

IN THE SUPREME COURT OF WISCONSIN

No. 2025XX1330

WISCONSIN BUSINESS LEADERS FOR DEMOCRACY, JOHN A. SCOTT,
NICHOLAS G. BAKER, BEVERLY JOHANSEN, RACHEL IDA BUFF, KIMBERLY
SUHR, SARAH LLOYD, NANCY STENCIL, AND VIKAS VERMA,

Plaintiffs,

v.

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

Defendants.

**PLAINTIFFS' BRIEF ADDRESSING
APPLICABILITY OF WIS. STAT. § 801.50(4m)**

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ISSUE PRESENTED

1. Plaintiffs filed a circuit court complaint challenging Wisconsin’s current congressional districts, adopted in *Johnson v. Wis. Elections Comm’n*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 (*Johnson II*), *rev’d in part and modified on other grounds by Wis. Legislature v. Wis. Elections Comm’n*, 595 U.S. 398, and *Johnson v. Wis. Elections Comm’n*, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559, as an anti-competitive gerrymander. Does the complaint allege an “action to challenge the apportionment of a congressional or state legislative district” under Wis. Stat. § 801.50(4m), such that this Court must appoint a three-judge panel, or should this Court instead dismiss this special proceeding and remand the action to the assigned circuit court judge for adjudication?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not warranted in this matter under the standards in Wis. Stat. § (Rule) 809.22.

Publication is proper under Wis. Stat. § (Rule) 809.23(1) and SCR 80.003(1)(a)–(b) and (2)(a)–(c), because the issues raised here are of statewide import and will provide guidance relevant to future redistricting litigation.

INTRODUCTION

For more than 100 years, Wisconsin's state and federal courts have characterized actions challenging the composition of Wisconsin legislative or congressional districts as actions challenging "apportionment" plans, "redistricting" plans, or "reapportionment" plans, often using the terms interchangeably within the same opinion. And for good reason: Wisconsin Constitution Article IV, Section 3 labels the state legislative redistricting process "Apportionment" in its title and describes the legislature's task to "apportion and district anew."

Against the backdrop of our courts' repeated use of "apportionment," "redistricting," and "reapportionment" to refer to the same process, the Wisconsin Legislature enacted 2011 Wisconsin Act 39. Created as part of Act 39, Wis. Stat. § 801.50(4m) provides that "[v]enue of an action to challenge the apportionment of any congressional or state legislative district shall be as provided in s. 751.035." Section 751.035(1), also created by Act 39, requires this Court to "appoint a panel consisting of 3 circuit court judges to hear the matter." In describing the actions falling within § 801.50(4m), the Legislature chose the same term that the Wisconsin Constitution applies in Article IV, Section 3: "Apportionment." And it chose to apply that term equally to actions to "challenge the apportionment of any congressional or state legislative district." Wis. Stat. § 801.50(4m).

In promulgating § 801.50(4m), the Legislature mirrored an analogous federal statute, 28 U.S.C. § 2284, requiring appointment of three-judge panels to hear redistricting cases brought in federal courts. That federal statute not only was in effect when the Legislature crafted Act 39 but had been invoked and applied to appoint three-judge panels

to hear federal challenges to Wisconsin redistricting statutes in the three preceding decennial redistricting cycles (and has been applied to another four federal Wisconsin redistricting cases since). It provides:

A district court of three judges shall be convened ... when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

28 U.S.C. § 2284(a). *See Wis. State AFL–CIO v. Elections Bd.*, 543 F. Supp. 630, 632 (E.D. Wis. 1982) (appointing three-judge panel to hear challenge to state legislative districts); *Prosser v. Elections Bd.*, 793 F. Supp. 859, 862 (W.D. Wis. 1992) (same); *Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 858 (E.D. Wis. 2001) (appointing three-judge panel to hear challenge to congressional and state legislative districts); *Baumgart v. Wendelberger*, Nos. 01–121 & 02–366, 2002 WL 34127471, at *2 (E.D. Wis. May 30, 2002) (appointing three-judge panel to hear challenge to state legislative districts).

Plaintiffs challenge Wisconsin’s congressional districts, adopted by this Court in *Johnson v. Wisconsin Elections Commission*, 2022 WI 14, as unconstitutionally composed. Plaintiffs were not parties to *Johnson*. Nor were the claims they allege asserted in *Johnson*. Indeed, Plaintiffs are the first litigants to bring anti-competitive gerrymandering claims in **any** Wisconsin court, making their action a case of first impression.

The plain meaning of § 801.50(4m) unambiguously encompasses Plaintiffs’ suit. But even were this Court to look beyond § 801.50(4m)’s text, state and federal courts in Wisconsin have consistently used the term “apportionment” in the context of a legal challenge to congressional or state legislative districts to encompass such claims.

