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Supreme Court of Wisconsin

No. 2021AP1450-OA

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS AND RONALD ZAHN,

Petitioners,

BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, REBECCA ALWIN, CONGRESSMAN GLENN GROTHMAN, CONGRESSMAN MIKE GALLAGHER, CONGRESSMAN BRYAN STEIL, CONGRESSMAN TOM TIFFANY, CONGRESSMAN SCOTT FITZGERALD, LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA, GERALDINE SCHERTZ, KATHLEEN QUALHEIM, GARY KRENZ, SARAH J. HAMILTON, STEPHEN JOSEPH WRIGHT, JEAN-LUC THIFFEAULT, AND SOMESH JHA,

Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, DON MILLIS IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, ANN JACOBS IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, CARRIE RIEPL IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, ROBERT SPINDELL, JR. IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, AND MARK THOMSEN IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION,

Respondents,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, IN HIS OFFICIAL CAPACITY, AND DIANNE HESSELBEIN, SENATE DEMOCRATIC MINORITY LEADER, ON BEHALF OF THE SENATE DEMOCRATIC CAUCUS,

Intervenors-Respondents.

REPLY IN SUPPORT OF INTERVENORS-PETITIONERS LISA HUNTER, JACOB ZABEL, AND JOHN PERSA'S MOTION FOR RELIEF FROM JUDGMENT

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INTRODUCTION

The map this Court enforces for the next four congressional elections should reflect the principled approach to redistricting it recently affirmed, not an obdurate commitment to an unworkable—and now overruled—remedial criterion. Hunter Intervenors-Petitioners' motion for relief from judgment rests on that sensible proposition. Yet the Johnson Petitioners, the Congressmen, and the Legislature (collectively, "Respondents") ask this Court to deprive Wisconsin voters of a lawful remedial process based solely on their strong preference for the now-discredited congressional map.

Lacking a defensible legal basis for their position, Respondents cycle through a series of vapid pejoratives, *e.g.*, Congressmen Resp. at 8 ("clumsy"); Legislature Resp. at 47 ("frivolous"), call into question the integrity of a member of this Court, Legislature Resp. at 40–41, and fill well over a hundred pages of briefing, shotgun-style, with every conceivable objection. Yet for all their invective and feigned indignation, one thing is conspicuously absent from Respondents' briefs: The equitable justification for subjecting Wisconsin voters to four more elections under a map that the Court *could not adopt* under its current jurisprudence.

Respondents do not provide that justification because it does not exist. *Johnson I* was a short-lived deviation from this Court's

longstanding commitment to fair, traditional redistricting principles. *Clarke* has now corrected that deviation. And none of Respondents' procedural and substantive objections stand in the way of applying *Clarke*'s remedial framework to the congressional map. The Court can, and should, grant the motion and finish the work of giving Wisconsin voters fair and equitable districts for the first time in a generation.[1]

ARGUMENT

I. The motion is timely.

Less than a month after the Court issued its decision in *Clarke* overruling the least change principle that drove the current congressional map, Hunter Intervenors-Petitioners filed their Motion for Relief from Judgment, along with its supporting memorandum and an expert report from Dr. Jonathan Rodden. There can be no doubt that the motion was made within a reasonable time as required by Section 806.07. Respondents grasp at inapplicable doctrines to argue otherwise, but none provides a reason to find the motion untimely. And the Court has more than

[1] *Johnson I* is the November 30, 2021, order in this action announcing the Court's criteria for map selection, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469; *Johnson II* is the March 1, 2022, order applying those criteria to adopt congressional and legislative maps, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402; and *Johnson III*, is the April 15, 2022, order adopting different legislative maps on remand from the U.S. Supreme Court, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559.

sufficient time to evaluate the motion and implement relief: the motion presents narrow, focused issues of equity and the earliest statutory deadline is still several months away. *See* Wis. Stat. § 8.15(1) (establishing June 1, 2024 deadline for filing of candidate nomination papers). In sum, the motion is timely and can be resolved in advance of the 2024 elections.

A. The motion is timely under Section 806.07.

Hunter Intervenors-Petitioners' motion easily satisfies the timeliness standard under Section 806.07(2), which only requires that the motion "be made within a reasonable time." This motion comes less than two years after the *Johnson II* judgment, which was issued on March 1, 2022. This is well within the timeframes previously accepted by this Court. *See, e.g.*, *State ex rel. Cynthia M.S. v. Michael F.C.*, 181 Wis. 2d 618, 624, 511 N.W.2d 868 (1994) (reversing denial of Section 806.07 motion filed ten years after judgment); *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 541, 363 N.W.2d 419 (1985) (reversing denial of Section 806.07 motion filed four years after judgment). More importantly, the motion comes less than a month after this Court issued its decision in *Clarke*—which is the relevant intervening event. The timeline thus resembles that of *M.L.B.*, where a paternity finding was challenged four years after the judgment, but only one month after a new blood test disproving paternity became available, shifting the equities. 122 Wis. 2d at 541, 363 N.W.2d 419. Similarly, here,

the Court's decision in *Clarke* established that continued enforcement of *Johnson II* is no longer equitable.

Respondents' overly narrow view of what constitutes "within a reasonable time" is plainly inconsistent with the statute itself. As an initial matter, this Court has recognized that Section 806.07 is "remedial in nature and should be liberally construed." *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶ 31, 326 Wis. 2d 640, 785 N.W.2d 493. Further, the statute's history reflects a deliberate attempt to expand the time in which parties may seek relief from inequitable judgments. Although the predecessor statute set an absolute limit of one year following the judgment for any relief, the statute was amended in 1975 to allow for a "reasonable time" instead. *See Matter of Smith's Est.*, 82 Wis. 2d 667, 671–73, 264 N.W.2d 239 (1978).

Lacking a timeliness argument under Section 806.07, Respondents look beyond the statute and invoke the equitable doctrine of laches and vague concerns about election timing. Legislature Resp. at 43–47; Congressmen Resp. at 28–32. But a laches inquiry would be redundant. Section 806.07(2) already expressly establishes the remedial provision's timeliness requirement and incorporates a reasonableness inquiry. There is no need to ask the same question through the lens of laches, *see Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶12, 393 Wis. 2d 308, 946 N.W.2d 101 (laches is premised on whether a party

"unreasonably delays" bringing a claim), or to impose an artificial "elections exception" where none exists.

