No.2025XX1438

In the Supreme Court of Wisconsin

ELIZABETH BOTHFELD, JO ELLEN BURKE, MARY COLLINS, CHARLENE GAEBLER-UHING, KATHLEEN GILMORE, PAUL HAYES, SALLY HUCK, THOMAS KLOOSTERBOER, ELIZABETH LUDEMAN, GREGORY ST. ONGE *AND* LINDA WEAVER,
PLAINTIFFS,
v.
WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, ANN S. JACOBS, DON M. MILLIS, ROBERT F. SPINDELL, JR., CARRIE RIEPL, MARK L. THOMPSON *and* MEAGAN WOLFE,
DEFENDANTS.

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)

PROPOSED 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, PER THIS COURT'S SEPTEMBER 25, 2025 ORDER

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INTRODUCTION[1]

In its September 25 Order, this Court asked whether Plaintiffs' request that this Court appoint a three-judge panel to adjudicate the constitutionality of the map this Court adopted in *Johnson v. Wisconsin Elections Commission* ("*WEC*"), 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 ("*Johnson II*"), challenges an "apportionment" under Wis. Stat. § 801.50(4m). The answer is "no" because the *Johnson II* map is not an "apportionment" under Section 801.50(4m) for two independent reasons. First, "apportionment" 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)," which is different from redistricting, which involves drawing new district boundaries. *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 5 n.2, 249 Wis. 2d 706, 639 N.W.2d 537 (emphasis added). The *Johnson II* map apportions no congressional seats but rather draws new district boundaries. Second, and even putting that dispositive point aside, the ordinary meaning of the term "apportionment"

[1] The Congressmen and Individual Voters have also moved to intervene in in *Wisconsin Business Leaders for Democracy v. Wisconsin Elections Commission*, No.2025XX1330 (Wis.), a similar miscellaneous matter before this Court that also involves a request for the appointment of a three-judge panel under Wis. Stat. § 801.50(4m) and Wis. Stat. § 751.035(1) to hear a challenge to Wisconsin's congressional map adopted by this Court. Given the similarity between these two miscellaneous matters, the Congressmen and Individual Voters have submitted substantially the same Proposed Motion and Proposed Brief Per This Court's September 25, 2025 Orders in both matters, except for certain limited changes relevant to the differences between the two miscellaneous matters.

does not include a court's adoption of a remedial map, as an exercise of its judicial role.

This later point also follows from the doctrine of constitutional avoidance, as permitting a constitutionally inferior three-judge panel under Section 801.50(4m) to review a map that this Court adopted would violate the Wisconsin Constitution. The Constitution vests this Court with superintending authority over all courts, and no lower court—including a three-judge panel appointed under Section 801.50(4m)—can modify or reverse a final judgment from this Court on a matter of state policy like its decision adopting the *Johnson II* map. This Court's decision adopting the *Johnson II* congressional map found that it "compl[ies] with all relevant state and federal laws," 2022 WI 14, ¶ 25, and no inferior court has the authority to second guess that conclusion.

This Court should thus decline to appoint a three-judge panel and should dismiss the Complaint.

STATEMENT OF THE CASE

A. In 2011, the Legislature adopted a new congressional district map. *See Johnson v. WEC*, 2021 WI 87, ¶¶ 2, 8, 14, 399 Wis. 2d 623, 967 N.W.2d 469 ("*Johnson I*"), *overruled in part by Clarke v. WEC*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370. Thereafter, certain plaintiffs challenged the new congressional map before a federal three-judge panel, arguing that it was an unconstitutional partisan gerrymander. *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 848 (E.D. Wis. 2012) (per curiam). The panel dismissed that partisan-

gerrymandering claim for failure to identify a justiciable standard and further explained that, based upon the evidence before that court, the 2011 congressional map was drafted in a "bipartisan process" that "incorporate[d] . . . feedback" from both Wisconsin Republicans and Wisconsin Democrats in Congress. *Id*. at 853–54. Other plaintiffs challenged the 2011 state assembly map as a partisan gerrymander in a separate action, while declining to challenge the 2011 congressional map on that basis. *See Gill v. Whitford*, 585 U.S. 48, 52–55 (2018).

