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SUPREME COURT

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**No.2025XX1330**

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**In the Supreme Court of Wisconsin**

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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.

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On Written Notice From The Dane County Clerk Of Courts  
Purporting To Notify This Court Of The Filing Of A Summons  
And Complaint Pursuant To Wis. Stat. § 801.50(4m)

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**PROPOSED RESPONSE BRIEF OF PROPOSED  
INTERVENOR-DEFENDANTS CONGRESSMEN GLENN  
GROTHMAN, BRYAN STEIL, TOM TIFFANY, SCOTT  
FITZGERALD, DERRICK VAN ORDEN, AND TONY WIED, AND  
INDIVIDUAL VOTERS GREGORY HUTCHESON, PATRICK  
KELLER, PATRICK MCCALVY, AND MIKE MOELLER,  
TO PLAINTIFFS' INITIAL BRIEF IN RESPONSE TO THIS  
COURT'S SEPTEMBER 25, 2025 ORDER**

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## INTRODUCTION

Plaintiffs begin the substantive portion of their response to this Court's September 25, 2025 Order not by addressing the meaning of Wis. Stat. § 801.50(4m)'s use of the term "apportionment," but by urging this Court to decline to exercise its supervisory authority in this case. Yet, Plaintiffs do not dispute that this Court has supervisory authority under our Constitution, including to order dismissal here, if this Court decides such relief is warranted. Nor do Plaintiffs explain how they can maintain their lawsuit when they (correctly) told this Court just a couple of months ago that, because "this Court imposed the current congressional map in *Johnson II*, only this Court has the authority to enjoin that map." Mot. to Intervene by Wis. Bus. Leaders for Democracy at Ex.1 ¶ 16, *Bothfeld v. Wis. Elections Comm'n* ("WEC"), No.2025AP000996 (Wis. June 5, 2025).

When Plaintiffs finally turn to answering this Court's question as to the meaning of "apportionment" under Section 801.50(4m), they conduct no textual analysis of "apportionment," instead just noting that this Court and other authorities have, at times, used the terms "apportionment" and "districting" interchangeably. But the Constitution itself distinguishes between "apportion[ment]" and "district[ing]" in a manner that refutes Plaintiffs' position, *see* Wis. Const. art. IV, § 3, and, in any event, Plaintiffs do not cite any case, from any jurisdiction, calling an action challenging *a court decision* (rather than a legislative action) like this an action challenging an "apportionment."

This Court should exercise its superintending and administrative authority over all courts in this case to rule that Section 801.50(4m) does not apply and dismiss the Complaint, given that it seeks unconstitutional relief from an inferior court.

### **ARGUMENT**

#### **I. This Court's Broad, Constitutional Superintending And Administrative Authority Over All Courts Gives It Ample Authority To Dismiss This Case**

Plaintiffs' Complaint seeks unconstitutional relief by requesting that this Court empower an inferior court to review and overrule a prior decision from this Court—namely, its decision in *Johnson v. WEC*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 (“*Johnson II*”) adopting Wisconsin’s current congressional map. See Congressmen & Individual Voters’ Initial Br. Per This Ct.’s Sep. 25, 2025 Order at 23–27, *Wis. Bus. Leaders for Democracy (“WBLD”) v. WEC*, No.2025XX1330 (Wis. Oct. 9, 2025) (“Initial.Br.”). Because no inferior court can constitutionally sit in judgment of this Court’s decisions, see Initial.Br.26–27, this Court should invoke its broad “superintending and administrative authority over all courts,” Wis. Const. art. VII, § 3(1), to order dismissal of the Complaint. After all, this Court already held that the *Johnson II* congressional map “compl[ies] with all relevant state and federal laws,” 2022 WI 14, ¶ 25, and no inferior court has the authority to second guess that judgment, Initial.Br.8, 25–26.

Plaintiffs claim that this Court has the “mandatory duty” under Section 801.50(4m) and Wis. Stat. § 751.035(1) to carry out, mechanically, a “purely ministerial” function in this case by appointing a three-judge panel. See Pls. Initial Br. in Resp. to Sep.

