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

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INTRODUCTION

Instead of conducting a textual analysis of Wis. Stat. § 801.50(4m)'s use of "apportionment," Plaintiffs observe that this Court and some other courts have, at times, used "apportionment" and "redistricting" interchangeably. But the Wisconsin Constitution distinguishes between "apportion[ment]" and "district[ing]" in a manner that refutes Plaintiffs' position, *see* Wis. Const. art. IV, § 3, and this Court and others have consistently recognized the same distinction when called to focus upon those terms. But even putting this point aside, Plaintiffs do not cite any case, from any jurisdiction, identifying an action like theirs—a challenge to *a court decision*, rather than a legislative action—as challenging an "apportionment." Plaintiffs also cannot explain how they could constitutionally maintain their lawsuit when they (correctly) told this Court just a couple of months ago that "no other court can provide . . . relief" for their "state law claims against a map that was adopted by this Court." Pet For An Original Action ¶ 98, *Bothfeld v. Wis. Elections Comm'n* ("*WEC*"), No.2025AP996 (Wis. May 7, 2025). After all, this Court already held that the congressional map that it adopted in *Johnson v. WEC*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 ("*Johnson II*"), "compl[ies] with all relevant state and federal laws," *id.* ¶ 25, and no inferior court has the authority to second guess that judgment.

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

ARGUMENT

I. A Challenge To An "Apportionment" Under Section 801.50(4m) Does Not Include A Challenge To A Judicially Adopted Redistricting Map

A. Plaintiffs' challenge to the map adopted by this Court in *Johnson II*, does not constitute "an action to challenge the apportionment of any congressional or state legislative district" under Section 801.50(4m), including because this challenged redistricting map was judicially adopted. *See* Congressmen & Individual Voters' Initial Br. Per This Ct.'s Sep. 25, 2025 Order ("Initial.Br.") at 14–24. Section 801.50(4m) applies only to "an action to challenge the *apportionment* of any congressional or state legislative district," Wis. Stat. § 801.50(4m) (emphasis added), a term that means the allocation of congressional or state legislative seats in Wisconsin, as opposed to a *redistricting* of congressional- or legislative-district boundaries in our State—as the Wisconsin Constitution, this Court's precedent, and other state and federal sources confirm, Initial.Br.16–22. But even if this Court were inclined to reject this distinction between an "apportionment" and a "redistricting," Section 801.50(4m) does not cover actions challenging a court-drawn map Initial.Br.20–22, 24.

B. In their Initial Brief Responding To This Court's September 25, 2025 Order ("Pls.Br."), Plaintiffs claim that their challenge to the *Johnson II* map "falls squarely within" the "scope" of Section 801.50(4m), relying upon examples of cases conflating the terms "apportionment" and "redistricting." Pls.Br.1, 6–10.

As a threshold and entirely dispositive matter, Plaintiffs fail to offer a single example of courts treating a *court-drawn map* as

an "apportionment," such that an action challenging a court-drawn map could be considered an "action to challenge the *apportionment* of any congressional or state legislative district." Wis. Stat. § 801.50(4m); *see generally* Pls.Br.6–10. Although Plaintiffs cite *Clarke v. WEC*, 2023 WI 79, 410 Wis. 2d 998, 998 N.W.2d 370—where this Court considered, in exercise of its original-action jurisdiction, a challenge to "the maps adopted [by this Court] in *Johnson III*," *id.* ¶ 7—they do not claim that *Clarke* held that a court-drawn map was an "apportionment," *see* Pls.Br.8–9. This is for good reason, as *Clarke* did not even purport to consider that question. *See* 2023 WI 79, ¶ 8 (listing the "four questions" considered in *Clarke*). Similarly, Plaintiffs fail to offer any logical or textual reason to conclude that the term "apportionment" includes court-drawn maps. *Contra* Initial.Br.20–22. This is reason enough to deny Plaintiffs' request for the appointment of a three-judge panel under Section 801.50(4m).

