contains no separation-of-powers analysis," App.13, misses the substance. Indeed, in the same breath, the panel acknowledged that *Clarke* "emphasized the need for the judiciary to reach an independent judgment," *id.*, yet

suggested that because *Clarke* did not explicitly use the term "separation of powers," it somehow failed to address the constitutional principle Plaintiffs invoke. That reasoning puts far too heavy an emphasis on nomenclature.

"Separation of powers" is synonymous with the constitutional principles that *Clarke* clearly articulated: courts, "[u]nlike the legislative and executive branches, which are political by nature . . . must remain politically neutral," and accordingly "do not have free license to enact maps that privilege one political party over another." *Clarke*, 2023 WI 79, ¶ 70. *Clarke* further emphasized that "courts can, and should, hold themselves to a different standard than the legislature regarding the partisanship of remedial maps," and "[a]s a politically neutral and independent institution," must "take care to avoid selecting remedial maps designed to advantage one political party over another." *Id.* ¶ 71. These are foundational principles about the proper judicial role—precisely what separation-of-powers doctrine addresses. *Cf. Gabler*, 2017 WI 67, ¶¶ 38, 46 (establishing that the judiciary has "an exclusive responsibility to exercise independent judgment" as a matter of separation of powers and "a truly independent judiciary must be free from control by the other branches of government"); *Tetra Tech*, 2018 WI 75, ¶ 48 (holding that the separation of powers "prevents [the judiciary] from abdicating [its] core power").

3. The Court should direct the panel to grant judgment to Plaintiffs on their separation-of-powers claim.

In denying Plaintiffs' motion for judgment on the pleadings, the panel held that it could not "conclude on its own that our highest court

in the *Johnson II* decision violated the separation-of-powers doctrine." App.14. But that framing misunderstood the panel's task. Plaintiffs did not ask the panel to sit in review of *Johnson II* in the first instance. They asked the panel simply to apply this Court's later, controlling decision in *Clarke* to Wisconsin's current congressional map. And *Clarke* did not merely announce a prudential rule to apply future remedial proceedings; it expressly overruled *Johnson II* in the course of rejecting least-change as a permissible standard. When *Clarke* proclaimed that courts "cannot allow a judicially-created metric, not derived from the constitutional text, to supersede the constitution," *Clarke*, 2023 WI 79, ¶ 62, it did not add "except for the map adopted in the very *Johnson* litigation that we are overturning." The panel was therefore required to apply *Clarke*'s constitutional reasoning to the map adopted in *Johnson II*.

In any event, whether the panel erred in its assessment of its power to apply *Clarke* is now academic. *This Court* unquestionably has authority to apply its own precedent to the current map on direct appellate review. Whether the current congressional map was adopted and is being perpetuated in violation of the separation of powers is precisely the type of question this Court must address when reviewing whether the panel properly dismissed Plaintiffs' claims.

This Court should now clarify what follows from *Clarke*: when a judicially adopted redistricting plan subordinates constitutional and statutory criteria to the judicially created least-change metric, it cannot stand as an exercise of judicial redistricting authority and thus cannot be constitutionally enforced in future elections. Because this claim presents a pure question of law—whether Wisconsin's congressional map, adopted based on least-change, violates the separation of powers—

it is well-suited for definitive appellate resolution. *See McNally v. Cap. Cartage, Inc.*, 2018 WI 46, ¶ 24, 381 Wis. 2d 349, 912 N.W.2d 35 ("Whether judgment on the pleadings should be granted is a question of law we review independently of the determination made by the circuit court and court of appeals."). The proper result is therefore an order reversing the trial court's denial of Plaintiffs' motion for judgment on the pleadings and instructing the trial court to enter judgment for Plaintiffs on their separation-of-powers claim. *See, e.g.*, *Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶ 2 303 Wis. 2d 94, 735 N.W.2d 418 (when an appellate court affirms or reverses a trial court order, the trial court has "no authority to reopen the case" or take further action beyond implementing the mandate); *State ex rel. U.S. Cellular Operating Co. LLC v. Town of Fond du Lac*, 2025 WI App 21, ¶ 50, 415 Wis. 2d 720, 19 N.W.3d 627 (reversing denial of motion for judgment on the pleadings and remanding with directions to enter declaratory judgment). The trial court can then begin the process of selecting a new congressional map that comports with the Wisconsin Constitution for use in the 2028 elections. *See Clarke*, 2023 WI 79, ¶¶ 75–76 (setting forth roadmap for judicial adoption of constitutional redistricting maps).