In any case, the elements of laches are not satisfied. For the reasons stated above, the Hunter Intervenors-Petitioners' motion was not "unreasonable delay[ed]" but a swift reaction to this Court's decision in *Clarke*. Further, Respondents fail to show, because of the mere weeks between *Clarke* and this motion, they are "prejudiced by the delay." *Wis. Small Bus. United*, 2020 WI 69, ¶12. While all the parties—and the public—have an interest in establishing lawful, equitable congressional districts as soon as possible, Respondents fail to identify a concrete barrier to either engaging with the motion or complying with its outcome. Most of what Respondents characterize as "prejudice" is merely the "disruption … necessary to serve the public's interest in having districts that comply with [Wisconsin law]." *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶ 43, 410 Wis. 2d 1, 998 N.W.2d 370. Although more time and further proceedings may be beneficial in the abstract, they must be balanced against the Courts' "overriding responsibility" to the Wisconsin Constitution and the Court's duty to ensure that its remedial powers are exercised in a lawful and equitable manner. *State ex rel. Lopez-Quintero v. Dittmann*, 2019 WI 58, ¶ 28, 387 Wis. 2d 50, 928 N.W.2d 480.

And even if all the elements of laches could be satisfied, this Court retains discretion over whether to apply laches. *Wis. Small Bus. United*, 2020 WI 69, ¶ 12. The Court has good reason to exercise that discretion by declining to apply laches here. Given the irreparable injury voters, including Hunter Intervenors-Petitioners, inflicted by the continuing imposition of an inequitable congressional map, the public interest is best served by consideration of the issues raised by the motion.

B. There is sufficient time to provide relief before the 2024 elections.

Because the Hunter Intervenors-Petitioners moved swiftly after this Court's decision in *Clarke*, there is more than sufficient time to evaluate the motion and provide relief from judgment. Given the relative simplicity of drawing congressional maps as compared to state legislative maps, the Court could carry out a remedial process on a much faster timeline than the process provided in *Clarke* and provide relief well in advance of the 2024 primary and general elections. Several months remain before the earliest statutory deadline to establish new congressional districts—when candidates file nomination papers on June 1, 2024. Wis. Stat. § 8.15(1).

Respondents' contention that there is insufficient time to address the merits of Hunter Intervenors-Petitioners' motion is not well founded. Legislature Resp. at 46–53; Congressmen Resp. at 60–64; Johnson Resp. at 23–25. The motion is premised on a

fundamental defect in the *Johnson II* injunction that renders its continued application inequitable—the Court's abdication of its judicial role through the unworkable and lawless least-change approach and the failure to consider partisan bias. Hunter Mem. 17–26. No evidentiary hearing is required to evaluate and resolve the merits of that argument. The Court has ample time to evaluate the merits of the motion and grant relief.[2]

The Court also has ample time to implement a new remedy if it grants relief from judgment. Neither this Court nor the parties are strangers to swift remedial mapping proceedings. After *Johnson I*, the Court allotted the parties just five weeks to submit proposed congressional *and* state legislative maps, expert reports, supportive briefing, and responsive and reply briefing. *See* November 17, 2021, Order. And while the remedial process ordered in *Clarke* spans roughly seven weeks, a congressional remedial process is far less complicated and could easily be accomplished in four weeks or less. Unlike the process for

[2] Even if the Court determines that further evaluation of Hunter Intervenors-Petitioners' factual allegations, including those in Dr. Rodden's report, is necessary to resolve the motion, *but see infra* Section III.B.2., the Court need only hold a single evidentiary hearing. *See Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶ 10, 282 Wis. 2d 46, 698 N.W.2d 610 (describing procedure for Section 806.07 motion, including a hearing to determine "the truth or falsity of the allegations").

redistricting the state legislature, which requires drawing 132 nested districts subject to additional legal requirements under Article IV, such as adherence to county and ward lines, *see Clarke*, 2023 WI 79, ¶ 65, the congressional redistricting process entails drawing only eight districts and is subject to fewer legal requirements. The lower complexity of congressional redistricting will ease the burden on the parties, the Court, and any Court-appointed consultants—permitting a much faster timeline for remedial proceedings.

Nor does the Court need to reserve time for the political branches to redistrict. Unlike *Clarke*, which concerned a new legal violation, this motion concerns only the Court's remedial process *after* the political branches failed to enact a congressional map. Accordingly, as Hunter Intervenors-Petitioners explained and as no Respondent refutes, the political branches are not entitled to a first-instance opportunity to craft the remedy. Hunter Mem. at 33.

Respondents make much of the March 15, 2024, deadline identified by the Commission in *Clarke*. *See* Legislature Resp. at 20; Congressmen Resp. at 20, 28, 53. But that aspirational target for finalizing maps is not a hard deadline and Respondents' fixation on that date elides important details. The Commission identified that deadline in the context of state legislative maps, which are substantially more complicated to implement. And the Commission arrived at that date by working backward from when

candidates may *begin* the petitioning process on April 15—but that date is not a hard deadline. Given Wisconsin's generous six-week period for gathering signatures, the start of that process does not foreclose the possibility of new maps. Indeed, this Court implemented new state legislative maps a week *after* this deadline in 2022. *See Clarke*, 2023 WI 79, ¶ 42 (citing *Johnson III*, 2022 WI 19, ¶ 138 (Grassl Bradley, J., concurring)). The earliest deadline warranting consideration is the June 1, 2024, filing deadline for candidates—which remains several months away. Wis. Stat. § 8.15.

II. The motion is procedurally proper.

Respondents' scattershot procedural objections to the motion miss the mark for one simple reason: none of them establish that motions under Section 806.07 cannot be applied to the *Johnson II* remedy. Whatever other procedures exist where similar issues could be raised, none of them preclude the application of this on-point rule of civil procedure. The plain text of the rule and the equitable principles underlying it entitle the Hunter Intervenors-Petitioners to invoke Section 806.07.

A. A motion for relief from judgment is an appropriate mechanism to seek relief from *Johnson II*.

Under the plain text of Section 806.07, Hunter Intervenors-Petitioners' motion is properly before this Court. The text is simple and straightforward: "On motion and upon such terms as are just, the court […] may relieve a party […] from a judgment, order or

stipulation." Wis. Stat § 806.07. It is beyond dispute that the Hunter Intervenors-Petitioners are parties to *Johnson* and have proceeded, on a motion, to seek relief from the judgment in *Johnson II*.[3]

Nevertheless, Respondents insist—without supporting authority—that Section 806.07 does not apply to the Wisconsin Supreme Court. But the rules of civil and appellate procedure are expressly incorporated into the rules of Supreme Court procedure. *See* Wis. Stat. §§ 809.63, 809.84. This incorporation is particularly appropriate in an original action like this one, where this Court is the tribunal of first instance. Moreover, this Court has previously looked to Chapter 806 in defining the term "judgment" under its own rules. *See Archdiocese of Milwaukee v. City of Milwaukee,* 91 Wis. 2d 625, 626, 284 N.W.2d 29 (1979).