B. After the 2020 census, the U.S. Constitution's "one person, one vote" rule required Wisconsin to redraw both its 2011 congressional district map, *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964); U.S. Const. art. I, § 2, and its 2011 state legislative maps, *Reynolds v. Sims*, 377 U.S. 533, 561 (1964); U.S. Const. amend. XIV, § 2, as those prior maps were now unconstitutionally malapportioned, *Johnson I*, 2021 WI 87, ¶¶ 1, 38. Certain parties then filed a Petition For Original Action in this Court, contending that the 2011 state legislative maps and the 2011 congressional map were now malapportioned and asking this Court to adopt remedial maps in advance of the 2022 election. *Id.* ¶¶ 2, 5, 16, 24–38, 64–79.

This Court accepted the case and, in *Johnson I*, the Court: entered (uncontested) declarations that the 2011 congressional map and the 2011 state legislative maps were now malapportioned under Article I, Section 2 of the U.S. Constitution and the Fourteenth Amendment's Equal Protection Clause, respectively; specified the legal requirements for remedial congressional maps

and state legislative maps in Wisconsin; and identified the process that this Court would use to adopt remedial maps, including a remedial congressional map. *Id.* ¶¶ 2, 16, 24–38, 64–79.

With respect to the legal requirements for a remedial congressional map, this Court clarified that such a map must comply with the U.S. Constitution's one person, one vote rule, *id.* ¶ 25; the federal statutory prohibition on multimember congressional districts, *id.* ¶ 27; and the federal Voting Rights Act, *id.* Further, the Court explained that it would not consider the "partisan fairness" of the congressional districts because that presents a "non-justiciable," "purely political question." *Id.* ¶¶ 39–40 (citing *Rucho v. Common Cause*, 588 U.S. 684, 696 (2019)). In addition, the Court would follow a "least-change approach," *id.* ¶¶ 72–73, recognizing that, when this Court adopts remedial maps, it must tread "[no] further than necessary to remedy [a map's] current legal deficiencies" so as not to "intrude upon the constitutional prerogatives of the political branches," *id.* ¶ 64.

Then, in *Johnson II*, the parties—including Governor Tony Evers—prepared and submitted their proposed remedial maps for this Court's consideration, and this Court adopted Governor Evers's proposed remedial congressional map and his proposed remedial state legislative maps. *Johnson II*, 2022 WI 14, ¶¶ 7, 10, 52. The U.S. Supreme Court reversed this Court's adoption of Governor Evers's remedial state legislative maps on federal equal-protection grounds. *Wis. Legislature v. WEC*, 595 U.S. 398, 406 (2022) (per curiam). The Court there found that this Court "erred

by adopting [Governor Evers's] maps" because there was insufficient evidence or analysis to demonstrate that the maps' creation of an additional "majority-black district" "satisfied strict scrutiny." *Id.* at 403. As the Court explained, there was inadequate evidence to show that race-based redistricting was "necessary" to comply with the VRA and this Court conducted an improper *Gingles* analysis, in part, because this Court "focused exclusively on proportionality," while "[l]ack of proportionality can never by itself prove dilution, for courts must always carefully and searchingly review the totality of the circumstances." *Id.* at 404–05 (citations omitted). The U.S. Supreme accordingly held that this Court failed "to undertake a full strict-scrutiny analysis" in compliance with equal-protection precedent and reversed this Court's selection of Governor Evers's state legislative maps. *Id.* at 406.

Certain of the Congressmen here moved this Court for reconsideration as to *Johnson II*'s adoption of Governor Evers's proposed congressional map. *See* Congressmen's Mot. Recons., *Johnson*, No.2021AP1450-OA (Wis. Mar. 23, 2022) (also renewing the then-pending request to submit new proposed remedial maps). Specifically, they submitted that the Court should reconsider its decision because it was possible for the Court to adopt a remedial congressional map that far outperformed Governor Evers's map in terms of maximizing core retention before the then-impending primary elections. *See id.* at 2–5. This Court denied that reconsideration motion in an unpublished order. *See* Order, *Johnson*, No.2021AP1450-OA (Wis. Apr. 15, 2022).