II. The panel erred in dismissing Plaintiffs' partisan gerrymandering claims.

As with Plaintiffs' separation-of-powers claim, the panel concluded that this Court's precedents forbade it from reaching the merits of Plaintiffs' partisan gerrymandering claims. *See* App.20 (concluding the panel "cannot assume" partisan gerrymandering claims are justiciable in light of *Johnson I*). The panel was wrong—this Court recently affirmed that the propriety of partisan gerrymandering remains an

"important and unresolved legal question" under Wisconsin law. *Clarke*, 2023 WI 79, ¶ 7. If this Court declines to resolve this case in Plaintiffs' favor as a matter of law on their separation-of-powers claim, the Court should now answer that "unresolved legal question," confirm that the Wisconsin Constitution does not tolerate partisan gerrymandering, and remand to the district court to adjudicate Plaintiffs' partisan gerrymandering claims.

A. The panel's reliance on *Johnson I* was misplaced.

This Court has not settled the issue of partisan gerrymandering, and Plaintiffs' claims are not precluded by this Court's precedent. The Court has already repudiated the *Johnson I* statements that the panel referenced in concluding otherwise. *Clarke* affirmed that partisan gerrymandering "present[s] an important and *unresolved* legal question," but declined to address it because it would require "extensive fact-finding," not because it was deemed nonjusticiable. *Id.* ¶ 7 (emphasis added). The panel was, accordingly, wrong to conclude that Plaintiffs' partisan gerrymandering claims are precluded by existing case law.

B. The Wisconsin Constitution prohibits partisan gerrymandering.

Properly construed, multiple provisions of the Wisconsin Constitution—each of which provides an independent basis for relief—forbid drawing district lines to disadvantage voters based on their political beliefs and party affiliation.

Equal Protection. Partisan gerrymandering violates the Wisconsin Constitution's guarantee of equality under the law. That conclusion follows from the Constitution's first substantive guarantee: Article I, section 1 of the Wisconsin Constitution declares that "[a]ll

people are born equally free and independent"—a principle that has long been understood to condemn laws that arbitrarily favor one class of citizens over another. *Christoph v. City of Chilton*, 205 Wis. 418, 421–22, 237 N.W. 134 (1931). Properly read, that foundational command cannot permit the sorting of voters into districts to amplify one class of voters and diminish another. Wisconsin's founders made "equality before the law the very corner stone of their plan of government," preserving in Article I, section 1 an "emphatic protest against special privileges to any favored person or class." *Black v. State*, 113 Wis. 205, 218–19, 89 N.W. 522 (1902).

This guarantee applies with full force to voting rights. Article I, section 1 protects every individual's right to vote "in the same manner, at the same time, and with the same effectiveness" as other voters. *State ex rel. Binner v. Buer*, 174 Wis. 120, 127, 182 N.W. 855 (1921). From its earliest redistricting cases, this Court has emphasized "the rights of the people to have full effect given to the political power of each elector." *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 501, 51 N.W. 724 (1892) (Pinney, J., concurring). The right to vote includes "the right to make use of the vote in a most effectual manner." *Buer*, 174 Wis. at 134.