Nothing in the rules of civil, appellate, or Supreme Court procedure bars the application of Section 806.07 in original actions. Respondents suggest that the availability of motions to

[3] Notably, the Legislature suggested in the *Clarke* litigation that a motion for relief from judgment was the *only* appropriate procedural mechanism to alter the *Johnson* judgments. *See* Opening Brief of Legislature at 50, *Clarke v. Wis. Elections Comm'n*, 2023AP001399-OA (Oct. 16, 2023) ("At the very least, any remedy must entail reopening *Johnson* to modify its injunction '[o]n motion'") (quoting Wis. Stat. § 806.07)). This Court concluded that Section 806.07 is not the exclusive procedure for new legal claims. *Clarke*, 2023 WI 79, ¶ 54.

reconsider, under Section 809.64, renders Section 806.07 unavailable in this Court. *See* Johnson Resp. at 11 (citing Wis. Stat. § 809.64). But reconsideration and relief from judgment are not mutually exclusive and, indeed, serve different purposes. Reconsideration procedures revisit a court's original judgment based on legal errors or factual circumstances at that time. The relief from judgment procedure, by contrast, provides courts that enter ongoing or prospective relief a tool to limit that relief when changed circumstances or other unanticipated developments so warrant—for instance, under subsection (g), when "it would be inequitable for the original judgment to be enforced prospectively." *M.L.B.*, 122 Wis. 2d at 543–44, 363 N.W.2d 419. Recognizing that distinction, this Court has expressly held that the existence of a reconsideration procedure in the trial court under Wis. Stat. § 805.17(3) does not preclude brining a motion for relief under Section 806.07 in the same forum. *Matter of Smith's Est.*, 82 Wis. 2d at 671–73, 264 N.W.2d 239.[4]

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[4] The Wisconsin Statutes thus provide further confirmation that these procedures serve different functions: Wisconsin trial courts have reconsideration procedures at their disposal, *see* Wis. Stat. § 805.17(3), yet are unquestionably authorized to grant relief under Section 806.07. If Respondents were right that the procedures served identical functions, the statutory scheme would make little sense.

Moreover, nothing *could* prohibit this Court from entertaining a motion for relief from judgment—under Section 806.07 or as a matter of pure equity power—because courts have "inherent power [...] to control disposition of causes on its docket." *Larry v. Harris*, 2008 WI 81, ¶¶ 23–25, 311 Wis. 2d 326, 752 N.W.2d 279. Whenever a court issues a permanent, ongoing 1injunction, that court "has inherent power to modify or vacate the injunction to conform to a change of conditions occurring after it was awarded." *Condura Const. Co. v. Milwaukee Bldg. & Const. Trades Council AFL*, 8 Wis. 2d 541, 545–47, 99 N.W.2d 751 (1959). Accordingly, this Court has explained that Section 806.07 simply "invokes the pure equity power of the court." *Mullen v. Coolong*, 153 Wis. 2d 401, 407, 451 N.W.2d 412 (1990).[5]

Finally, the Legislature argues that motions under Section 806.07 permit only the dissolution of an injunction, not its modification. Legislature Resp. at 22–24. This argument is

[5] The Johnson Petitioners argue that this is "not the same Court" that issued *Johnson II* because of "membership changes." Johnson Resp. at 13–14. But they concede that this Court has jurisdiction over this case—meaning it also has jurisdiction over the *Johnson II* judgment and this motion seeking relief from it. *Id.* And the Johnson Petitioners cite nothing to support their suggestion that "membership changes" are relevant. Nor could they—such a rule would lead to absurd results whereby Section 806.07 motions are precluded when, for example, a circuit court judge retires.

contrary to the text of the rule, the equitable principles governing injunctions, the application of its federal analogue, and the circumstances of this case. The rule speaks in broad terms of "reliev[ing]" a party from a judgment. Wis. Stat. § 806.07. If relief were limiting to "dissolving an injunction," the rule would say so. And the equitable principles of Wisconsin law that are codified in Section 806.07 confirm a court's inherent power to not only dissolve injunctions but "modify" them. *Condura Const. Co.*, 8 Wis. 2d at 545–47, 99 N.W.2d 751.

The equitable power of courts to modify injunctions under Wisconsin law is confirmed by federal practice. *Contra* Legislature Resp. at 23–24. The U.S. Supreme Court has long held that Federal Rule of Civil Procedure 60(b)(5) "provides a means by which a party can ask a court to modify *or* vacate a judgment." *Horne v. Flores*, 557 U.S. 433, 447 (2009) (emphasis added). This ability to modify an injunction is particularly important when the injunction will "remain in force for many years, [as] the passage of time frequently brings about changed circumstances," including "changes in governing law or its interpretation by the courts." *Id.* at 447–48. The cases cited by the Legislature—repudiating the use of Rule 60(b) to alter monetary or property awards—do not apply to equitable actions where permanent injunctions are enforced on an ongoing basis. *See, e.g.*, *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 620 (8th Cir. 1987) (reversing modification of fee award

under Rule 60); *United States v. $119,980.00*, 680 F.2d 106, 108 (11th Cir. 1982) (reversing award of money to IRS under Rule 60); *United States v. One 1961 Red Chevrolet Impala Sedan, Serial No. 11837A177369*, 457 F.2d 1353, 1357 (5th Cir. 1972) (reversing award of property under Rule 60).

Even if one contorted Section 806.07 to permit only the *dissolution* of the *Johnson II* injunction, dissolving that injunction would necessitate a new remedial process to develop a constitutional map. As the Legislature admits, the "State has not enacted new congressional redistricting legislation, so the *Johnson II* injunction is still necessary to ensure constitutional apportionment of Wisconsin's congressional districts." Legislature Resp. at 25. If the motion is granted, the need to resolve the impasse will permit the Court to craft a new map, whether or not Section 806.07 authorizes an injunction's modification.

B. Hunter Intervenors-Petitioners are appropriate parties to seek relief.

Under the plain text of the rule, Hunter Intervenors-Petitioners are entitled to invoke the relief-from-judgment procedure. The only relevant textual requirement is that the movant be "a party." Wis. Stat. § 806.07(1). There is no disputing that Hunter Intervenors-Petitioners were parties to *Johnson II* and are thus entitled to move under Section 806.07.