C. On January 16, 2024, certain *Johnson* intervenor-petitioners—represented by the Elias Law Group, which represents Plaintiffs here—filed a motion for relief from judgment, asking this Court to throw out the congressional map that it adopted in *Johnson II* and replace it with a new one. *See* App.115–50.[2] The motion claimed that this Court had since rejected the least-changes-only approach when adopting state legislative remedial maps in *Clarke*, App.122, and further argued that the *Johnson II* map "subjects Wisconsin voters to intolerable partisan unfairness" because it is too favorable to Republicans, App.135 (emphasis omitted); *see* App.135–40. According to those intervenor-petitioners, this Court is constitutionally obligated to consider "partisan outcomes" when adopting a remedial congressional map. App.145. The Congressmen opposed that relief-from-judgment motion on various grounds and also filed a motion to recuse Justice Protasiewicz. *See* App.206–52; App.424–70. This Court denied the *Johnson* intervenor-petitioners' motion. *See* App.271–74.

D. Three years after this Court adopted the Governor's proposed congressional map in *Johnson II*, this Court received two separate original-action petitions that once again sought to challenge that map. App.311–44; App.345–59. Among their other arguments, one group of petitioners claimed that the congressional map failed to achieve mathematical equality in violation of Article I, Section 1 of the Wisconsin Constitution, App.355–56,

[2] Citations of "App." refer to the Congressmen and Individual Voters' Appendix filed with their Motion To Intervene.

while the other group of petitioners—consisting of several of the same Plaintiffs here represented by the Elias Law Group—claimed that the map was an unconstitutional partisan gerrymander, App.334–38. Wisconsin Business Leaders for Democracy ("WBLD") and several individual Wisconsin residents sought to intervene as petitioners in *Bothfeld* to challenge the congressional map as a purportedly "anti-competitive gerrymander." *See* App.584–621. The Congressmen and Individual Voters, for their part, moved to intervene in both actions as respondents (or, in the alternative, to submit nonparty briefs) to defend the congressional map's constitutionality. *See* App.471–506; App.360–95.

This Court denied both petitions without any noted dissents, while granting the Congressmen and Individual Voters' intervention motion and denying the WBLD-led intervention motion as moot. App.650–55; App.658–59.

E. Not to be deterred, the Elias Law Group and several of the same individual Wisconsin residents who filed the *Bothfeld* original-action petition filed a new lawsuit in the Dane County Circuit Court in July 2025, asserting the same partisan-gerrymandering claim that they had previously asked this Court to hear. *See* Complaint, *Bothfeld. v. WEC*, No.2025CV2432, Dkt.9 (Dane Cnty. Cir. Ct. July 21, 2025). They purport to have brought "an action to challenge the *apportionment*" of congressional districts, Wis. Stat. § 801.50(4m) (emphasis added), and so have requested that this Court appoint a three-judge panel to hear their case under Section 801.50(4m), Compl. at 5, ¶ 34. After this Court received that request, the Congressmen and Individual Voters

filed a letter noting their opposition and requesting that this Court first consider whether to dismiss the action. Letter, *Bothfeld v. WEC*, No.2025XX1438 (Wis. July 23, 2025).

On September 25, 2025, this Court ordered the parties to file simultaneous briefs on "whether Bothfeld's complaint filed in the circuit court constitutes 'an action to challenge the apportionment of a congressional or state legislative district' under Wis. Stat. § 801.50(4m)." Order at 2, *Bothfeld v. WEC*, No.2025XX1438 (Wis. Sep. 25, 2025) ("Sep. 25 Order"). This Court's Order also noted the Congressmen and Individual Voters' letter and stated that, "[i]f the Congressmen wish to be heard in this matter, the Congressmen may move in this miscellaneous matter for intervention or for leave to participate as amicus curiae." *Id.*

ARGUMENT

I. A Challenge To A Redistricting Map Drawn By A Court, Rather Than The Legislature, Is Not A Challenge To An "Apportionment Of Any Congressional Or State Legislative District" Under Section 801.50(4m)