Accordingly, the Court has recognized a constitutional "right to secure equal representation." *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 55, 132 N.W.2d 249 (1965). In *Sylvester*, the Court invalidated a scheme under which "a small minority of citizens in many counties [could] control a majority of the votes cast," reaffirming that Wisconsin's equal protection clause rests on "the basic principle of equality among voters" and "the fundamental principle that representative government is one of equal representation." *Id.* at 47, 54–55. Vote dilution based on

geography or classification cannot be justified "within the constitutional restrictions of the equal-protection clause." *Id.* at 58; *see also La Crosse County v. City of La Crosse*, 108 Wis. 2d 560, 562, 322 N.W.2d 531 (Wis. Ct. App. 1982) (Wisconsin's equal protection clause guarantees "the right not to have one's vote diluted by the unequal distribution of state legislative seats.").

Partisan gerrymandering violates these settled principles by disadvantaging voters who favor a particular political party. That is why state courts across the country have applied similar equal protection principles in reading their state constitutions to prohibit partisan gerrymanders. *See, e.g.*, *In re 2021 Redistricting Cases*, 528 P.3d 40, 57, 92 (Alaska 2023) (recognizing that "partisan gerrymandering is unconstitutional" under "two principles of equal protection"—the right to an "equally weighted" vote and the right to an "equally powerful" vote) (citation omitted); *Grisham v. Van Soelen*, 2023-NMSC-027, ¶ 30, 539 P.3d 272, 284 (applying state equal protection clause and holding that "egregious partisan gerrymandering can effect vote dilution to a degree that denies individuals their inalienable right to full and effective participation in the political process" (citation modified)). Sorting Wisconsin voters into districts based on their partisan affiliation is fundamentally irreconcilable with the constitutional principle of equal protection under the law.

Free Speech and Association. Partisan gerrymandering also violates rights to free speech and association. Wisconsin's Constitution provides unusually robust protection for political speech and political association. Article I, section 3 guarantees that "[e]very person may freely speak, write and publish his sentiments on all subjects," and that

"no laws shall be passed to restrain or abridge the liberty of speech." Wis. Const. art. I, § 3; *State v. Pierce*, 163 Wis. 615, 619, 158 N.W. 696 (1916). Article I, section 4 separately protects "[t]he right of the people peaceably to assemble, to consult for the common good, and to petition the government." Wis. Const. art. I, § 4. This bundle of rights is sacrosanct and represents another "corner stone[]" of Wisconsin's democratic institutions. *Pierce*, 163 Wis. at 619.

Wisconsin courts have repeatedly emphasized that Wisconsin's free-speech guarantee is especially strong. It is "more definite and sweeping" than comparable provisions in other constitutions, *id.*, and political speech is "afforded the highest level of protection" because it is "the right most fundamental to our democracy," *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶¶ 44, 47, 363 Wis. 2d 1, 866 N.W.2d 165. These guarantees protect not only against outright bans on speech, but also against laws that "abridge"—that is, diminish or render less effective—the exercise of constitutional rights. *Pierce*, 163 Wis. at 619 ("The ordinary meaning of the word *abridge* is to diminish or to lessen[,] but not to cut off entirely.").

Partisan gerrymandering abridges speech and association. By design, it diminishes the effectiveness of political expression and political association based on viewpoint. Indeed, as Plaintiffs allege, the challenged congressional map ensures that voters who associate with and advocate for the disfavored political party are far less likely to be able to translate their speech, organizing, and votes into electoral success, while voters supporting the favored party enjoy amplified political power. Compl. ¶¶ 1–2, 67–75. The fact that disfavored voters may still speak, associate, and cast ballots does not cure the

constitutional injury; the government burdens speech when it deliberately renders that speech less effective because of its content or viewpoint. *See Johnson I*, 2021 WI 87, ¶ 108 (Dallet, J., dissenting) ("[T]he problem with extreme partisan gerrymandering isn't that it literally denies people the right to vote or run for office. It's that extreme gerrymandering distorts the political process so thoroughly that those rights can become meaningless.").