Respondents argue for an unjustifiably narrow reading of the rule, whereby the motion is only available to parties who face

"obligations" under the judgment in question. Legislature Resp. at 21–22; Johnson Resp. at 12. This reading conflicts with the text and purpose of the rule. *First*, this crabbed construction ignores the use of the broad phrase "a party" rather than a specific phrase referring to a subset of parties that face obligations under the judgment (e.g., "defendant" or "enjoined party"). *Second*, the Court should not strain to find such limits in the rule, as it is a remedial provision must be read "liberally" rather than narrowly. *Miller*, 2010 WI 75, ¶ 31. *Third*, the Legislature's proposed restriction on who can bring motions under Section 806.07 would serve no purpose because, as this Court has previously held, courts may resolve such motions *sua sponte*. *Larry*, 2008 WI 81, ¶ 23.

Looking beyond the rule itself, the history of the provision, its predecessor statute, and the underlying equitable principles demonstrate that the Hunter Intervenors-Petitioners are appropriate parties to seek relief under Section 806.07. In construing similar motions prior to the current rule's enactment, this Court explained that such relief was intended for any "party to the action who is *adversely affected* by the injunction." *Condura Const. Co.*, 8 Wis. 2d at 545–47, 99 N.W.2d 751. Here, there can be no doubt that Hunter Intervenors-Petitioners—Wisconsin voters—are adversely affected by the continued imposition of an inequitable congressional map.

The Johnson Petitioners flip the doctrine of judicial estoppel on its head to argue that Hunter Intervenors-Petitioners are barred from arguing against the maps chosen in *Johnson II* based on statements made after *Johnson I*. *See* Johnson Resp. at 16–17. But a necessary element of judicial estoppel is that "the party to be estopped must have convinced the first court to adopt its position." *Salveson v. Douglas County*, 2001 WI 100, ¶ 38, 245 Wis. 2d 497, 630 N.W.2d 182. Johnson Petitioners' focus on Hunter Intervenors-Petitioners' arguments *after* this Court imposed the least-change rule in *Johnson I* ignores the fact that Hunter Intervenors-Petitioners had previously argued against the "least change" approach and disregarding partisan fairness. *See* Hunter Brief Addressing Court's October 14 Order at 1–18. Notably, the Hunter Intervenors-Petitioners *failed* to convince the Court to adopt its position in *Johnson I*. It would defy both reason and doctrine to judicially estop Hunter Intervenors-Petitioners from making arguments fully consistent with arguments they already made.

Even if judicial estoppel could be applied to bar Hunter Intervenors-Petitioners from seeking relief consistent with their original position, the Johnson Petitioners would also have to establish a "clear[] inconsisten[cy]" between Hunter Intervenors-Petitioners' positions. *Salveson*, 2001 WI 100, ¶38. The Johnson Petitioners point to Hunter Intervenors-Petitioners' one-sentence

statement that the congressional map chosen in *Johnson II* complies "with all relevant state and federal law." Johnson Resp. at 16 (citing Hunter Intervenors' December 30, 2021 Response Brief at 13). Notably, the very next sentence—which the Johnson Petitioners omit—makes clear that Hunter Intervenors-Petitioners' evaluation of that map was "[b]ased on the criteria established in [*Johnson I*]." Hunter Intervenors' December 30, 2021 Response Brief at 13. In other words, the prior statement about compliance with "relevant state and federal law" refers to the state and federal law as set forth in *Johnson I,* which were the express criteria for evaluating maps at the remedial stage. The statement plainly does not refer to other proposed remedial criteria that the Court had already rejected.

Finally, even if the Johnson Petitioners could establish the necessary elements, the Court retains discretion over whether to apply judicial estoppel. *Clarke*, 2023 WI 79, ¶ 49. Given the public import of the motion's substance, the Court has good reason to exercise its discretion not to apply the doctrine here. *Id*.

III. The motion should be granted.

A. A motion for relief from judgment may test the continuing viability of a remedy without establishing that a new legal violation has occurred.

Respondents fundamentally misunderstand the function of a motion for relief from judgment under subsections (g) or (h). Such a motion may serve to challenge the continuing viability of a

remedy for an already-proven violation; thus, by definition, such a motion does not require the movant to establish a new violation. For instance, in *Wisconsin Department of Corrections v. Kliesmet*, 211 Wis. 2d 254, 564 N.W.2d 742 (1997), a subsection (g) case, this Court considered whether to vacate a permanent injunction preventing the Milwaukee County Sheriff "from refusing to keep DOC detainees for longer than five days," *id.* at 258. In granting such relief, the Court did not in any way disturb the conclusion of law underpinning the injunction: that a state statute granted "the DOC discretion to keep alleged violators of probation or parole in [county] jails." *Id.* at 266. But the Court adjusted its remedial framework under that statute to account for "overcrowding" and sheriffs' responsibility to preserve "jail safety." *Id.* at 268. Similarly, the question here is not whether the *Johnson II* map contains a legal violation; the question is whether its continued enforcement constitutes an equitable and just exercise of the Court's remedial impasse powers. As the U.S. Supreme Court has put it: "the court cannot be required to disregard significant changes in law or facts if it is 'satisfied that what it was been doing has been turned through changing circumstances into an instrument of wrong.'" *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 647 (1961).

Yet Respondents complain that Hunter Intervenors-Petitioners have not identified any new "legal" violation in the

Johnson II congressional map. Legislature Resp. at 28, 36; Congressmen Resp. at 37–44; Johnson Resp. at 14–17. The Congressmen, in particular, argue that *Clarke* changed only "remedial" principles, so although "least change" may no longer constitute the Court's "overarching approach" to redistricting, the *Johnson II* map remains lawful. Congressmen Resp. at 37–41. This legal–remedial distinction is nonsensical as a response to the instant motion, which seeks relief from this Court's remedial *Johnson II* determination based on application of *Clarke*'s remedial principles. By design, a motion for relief from judgment under subsection (g) considers not whether a previous judicial remedy is subject to a new legal claim but instead whether that remedy should remain in effect as a matter of justice and equity.

The Legislature, for its part, argues that nothing in *Clarke* establishes a "constitutional defect" in the existing congressional districts. Legislature Resp. at 28. But that presupposes the wrong question. The relevant *constitutional* defect is found in the most recent legislatively adopted map, the 2011 plan—that map is malapportioned, a liability claim Hunter Intervenors-Petitioners prevailed on in *Johnson I*. Because that map is malapportioned, and because the political branches have logjammed in their attempts to rectify the constitutional defect, the Court had to step

in to adopt a remedy. This motion tests whether the court-adopted remedy suffers from any *equitable* defects.[6]

The Congressmen similarly argue that "the U.S. Constitution and Wisconsin law" provide the lawful bases for the *Johnson II* map. Congressmen Resp. at 41–42; *see also* Johnson Resp. at 14–17. But that is only half-right. Those sources of law provide the Court's authority to adopt a redistricting plan *of some sort* as an impasse remedy. The lines that give that plan its substance, however, must be established under the Court's recognized remedial principles. The question of liability is separate from and prior to the question of remedy. *See infra* Part III.D.