A. "[S]tatutory interpretation 'begins with the language of the statute,'" giving that language "its common, ordinary, and accepted meaning" and affording "specially-defined words or phrases . . . their technical or special definitional meaning." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶¶ 45, 48, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted). When "the meaning of the statute is plain, [courts] ordinarily stop the inquiry" there. *Id.* ¶ 45. Courts must also interpret statutory language in light of "the context in which it is used," looking to the language "as part of a whole" and "in relation to the language of

surrounding or closely-related statutes," while also taking care to "give reasonable effect to every word" in the statute. *Id.* ¶ 46 (citations omitted). When a statute "use[s] two different words," courts "generally consider each separately and presume that different words have different meanings." *Augsburger v. Homestead Mut. Ins. Co.*, 2014 WI 133, ¶ 17, 359 Wis. 2d 385, 856 N.W.2d 874. Courts "should not add words to a statute to give it a certain meaning," but should "interpret the words the legislature actually enacted into law." *State v. Neil*, 2020 WI 15, ¶ 23, 390 Wis. 2d 248, 938 N.W.2d 521 (citations omitted). They should avoid interpretations that create "absurd or unreasonable results" or render words in a statute "surplusage." *Kalal*, 2004 WI 58, ¶ 46. And they must "avoid[ ] a decision regarding the constitutionality of a statute when the court can decide the case on non-constitutional grounds." *State v. Scott*, 2018 WI 74, ¶ 26 n.15, 382 Wis. 2d 476, 914 N.W.2d 141 (citation omitted).

B. Here, Section 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," and that, no "more than 5 days after" such an action "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." Wis. Stat. § 801.50(4m). Section 751.035, in turn, states that, upon receiving such notice under Section 801.50(4m), "the supreme court shall appoint a panel consisting of 3 circuit court judges to hear the matter," "choos[ing] one judge from each of 3 circuits" and "assign[ing] one of the circuits as the venue for all hearings and filings in the

matter." *Id.* § 751.035(1). A "plain-meaning interpretation," *Kalal*, 2004 WI 58, ¶ 48, of Section 801.50(4m) reveals that this provision refers only to a challenge to an *apportionment*—as distinct from a challenge to a *redistricting*, *infra* Part I.B.1—and, in any event, does not apply to any challenge to any action taken by a court, *infra* Part I.B.2.

1. As a threshold matter, a challenge to a *redistricting* plan does not constitute "an action to challenge the *apportionment* of any congressional or state legislative district" within the scope of Section 801.50(4m), as the term "apportionment" in this statute refers only to the allocation of legislative or congressional seats, not the seats' boundaries. Wis. Stat. § 801.50(4m) (emphasis added).

The "common, ordinary, and accepted meaning," *Kalal*, 2004 WI 58, ¶ 45, of "apportionment," Wis. Stat. § 801.50(4m), is the act of "distribut[ing] [ ] legislative seats among districts; esp., the allocation of congressional representatives among the states based on population, as required by the 14th Amendment" to the U.S. Constitution, *Apportionment*, Black's Law Dictionary (12th ed. 2024); *see Apportionment*, The American Heritage Dictionary of the English Language (5th ed. 2022) ("The proportional distribution of the number of members of the US House of Representatives on the basis of the population of each state.").[3] As this Court has explained, while the terms apportionment or "reapportionment" are sometimes used "interchangeably" with the

[3] Available at https://www.ahdictionary.com/word/search.html?q=apportionment (all webpages last accessed Oct. 9, 2025).

term "redistricting"—including in "[t]he cases" on these issues—"there is a distinction" between these terms. *Jensen*, 2002 WI 13, ¶ 5 n.2. Namely, "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*)." *Id.* (emphases added). "[R]edistricting," in contrast, "is the drawing of new political boundaries," thus creating the districts from which the occupants of the apportioned seats are elected. *Id.* "[A]pportionment refers to the allocation of a legislative body's representatives to existing geographical areas, *such as when the members of the United States House of Representatives are apportioned to the various states based on state population*; while districting refers to the actual drawing of geographical boundaries to define a representative's constituents and electors." *Daly v. Hunt*, 93 F.3d 1212, 1214 n.1 (4th Cir. 1996) (collecting cases) (emphasis added).

The Wisconsin Constitution reflects the distinction between "apportionment" and "redistricting" that *Jensen* recognized. The Wisconsin Constitution grants the Legislature the authority both to "apportion" the elected members comprising the Legislature as well as to "district" the State into districts to elect those members. Wis. Const. art. IV, § 3. Specifically, Article IV, Section 3—entitled, "Apportionment"—provides that, "[a]t its first session after each enumeration made by the authority of the United States, the legislature shall *apportion* and *district* anew the members of the senate and assembly, according to the number of