Disadvantaging voters in redistricting based on their political affiliation also burdens associational rights by undermining voters' ability to band together to elect candidates who represent their shared political views. Partisan gerrymandering "weakens [a party's] capacity to perform all its functions" by making fundraising, organizing, and candidate recruitment substantially more difficult for the disfavored group. *Gill v. Whitford*, 585 U.S. 48, 81 (2018) (Kagan, J., concurring). Wisconsin's Constitution does not permit the State to structure electoral districts to penalize political participation and association on a partisan basis.

Free Government Guarantee. Article I, section 22 of the Wisconsin Constitution declares that "[t]he blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." Wis. Const. art. I, § 22. This provision is not merely aspirational. For over a century, Wisconsin courts have read section 22 as an "'implied inhibition' against governmental action with which any legislative scheme must be in compliance," possessing "quite as much efficiency as would express limitations." *Jacobs v. Major*, 139 Wis. 2d 492, 509, 407 N.W.2d 832 (1987) (quoting

State ex rel. Milwaukee Med. Coll. v. Chittenden, 127 Wis. 468, 521, 107 N.W. 500 (1906)).

This Court has repeatedly relied on the Free Government Guarantee to invalidate legislation that departs from fundamental principles of justice or confers arbitrary advantages on favored classes. This Court's cases applying the Guarantee illustrate its scope and vitality. For instance, in *Christoph*, 205 Wis. at 420–21, the Court considered the constitutionality of a law granting "to owners of two hundred acres or more of agricultural lands located in cities of the fourth class the right or privilege to secede or to become detached from such cities," but denying that same right "to the owners of lands of like character, area, and location situated in cities of the first, second, or third classes." The Court held the Free Government Guarantee (along with Article I, section 1 of the Wisconsin Constitution) forbade legislation "based on a classification which is arbitrary and unreasonable." *Id.* at 420. It therefore struck down the statute as one granting "special privileges to a favored class." *Id.* at 421.

Similarly, in *Stierle v. Rohmeyer*, 218 Wis. 149, 152–53, 164–68 260 N.W. 647(1935), this Court held unconstitutional in part a statutory scheme imposing certain notice and affidavit filing requirements upon a mortgage holder seeking to redeem a chattel mortgage. The penalty for noncompliance was to render the mortgage fully satisfied and canceled—meaning that a mortgagee who filed an affidavit eighteen days late, and for a mortgage sale that recovered just a few hundred dollars, was to suffer discharge of a mortgage worth over $4,000. *Id.* at 152–53. Invoking Section 22 and several other provisions of the state and federal Constitutions, this Court held the extremely disproportionate forfeiture

rule unconstitutional. *Id.* at 167. The Court explained that, "[w]hen things so monstrous as this are contemplated as within the language of the statutory provisions under consideration, it behooves us to heed the admonitions of sec. 22, art. 1, of our state Constitution"—that is, of the Free Government Guarantee. *Id.*

Partisan gerrymandering is even more obnoxious to the notion of a free government than the schemes invalidated by the Court in *Christoph* and *Stierle*. By entrenching one political party in power and insulating it from electoral accountability, partisan gerrymandering abandons "justice, moderation, [and] temperance," Wis. Const. art. I, § 22, in favor of extreme partisan self-interest. It distorts elections so that outcomes are effectively predetermined, depriving citizens of meaningful participation in choosing their representatives and undermining the consent of the governed. *See Johnson I*, 2021 WI 87, ¶ 106 (Dallet, J., dissenting) (explaining that partisan gerrymandering "robs the people of their most important power—to select their elected leaders") (citing *The Federalist* No. 37, at 4 (James Madison)). Few acts more directly threaten "the blessings of a free government." Wis. Const. art. I, § 22. Section 22 exists precisely to guard against such "encroachment on the liberty and freedom of the citizens of this state." *Allen v. State*, 183 Wis. 323, 329, 197 N.W. 808 (1924).