This Court should hold that Plaintiffs’ complaint alleges a “challenge to the apportionment of any congressional or state legislative

district” and should carry out its ministerial statutory duty to appoint a panel of three circuit court judges to preside over Plaintiffs’ claims and assign venue. If the Court holds that Plaintiffs’ complaint does not allege an action that challenges the “apportionment” of Wisconsin’s current congressional districts, then, absent further action to assert supervisory authority, the Court should remand the case for adjudication by the assigned circuit court judge.

FACTUAL AND PROCEDURAL BACKGROUND

The venue statute at issue, Wis. Stat. § 801.50(4m).

The venue statute at issue here was enacted as part of 2011 Wisconsin Act 39. Section 801.50(4m) provides:

Venue of an action to challenge the apportionment of any congressional or state legislative district shall be as provided in s. 751.035. Not more than 5 days after an action to challenge the apportionment of a congressional or state legislative district is filed, the clerk of courts for the county where the action is filed shall notify the clerk of the supreme court of the filing.

Section 751.035, the provision referenced above, provides:

(1) Upon receiving notice under s. 801.50(4m), the supreme court shall appoint a panel consisting of 3 circuit court judges to hear the matter. The supreme court shall choose one judge from each of 3 circuits and shall assign one of the circuits as the venue for all hearings and filings in the matter.

(2) Notwithstanding s. 801.58, no party may move for substitution of any circuit court judge assigned under this section.

(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.

Neither provision has ever been amended.

Legislative enactment of Wisconsin's congressional districts in 2011.

On August 23, 2011, 2011 Wisconsin Acts 43 and 44, which adopted new state legislative districts and new congressional districts, respectively, were published. Both Acts were both promptly challenged in the U.S. District Court for the Eastern District of Wisconsin.¹ The claims included a challenge to Act 44 as an unconstitutional partisan gerrymander. *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 847–48 (E.D. Wis. 2012). And, “[b]ecause these two lawsuits [consolidated for trial] qualified as actions ‘challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body,’ 28 U.S.C. § 2284(a),” a three-judge panel was appointed to preside. *Id.* at 847. The three-judge panel upheld Act 44, *see id.* at 853–54, 861, and the 2011 congressional districts remained in effect throughout the decade.

Clinard v. Brennan: the sole previous attempt to invoke § 801.50(4m).

Only one other litigant has invoked § 801.50(4m), during the *Baldus* litigation. Act 43 stated that it would not take effect until the 2012 primary and general elections. But several state senators facing recall elections in 2012 (and other plaintiffs) filed suit in the Waukesha County Circuit Court, seeking a declaration that the Act 43 maps would apply to the recall elections. (App.5-29, Compl., *Clinard v. Brennan*, No. 2011CV3995 (Waukesha Cnty. Cir. Ct., Nov. 28, 2011)) After the

¹ *Baldus v. Members of Wis. Gov't Accountability Bd.*, Nos. 11-CV-562 JPS-DPW-RMD & 11-CV-1011 JPS-DPW-RMD.

Waukesha County Circuit Court Clerk sent a letter to this Court, characterizing the *Clinard* suit as “a redistricting challenge under Section 751.035 and 801.50(4m),” this Court ordered the parties to brief five issues, including whether the Clerk’s letter “constitute[s] valid notice of an action to challenge the apportionment of a state legislative district under Wis. Stat. §§ 801.50(4m).” (App.32, Order at 3, *Clinard v. Brennan*, No. 2011XX1409 (Wis. Dec. 6, 2011))

Simultaneously, this Court considered a petition for original action filed one week earlier by the same group of plaintiffs. (*See id.* at 2.) On November 30, 2011, this Court issued an order instructing the parties to that original action proceeding to brief a different—but related—set of issues regarding the applicability of §§ 751.035 and 801.50(4m) to the original action. (App.35, Order at 2, *Clinard v. Brennan*, No. 2011AP2677-OA (Wis. Nov. 30, 2011))

Although the parties to both actions submitted briefs as instructed, the Court never ruled on these issues. Rather, two years later, the Court issued orders dismissing both actions based on the notification “that the federal district court has resolved all pending matters before it and has formally closed the case” and that the matters before it “may have been rendered moot.” (App.37-38, Order at 1-2, *Clinard*, No. 2011AP2677-OA (Wis. Jan. 13, 2014); App.40, Order at 2, *Clinard*, No. 2011XX1409 (Wis. Jan. 13, 2014)) Between *Clinard* and Plaintiffs’ commencement of this circuit court action, no litigant sought to invoke Wis. Stat. § 801.50(4m). This Court has neither interpreted nor applied the statute.