inhabitants." Wis. Const. art. IV, § 3 (emphases added). "[A]pportion" within Article IV, Section 3, *id.*, refers to the Legislature's constitutional authority to set "[t]he number of members of the assembly" between "fifty-four" and "one hundred," and the "number" of Senators between "one-third" and "one-fourth of the number of the members of the assembly," *id.*, art. IV, § 2; *see Jensen*, 2002 WI 13, ¶ 5 n.2. "[D]istrict" within Article IV, Section 3, on the other hand, refers to the Legislature's "primary authority and responsibility for drawing assembly and senate districts" from which the occupants of the Assembly or Senate seats are elected. *Clarke*, 2023 WI 79, ¶ 57 (citing *Jensen*, 2002 WI 13, ¶ 6). That gives these "two different words" in this single provision "different meanings." *Augsburger*, 2014 WI 133, ¶ 17; *see generally Wis. Just. Initiative, Inc. v. WEC*, 2023 WI 38, ¶ 21, 407 Wis. 2d 87, 990 N.W.2d 122 (analogizing "constitutional interpretation" to "statutory interpretation").

Congress and the Legislature have also recognized that the terms "apportionment" and "redistricting" carry different meanings, consistent with these terms' usage in Article IV, Section 3 and *Jensen*. For example, in 2 U.S.C. § 2a(c)—found within the chapter of the U.S. Code governing the election of Representatives to Congress—Congress provided for certain default rules for the election of Representatives that a State must follow "[u]ntil a State is *redistricted* in the manner provided by the law thereof after any *apportionment*." 2 U.S.C. § 2a(c) (emphases added); *see Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 698 (2022) (noting the Court's "usual presumption that differences in

language . . . convey differences in meaning" (citations omitted)). Similarly, in Wis. Stat. § 59.10—which regulates the composition and election of county boards—the Legislature separately established the "[n]umber of supervisors and apportionment of supervisory districts," *see id.* § 59.10(1)(a), (3)(a), and the rules for "redistricting" the county supervisory districts from which those supervisors are elected if the county board has subsequently "decrease[d] the number of supervisors," *id.* § 59.10(3)(cm)(1); *see also id.* § 120.02(2) (discussing a "plan of apportionment of school board members among the cities, towns and villages or parts thereof within the school district").

Section 801.50(4m) applies *only* to "apportionment"—not to redistricting—so the statutory phrase "an action to challenge the apportionment of any congressional or state legislative district," Wis. Stat. § 801.50(4m), must refer only to an action challenging the "distribution," *Apportionment*, Black's Law Dictionary, *supra*, or "allocation of congressional" or state-legislative "seats" in Wisconsin, not to "the drawing of new political boundaries" to create the districts in Wisconsin that elect the occupants of those seats, *Jensen*, 2002 WI 13, ¶ 5 n.2. Section 801.50(4m) would apply to actions challenging the Legislature's failure to apportion the Assembly or Senate according to law—such as by, for example, apportioning too few or too many members of either chamber to the State, *contra* Wis. Const. art. IV, § 2, or by attempting to assign multiple members to a single district within the State, *contra id.*, art. IV, § 4. Further, Section 801.50(4m) would apply to an action against the Secretary of the U.S. Census Bureau challenging the

Secretary's miscalculation of Wisconsin's population in the decennial census resulting in too few Wisconsin Representatives in Congress. *See* 13 U.S.C. § 141(a)–(b) (directing the Secretary of the Census Bureau to conduct "[t]he tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States"); *see generally* U.S. Const. amend. XIV, § 1 (requiring Representatives to Congress to "be apportioned among the several States according to their respective numbers" after each decennial census); 2 U.S.C. § 2b (requiring "the method known as the method of equal proportions" for calculating apportionment of Representatives); U.S. Census Bureau, *Computing Apportionment* (providing the technical description of the "Equal Proportions" method).[4]

2. Regardless of whether this Court accepts the above-described distinction between "an action to challenge [an] *apportionment*," Wis. Stat. § 801.50(4m) (emphasis added), on the one hand, and an action to challenge a redistricting, on the other, *supra* Part I.B.1, at the very minimum, the "ordinary" meaning, *Kalal*, 2004 WI 58, ¶ 45, of "apportionment" does not include a court's adoption of a redistricting map.