C. Partisan gerrymandering claims are justiciable under the Wisconsin Constitution.

The Court should reject Intervenors' position below that courts should blind themselves to partisan gerrymandering because adjudicating these claims is simply too difficult. The Wisconsin Constitution forecloses this plea for self-imposed judicial helplessness by

mandating that "*[e]very person* is entitled to a certain remedy in the laws for *all injuries*, or wrongs," and justice must be administered "*completely and without denial*." Wis. Const. art. I, § 9 (emphases added).

Identifying standards for adjudicating partisan gerrymandering claims in Wisconsin is perfectly feasible. In fact, many other state courts have found "judicially manageable standards for judging when partisan gerrymandering is excessive." *Johnson I*, 2021 WI 87, ¶ 104 (Dallet, J., dissenting); *see, e.g.*, *Grisham*, 2023-NMSC-027, ¶ 50; *In re 2021 Redistricting Cases*, 528 P.3d at 92 (Alaska 2023); *League of Women Voters of Pa. v. Pennsylvania*, 645 Pa. 1, 117–18, 128–29, 178 A.3d 737 (2018); *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363, 416 (Fla. 2015); *League of Women Voters of Utah v. Utah State Legislature*, No. 220901712, 2025 WL 3145894 at *36–37 (Utah Dist. Ct. Nov. 10, 2025); *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194, at *46 (Md. Cir. Ct. Mar. 25, 2022). Even the U.S. Supreme Court, which found partisan gerrymandering claims nonjusticiable under federal law, recognized that "*state constitutions* can provide standards and guidance for state courts to apply" to such claims. *Rucho v. Common Cause*, 588 U.S. 684, 719 (2019) (emphasis added).

Because the only issue before the Court is whether Plaintiffs' partisan gerrymandering claims were properly dismissed as nonjusticiable, it is not necessary for the Court to decide the precise standards that should be applied to partisan gerrymandering claims—all the Court needs to decide now is that manageable standards *exist*. *See Wausau Tile, Inc. v. Cnty. Concrete Corp.*, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999) ("Unless it seems certain that no relief could be granted under any set of facts that the plaintiff could prove, dismissal of

the complaint is improper."). And options abound. The Pennsylvania Supreme Court, for instance, employs an objective, effects-based standard that assesses whether a challenged map subordinates traditional "neutral criteria" for redistricting—such as compactness, contiguity, maintaining political subdivisions, and equal populations—to partisan advantage. *League of Women Voters of Pa.*, 645 Pa. at 122. Under that test, plaintiffs need not show map drawers "*intentionally* subordinated" those neutral criteria to partisan considerations; only that the "traditional criteria *were* subordinated." *Id.* (emphases added). That is the standard Plaintiffs would urge on remand or in any subsequent proceedings before this Court. But as Justice Kagan noted in her *Rucho* dissent, some other courts adjudicate partisan gerrymandering claims through a three-part test that looks to intent, effects, and causation. 588 U.S. at 735–36 (Kagan, J., dissenting) ("If you are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day."). If it ultimately proved necessary, "[t]here is no reason why" this Court or the panel below on remand "could not develop similar standards to judge such claims in Wisconsin." *Johnson I*, 2021 WI 87, ¶ 104 (Dallet, J., dissenting). Accordingly, manageable standards exist to evaluate partisan gerrymandering claims, and the panel's dismissal of Plaintiffs' partisan gerrymandering claims should be reversed.

III. Plaintiffs' claims are not barred by laches.

Although Intervenors raised laches below, the trial court properly declined to address the defense—for good reason. Laches is categorically inapplicable to constitutional claims seeking prospective relief, and Plaintiffs have acted with diligence in any event.