With Respondents' fundamental misapprehension about the nature of the inquiry corrected, the Court may turn to the correct questions: First, is "prospective application" of the *Johnson II* congressional remedy "no longer equitable," such that relief from judgment should be granted under subsection (g)? And second, do "[a]ny other reasons"—chiefly, justice and the public interest—

[6] The Legislature invokes *State ex rel. Smith v. Zimmerman*'s instruction that "without a constitutional change permitting it no more than one legislative apportionment may be made in the interval between two federal enumerations." 266 Wis. 307, 312, 63 N.W.2d 52 (1954); *see* Legislature Resp. at 36. But *Zimmerman* is off point because no "legislative apportionment" is at issue—to the contrary, the absence of any valid legislative apportionment is what required—and continues to require—this Court to exercise its equitable powers in this case.

justify relief from that judgment under subsection (h)? The Court should answer both questions in the affirmative.

B. Hunter Intervenors-Petitioners are entitled to relief from judgment under subsection (g).

Subsection (g) authorizes relief from a judgment whenever it is “no longer equitable that the judgment should have prospective application.” Wis. Stat. § 806.07(1)(g). Generally, relief under this subsection will be granted where “a change in conditions” means that “it would be inequitable for the original judgment to be enforced prospectively.” *M.L.B.*, 122 Wis. 2d at 543–44, 363 N.W.2d 419; *see* Hunter Mem. at 14–15. Such inequity exists where the judgment’s prospective application would harm “the public interest.” *Kliesmet*, 211 Wis. 2d at 261, 564 N.W.2d 742 (quoting *Rufo v. Inmates of the Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992)).

Hunter Intervenors-Petitioners have identified three grounds to find that prospective application of the *Johnson II* map to the next four congressional elections would be inequitable and would harm the public interest. First, and most crucially, the lines that constitute the map no longer have any basis in this Court’s remedial redistricting principles after *Clarke*, rendering the map an equitable remedy with no equitable justification. Hunter Mem. at 17–21. Second, the Court failed to consider partisan bias in selecting a remedial map—which *Clarke* established it must do—resulting in a judicial remedy that subjects Wisconsin voters to

gross partisan unfairness. *Id.* at 21–26. And third, the least-change principle that animated the map's formation violates the separation of powers, so the map's continued application works that harm on Wisconsin's constitutional order on an ongoing basis. *Id.* at 26–31. Respondents' shotgun attempts to refute these points are unavailing.

1. ***Johnson II*'s reliance on the least-change principle renders the congressional map inequitable in light of *Clarke*.**

The Legislature begins by misstating the standard, suggesting that no change in circumstances has rendered the *Johnson II* injunction "unnecessary." Legislature Resp. at 25 (quoting *M.L.B.*, 122 Wis. 2d at 544, 363 N.W.2d 419). Of course, some sort of mandatory injunction remains necessary given the political branches' impasse. But a finding that an injunction has become "unnecessary" is just one of several different findings that may authorize relief under subsection (g)—the statutorily mandated inquiry is whether "prospective application" is "equitable." Wis. Stat. § 806.07(1)(g). The Legislature's contrary suggestion is misleading.

Respondents go on to advance the remarkable contention that *Clarke* presents no "change in conditions" because it changed nothing at all—according to the Legislature, *Clarke* did *not* overrule the "least change" principle. Legislature Resp. at 26. Indeed, the Legislature suggests the Court *could not* overrule

"least change" as a paramount redistricting principle, because "the very reason for the least-changes approach in this case was as a way of abiding by the careful division of the separation of powers." *Id.* Unfortunately for the Legislature, the Court was very clear in *Clarke*: "we overrule any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach." *Clarke*, 2023 WI 79, ¶ 63. In so doing, the Court explained that it "cannot allow a judicially-created metric, not derived from the constitutional text, to supersede the constitution," *id.* ¶ 62—precisely what happened at the remedial phase in *Johnson II*. Hunter Intervenors-Petitioners, unlike Respondents, take this Court at its word about what it was doing in *Clarke* and recognize its authority to revisit its own precedents when they prove wrong and unworkable.

Respondents also contend that *Clarke* cannot constitute a relevant "change in conditions" because it was a change in law. Johnson Petitioners go so far as to suggest that "a change in applicable law" *never* justifies relief from judgment. Johnson Resp. at 22 (quoting *Schauer v. DeNeveu Homeowners Ass'n*, 194 Wis. 2d 62, 73, 533 N.W.2d 470 (1995)). *But see, e.g., Am. Horse Prot. Ass'n v. Watt*, 694 F.2d 1310, 1316 (D.C. Cir. 1982) ("When a change in the law authorizes what had previously been forbidden it is abuse of discretion for a court to refuse to modify an injunction founded on the superseded law."). The Legislature, for its part, recognizes

that a change in law may in certain circumstances justify relief from judgment. Legislature Resp. at 27–28. But it improperly limits those circumstances based on a case that (1) does not control this Court's exercise of its discretion; (2) specifically concerns when a *consent decree* may be modified; and (3) does not itself purport to be exhaustive. *Id.* (quoting *Rufo*, 502 U.S. at 388).

In truth, *Clarke* does qualify as a "change in conditions" warranting relief from judgment. As Hunter Intervenors-Petitioners explained, "*Johnson I* was not, with respect to *Johnson II*, merely an unrelated precedent that provided a rule of law." Hunter Mem. at 18–19. Rather, the *Johnson I* "mandate dictated both the form of the remedial maps proposed by the parties . . . and the Court's selection from among those proposed remedies." *Id.* (citing *Johnson II*, 2022 WI 14, ¶ 54 (Walsh Bradley, J., concurring in the judgment)). In other words, *Clarke* vitiated the entire logic of the *Johnson II* remedial framework, rendering the current map nothing more than an exercise of arbitrary power. *Clarke* rendered invalid both the plan's inputs—the parties' remedial proposals circumscribed by *Johnson I*'s mandate of least change—and its output. Although Hunter Intervenors-Petitioners made this precise point in their opening brief, no Respondent addresses it.

2. *Johnson II*'s failure to give due weight to partisan effects and the separation of powers renders the congressional map inequitable in light of *Clarke*.