The term "apportionment" is "[a]lso termed *legislative* apportionment," *Apportionment*, Black's Law Dictionary, *supra* (emphasis added)—reflecting that this term "ordinarily" refers, *Kalal*, 2004 WI 58, ¶ 54, "[s]tate *legislatures*," who "have primary jurisdiction over legislative reapportionment," *North Carolina v.*

[4] Available at https://www.census.gov/topics/public-sector/congressional-apportionment/about/computing.html.

Covington, 585 U.S. 969, 979 (2018) (emphasis added). "[D]istricting and apportionment are legislative tasks in the first instance," *Ely v. Klahr*, 403 U.S. 108, 114 (1971), so "*legislative reapportionment* is primarily a matter for legislative consideration and determination," *Connor v. Finch*, 431 U.S. 407, 414 (1977) (citation omitted; emphasis added). Article IV, Section 3 of the Wisconsin Constitution sets this out expressly: "after each enumeration made by the authority of the United States, *the legislature* shall apportion and district anew the members of the [State's] senate and assembly, according to the number of inhabitants." Wis. Const. art. IV, § 3 (emphasis added).

The Legislature's primacy in the duty of apportionment also means that "apportionment" does not refer to maps drawn by the courts. The courts "are not the branch of government assigned the constitutional responsibility to 'apportion and district anew' after each decennial census." *Johnson I*, 2021 WI 87, ¶ 82 (Hagedorn, J., concurring) (quoting Wis. Const. art. IV, § 3, and citing *Jensen*, 2002 WI 13, ¶ 6). Rather, the courts' role is limited and contingent: "when faced with unconstitutional maps," the court may either "adopt valid remedial maps" proposed to it "or [ ] formulate a valid redistricting plan" itself, "[i]f the legislative process does not result in remedial legislative maps." *Clarke*, 2023 WI 79, ¶ 58 (citations omitted). So, even where a court is thrust into the redistricting process and has "declared" "an existing plan . . . unconstitutional," the courts' role is to, "whenever practicable, [ ] afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure," so that the court itself need not

"adopt remedial maps." *Id.* ¶ 57 (citation omitted); *accord Covington*, 585 U.S. at 979 ("[A] legislature's 'freedom of choice to devise substitutes for an apportionment plan found unconstitutional . . . should not be restricted [by a court] beyond the clear commands' of federal law." (citation omitted)); *Johnson I*, 2021 WI 87, ¶ 82 (Hagedorn, J., concurring). At all times then, the Court's "role in redistricting remains a purely judicial one." *Johnson I*, 2021 WI 87, ¶ 3.

The upshot of the Legislature's and the court's respective roles in the redistricting process is clear with respect to the meaning of Section 801.50(4m). As noted, Section 801.50(4m) applies only to "an action to challenge the apportionment of a congressional or state legislative district." Wis. Stat. § 801.50(4m). This statutory use of the term "apportionment," *id.*, necessarily invokes that term's "ordinary" meaning, *Kalal*, 2004 WI 58, ¶ 45—"*legislative* apportionment," *Apportionment*, Black's Law Dictionary, *supra* (emphasis added); *supra* pp.20–21—meaning that judicial actions do not fall within its scope.

C. In this miscellaneous matter pending before this Court, Plaintiffs challenge the constitutionality of the congressional districting map that this Court adopted in *Johnson II*, 2022 WI 14, ¶¶ 13–25. Specifically, Plaintiffs claim that Wisconsin's current congressional map adopted by this Court in *Johnson II* is a "partisan gerrymander[ ]" that violates several provisions of the Wisconsin Constitution. Compl. at 6, 26. Plaintiffs' action does not constitute "an action to challenge *the apportionment* of

[Wisconsin's] congressional . . . district[s]," Wis. Stat. § 801.50(4m) (emphasis added), for two independently sufficient reasons.