Plaintiffs cite 28 U.S.C. § 2284(a)—a federal statute providing that "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body," 28 U.S.C. § 2284(a)—but this does not salvage their cause, Pls.Br.9–10. None of Plaintiffs' many examples of three-judge panels convened under Section 2284(a) considered challenges to a court-drawn map. Pls.Br.9–10. Rather, each involved challenges to maps drawn by a legislature. *See Miss. State Conf. of NAACP v. State Bd. of Election Comm'rs*, 739 F. Supp. 3d 383, 403 (S.D. Miss. 2024) (per

curiam) (considering legislatively adopted map); *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 801 (M.D.N.C. 2018) (reviewing a map created by "legislative mapdrawers"), *vacated and remanded,* 588 U.S. 684 (2019); *League of Women Voters of Mich. v. Johnson*, 352 F. Supp. 3d 777, 786 (E.D. Mich. 2018) ("The [challenged] Apportionment Plan was signed into law by the governor . . . after being passed by both chambers of the Michigan legislature."), *rev'd and remanded,* No.18-2383, 2018 WL 10096237 (6th Cir. Dec. 20, 2018); *Whitford v. Gill*, 218 F. Supp. 3d 837, 846 (W.D. Wis. 2016) (reviewing an "apportionment plan" that the "legislature passed, and the governor signed"), *vacated and remanded*, 585 U.S. 48 (2018); *Shapiro v. McManus*, 203 F. Supp. 3d 579, 586–87 (D. Md. 2016) (reviewing a challenge to a map "passed" by the state legislature); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 844–46 (E.D. Wis. 2012) (per curiam) (considering maps adopted by the Legislature).

But even if this Court went beyond this dispositive, straightforward reason to deny Plaintiffs' request to appoint a three-judge panel under Section 801.50(4m), Plaintiffs are also wrong that the term "apportionment" covers all actions "alleging that Wisconsin's congressional districting map is unlawful," Pls.Br.10, as opposed to actions challenging the number of Representatives in Congress allocated to Wisconsin or the Legislature setting of the number of state or local legislative seats and distributing of those seats across districts in the State, Initial.Br.16–20.

As the Congressmen and the Individual Voters have explained, multiple sources recognize the distinction between an "apportionment" (the allocation of legislative or congressional seats) and a "redistricting" (the drawing of the boundaries to create the districts from which occupants of the apportioned seats are elected). Initial.Br.16–20. Most importantly, the Wisconsin Constitution specifically reflects this distinction in Article IV, § 3, vesting the Legislature with the authority both to "apportion" the elected members comprising the Legislature as well as to "district" the State into districts to elect those members. *Id.* at 17–18. This Court explained this "distinction" in *Jensen v. WEC*, 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537, while noting that some "cases and [ ] parties" sometimes incorrectly use these terms "interchangeably." *Id.* ¶ 5 n.2. Multiple other state and federal sources provide further support. *See* Initial.Br.17–19 (citing 2 U.S.C. § 2a(c); *Daly v. Hunt*, 93 F.3d 1212, 1214 n.1 (4th Cir. 1996); Wis. Stat. § 59.10; and Wis. Stat. § 120.02(2)).

The best that Plaintiffs can do is identify some judicial opinions that have, in passing, failed to recognize this constitutionally-grounded distinction between "apportionment" and "districting" by using these terms "interchangeably." Pls.Br.8–9. This is of no moment, as it is precisely the error that this Court flagged in *Jensen*, where this Court carefully explained the differences between these terms and noted that some "cases and [ ] parties" improperly conflate these terms. 2002 WI 13, ¶ 5 n.2; *accord Wis. Just. Initiative, Inc. v. WEC*, 2023 WI 38, ¶ 150, 407 Wis. 2d 87, 990 N.W.2d 122 (Hagedorn, J., concurring) ("Our

opinions are not statutes . . . . [we] misdescribe things and use imprecise language."). The key point is that, when courts are called upon to focus on these concepts, they correctly recognize that "there is a distinction" and use the terms accordingly. *See Jensen*, 2002 WI 13, ¶ 5 n.2; *see also, e.g.*, *Daly*, 93 F.3d at 1214 n.1 (collecting cases); Initial.Br.16–19.