Johnson II: *this Court’s adoption of the current congressional districts.*

The 2020 census showed that Wisconsin’s population had shifted, such that the Act 44 congressional districts needed to be redrawn to meet constitutional standards. Different parties filed suit contemporaneously in federal court and in this Court to redraw those districts. In accord with 28 U.S.C. § 2284(a), Chief Judge Diane Sykes of the Seventh Circuit appointed a three-judge federal panel to adjudicate both federal cases that had been filed. (See App.41, Order, *Hunter v. Bostelmann*, No. 21-cv-00512-jdp-ajs-eec, Dkt. 16 (W.D. Wis. Aug. 18, 2021); App.42, Order, *BLOC v. Spindell*, No. 21-cv-534-jdp-ajs-eec, Dkt. 16 (W.D. Wis. Aug. 26, 2021).) The three-judge federal panel stayed the federal proceedings in deference to the *Johnson* proceeding before this Court (App.43-54, Opinion and Orders, *Hunter v. Bostelmann*, No. 21-cv-00512-jdp-ajs-eec, Dkts. 103, 114, and *BLOC v. Spindell*, No. 21-cv-534-jdp-ajs-eec, Dkts. 71, 81 (W.D. Wis. Oct. 6 & Nov. 17, 2021) (consolidated)), and extended the stay until this Court’s rulings in *Johnson* mooted the federal actions, which the panel eventually dismissed via text order on May 5, 2022.

On the same day as the *BLOC* case was filed, a petition for original action was filed, asking this Court to exercise original jurisdiction over challenges to Wisconsin’s congressional and state legislative districts arising from the 2020 census. *Johnson v. Wis. Elections Comm’n*, No. 2021AP1450-OA (Wis., Aug. 23, 2021). This Court granted the petition for original action, allowed numerous interventions, and ordered “a single omnibus amended petition that, in numbered paragraph form, restates the previously asserted allegations and claims advanced by petitioners ... and states the allegations and claims of each intervening petitioner.” (App.56, Order, *Johnson*, No. 2021AP1450-OA (Wis. Oct. 14,

2021)) No Plaintiff in the current circuit court action was a party to *Johnson*, and the omnibus amended petition (filed October 21, 2021) did not allege that the congressional districts (or any district) then in effect constituted an illegal anti-competitive gerrymander.

In the meantime, the Legislature began considering new congressional districts. In November, 2021, in light of the 2020 Census data, the Legislature passed a bill redrawing Wisconsin’s congressional districts, which Governor Evers vetoed. Wis. St. Leg. 2021-2022, S.B. 621 (failed to pass notwithstanding the objections of the Governor). The resulting impasse required this Court to step in.

After ordering the parties to the *Johnson* case to brief the criteria that the Court should use to evaluate prospective new congressional and state legislative districts, by a 4–3 vote, the Court announced it would follow a “least-changes” approach in imposing a remedy. *See Johnson v. Wis. Elections Comm’n*, 2021 WI 87, ¶81, 399 Wis. 2d 623, 967 N.W.2d 469 (*Johnson I*). But no majority of this Court agreed on a definition of “least changes.” *Compare id.*, ¶81 (lead op.) *with id.*, ¶¶82-84 & n.4 (Hagedorn, J., concurring) (declining to join aspects of lead opinion defining “least changes” and concluding instead that equitable considerations could inform proper remedy). After submissions and oral argument by various parties, the Court voted 4–3 to impose the congressional plan proposed by Governor Evers because it moved the fewest number of people to new districts—a metric called “core retention.” *See Johnson II*, ¶7. Only Justice Hagedorn concluded both that “least changes” was the proper framework and that core retention was the appropriate definition. The remaining three Justices in the *Johnson II* majority would not have applied a “least-changes”

framework, *see id.*, ¶¶58–63 (Walsh Bradley, J., concurring), and the three dissenting Justices disagreed that “least changes” meant “core retention,” *see id.*, ¶¶133–37 (Ziegler, C.J., dissenting), 211 (Grassl Bradley, J., dissenting).

The U.S. Supreme Court denied an application to stay this Court’s order adopting the Governor’s proposed congressional districts. *Grothman v. Wis. Elections Comm’n*, 142 S. Ct. 1410 (2022). The congressional districts this Court adopted in *Johnson II* remain in effect today.

Plaintiffs’ anti-competitive gerrymandering claims alleged in their circuit court complaint in this action.

On July 8, 2025, Plaintiffs initiated this action by filing their complaint in the Circuit Court for Dane County. Plaintiffs’ complaint alleges that Act 44 suffers from a deficiency not separately challenged in *Baldus*: it was intentionally designed to create uncompetitive districts that protected the incumbent members of Wisconsin’s delegation in the U.S. House of Representatives, and that it had that effect throughout the decade. (Compl. ¶¶5-6)

Plaintiffs further allege that in *Johnson II*, this Court replaced the Act 44 map with one chosen based on a “least change” approach that replicates the uncompetitive districts of the Act 44 map, thus perpetuating the anti-competitive gerrymander imposed in 2011. (Compl. ¶7) Plaintiffs’ complaint explains that anti-competitive gerrymanders—which are distinct from partisan and racial gerrymanders but are every bit as antithetical to law—occur when elected officials work in concert to draw district lines to suppress electoral competition, thereby benefiting incumbent politicians to the

detriment of voters. The essence of anti-competitive gerrymandering is that it yields lower levels of competition than would arise under a neutral map not crafted to protect officeholders. Candidates prevail by larger margins, fewer districts are competitive, and less legislative turnover occurs, undermining core democratic values of accountability and responsiveness. (Compl. ¶¶8-11)