25, 2025 Ct. Order at 16–25, *WBLD v. WEC*, No.2025XX1330 (Wis. Oct. 9, 2025) (“Pls.Br.”). But Plaintiffs ultimately concede that this Court “has the power” to take action on the merits “now,” “should it so choose” to “exert [its] supervisory authority over the circuit court action.” *Id.* at 16–17; *see, e.g., id.* at 22 (suggesting that this Court could “adjudicate the merits of the underlying complaint” and “the propriety of the notice under § 801.50(4m)” if it “first invoke[s] its supervisory authority over the circuit court action pursuant to Wis. Const. art. VII, § 3(1)”). Given that the relief Plaintiffs seek—an inferior court overruling the constitutionality of this Court’s judgment in *Johnson II*—is a constitutional nonstarter (whether it comes from a three-judge panel or a Circuit Court), this case presents an ideal vehicle for the Court to exercise its constitutional supervisory authority, just as this Court did in *Clinard v. Brennan*, No.2011XX1409 (Wis. Jan. 13, 2014).

Plaintiffs spill much ink discussing “the Wisconsin Attorney General’s position in *Clinard*,” *see* Pls.Br.20–23, where he argued that Section 751.035(1)’s panel-appointment process “deprives the Court of jurisdiction to hear any merits issues” and allows “only the three-judge panel [to] address the merits of any pre-trial motions,” *id.* at 22 (citations omitted). But this Court necessarily *rejected* the Attorney General’s position in *Clinard* by dismissing the underlying petition while the *Clinard* petitioners’ request for the “appointment of [a] three judge panel pursuant to Wis. Stat. §§ 751.035 and 801.50(4m)” was still pending. Order at 1–2, *Clinard*, No.2011XX1409 (Jan. 13, 2014) (capitalization altered).

Plaintiffs also argue that this Court should refrain from exercising its supervisory authority because this Court “may hear an appeal from any final judgment issued by the three-judge panel that it appoints” and “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.” Pls.Br.24. While Plaintiffs are correct that any appeal of an order from the three-judge panel (if constituted) would lie in this Court, they are wrong that no “hardship” would result from “assigning a three-judge panel” and adhering to “the normal procedures of appeal” in this case. *Contra* Pls.Br.20 (citation omitted). Declining to dismiss this case would put the judiciary in the unconstitutional position where a lower court would be adjudicating the constitutionality of a decision by this Court. *See* Initial.Br.23–27. It is neither “orderly” nor “thoughtful” to allow lower courts to “adjudicate and decide the factual” and “legal issues” raised by this case, *contra* Pls.Br.24–25, when this lawsuit is a constitutional non-starter under principles of judicial hierarchy and the Wisconsin Constitution, *see* Initial.Br.25–27. Again, the *Johnson II* congressional map is a result of a “final and conclusive” order from this Court, *Sutter v. State, Dep’t of Nat. Res.*, 69 Wis. 2d 709, 717, 233 N.W.2d 391 (1975) (citation omitted), and only *this Court* has “the power to overrule [or] modify” its own decisions, *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

## **II. A Challenge To An “Apportionment” Of A Congressional District Under Section 801.50(4m) Does Not Include A Challenge To The *Johnson II* Map**

The plain-meaning interpretation of Section 801.50(4m) dictates that Plaintiffs’ challenge to the *Johnson II* map does not constitute “an action to challenge the apportionment of any congressional or state legislative district” under Section 801.50(4m). *See* Initial.Br.13–23. “Apportionment” (*i.e.*, the distribution or allocation of legislative or congressional seats) and “redistricting” (*i.e.*, the drawing of those seats’ physical boundaries) are distinct terms with distinct meanings, and Section 801.50(4m) applies only to actions challenging the former, which Plaintiffs’ challenge to the *Johnson II* map here is not. *See* Initial.Br.15–19, 22–23. Further, even if this Court rejects this recognized distinction between “apportionment” and “redistricting,” Section 801.50(4m) would still not apply because a court-drawn remedial map like the *Johnson II* map does not constitute an “apportionment.” *See* Initial.Br.19–21, 23.

Plaintiffs’ contrary arguments, claiming that this action constitutes an “apportionment” challenge under Section 801.50(4m), *see* Pls.Br.25–30, are without merit.