Finally, Plaintiffs argue that "applying *Jensen*'s technical distinction to Section 801.50(4m)" would produce "absurd or unreasonable results." Pls.Br.7–8 (citation omitted). As an initial matter, no absurd result would possibly obtain if this Court simply held that court-drawn maps are not an "apportionment"; indeed, that approach is strongly supported by the canon of constitutional avoidance. *See Am. Family Mut. Ins. Co. v. Wis. Dep't of Revenue*, 222 Wis. 2d 650, 667, 586 N.W.2d 872 (1998). But even putting that aside, Plaintiffs are mistaken in claiming that interpreting "apportionment" in Section 801.50(4m) according to its ordinary meaning fails to give "reasonable effect to every" part of this Section. *See State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. In particular, under this ordinary meaning of "apportionment," an action against the Secretary of the U.S. Census Bureau for miscalculating Wisconsin's population in the decennial census under federal law, thus depriving Wisconsin of its full number of Representatives in Congress, would be an "an action to challenge the apportionment of any congressional . . . district" that must be heard by a three-judge panel. Wis. Stat. § 801.50(4m); Initial.Br.19–20 (collecting U.S. Census Bureau-related authorities); *see generally Terry v.*

Kolski, 78 Wis. 2d 475, 484, 254 N.W.2d 704 (1977) (explaining that state courts "shall enforce the laws of Congress" and "[o]nly if the Congress has exclusively reserved jurisdiction to the federal courts are state courts without power to act"). As would an action claiming that the Legislature had apportioned too few or too many members of the state Assembly or Senate or assigned multiple members of either chamber to a single district, or otherwise acted unlawfully in apportionment. *See* Initial.Br.19. Even if Plaintiffs viewed that outcome as an "oddity," there is no other "textually permissible interpretation" to give Section 801.50(4m)'s plain text, which plain text this Court cannot "disregard[ ] or chang[e]." *Saint John's Communities, Inc. v. City of Milwaukee*, 2022 WI 69, ¶ 26, 404 Wis. 2d 605, 982 N.W.2d 78 (citation omitted).

II. Because An Inferior Three-Judge Panel Under Section 801.50(4m) Cannot Constitutionally Overrule A Judgment From This Court, This Court Should Provide Finality By Dismissing This Lawsuit

Plaintiffs seek unconstitutional relief by asking this Court to appoint an inferior, three-judge Circuit Court panel to overturn the constitutionality of this Court's judgment adopting Wisconsin's current congressional map in *Johnson II*. *See* Initial.Br.24–28. Under our Constitution, only this Court can "overrule [or] modify" one of its previous decisions, *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997), given that this Court alone has the "superintending and administrative authority over all courts," Wis. Const. art. VII, § 3(1), making its "judgments . . . relate[d] to state polity . . . final and conclusive," *Sutter v. State, Dep't of Nat. Res.*, 69 Wis. 2d 709, 717, 233 N.W.2d 391 (1975) (citation omitted).

The three-judge panel that Plaintiffs ask this Court to appoint under Section 801.50(4m) is constitutionally and statutorily inferior to this Court. *See* Initial.Br.26–27. Thus, because no inferior court can constitutionally sit in judgment of this Court's decisions—as Plaintiffs previously recognized, *see supra* p.6—Plaintiffs' request that this Court appoint a three-judge panel under Section 801.50(4m) to determine whether "the congressional map" this Court adopted in *Johnson II* is "unlawful," Pls.Br.6, is a request to violate the Wisconsin Constitution, *see* Initial.Br.24–28. And, given that Circuit Courts are inferior to this Court as well, that same unconstitutional result would obtain even if Plaintiffs had brought their challenge this Court's prior decision in *Johnson II* to a single-judge Circuit Court. *Contra* Pls.Br.12–14.

Plaintiffs make it abundantly clear that, if this Court does not dismiss their Complaint, they will seek their unconstitutional requested relief—the overturning of the *Johnson II* map by an inferior court. *Id.* at 1; *see id.* at 5, 11, 15. As Plaintiffs explain, "[e]ven if the Court concludes that § 801.50(4m) does not apply" and properly declines to appoint a three-judge panel to hear this case, Plaintiffs will pursue their claims before "a single judge in Dane County Circuit Court." *Id.* at 11. This makes it imperative for this Court exercise its "superintending and administrative authority over all courts," Wis. Const. art. VII, § 3(1), now and dismiss Plaintiffs' attack on the Wisconsin Constitution and basic principles of judicial hierarchy.