The complaint further alleges that Wisconsin's current congressional plan presents a textbook example of an anti-competitive gerrymander that violates the Wisconsin Constitution in several respects, including by violating the state constitutional guarantees of equal protection to all citizens, the promise to maintain a free government, and the right to vote. Wis. Const. art. I, §§ 1, 22; *id.*, art. III. (Compl. ¶¶12-14) Plaintiffs seek the appointment of a panel of three circuit court justices to hear their case; a declaration that the current congressional districts are an unconstitutional anti-competitive gerrymander; an injunction against their continued use; and an order requiring that new, competitive and otherwise lawful congressional districts be created. (Compl. at 32-34)

ARGUMENT

- I. **The circuit court action is before this Court solely to carry out its statutorily mandated, ministerial duty to appoint a three-judge panel to adjudicate the case in the circuit court; this Court has not otherwise asserted jurisdiction or supervisory authority.**

This Court's role at the present juncture is purely ministerial. Although the Court has the power to exercise jurisdiction or exert supervisory authority over the circuit court action should it so choose,

now or after the circuit court adjudicates the circuit court action on the merits, the Court has not yet taken any such steps.

Plaintiffs address these issues here fully and ask that the Court do likewise because they are significant, they have gone unanswered by this Court since the statutes at issue were adopted in 2011, and it would be better for the Court to do so now, rather than during the crush of an expedited redistricting action filed at the outset of a new decennial redistricting cycle.

A. The Court’s tasks under the current procedural posture are both ministerial and mandatory: (1) to appoint three circuit court judges to adjudicate the circuit court action and (2) to designate the venue for that action.

The unambiguous, express, and mandatory text of the governing statutory provisions prescribes only a ministerial role for this Court at this stage: appoint a panel of three circuit court judges and designate venue for the circuit court action. This interpretation is supported by the position previously taken by the Wisconsin Attorney General in *Clinard*, representing the Government Accountability Board.

“Because we presume that the legislature says in a statute what it means and means in a statute what it says there, statutory interpretation begins with the language of the statute.” *Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶26, 339 Wis. 2d 125, 810 N.W.2d 465 (internal citations omitted). Here, the venue statutes direct that, upon receipt of a notice from the circuit court clerk’s office pursuant to § 801.50(4m), this Court “**shall** appoint a panel consisting of 3 circuit court judges to hear the matter” and “**shall** assign one of the circuits as the venue for all hearings and filings in the matter.” Wis. Stat. § 751.035(1) (emphases added). The statute prescribes the proper procedure for this

Court to follow upon receiving the statutory notice pursuant to § 801.50(4m) clearly, unambiguously, and with specificity.

As the express language of § 751.035 states clearly and unambiguously, this Court’s initial task—the *only* one presently at hand—is purely ministerial, and the provision anticipates nothing more for the Court to do as part of the statutory procedure. Applying the presumption “that the legislature says in a statute what it means and means in a statute what it says there,” *Heritage Farms*, 2012 WI 26, ¶26, this Court has held that, when the Legislature has used the term “shall” rather than “may” in a statute, that choice triggers a presumption that the Legislature intended to assign a “mandatory” duty, *id.*, ¶32. That principle applies with extra force here, where the Legislature used both the terms “shall” and “may” in the same statute, giving effect to the mandatory nature of its use of “shall.” *Compare* Wis. Stat. § 751.035(1) (using “shall”) *with id.*, § 751.035(2), (3) (using “may”).

This Court has further held that such a mandatory duty that does not involve the exercise of discretion is a ministerial function. *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶25, 253 Wis. 2d 323, 646 N.W.2d 314 (ministerial duty “is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion” (citation and internal quotation marks omitted)). Notwithstanding any future role the Court may assume pursuant to its appellate jurisdiction or supervisory authority as discussed below, the Court’s present role is ministerial.

That the Court’s present role is limited to a simple ministerial one is further supported by the Wisconsin Attorney General’s position in *Clinard*. (See *infra* Part B.)

The statutory scheme adopted in Act 39 does not contemplate challenges to the propriety of the notice provided by the circuit court clerk. This indicates that any such challenges are to be adjudicated in the first instance by the three-judge panel in the circuit court, rather than by this Court prior to appointing that panel. Any such challenges that, for instance, alleged a claim involving the interpretation or application of the governing statute, would “benefi[t] from the analyses” circuit court judges assigned to the three-judge panel. *Heritage Farms*, 2012 WI 26, ¶24.