First, Plaintiffs' Complaint does not challenge the allocation of the number of Representatives of Wisconsin in Congress. As explained above, "redistricting is the drawing of new political boundaries," *Jensen*, 2002 WI 13, ¶ 5 n.2, and Plaintiffs openly take issue with the way in which the current "congressional map was *drawn*," Compl. ¶ 82 (emphasis added), claiming that, "[i]n the 2021 round of *redistricting*," this Court "deviat[ed] from Wisconsin's traditional *redistricting* principles," *id.* at 15 (emphases added), by redrawing district lines in such a manner that they made the map an unconstitutional "gerrymander in favor of Republican candidates," *id.* ¶ 56. A congressional "apportionment," in contrast, is the "allocation of congressional seats among established districts, that is, the states," *Jensen*, 2002 WI 13, ¶ 5 n.2; *Daly*, 93 F.3d at 1214 n.1; *Apportionment*, Black's Law Dictionary, *supra*—a process that occurred most recently in 2021, following the 2020 census, with Wisconsin again receiving eight Representatives in Congress, *see* U.S. Census Bureau, *2020 Census Apportionment Results Delivered To The President* (Apr. 26, 2021);[5] U.S. Census Bureau, *2020 Census Apportionment Results* (Apr. 2021) (Table 1).[6] Plaintiffs are not challenging Wisconsin's "allocation of congressional seats" after the 2020 census, *Jensen*, 2002 WI 13, ¶ 5 n.2, and, indeed, take it as a given

[5] Available at https://www.census.gov/newsroom/press-releases/2021/2020-census-apportionment-results.html.

[6] Available at https://www.census.gov/data/tables/2020/dec/2020-apportionment-data.html.

that Wisconsin was properly apportioned eight Representatives in Congress, *see* Compl. ¶¶ 1, 36. Thus, Plaintiffs have not raised an "apportionment" challenge under Section 801.50(4m).

Second, and independently, Plaintiffs' Complaint fails to qualify as an "apportionment" challenge under Section 801.50(4m) because it challenges a court-drawn map. As discussed above, *supra* Part I.B.2, "apportionment" under Section 801.50(4m) does not include a court's adoption of a redistricting map. The object of Plaintiffs' challenge here is Wisconsin's remedial congressional map adopted *by this Court* in *Johnson II*. Compl. at 22–26. This Court adopted that map solely as an exercise of its "purely judicial" role, *Johnson I*, 2021 WI 87, ¶ 3, and only after the Legislature and the Governor failed to enact a constitutionally compliant congressional map for the State in light of the 2020 census, *see id.* ¶¶ 17–19. Thus, this Court's remedial congressional map from *Johnson II* is not an apportionment under Section 801.50(4m).

II. The Contrary Conclusion Would Raise Serious Constitutional Concerns—Including By Purporting To Allow A Lower Court Of This State To Overrule A Judgment Of This Court Adopting A Remedial Map

If this Court were to hold that the term "apportionment" in Section 801.50(4m) encompasses a challenge to a court-drawn map and thus appoints a three-judge panel, that would raise serious constitutional concerns, including by purporting to empower a lower court of this State to review a final judgment from this Court, as this case illustrates.

This Court must interpret statutes to avoid constitutional invalidity. *Am. Family Mut. Ins. Co. v. Wis. Dep't of Revenue*, 222

Wis. 2d 650, 667, 586 N.W.2d 872 (1998) ; *see In re Termination of Parental Rights to Max G.W.*, 2006 WI 93, ¶ 51, 293 Wis. 2d 530, 716 N.W.2d 845; *Scott*, 2018 WI 74, ¶ 26 n.15. A "cardinal rule" of statutory interpretation is not to "interpret[ ] a statute in a way that would render it unconstitutional when a reasonable interpretation exists that would render the legislation constitutional." *State v. Hamdan*, 2003 WI 113, ¶ 27 n.9, 264 Wis. 2d 433, 665 N.W.2d 785 (citation omitted). Under this constitutional-avoidance canon, if a statute raises serious constitutional questions and this Court "can reasonably adopt a saving construction" that "avoid[s the] constitutional conflict," it "do[es] so." *See In re Commitment of Hager*, 2018 WI 40, ¶ 31, 381 Wis. 2d 74, 911 N.W.2d 17.

As explained above and as relevant to this constitutional-avoidance argument, the ordinary meaning of the term "apportionment" in Section 801.50(4m) does not include maps drawn by courts, including by this Court. *Supra* Part I.B.2. But to the extent this Court has any doubt, the doctrine of constitutional avoidance mandates this interpretation of Section 801.50(4m). *See In re Commitment of Hager*, 2018 WI 40, ¶ 31; *Am. Family Mut. Ins. Co.*, 222 Wis. 2d at 667. That is because the alternative reading—namely, that "an action to challenge [an] apportionment" Section 801.50(4m) encompasses actions challenging judicial redistricting—leads to unconstitutional results.