A. Laches is inapplicable because the Court can offer prospective relief.

In election-related litigation, laches typically applies where a plaintiff sits on objections to preelection procedures until after the election, and then belatedly challenges the final election results. *See Trump v. Biden*, 2020 WI 91, ¶ 22, 394 Wis. 2d 629, 951 N.W.2d 568. In that circumstance, the delay renders it impossible for officials to re-administer the contested election under the requested procedures, giving rise to the affirmative defense. But as this Court has explained, districting challenges brought well before an election are fundamentally different, and laches is unavailable as an affirmative defense. *See Clarke*, 2023 WI 79, ¶ 43 n.20 (rejecting laches defense where Court was asked to "establish a process going forward so that constitutional maps are adopted in time for the next election"). This distinction reflects common sense: Where a court can offer relief for a future election, then a request for that relief is necessarily timely.

Federal courts across the country have endorsed this straightforward logic, rejecting laches defenses where plaintiffs sought to prevent injuries in future elections. *See, e.g.*, *Navarro v. Neal*, 716 F.3d 425, 429–30 (7th Cir. 2013) (reversing application of laches where plaintiffs sought "a purely prospective remedy" "concerning elections to be held in future years"); *Env't Def. Fund v. Marsh*, 651 F.2d 983, 1005 n.32 (5th Cir. 1981) ("The concept of undue prejudice, an essential element in a defense of laches, is normally inapplicable when the relief is prospective."); *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867, 909 (E.D. Mich.) (rejecting laches defense in partisan gerrymandering case because plaintiffs sought injunction against map's

use in future elections), *vacated on other grounds sub nom Chatfield v. League of Women Voters of Mich.*, 589 U.S. 1031 (2019).

Consistent with this principle, *Clarke* explained that the laches inquiry in redistricting cases looks not to when the challenged map was adopted, but rather to when the next election will be held. *See Clarke*, 2023 WI 79, ¶ 42; *see also Thomas v. Bryant*, 366 F. Supp. 3d 786, 803 (S.D. Miss. 2019) (recognizing "[i]n the redistricting context," laches "is best considered as a defense to last-minute requests for injunctive relief, and should not be wielded more than a year before an election"), *vacated as moot sub nom. Thomas v. Reeves*, 961 F.3d 800 (5th Cir. 2020) (en banc). Because Plaintiffs filed their claims to prospective relief well over *three years* in advance of the 2028 elections for which they now seek relief, there is no plausible argument that laches applies.[6]

B. None of the laches elements are present.

Even if laches were available as an affirmative defense in this case, it would still fail. To succeed on a laches defense, the party invoking it must prove (1) that Plaintiffs unreasonably delayed in bringing a claim; (2) a lack of knowledge that Plaintiffs would raise that claim; and

[6] Indeed, courts across the country have invalidated redistricting plans and ordered remedies on timelines much shorter than what is available here. *See* Order on Application to Issue the Judgment Forthwith, *Louisiana v. Callais*, No. 25A1197 (U.S. May 4, 2026) (fast-tracking a final injunction against Louisiana's congressional map *amid early voting*); *Harper v. Hall*, 380 N.C. 317, 868 S.E.2d 499 (2022) (invalidating plan approximately three months before primary), *overruled by*, 384 N.C. 292, 886 S.E.2d 393 (2023), *aff'd sub nom. Moore v. Harper*, 600 U.S. 1 (2023); *League of Women Voters of Pa.*, 645 Pa. at 134–135 (2018) (invalidating plan approximately three months before primary and ordering new plan within weeks); *Harkenrider v. Hochul*, 38 N.Y.3d 494, 521–24, 197 N.E.3d 437 (2022) (enjoining plan after qualifying period had already passed).

(3) prejudice resulting from the delay. *Clarke*, 2023 WI 79, ¶ 41. None of these elements are met here.