Nor does the statutory scheme assigning this Court the ministerial duty of appointing a three-judge panel raise any jurisdictional problem. While the Legislature “is prohibited from unreasonably burdening or substantially interfering with the judicial branch,” statutory assignment of ministerial duties to this Court does not encroach upon the “[g]reat borderlands of power [that] lie in the interstices among the branches’ core zones” of [exclusive authority].” *State ex rel. Friedrich v. Cir. Ct. for Dane Cnty.*, 192 Wis. 2d 1, 14, 531 N.W.2d 32 (1995) (internal quotation marks omitted). Indeed, the Legislature can—and does—adopt statutes directing this Court to act. See Wis. Stat. § 751.12(4).² The statutory

² Examples are replete throughout the statutes. See, e.g., Wis. Stat. §§ 751.10 (“The supreme court shall decide all cases in writing.”); 751.11(2) (“The Supreme Court shall purchase sufficient copies of its reports to meet [statutory] requirements for distribution” and “shall reimburse the department of administration for all costs associated with the distribution of its reports”); 762.07 (“The supreme court shall appoint a court of appeals judge to be the chief judge of the court of appeals for a term of 3 years.”); 885.38(2) (“The supreme court shall establish the procedures and policies

assignment of initial jurisdiction to a three-judge panel neither trespasses upon nor commandeers core judicial powers, especially because this Court retains appellate jurisdiction over the panel's decisions.

B. Unless and until this Court exercises supervisory authority or appellate jurisdiction, its role is purely administrative.

The power of superintending control is one the Court has invoked reluctantly and never to evade the normal procedures of appeal and review. *State v. Hoppmann*, 207 Wis. 481, 240 N.W. 884, 885, *on reh'g sub nom. State ex rel. Fireman's Fund Ins. Co. v. Hoppmann*, 207 Wis. 481, 242 N.W. 133 (1932). A litigant would be hard-pressed in this case to identify any “grave exigencies” that might justify such a procedural departure. *Id.* Furthermore, it is unlikely that any “grave hardship” would result from following the statutory procedure and assigning a three-judge panel. *State ex rel. Ondrasek v. Cir. Ct. for Calumet Cnty.*, 133 Wis. 2d 177, 185, 394 N.W.2d 912 (Ct. App. 1986). Here, all of the normal protections of due process and an avenue for judicial review—in this Court—remain available should the appointed panel render a final judgment that any litigant wishes to challenge.

That conclusion is supported by the Wisconsin Attorney General's position in *Clinard*. There, briefing questions posed by this Court as part of both the original action and the § 801.50(4m) referral, the Attorney General interpreted this Court's role as purely administrative, and thus not conferring jurisdiction. He first noted in the original action that there are two alternative paths to challenge redistricting in state court: 1) an

for the recruitment, training, and certification of persons to act as qualified interpreters in a court proceeding ...”).

original action at the state supreme court (citing Wis. Stat. § 809.70 and *Petition of Heil*, 230 Wis. 428, 284 N.W. 42 (1939)); or 2) the procedures outlined in Wis. Stat. §§ 801.50(4m) and 751.035. (App.64, Resp. of Resp'ts to Ct.'s Orders, to Voluntary withdrawal of Pet. and to Mot. to Dismiss at 5, *Clinard*, No. 2011AP2677-OA (Wis., Dec. 6, 2011)) The Attorney General explained that when an action within the ambit of § 801.50(4m) is filed, this Court **must** appoint a panel. (*Id.*) He contrasted the procedures in §§ 801.50(4m) and 751.035—which he described as “statutory prescripts”—with the discretionary procedure under Wis. Stat. § 809.70 for this Court to exercise discretion over whether to exercise original jurisdiction. (*Id.* at 6)³

In a second brief filed in the same case, the Attorney General stated unequivocally that this Court does not take jurisdiction over a circuit court redistricting action until there is an appeal from the circuit court's decision, noting that “751.035 is not a jurisdiction transferring statute.” (App.75, Resp'ts' Reply to Resps. to Ct.'s Orders dated Nov. 30, 2011 and Dec. 1, 2011 at 6, *Clinard*, No. 2011AP2677-OA (Wis., Dec. 9, 2011)) He observed that “the Court has been instructed by the Legislature to perform an administrative function and to select the judges who will hear the case. The Court does not exercise jurisdiction over the case when appointing the judges.” (*Id.* at 7) He analogized the procedure set forth in § 751.035 to that prescribed in § 751.03, “which gives the Chief Justice authority to temporarily assign justices and judges to the court of appeals or circuit court to aid in the proper

³ In this sense, the Attorney General's characterization of this Court's role as “administrative” is functionally the same as Wisconsin law's characterization of its role in this situation as “ministerial.” Both emphasize that it is the mandatory, non-discretionary nature of the Court's role here that renders it “ministerial” or “administrative.”

dispositions of their business. The Court does not, and need not, take jurisdiction of a case to make such an assignment under Wis. Stat. § 751.03 because the administrative function does not reach the merits of the case.” (*Id.*)

The Attorney General’s briefing in the parallel special proceeding docketed in this Court as 2011XX1409 echoed and reinforced these positions. After restating the arguments above, the Attorney General described this Court’s function under 751.035(1):

The Court has been instructed by the Legislature to perform an administrative function and to select the three judges who will hear the case. The Court does not exercise jurisdiction over the case when appointing those judges; it serves an important, but purely administrative duty, in making the appointment. There is nothing in the statutes to indicate that jurisdiction transfers from the circuit court to this Court and then to the three-judge panel. In fact, jurisdiction never leaves the circuit court until an appeal brings it before this Court.