Respondents' objections to Hunter Intervenors-Petitioners' partisan-unfairness and separation-of-powers arguments fare no better. Indeed, this Court need not even opine on these objections in order to grant Hunter Intervenors-Petitioners' motion, as the substantive defects in the *Johnson II* map only illustrate the procedural defects in the development of that map—defects that this Court has already identified and overruled in *Clarke*.

As an initial matter, the Legislature claims that neither the partisan effects of the *Johnson II* map nor the separation-of-powers problem that drove the least-change approach are "changes" in conditions, Legislature Resp. at 25—but that rejoinder fails. As to partisan fairness, there has now been an election under the plan the Court adopted in *Johnson II*, and that election has revealed the plan to be an extreme outlier favoring Republicans. Hunter Mem. at 24; Rodden Aff. ¶¶ 26–38. That new fact, coupled with the Court's renewed commitment in *Clarke* not to "enact maps that privilege one political party over another," 2023 WI 79, ¶ 70, gives rise to sufficiently changed conditions to warrant relief. As for the separation of powers, *see* Legislature Resp. at 25, Hunter Intervenors-Petitioners do not dispute that the Court's adoption of the "least change" principle undermined the

separation of powers from the start. But it does not follow that the Court should stand pat, for "liberty is always at stake" when the separation of powers is transgressed. *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). The ongoing deviation from a proper respect for the separation of powers is a significant equitable factor that bolsters the case for relief.[7]

The Congressmen take a different tack, arguing that Hunter Intervenors-Petitioners' partisan-unfairness argument is a "one-sided, untested presentation," and claiming that the Court must conduct further proceedings to assess whether "the map-drawers" had "impermissible partisan intent." Congressmen Resp. at 59. This misses the mark in every particular. For starters, if the partisan-fairness briefing before the Court is one-sided, that is because neither the Congressmen nor any other Respondent has

[7] Respondents far overstate the risk that the Court will be asked to "revisit *Johnson* endlessly." Legislature Resp. at 36. The circumstances here are unique and furnish numerous limiting principles. In particular, the Court was warned before it adopted the *Johnson II* map—and was presented with *ex ante* evidence—that the road it was setting out on would lead it to adopt a map that worked substantial partisan unfairness while also undermining the separation of powers. Both those predicted harms came to pass, and least change proved "unworkable in practice," *Clarke*, 2023 WI 79, ¶ 63. Reconsidering the remedy in light of all those circumstances will not open the door to endless relitigation—least change was a unique misstep that requires a unique course-correction.

bothered to challenge Dr. Rodden's analysis or put forth an analysis of its own. The Congressmen complain that they have not had time to assess Dr. Rodden's findings. But this claim is belied by the prior course of this litigation, in which the parties had just two weeks (over the winter holidays, no less) to respond to expert reports *and* proposed maps. *See* November 17, 2021, Order (setting a December 15 deadline for map submissions and expert reports and December 30 deadline for responses). The reality is that the Congressmen know they are the beneficiaries of a very unfair map, and so have opted to complain about process rather than meet the motion's substance.

More importantly, the Congressmen's suggestion that a further inquiry into intent is warranted, Congressmen Resp. at 59, both misunderstands the motion and misconstrues *Clarke*. Hunter Intervenors-Petitioners are not making "partisan-gerrymandering assertions." *Id.* Rather, the motion emphasizes the map's partisan *effects*—effects which were born of a flawed and unprincipled remedial process. As *Clarke* explained, to maintain judicial independence, this Court has an affirmative duty to "take care to avoid selecting remedial maps designed to advantage one political party over another." 2023 WI 79, ¶ 71. That is because a "politically mindless approach may produce, whether intended or not, the

most grossly gerrymandered results." *Id.* The Court has all the information it needs to fulfill that obligation.[8]

Accordingly, the Court need not opine on the partisan bias of the map or credit Dr. Rodden's specific factual submissions to grant the motion. In light of *Clarke*, the Court's express refusal to consider potential partisan effects was a process error that flowed from its improper use of the least-change criterion, and it is that flawed—and now overruled—approach to redistricting that warrants taking another look at the *Johnson II* map. While Dr. Rodden's findings provide strong and unrefuted evidence that the process failure led to substantive harms, the Court need not make a substantive finding as to partisan impact to grant relief.

* * *

In sum, none of Respondents' attempts to stave off relief under subsection (g) hold up. *Clarke* changed this Court's approach to remedial redistricting in two key ways, each of which independently renders the *Johnson II* map's "prospective

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[8] The Congressmen also repeatedly cite *Baldus v. Members of Wisconsin Government Accountability Board*, 849 F. Supp. 2d 840, 853–54 (E.D. Wis. 2012) (per curiam), which held that a federal partisan gerrymandering challenge to the 2011 map was nonjusticiable. *See, e.g.*, Congressmen Resp. at 7. That federal-law holding does not bear on whether the judicially adopted *Johnson I* map effects substantial partisan unfairness sufficient to warrant relief under Section 806.07 and this Court's state-law remedial framework.

application" inequitable. Wis. Stat. § 806.07(1)(g). First, *Clarke* repudiated the use of the "least change" principle as the cornerstone of the Court's map-drawing process. Because that principle both circumscribed the parties' remedial submissions and dictated which submission was selected, the *Johnson II* congressional map now lacks any continuing equitable justification. The Court cannot equitably subject Wisconsin voters to four more elections under a map it could not draw today. Second, *Clarke* reaffirmed this Court's promise not to work substantial partisan unfairness in redistricting, correcting *Johnson I*'s deviation from that longstanding commitment. Because the current congressional map is judicially mandated, was drawn without due consideration of partisan effects, and is in fact profoundly unfair in partisan effect—a fact no Respondent contests—equity and the public interest warrant relief.

C. Hunter Intervenors-Petitioners are entitled to relief from judgment under subsection (h).

Subsection (h) authorizes relief whenever "[a]ny other reasons justif[y] relief from the operation of the judgment." Wis. Stat. § 806.07(1)(h). Under this broad grant of authority, "the ground for granting relief is 'justice[.]'" *M.L.B.*, 122 Wis. 2d at 544–45, 363 N.W.2d 419. And in deciding a subsection (h) motion, the Court has "broad discretionary authority" to exercise its "pure equity power." *Mullen*, 153 Wis. 2d at 407, 451 N.W.2d 412; *see also* Hunter Mem. at 15.