To begin and entirely dispositive, while Plaintiffs assert that “this Court’s references to ‘apportionment’ plans extends to redistricting plans that this Court adopts,” Pls.Br.27, they provide no example of a court considering a challenge to the decision of another court to be an “apportionment” challenge, nor any reason to believe that such a challenge is to an “apportionment,” Pls.Br.25–30. That is because an apportionment necessarily

entails a *legislative* action, not a court order. See Initial.Br.19–21, 23. The ordinary meaning of “apportionment” refers to “legislative apportionment,” *Apportionment*, Black’s Law Dictionary (12th ed. 2024)—not a judicial action affecting apportionment or redistricting. Further, it is the legislative branch that has “primary jurisdiction over legislative reapportionment,” *North Carolina v. Covington*, 585 U.S. 969, 979 (2018) (citation omitted), and that is constitutionally “task[ed] in the first instance” with conducting apportionment, *Ely v. Klahr*, 403 U.S. 108, 114 (1971); see Wis. Const. art. IV, § 3, while the judiciary’s role in the process is always “a purely judicial one” exercised only when necessary to ensure compliance with the law, *Johnson v. WEC*, 2021 WI 87, ¶ 3, 399 Wis. 2d 623, 967 N.W.2d 469 (“*Johnson I*”); see *Covington*, 585 U.S. at 979. Therefore, Plaintiffs’ challenge to the judicial action that this Court took in *Johnson II* of adopting Wisconsin’s current congressional map cannot be an action challenging an “apportionment” under Section 801.50(4m) on this basis alone.

But even if this Court goes beyond this court/legislative map distinction, Plaintiffs are wrong that “apportionment” and “redistricting” are “interchangeabl[e]” synonyms and that “apportionment” is “a broad term that includes all challenges to the composition of electoral districts.” Pls.Br.27 (citation omitted).

Although Plaintiffs are correct that some courts, at times, have referred to the concepts of “apportionment” and “redistricting” “interchangeably,” *id.* at 25 (citation omitted), when courts and other authorities are called to focus upon these concepts, they consistently recognize the same meaningful

“distinction” between apportionment and redistricting that this Court explained in *Jensen v. WEC*, 2002 WI 13, ¶ 5 n.2, 249 Wis. 2d 706, 639 N.W.2d 537, *see* Initial.Br.16–18. As this Court articulated, “reapportionment” refers to “the allocation of seats in a legislative body where the district boundaries do not change but the number of members per district does (*e.g.*, allocation of congressional seats among established districts, that is, the states),” while “redistricting” refers to “the drawing of new political boundaries.” *Jensen*, 2002 WI 13, ¶ 5 n.2. Again, when legal authorities focus on the meaning of “redistricting” and “apportionment,” they correctly recognize this distinction. This is true, for example, of the Wisconsin Constitution, *see* Wis. Const. art. IV, § 3, the Wisconsin Statutes, *see, e.g.*, Wis. Stat. § 59.10, the U.S. Code, *see, e.g.*, 2 U.S.C. § 2a(c), and the decisions of federal courts of appeals, *see, e.g.*, *Daly v. Hunt*, 93 F.3d 1212, 1214 n.1 (4th Cir. 1996).

Given that the distinction between these terms in this State is found in the Wisconsin Constitution itself, *see* Initial.Br.16–17, Plaintiffs’ claim that the “Wisconsin Constitution” conflates redistricting and apportionment by using these terms to “refer to the same process,” Pls.Br.8, backfires. Article IV, Section 3 of the Constitution tasks the Legislature with both “apportion[ing]” and “district[ing]” after each decennial census, Initial.Br.16–17 (citing Wis. Const. art. IV, § 3), and that usage of two different words in a single provision clearly indicates that they have “different meanings,” *Augsburger v. Homestead Mut. Ins. Co.*, 2014 WI 133, ¶ 17, 359 Wis. 2d 385, 856 N.W.2d 874 (citation omitted)—

specifically, the distinct meanings articulated by this Court in *Jensen*, Initial.Br.16–18. Thus, “apportion[ing],” Wis. Const. art. IV, § 3, within Article IV refers to the legislature setting “[t]he number of the members of the assembly” and the Senate, *id.* § 2, while “district[ing]” within Article IV refers to the Legislature “drawing assembly and senate districts” from which the occupants of the Assembly or Senate seats are elected, *Clarke v. WEC*, 2023 WI 79, ¶ 57, 410 Wis. 2d 1, 998 N.W.2d 370; Initial.Br.17–18.