(App.87-88, Resp’ts’ Resp. to Dec. 6 Order at 4-5, *Clinard*, No. 2011XX1409 (Wis., Dec. 12, 2011)) The Attorney General explained that this Court’s narrow role in the venue-appointment process has another implication: it deprives the Court of jurisdiction to hear any merits issues. (*Id.* at 9 (“§ 751.035 requires appointment of a three-judge panel (when warranted by the pleadings), but makes no distinction between pre-trial and trial matters. As a result, it appears that only the three-judge panel may address the merits of any pre-trial motions.”))

A jurisdictional problem would arise if, as the Dissent seems to suggest, this Court were to adjudicate the merits of the underlying complaint, or the propriety of the notice under § 801.50(4m), without first invoking its supervisory authority over the circuit court action pursuant to Wis. Const. art. VII, § 3(1). The suggestion that this Court may set aside the statutorily prescribed procedure and choose to reach the merits

of this case that remains docketed in the circuit court, based solely upon the Court’s preference not to await the issues being presented as part of a proper appeal, is deeply troubling.

This Court’s jurisdiction is established and constrained by constitutional grants of power. Our Constitution expressly grants the Supreme Court three categories of judicial power: (1) “superintending and administrative authority over all courts,” (2) “appellate jurisdiction over all courts” augmented by the power to “hear original actions and proceedings,” and (3) the power to “review judgments and orders of the court of appeals, ... remove cases from the court of appeals and ... accept cases on certification from the court of appeals.” Wis. Const. art. VII, § 3. Moreover, the constitution expressly empowers this Court to “issue all writs necessary in aid of its jurisdiction.” *Id.*, § 3(2). Here, there is neither an appeal nor an original proceeding initiated in this Court. (Were there any doubt, none of the initiating documents for an appeal or an original action has been filed here. *See* Wis. Stat. §§ 809.60–.62, .70–.71.) That suggests that any action beyond the specific prescriptions of the relevant statutory provisions falls within this Court’s superintending and administrative authority. Though it *could* “snatch[]” this case “from the circuit court in its infancy,” *SEIU, Local 1 v. Vos*, 2020 WI 67, ¶165 & n.3 (Dallet, J., dissenting), this Court has not invoked its authority to do so here. And unless and until it does, the Court must follow § 751.035(1).

Absent such an invocation, any challenge—whether to the circuit court clerk’s notice to this Court, or to the viability of the underlying complaint—is properly adjudicated in the first instance by the three-judge panel that this Court has a ministerial duty to appoint. For these reasons, the Court should either:

1. Fulfill its statutory mandate and leave adjudication to another day; this course of action would entail promptly appointing a three-judge panel under the procedure prescribed by the Legislature and allowing that panel to entertain all further proceedings in the first instance, or
2. If this Court prefers, at this stage, to itself address the substance of the complaint or the proper interpretation or application of the three-judge panel statute, it would need to invoke its superintending authority and remove the case from the circuit court.

But the Court need not, and should not, assert its supervisory jurisdiction at this stage. As an initial matter, the statutes at issue provide that this Court, within its appellate jurisdiction, may hear an appeal from any final judgment issued by the three-judge panel that it appoints.⁴ See Wis. Stat. § 751.035(3); see also *id.*, § 808.03(1); *Morway v. Morway*, 2025 WI 3, ¶18, 414 Wis. 2d 378, 15 N.W.3d 886 (“A judgment or order of a circuit court is appealable to the court of appeals as a matter of right only if the judgment or order is “final.”); *Wambolt v. W. Bend Mut. Ins. Co.*, 2007 WI 35, ¶24, 299 Wis. 2d 723, 728 N.W.2d 670 (appeals as of right emanate from final orders or judgments). Consequently, this Court will have the opportunity, via appellate jurisdiction, to review any adjudication by the circuit court.

Moreover, allowing for development of both the facts and the law in the circuit court would best promote the interests of our judicial system in the orderly and thoughtful adjudication. It would be preferable to allow the lower court to adjudicate and decide the factual issues raised

⁴ Given that all parties to a circuit-court action possess a due process right to appeal from a final order or judgment, and that § 751.035(3) expressly bars the courts of appeal for any district from hearing an appeal of the three-judge panel’s order or decision, this Court is necessarily the proper venue for such an appeal as of right. See Wis. Const. art. VII, § 3(2); *id.*, art. I, § 9; Wis. Stat. § 808.03(1).

by plaintiffs’ complaint and to thoughtfully consider and rule on the legal issues before they reach this Court. Justice Hagedorn articulated that principle well in a recent concurrence:

Judicial humility recognizes that this court is given a modest role in our constitutional order, and that our court’s inherent limitations counsel caution when exercising our immense power. We must remember that we are designed to be the court of last resort, not the court of first resort. Rather, even when the issues are ones we are likely to consider in the end, the law is almost always better served by subjecting claims to the crucible of the multi-tiered adversarial process. ...