If Section 801.50(4m) were interpreted to cover challenges to court-drawn remedial redistricting maps, this would purport to

empower an inferior, three-judge panel to review and, potentially, overrule, a map adopted by this Court—a map that "compl[ies] with all relevant state and federal laws," *Johnson II*, 2022 WI 14, ¶ 25—just as Plaintiffs here seek. When this Court adopts a map to remedy a violation in a prior map, that adoption takes the form of an "order" of this Court in a contested case between adverse parties. *See, e.g.*, *id.* ¶ 52. A remedial map is, in other words, a "judicial" remedy from this Court, consistent with the Court's "purely judicial" "role in redistricting." *Johnson I*, 2021 WI 87, ¶ 3. Therefore, for a three-judge panel under Section 801.50(4m) to afford any relief to a plaintiff challenging a remedial map from this Court, that panel must overrule this Court's remedial-map order and replace it with its own remedial-map order. The relief requested from the three-judge panel by Plaintiffs in their own Complaint is a case in point: "[d]eclare that Wisconsin's congressional districting map"—adopted by this Court in the *Johnson* litigation—"violates . . . the Wisconsin Constitution," "[e]njoin Defendants from conducting any congressional elections under [that] map," and "[p]rescribe procedures for the adoption of a lawful congressional map in time for the 2026 congressional elections." Compl. at 26.

A three-judge panel under Section 801.50(4m) cannot constitutionally review or overrule any order from this Court, including an order adopting a remedial map for the State.

The three-judge panel appointed under Sections 801.50(4m) and 751.035 is statutorily and constitutionally inferior to this Court. As a statutory matter, this Court is the "appoint[ing]"

authority for the "panel consisting of 3 circuit court judges [under Section 801.50(4m)]," Wis. Stat. § 751.035(1), and, moreover, "may [ ] hear[ ]" any "appeal from any order or decision issued by the panel assigned pursuant to [Section 801.50(4m)]," *id.* § 751.035(3). These provisions establish the inferiority of the three-judge panel to this Court, as a matter of statute. And the Wisconsin Constitution mandates the same result. Our Constitution vests this Court with "superintending and administrative authority over *all* courts," Wis. Const. art. VII, § 3(1) (emphasis added), which means the three-judge panel is inferior to this Court.

No inferior court may overrule or modify the decisions of this Court. "The constitution provides that this [Court] shall be a court of last resort, . . . whose judgments, so far as they relate to state polity, *are final and conclusive*." *Sutter v. State, Dep't of Nat. Res.*, 69 Wis. 2d 709, 717, 233 N.W.2d 391 (1975) (emphasis added; citations omitted). This is why only this Court has "the power to overrule, modify or withdraw language from a previous supreme court case." *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997); *see State v. Lira*, 2021 WI 81, ¶ 46, 399 Wis. 2d 419, 966 N.W.2d 605. This Court's "superintending and administrative authority over all courts" means that no inferior court may sit in review of this Court's judgments. Wis. Const. art. VII, § 3(1); *see State ex rel. Fourth Nat'l Bank of Phila. v. Johnson*, 103 Wis. 591, 79 N.W. 1081, 1091–92 (1899) ("By the constitution this court was given power to exercise fully and completely the jurisdiction of superintending control over all inferior courts[.]").

These fundamental constitutional principles inform the interpretation of Section 801.50(4m). The three-judge panel under Section 801.50(4m) is a court that is inferior to this Court and no inferior court may overrule the prior decisions of this Court. Therefore, a three-judge panel under Section 801.50(4m) affording any relief to a plaintiff challenging a remedial map adopted by this Court would violate the Constitution. So, because that outcome would plainly be unconstitutional, this Court should interpret Section 801.50(4m) to exclude that possibility, as a statutory matter, as set forth above. *Supra* Part I.

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. This Court has the authority to order dismissal, *see Madison Tchrs., Inc. v. Walker*, 2013 WI 91, ¶ 16, 351 Wis. 2d 237, 839 N.W.2d 388 (explaining that this Court's "authority is as broad and as flexible as necessary to insure the due administration of justice in the courts of this state" (citation omitted)); *see also* Order, *Clinard v. Brennan*, No.2011XX1409 (Wis. Jan. 13, 2014), and doing so would recognize that Plaintiffs cannot file this action challenging the *Johnson II* map in an inferior court.

Dated: October 9, 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 5,569 words.

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