None of the cases that Plaintiffs identify as using “apportionment” and “redistricting” “interchangeably,” see Pls.Br.25–28, undermine this constitutionally grounded distinction between “apportionment” and “districting.”

*Clarke* dealt with an original-action petition challenging the constitutionality of the “state legislative districts adopted by this [C]ourt” in the *Johnson* litigation, *Clarke v. WEC*, 2023 WI 70, 409 Wis. 2d 372, 373, 995 N.W.2d 779 (order granting petition), and, as Plaintiffs admit, the Court correctly characterized that action as a “redistricting challenge[ ],” *id.* at 374 (citation omitted); see Pls.Br.25—not a challenge to an *apportionment*. Nevertheless, Plaintiffs claim that *Clarke* order granting the original-action petition used the terms “redistricting” and “apportionment” interchangeably. See Pls.Br.25–26. But the only portion of the order for the majority that Plaintiffs cite merely recited the passage from *Jensen* that “any reapportionment or redistricting case is, by definition, *publici juris*, implicating the sovereign rights of the people of this state” and thereby supporting the Court’s conclusion that “redistricting challenges [are] a proper subject for

the court's exercise of its original jurisdiction." *Clarke*, 409 Wis. 2d at 374 (citing *Jensen*, 2002 WI 13, ¶ 17). That "redistricting" and "reapportionment" cases may both raise issues of "important and unresolved questions of statewide significance," *id.* at 374–75, in no way shows that such cases raise identical issues, or that those distinct terms are interchangeable. To the contrary, the Court's use of the disjunctive "or" between "redistricting" and "reapportionment" in the *Clarke* order, *id.* at 374 (citation omitted), further supports the conclusion that this Court views those words as "distinct terms" with "different meanings," *see Pawlowski v. Am. Fam. Mut. Ins. Co.*, 2009 WI 105, ¶ 22, 322 Wis. 2d 21, 777 N.W.2d 67; *Augsburger*, 2014 WI 133, ¶ 17. Indeed, the case that *Clarke* cited—*Jensen*—recognized that "there is a distinction" between "reapportionment" and "redistricting," although those terms are sometimes used "interchangeably," as already explained above. 2002 WI 13, ¶ 5 n.2.

*Clinard* likewise provides no support for Plaintiffs' misinterpretation of "apportionment" under Section 801.50(4m). While the *Clinard* order that Plaintiffs cite refers to "apportionment matters," Pls.Br.26 (citation omitted), this Court in no way determined that the original-action petition before it there constituted an "apportionment" challenge within the meaning of Sections 751.035 and 801.50(4m). Rather, this Court ordered the parties to brief the question of whether those statutes applied to the petition at all, *see* Order at 2, *Clinard v. Brennan*, No.2011AP2677-OA (Wis. Nov. 30, 2011), and eventually dismissed the petition, *see* Order at 2, *Clinard*, No.2011AP2677-

OA (Jan. 13, 2014). In any event, unlike the present case, where this Court adopted the congressional map that Plaintiffs challenge, *Clinard* concerned the congressional redistricting plan that the Legislature enacted following the 2010 decennial census. See *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 846 (E.D. Wis. 2012) (explaining that, after the census, “the [L]egislature passed” and “Governor Scott Walker signed into law” “Act 44, establishing the new lines for Wisconsin’s eight congressional districts”).