In addition, we benefit from the work of our colleagues in the circuit court and court of appeals. In my experience, especially in novel areas, they have something to teach us and the parties. Thoughtful lower court decisions usually improve the clarity of our work by framing the arguments and telling the parties what worked and what didn’t.

Wis. Voter Alliance v. Secord, 2025 WI 2, ¶58 n.9, 414 Wis. 2d 348, 15 N.W.3d 872 (Hagedorn, J., concurring). The same logic applies here.

II. Wisconsin law and courts have consistently characterized lawsuits seeking to invalidate either congressional or state legislative districts as actions challenging “apportionment.”

Wisconsin case law is replete with decisions new and old that interchangeably use the terms “apportionment,” “reapportionment,” and “redistricting.”

Consider, for example, this Court’s recent order accepting jurisdiction in *Clarke v. Wis. Elections Comm’n*, 2023 WI 70, 409 Wis. 2d 372, 995 W.W.2d 779. There, the majority characterized the case as a “redistricting challenge[],” *id.*, 409 Wis. 2d at 374 (quoting *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶17, 249 Wis. 2d 706, 639 N.W.2d 537), which it equated with past discussions of “any reapportionment or redistricting case,” including “challenges to existing district maps” and “challenges to a legislatively enacted map,” *id.* (citing *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 558, 126 N.W.2d 551 (1964)). Chief Justice

Ziegler, in dissent, used the phrases the “apportionment maps,” “redistricting plans,” and “redistricting maps,” all interchangeably. *Id.* at 381–82, 384, 387, 389 (Ziegler, C.J. dissenting). Justice Grassl Bradley’s dissent similarly referred to “remedial maps” as a placeholder for a “valid legislative apportionment plan,” and referenced “[r]edistricting litigation” as a response to “malapportionment.” *Id.* at 395–96 (Grassl Bradley, J., dissenting). Justice Hagedorn referenced both decennial redistricting in response to census data and an effort at mid-decade redistricting in 1964 as “reapportionment.” *Id.* at 411 n.32 (Hagedorn, J., dissenting) (citing *Zimmerman*, 22 Wis. 2d at 558).

Similarly, in the *Clinard* original action last decade, among the issues this Court directed the parties to brief was the question: “Should the Wisconsin state courts defer from proceeding with the petition in this matter in light of the [*Baldus*] action already pending in the United States District Court for the Eastern District of Wisconsin ... or should **apportionment** matters be heard in state courts despite the presence of a pending federal action on the subject?” (App.35, Order at 2, *Clinard v. Brennan*, No. 2011AP2677-OA (Wis. Nov. 30, 2011) (emphasis added))

These recent usages are consistent with this Court’s earliest approach to the same topic. Nearly 165 years ago, in *Slauson v. Racine*, 13 Wis. 398 (1861), the majority referred to the Legislature’s alteration of Assembly districts under “the previous apportionment law,” referred to “the next apportionment, as prescribed by the [Wisconsin] constitution,” and stated that the process included “alterat[ion]” of assembly districts, including by the “annexation of” tracts that change the shape of a district. *Id.* at 400. Under the *Slauson* Court’s definition of “apportionment law,” even transferring territory from one district to

another, while controlling precisely the numbers of persons contained in each and not affecting at all the allocation of seats, refers necessarily to redistricting.

Close readings of this Court’s intervening decisions show that they fit the same pattern, using “apportionment” broadly to refer to dividing voters among districts and also to moving district lines for other reasons. *See, e.g., Zimmerman*, 22 Wis. 2d 544; *State ex rel. Hicks v. Stevens*, 112 Wis. 170, 88 N.W. 48, 49 (1901); *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W.35, 54 (1892); *State ex rel. Att’y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1892). The pattern is clear: this Court has long construed “apportionment” as a broad term that includes all challenges to the composition of electoral districts. Even when this Court has made a distinction between the terms “reapportionment and “redistricting” it has recognized that these terms are used by the court and by parties “interchangeably.” *Jensen*, 2002 WI 13, ¶5 n.2.⁵

Moreover, this Court’s references to “apportionment” plans extends to redistricting plans that this Court adopts. As this Court repeatedly stated in *Zimmerman*, when the legislative process fails to produce new districts, “this court has the power to adopt on our own initiative a **reapportionment** plan which conforms to the requirements of art. IV, Wis. Const.” 22 Wis. 2d 544, 569 (emphasis added); *id.* at 571 (“We do not abdicate our power to draft and execute a final plan of

⁵ The Dissent to this Court’s September 25, 2025 Order contends that *Jensen* recognizes a functional distinction between “apportionment” and “redistricting.” Order, *Wis. Business Leaders v. Wis. Elections Comm’n*, No. 2025XX1330, ¶6 (Grassl Bradley, J., dissenting). But the distinction in *Jensen* is *ipse dixit* that appears in a solitary footnote without citation or reference to any Wisconsin (or other) law or precedent. In the face of the history of Wisconsin courts’ consistent and overwhelming use of the terms interchangeably, the *Jensen* court’s unsupported statement provides no authority.

apportionment which conforms to the requirements of art. IV, Wis. Const., should the other arms of our state government be unable to resolve their differences and adopt a valid plan.” (emphasis added)); *id.* (“Should it become necessary for this court to execute such a plan of **apportionment**” (emphasis added)).