For the same reasons relief is appropriate under subsection (g), it is also appropriate under subsection (h). *See supra* Section III.B. In particular, under the Court's precedents, the foregoing considerations warrant subsection (h) relief in order to do "substantial justice" to Hunter Intervenors-Petitioners. *Mullen*, 153 Wis. 2d at 408, 451 N.W.2d 412; *see also* Hunter Mem. at 19–21. Movants are Wisconsin voters who intervened in this litigation for two reasons: (i) to correct the unconstitutional malapportionment in the 2011 congressional map and (ii) to ensure that their interests as voters were reflected in the resulting remedial process. Hunter Intervenors-Petitioners prevailed as to the first goal, establishing malapportionment. *Johnson I*, 2021 WI 87, ¶ 2. That successful liability showing triggered the Court's obligation to adopt an impasse remedy. At that juncture, Hunter Intervenors-Petitioners warned that prioritizing "least change" would overbear Wisconsin's traditional redistricting criteria, impose substantial partisan unfairness on them and other voters, and undermine the separation of powers. Hunter Intervenors' Brief Addressing Court's October 14 Order at 3–18. Those concerns were vindicated just two years later, when *Clarke* repudiated *Johnson I* on all the grounds Hunter Intervenors-Petitioners had pressed in this litigation. *Clarke*, 2023 WI 79, ¶¶ 60–63. Yet the Court's erroneous imposition of the least-change remedial framework in the interim frustrated Hunter Intervenors-

Petitioners' remedial objectives, depriving them of a full and fair opportunity to propose a remedial plan.

Although it is too late to grant Hunter Intervenors-Petitioners an opportunity to propose a map informed by valid redistricting principles for the 2022 election, this Court's decision in *Mullen* supports doing so for future elections. *See* 153 Wis. 2d at 408, 451 N.W.2d 412. *Mullen* establishes that where a party presses a "precise" point of law but is rebuffed, the Court shortly thereafter "specifically overrules" the decision adverse to the party and adopts the same precise rule in a parallel case, and the party timely moves for relief, subsection (h) relief may be granted so as to do "substantial justice" to that party. Hunter Mem. at 20–21; *Mullen*, 153 Wis. 2d at 404–08, 451 N.W.2d 412. All those conditions are met here: Hunter Intervenors-Petitioners pressed the "precise" grounds to reject least change that were vindicated soon thereafter in *Clarke*, and they moved for relief just a few days after the Court declined to reconsider that decision.

Respondents contend that subsection (h) is unavailable because Hunter Intervenors-Petitioners have failed to show "extraordinary circumstances." Congressmen Resp. at 55; Legislature Resp. at 30–31. But the opening brief anticipates and refutes this very point. Hunter Mem. at 15 n.4. The Court first adopted the "extraordinary circumstances" requirement in the context of subsection (h) motions that seek relief that would

otherwise be available under subsections (a), (b), or (c), but is time-barred. *M.L.B.*, 122 Wis. 2d at 549–50, 363 N.W.2d 419. While several recent cases have suggested that the test applies to *all* subsection (h) claims, *see, e.g.*, *Miller*, 2010 WI 75, ¶ 35, the Court has not actually applied the extraordinary-circumstances test so broadly. *See Mullen*, 153 Wis. 2d at 408–11, 451 N.W.2d 412.[9]

The Congressmen simply ignore this analysis, *see* Congressmen Resp. at 55, and the Legislature's response is disingenuous, Legislature Resp. at 30–31. Hunter Intervenors-Petitioners did not "imply that the extraordinary circumstances requirement has been adopted by this Court only in 'recent cases.'" Legislature Resp. at 30. Rather, as just discussed, the opening brief directs the Court's attention to the 1985 case, *M.L.B.*, that adopted the test, explains its reasoning, and emphasizes that it applied the test only to time-barred subsection (a), (b), and (c) claims—and then *separately* notes that "recent" cases have assumed the test applies to all claims, but have not explained why that would be the case. Hunter Mem. at 15 n.4. The point is that

[9] The Legislature suggests that because the Court used the phrase "unique circumstances" in *Mullen*, it "applied the test." Legislature Resp. at 31 (quoting *Mullen*, 153 Wis. 2d at 411, 451 N.W.2d 401 (emphasis deleted)). But the extraordinary-circumstances test is the five-factor test the Legislature discusses two pages later, *see* Legislature Resp. at 33, and nowhere in *Mullen* is that test applied.

there is no good reason to extend the extraordinary-circumstances test to all subsection (h) claims—that requirement is not part of subsection (h)'s text, and it is the need to excuse untimeliness that justifies grafting it onto the text. *See M.L.B.*, 122 Wis. 2d at 549–50, 363 N.W.2d 419. No Respondent ever addresses that reasoning. Accordingly, the Court should not apply the extraordinary-circumstances test to the instant motion, which could not have been brought under subsections (a), (b), or (c).[10]

D. Granting relief from judgment would not violate the Elections Clause.

Respondents, and the Congressmen in particular, argue that granting relief from judgment would somehow violate the Elections Clause of the U.S. Constitution. Congressmen Resp. at 44–47; *see also* Legislature Resp. at 37–39. At times, the argument seems to be that *Clarke* did not overrule the least-change-centered approach to redistricting *vis-à-vis* congressional maps. At other times, the argument seems to be that, *Clarke* notwithstanding, the

[10] Because the extraordinary-circumstances test does not apply, the Congressmen and Legislature's detailed discussion of that test's five factors is irrelevant. Congressmen Resp. at 50–54; Legislature Resp. at 33–35. Notably, the Legislature dissembles yet again, presenting these five factors as a requirement for *any* motion for relief from judgment. *See* Legislature Resp. at 33. But even under the Legislature's improperly expansive account of the test's scope, it applies, at most, only to subsection (h) motions.

Elections Clause constrains what this Court may do going forward. Neither argument is correct.

For starters, the Congressmen's premise is false: the Court in *Johnson I* did not rely on the Elections Clause. The Congressmen apparently glean such reliance from paragraphs 12 and 64. Congressmen Resp. at 14–15 (citing *Johnson I*, 2021 WI 87, ¶¶ 12, 64). But the words "Elections Clause" appear nowhere in the *Johnson I* decision—a curious omission, if that Clause is what motivated that opinion's remedial approach. Paragraph 12 cites the *section* of the Constitution that contains the Elections Clause but does so only for the proposition that "the United States Constitution does not substantially constrain state legislatures' discretion to decide how congressional elections are conducted." 2021 WI 87, ¶ 12 (citing U.S. Const. art. I, § 4). And paragraph 64 does not even go that far. *Id.* ¶ 64. Rather, it expresses the Court's commitment to maintaining the separation of powers as a matter of *state law*. This is made plain by the immediately following sentence, which grounds the separation of powers in "the Wisconsin Constitution." *Id.* ¶ 65.