First, Plaintiffs did not delay. Plaintiffs' principal claim arose from the Wisconsin Supreme Court's December 22, 2023, *Clarke* decision repudiating Johnson's "least-change" criterion for remedial maps. Immediately after *Clarke* issued, certain parties in *Johnson* invited the Court to revisit its holding in light of *Clarke*'s correction. When the Court declined to do so on March 1, 2024, it was reasonable to conclude that a lawsuit initiated at that time would be unlikely to obtain relief in advance of the 2024 elections. Accordingly, Plaintiffs sought relief for the next available congressional elections. They filed an original-action petition in this Court in May 2025, and less than one month after the Court denied that petition on June 25, 2025, Plaintiffs filed their claims in Dane County Circuit Court on July 21, 2025. Although 2026 relief is no longer practicable given delays in the litigation below, Plaintiffs' pursuit of that relief has always been diligent. Based on the prior pace of redistricting litigation in Wisconsin, Plaintiffs filed early enough to anticipate relief before the 2026 election—and indisputably early enough for relief before the 2028 election. Notably, *Clarke* itself rejected a laches defense to claims filed approximately "a year-and-a-half after" the judicial decision creating grounds for the claim—a similar timetable as here—because it was reasonable for petitioners to wait to file after elections that were approaching too rapidly for relief. 2023 WI 79, ¶ 42.

Second, it is not plausible that any defendant failed to anticipate this suit. Because this Court's original action docket is discretionary, it was natural after Plaintiffs' 2025 petition here was denied without comment to expect them to litigate their claims in the ordinary course,

starting in the trial court. *Cf.* Order, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Mar. 1, 2024) (Grassl Bradley, J., concurring) (recognizing the effort to seek relief from *Johnson* in light of *Clarke* "comes as no surprise"). And because the claims here mirror those in the original action petition—which all three sets of Intervenors opposed, *see* Non-Party Brief of Wisconsin Legislature, No. 2025AP996-OA, *Bothfeld v. Wis. Elections Comm'n* (Wis. June 6, 2025); Amicus Brief of Billie L. Johnson et al., No. 2025AP996-OA, *Bothfeld v. Wis. Elections Comm'n* (Wis. June 6, 2025); Congressmen's Proposed Response in Opposition to Petition for Original Action, *Bothfeld v. Wisconsin Elections Comm'n*, Case No. 2025AP996-OA (Wis. June 5, 2025)—Intervenors cannot credibly argue that they were "unaware of any potential claim" until this lawsuit was filed. *Wis. Small Businesses United, Inc. v. Brennan*, 2020 WI 69, ¶ 18, 393 Wis. 2d 308, 946 N.W.2d 101.

Third, no party can claim prejudice from the timing of Plaintiffs' filing. Below, Intervenors objected only to the litigation itself and the prospect that they may lose, not to its timing. But as courts have made clear, the potential merits consequences of an adverse judgment cannot support a laches defense. *See, e.g.*, *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1286 (11th Cir. 2015) (explaining that prejudice must stem from the delay "rather than from the consequences of an adverse decision on the merits"); *Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1058 (5th Cir. 1985) (similar). *Clarke* properly rejected identical arguments: "litigation costs alone cannot constitute prejudice for laches purposes, and any disruption to the current state legislative districts is necessary to serve the public's interest in having districts that comply with each of the requirements of

the Wisconsin Constitution." 2023 WI 79, ¶ 43. Accordingly, every element of laches is absent here.

CONCLUSION

Plaintiffs respectfully request that this Court reverse the panel's order dismissing the Plaintiffs' separation-of-powers claim and denying Plaintiffs' motion for judgment on that claim; instruct the panel to enter judgment for Plaintiffs on their separation-of-powers claim; and order the panel to commence a remedial process that will ensure a new map is selected in time for the 2028 elections.

In the alternative, the Court should reverse the panel's order dismissing Plaintiffs' partisan gerrymandering claims and remand for further proceedings to take place on a timeline that would allow for meaningful relief in advance of the 2028 elections.

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Respectfully submitted,

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

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 9,513 words excluding those portions permitted to be excluded.

Electronically signed by Barret V. Van Sicklen

CERTIFICATION BY ATTORNEY

I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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

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