Under this consistent usage, the congressional districts that this Court adopted in *Johnson II* constitute an “apportionment” of congressional districts, and Plaintiffs’ complaint—which seeks to set aside those districts as unconstitutionally composed—constitutes “an action to challenge the apportionment of a[] congressional ... district,” triggering the application of Wis. Stat. § 801.05(4m).

III. The language of § 801.50(4m) is similar to 28 U.S.C. § 2284(1), which requires three-judge panels in federal redistricting cases.

As noted above, § 801.50(4m) mirrors an analogous federal statute, 28 U.S.C. § 2284, which requires appointment of three-judge panels to hear redistricting cases brought in federal courts. That statute provides:

A district court of three judges shall be convened ... when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

That federal statute was in effect when 2011 Wisconsin Act 39 was adopted, creating both Wis. Stat. §§ 751.035 and 801.50(4m). In the three redistricting or apportionment cycles leading up to the adoption of those statutes—in the 1980s, 1990s, and 2000s—the statute was applied to appoint three-judge panels to hear legal challenges to Wisconsin redistricting statutes filed in federal courts. *See Wis. State AFL–CIO*, 543 F. Supp. at 632; *Prosser*, 793 F. Supp. at 862; *Arrington*, 173 F. Supp. 2d

at 858; *Baumgart*, 2002 WL 34127471, at *2.⁶ Wisconsin law presumes that the Legislature was aware of the federal statute and its application to actions challenging existing apportionment plans in the preceding decades when it passed Act 39. *See, e.g., Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶103, 327 Wis. 2d 572, 786 N.W.2d 177 (“The legislature is presumed to be aware of existing laws and the courts’ interpretations of those laws when it enacts a statute.”); *Heritage Farms*, 2009 WI 27, ¶40. As this Court has held, “[i]t is well established that federal cases may provide persuasive guidance to the proper application of state law copied from federal law.” *State v. Gudenschwager*, 191 Wis. 2d 431, 439, 529 N.W.2d 225, 228 (1995).

Moreover, three-judge panels were appointed to hear four federal court actions since Act 39 was adopted. *See Baldus*, 849 F. Supp. 2d at 847; *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *vacated on other grounds, Gill v. Whitford*, 585 U.S. 48, 56 (2018); App.41, Order, *Hunter v. Bostelmann*, No. 21-cv-00512-jdp-ajs-eec, Dkt. 16 (W.D. Wis. Aug. 18, 2021); App.42, Order, *BLOC v. Spindell*, No. 21-cv-534-jdp-ajs-eec, Dkt. 16 (W.D. Wis. Aug. 26, 2021).

Baldus, *Whitford*, and *BLOC* were all actions that alleged claims other than (or in addition to) malapportionment claims. *Baldus* alleged claims under various state and federal laws, including the alleged violation of Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301, a claim upon which the plaintiffs there ultimately prevailed. *See* 849 F.

⁶ Although the *Baldus* action had been pending for more than a month when SB 150—the Wisconsin State Senate Bill that became Act 39—was introduced by the Committee on Senate Organization on July 11, 2011, *see* <https://docs.legis.wisconsin.gov/2011/proposals/sb150> (last visited Oct. 7, 2025); *Baldus*, 849 F. Supp. 2d at 846–47, the three-judge panel was not appointed in *Baldus* until September 2011, the month after Act 39 was enacted.

Supp. 2d at 847–48. *Whitford* alleged a single count that Act 43, the state legislative districting scheme that the federal court modified in *Baldus*, was a partisan gerrymander that violated the First and Fourteenth Amendments to the U.S. Constitution. *See Whitford*, 218 F. Supp. 3d at 854. And *BLOC* alleged, among other claims, that the state legislative districts enacted in Act 43 and modified by the federal court in *Baldus* violated Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301. (See App.97, First Am. Compl., *BLOC v. Spindell*, No. 21-cv-534-jdp-ajs-ec, Dkt. 44 at 2 (W.D. Wis., Sept. 21, 2021).)

As in those cases in which three-judge panels were appointed to hear federal court challenges pursuant to 28 U.S.C. § 2284, Plaintiffs’ claims here fall within the analogous state statute, Wis. Stat. § 801.50(4m).

CONCLUSION

For the foregoing reasons, this Court should perform its ministerial duties under Wis. Stat. §§ 801.50(4m) and 751.035 by proceeding to appoint a three-judge panel and designating venue. This approach is consistent with statutory text, past practice of this Court, and application of a parallel federal statute. It also stays squarely within jurisdictional constraints.

Respectfully submitted this 9th day of October, 2025.

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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 6,591 words.

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