Plaintiffs argue that "a lower court" would constitutionally "have the power to grant Plaintiffs relief," Pls.Br.12, but that is

meritless, contradicts their prior express representations to this Court, and misunderstands how "the principle of vertical *stare decisis*" works, *id.* at 13. Plaintiffs claim that "[t]he current congressional map [ ] rests on quicksand" because *Clarke* "overrule[d] any portions of *Johnson* . . . that mandate[s] a 'least change' approach," such that "lower courts" would "be bound by *Clarke*'s repudiation of *Johnson*" and need only "apply" that repudiation in this case. *Id.* at 12–13 (citations omitted, first alternation in original). But *Clarke* held only that *Johnson*'s "least change" approach was not mandated when a court adopts remedial "legislative districts," 2023 WI 79, ¶¶ 63, 77; *see id.* ¶¶ 60–63—not that every map adopted under the "least change" approach must be set aside for that reason, as Plaintiffs erroneously claim. ***That is why Clarke first identified a substantive constitutional violation in Johnson III's state legislative maps, id. ¶¶ 1–3, 10–35, 56—there, a violation of "[t]he contiguity requirement for assembly and senate districts," id. ¶ 66—and only thereafter considered the proper approach for drawing a remedial map that corrected <u>that</u> error, id. ¶¶ 3–4, 9, 56***. So, a lower court could not simply "apply" *Clarke* to strike down even a state legislative map drawn under the "least change" approach, where that map complied with all redistricting-map requirements. *Contra* Pls.Br.13–14. And, of course, this Court already held that the *Johnson II* congressional map "compl[ies] with all relevant state and federal laws." 2022 WI 14, ¶ 25.

Further, *Clarke* says nothing about the constitutionality of applying its approach to *congressional* maps like the *Johnson II*

map that Plaintiffs challenge here, *see Clarke*, 2023 WI 79, ¶¶ 1–2 ("Here we are asked to determine whether these [state legislative] districts violate . . . the Wisconsin Constitution[.]")—especially since there are additional, federal-constitutional considerations to overruling such maps that *Clarke* did not confront. Most notably, the Elections Clause of the U.S. Constitution prohibits state courts from "transgress[ing] the ordinary bounds of judicial review" when considering the lawfulness of congressional maps drawn by state legislatures, thereby "arrogat[ing] to themselves the power vested in state legislatures to regulate federal elections." *Moore v. Harper*, 600 U.S. 1, 36–37 (2023). Nothing in *Clarke* intended to settle the question of whether the "least change" approach is appropriate, permissible, or mandatory for remedial congressional districts, in light of the Elections Clause. So, far from simply having to "faithfully apply [a] decision[ ]" of this Court, *contra* Pls.Br.13 (citations omitted), a three-judge panel or single Circuit Court would have to decide whether the *Johnson II* congressional map is unconstitutional, which is a constitutional impossibility given that these are inferior tribunals, *see supra* pp.12–13.

Plaintiffs are also wrong that this Court would derive any "benefit" from allowing a lower court to first "render[ ] a reasoned decision of its own" in this case. Pls.Br.14. This Court declining to dismiss this case would put the judiciary in an unconstitutional position where a lower court would be adjudicating the constitutionality of a decision of this State's highest court. *See* Initial.Br.24–28. It is not "benefi[cial]" to allow inferior courts to "first develop" the "issue[s]" below, *contra* Pls.Br.14, when this

entire case is a constitutional non-starter, under the very principles that Plaintiffs seemed to recognize just a couple of months ago, *see supra* p.6. The *Johnson II* congressional map is a result of a "final and conclusive" order from this Court, *Sutter*, 69 Wis. 2d at 717 (citation omitted), which order only this Court has "the power to overrule [or] modify," *Cook*, 208 Wis. 2d at 189. Allowing Plaintiffs to challenge that map either before an inferior three-judge panel or an inferior single-judge Circuit Court would thus violate the Wisconsin Constitution, and the Court should order dismissal of the Complaint to end this matter.

CONCLUSION

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

Dated: October 16, 2025

Respectfully submitted,

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FORM AND LENGTH CERTIFICATE

I hereby certify that this document conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b), (bm), and (c), as well as the length limitations contained in this Court's September 25, 2025 Order for a brief produced with a proportional serif font. The length of this brief is 2,767 words.

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