Plaintiffs cite multiple other Wisconsin cases that allegedly “us[ed] ‘apportionment’ broadly to refer to dividing voters among districts and also to moving district lines for other reasons,” Pls.Br.27, but none of those cases involved Section 801.50(4m) or a challenge to a court-drawn map. As *Clarke* recognized, *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964), “resolv[ed] challenges to a *legislatively enacted* map through an original action.” *Clarke*, 409 Wis. 2d at 374 (citing *Zimmerman*, 22 Wis. 2d at 558) (emphasis added). Similarly, *State ex rel. Hicks v. Stevens*, 112 Wis. 170, 88 N.W. 48 (1901), challenged the constitutionality of an apportionment law that the Legislature passed creating a new county that was not wholly contained within one state Assembly district, and the Court held that, to “meet the growing demands of the increase of population,” “the legislature . . . may create new counties” with “designated boundaries [that] cross the lines of an assembly district” so long as “the original legislative districts are not disturbed.” *Id.* at 51. Thus, in contrast to Plaintiffs’ challenge, *Stevens* involved an

“apportionment act” (*i.e.*, the distribution of Assembly seats among counties), *id.* at 48, that was taken by “the [L]egislature,” *id.* at 51.

The *Cunningham* cases that Plaintiffs cite likewise provide no support for Plaintiffs’ position. See *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W.35 (1892); *State ex rel. Att’y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892). As *Stevens* later explained, those cases “settled the question that the [L]egislature had no power to break up county lines and boundaries in apportioning assembly districts.” 88 N.W. at 48 (citations omitted). So, again, those cases dealt with a challenge to the legislative act of distributing legislative seats among districts (there, counties)—not a challenge to a court order adopting a redistricting plan redrawing district boundaries.

Finally, *Slauson v. City of Racine*, 13 Wis. 398 (1861), also concerned a challenge to legislative, not judicial, action: whether an “action of the legislature” annexing certain property in one Assembly district to a city in another district, thereby changing the boundaries of the district, constituted an unconstitutional “second apportionment in one census period,” *State ex rel. Smith v. Zimmerman*, 266 Wis. 307, 314, 63 N.W.2d 52 (1954) (citing *Slauson*, 13 Wis. 398). And contrary to Plaintiffs’ suggestion, Pls.Br.26–27, the Court determined that the moving of district lines “was *not* a reapportionment” under Article IV, § 3, but rather was “only an incident to the accomplishment of a valid act passed to effect a different, constitutionally authorized purpose”—the Legislature’s power “to organize counties, towns and cities, and

change the boundaries of such as are already organized.” *Id.* at 314–15 (citation omitted) (emphasis added).

Plaintiffs’ analogizing of Section 801.50(4m) to 28 U.S.C. § 2284 and their reliance on case law applying that federal statute, *see* Pls.Br.28–30, fail to show that Plaintiffs’ Complaint constitutes an apportionment challenge within Section 801.50(4m)’s scope. Plaintiffs note that federal courts have appointed three-judge panels under Section 2284(a) in three “actions that alleged claims other than (or in addition to) malapportionment claims.” Pls.Br. 29. But all three cases upon which Plaintiffs rely challenged a legislatively-enacted map, not a court-drawn map. *See Baldus*, 849 F. Supp. 2d at 844–47 (considering maps adopted by the Legislature); *Black Leaders Organizing for Communities v. Spindell*, No.3:21-cv-534, Dkt.44 at 2 (W.D. Wis. Sept. 21, 2021) (“Wisconsin’s current state legislative districts were adopted by the Wisconsin State Legislature and signed by Wisconsin’s Governor[.]”); *Whitford v. Gill*, 218 F. Supp. 3d 837, 853 (W.D. Wis. 2016) (explaining that “[t]he Senate and Assembly passed the bill” containing the challenged “redistricting plan” and “[t]he Governor signed the bill” into law), *vacated and remanded*, 585 U.S. 48 (2018).

At bottom, Plaintiffs are unable to identify *any* state or federal case that concluded that a challenge to a court-drawn remedial map was a challenge to an “apportionment,” further confirming that their Complaint falls outside Section 801.50(4m)’s scope.

## CONCLUSION

This Court should decline to appoint a three-judge panel under Wis. Stat. § 801.50(4m) and should instead order dismissal of the Complaint.

Dated: October 16, 2025

Respectfully submitted,

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### FORM AND LENGTH CERTIFICATE

I hereby certify that this document conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b), (bm), and (c), as well as the length limitations contained in this Court's September 25, 2025 Order for a brief produced with a proportional serif font. The length of this brief is 3,037 words.

Dated: October 16, 2025

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