In any case, the Court's decision in *Clarke* repudiated the least-change approach entirely—including for purposes of remedy-phase litigation over congressional maps. Specifically, Clarke overruled "*any* portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach." 2023 WI 79, ¶ 63

(emphasis added). By its plain language, *Clarke* thus would have overruled "any portion of *Johnson I*" that mandated a least-change approach *based on the Elections Clause*—if any such portion in fact existed. Were there any doubt about that, the Court's explanation for its decision to overrule least change would dispel it. The Court emphasized, in particular, its "inability" to "agree upon the actual meaning of 'least change' in practice." *Id.* ¶ 61. Least change, the Court said, had to be abandoned because "no majority of the court agreed on what least change actually meant." *Id.* That concern applies equally to legislative and congressional maps, and regardless of the principled basis for the approach.

Respondents' real argument is that the Court got it wrong in *Clarke* and should hold its least-change approach to be justified by the Elections Clause in hindsight. Congressmen Resp. at 44–47; *see also* Legislature Resp. at 37–39. But Respondents are wrong there too: the Elections Clause does not constraint the Court to apply a least-change approach to congressional *impasse* redistricting. Unlike this motion, *Moore v. Harper* concerned a state constitutional challenge to a *legislatively enacted* map—the Elections Clause issue in that case was whether the Clause "vests state *legislatures* with authority to set rules governing federal elections free from restrictions imposed under state law." 600 U.S. 1, 9–10 (2023) (emphasis added). Here, by contrast, Hunter Intervenors-Petitioners seek relief from a congressional map

adopted by this Court, not enacted by the state legislature. Thus, nothing about this case implicates the state legislature's "power conferred upon [it] by the Elections Clause," as contemplated by *Moore*. *Id.* at 37. To the contrary, this litigation arises from the state legislature's failure to undertake its duty and enact a new map after the 2020 Census. *See Johnson II*, 2022 WI 14, ¶ 2. The only question before this Court—in 2022 and today—is what criteria should dictate the form of the court-adopted map. Nothing in the text or history of the Elections Clause, or the more than half-century of impasse litigation, supports the idea that the Elections Clause binds or otherwise informs how state courts draw redistricting maps when state legislatures fail to do so.

Moreover, the Congressmen cannot credibly argue that the Elections Clause requires maintaining the *Johnson II* map as a matter of adherence to "least change." *See* Congressmen Resp. at 64. Their consistent position in this litigation has been that the core-retention methodology applied to generate the *Johnson II* map is *not least change at all*, *see* Congressmen Resp. at 17–18, so the current congressional map certainly is not mandated by the Congressmen's view of the Elections Clause.

E. Granting relief from judgment would not violate due process.

Respondents raise a range of arguments styled in terms of due process, but they boil down to a mix of procedural preferences and distorted accusations. The due process protections under the

Wisconsin and U.S. Constitutions entitle a party only to notice and an opportunity to be heard as "adapted to the nature of the case in accord with established rules." *State v. Thompson*, 2012 WI 90, ¶ 46, 342 Wis. 2d 674, 818 N.W.2d 904. Here, Hunter Intervenors-Petitioners have followed the established rules for motions under Section 806.07, which has provided all parties with notice and an opportunity to respond. There is no reason this tribunal cannot evaluate Hunter Intervenors-Petitioners' motion in a timely manner that respects the procedural minimum required by the U.S. and Wisconsin Constitutions.

Contrary to Respondents' claims, evaluating the motion expeditiously does not conflict with due process. As set forth above, Hunter Intervenors-Petitioners' motion can be resolved without fact-finding or further hearings. *See supra* Sections I.B. & III.A.–B. The Johnson Petitioners are wrong to suggest that "a full-scale trial with extensive fact-finding" would ever be necessary to resolve the motion. Johnson Resp. at 24. As an example, they cite *Whitford v. Gill*, which involved a partisan gerrymandering claim. *Id.*; *see also* 218 F. Supp 3d. 837 (W.D. Wis. 2016). But whether a map is so gerrymandered that it violates the Wisconsin Constitution is a much broader and fact-intensive inquiry. *See, e.g.*, *Clarke*, 2023 WI 79, ¶ 7. By contrast, merely assessing whether one or several proposed maps demonstrate partisan bias

is a simple, even rote task. And none of Respondents actually allege that the existing congressional map lacks partisan bias.

Separately, the Congressmen claim to have been denied "fair 'notice' that *Clarke* could affect their legitimate interests in the *Johnson II* judgment." Congressmen Resp. at 31–32. But the Congressmen received the same notice of the change in the Court's remedial principles that the Hunter Intervenors-Petitioners received when, on December 22, 2023, 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. Nor is it unreasonable to anticipate that a high court's resolution of one redistricting case may set precedent that affects a prospective impasse remedy entered in another case. But even if the Congressmen were entirely unaware of the pendency and ultimate resolution of *Clarke*, they have received notice that *Clarke* affects *Johnson II* via Hunter Intervenors-Petitioners' motion; and now, they have received an opportunity to be heard in response to the motion. Courts have held that the motion procedure under Section 806.07 provides sufficient notice and opportunity to be heard. *See, e.g.*, *In re Est. of Persha*, 2002 WI App 113, ¶ 27, 255 Wis. 2d 767, 649 N.W.2d 661.

Finally, Respondents question the fairness of this tribunal to evaluate Hunter Intervenors-Petitioners' motion. *See* Legislature Resp. at 40–41; Congressmen Resp. at 63–64; Johnson

Resp. at 24–25. For the reasons stated in Hunter Intervenors-Petitioners' February 5 Response to Motion to Recuse Justice Protasiewicz, no party has established that this tribunal is unfair, has a conflict of interest, or that it has prejudged the merits of this motion.

CONCLUSION

For the reasons stated above and in their prior Memorandum of Law, Hunter Intervenors-Petitioners respectfully request that the Court grant the motion for relief from judgment.

Dated: February 9, 2024

Respectfully submitted,

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CERTIFICATE AS TO FORM AND WORD COUNT

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.81 for papers filed in this Court. Excluding the caption, tables of contents and authorities, signatures, and these certifications, the length of this brief is 8,846 words as calculated by Microsoft Word.

Dated: February 9, 2024 By: *Electronically signed by Diane M. Welsh*

CERTIFICATE OF SERVICE

I certify that on this 9th day of February, 2024, I caused a copy of this brief to be served upon counsel for each of the parties via e-filing.

Dated: February 9, 2024 By: *Electronically signed by Diane M. Welsh*