No.2026AP1168

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-APPELLANTS,

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-RESPONDENTS,

GLENN GROTHMAN, BRYAN STEIL, TOM TIFFANY, SCOTT FITZGERALD, DERRICK VAN ORDEN, TONY WIED, GREGORY HUTCHESON, PATRICK KELLER, PATRICK MCCALVY, MIKE MOELLER, WISCONSIN STATE LEGISLATURE, BILLIE JOHNSON, CHRIS GOEBEL, AARON GUENTHER, CHARLES HANNA, TIM HIGGINS, LOU KOWIESKI, CHRIS MULLER, ERIC O'KEEFE, CRAIG ROSAND, RUTH STRECK, *and* RONALD ZAHN,

INTERVENORS-DEFENDANTS-RESPONDENTS.

On Appeal From The Dane County Circuit Court,
The Honorable Julie Genovese, Mark Sanders,
and Emily Lonergan, Presiding
Case No.2025CV2432

RESPONSE BRIEF OF INTERVENORS-DEFENDANTS-RESPONDENTS 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

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ISSUES PRESENTED

1. Whether this Court should order dismissal because the only constitutional methods for seeking relief from this Court's judgment in *Johnson v. Wisconsin Elections Commission* ("WEC"), 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 ("*Johnson II*"), are a motion for rehearing or an original-action petition.

The Panel did not directly address this issue, although it did conclude that it "possesses no authority to supersede decisions of the Wisconsin Supreme Court," App.10, and that only this Court can decide Plaintiffs' claims, App.15, 20.

2. Whether Plaintiffs' separation-of-powers and partisan-gerrymandering claims fail as a matter of law.

The Panel answered "yes."

3. Whether the Wisconsin State Courts striking down the congressional redistricting map that this Court adopted for the State under a least-change approach in *Johnson II* would violate the U.S. Constitution's Elections Clause.

The Panel did not address this issue.

4. Whether the doctrine of laches bars Plaintiffs from obtaining any relief in this case.

The Panel did not address this issue.

INTRODUCTION

This is now the third effort by Plaintiffs and/or their counsel to use *Clarke v. Wisconsin Elections Commission*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370, to invalidate the congressional map that this Court adopted in *Johnson II*. During one of their prior failed efforts, they correctly told this Court that because the *Johnson II* map "was adopted by this Court, no other court can provide [this] requested relief." R.60:320. Yet, in this case, Plaintiffs ask this Court to authorize a circuit-court panel to overturn the judgment that this Court issued years ago in *Johnson II*. This is a constitutional impossibility, as it would turn the judicial hierarchy in this State upside-down. This Court should (again) reject Plaintiffs' serial efforts to undo the map that this Court adopted, which map this Court already explained "compl[ies] with all relevant state and federal laws." *Johnson II*, 2022 WI 14, ¶ 25.

If this Court nevertheless reaches the merits of Plaintiffs' claims, it should reject both of their unprecedented theories, which ask this Court to put itself on a collision course with the U.S. Supreme Court's Elections Clause jurisprudence. Plaintiffs' lead argument—that this Court somehow violated the separation of powers by honoring the Legislature's policy choices to the greatest extent constitutionally feasible when adopting a remedial congressional map—finds no grounding in our Constitution's text or this Court's caselaw. That this Court has since chosen a different remedial path for state-legislative maps does not retroactively transform every map adopted under this Court's prior approach into a separation-of-powers violation. And the

Elections Clause should put to rest the constitutional adventurism that Plaintiffs ask this Court to engage in. It is hard to imagine a more egregious violation of that Clause than a state court rejecting a congressional map precisely because that map honored the policy choices "prescribed . . . by the Legislature." U.S. Const. art. I, § 4. As to Plaintiffs' partisan-gerrymandering theory, they do not seriously argue that this theory has any grounding in this Court's caselaw or our State's history, and do not even attempt to propose a judicially manageable standard to adjudicate their theory. Instead, they would have the Panel below come up with its own standard and then judge for itself if this Court violated our Constitution in *Johnson II*. That is an affront to this Court, our State's Constitution, and the Elections Clause.

This Court should affirm the Panel's judgment.

ORAL ARGUMENT AND PUBLICATION

By "decid[ing] that this appeal will be heard," June 11 Order at 1, this Court has indicated that this case is appropriate for publication. This Court set oral argument for September 16, 2026.

STATEMENT

A. Wisconsin Congressional Redistricting In Historical Context

1. An increase in the Wisconsin Territory's population in the 1840s prompted Congress to authorize the Territory's People "to form a constitution and State government, for the purpose of being admitted into the Union." Ch. 89, 9 Stat. 56, 56 (1846). Congress further provided that Wisconsin would have "two representatives in [ ] Congress," once it attained statehood. *Id.* at 58.

After an unsuccessful first constitutional convention, a second constitutional convention convened to draft a proposed constitution for the People's consideration. That convention drew the State's first congressional map. *See Journal Of The [Second] Convention To Form A Constitution For The State Of Wisconsin* 553, 564–68, 620 (1848)[1] (hereinafter "Journal") (debate on "No. 22"). Delegate John H. Rountree raised the only noteworthy objection to this congressional map, claiming that the map was a partisan gerrymander and proposing his own map. *See id.* at 564–68. The convention rejected Delegate Rountree's objections and map in favor of its initially proposed map, adopting that map as Article XIV, Section 10 of the proposed Constitution. *Id.* at 620; *see id.* at 568; *id.* at 601–27. The convention thereafter adopted the entire proposed Constitution, *id.* at 598–99, 619–20, and the People approved it, Ray A. Brown, *The Making of the Wisconsin Constitution, Part II*, 1952 Wis. L. Rev. 23, 62 (1952).

Congress accepted the Constitution and admitted Wisconsin to the Union on May 29, 1848. Ch. 50, 9 Stat. 233 (1848).

2. After statehood, the Legislature periodically redrew Wisconsin's congressional map as Congress changed the number of seats that Wisconsin held. *See* Wis. Legislative Reference Bureau ("LRB"), *Redistricting In Wisconsin 2020* 46–47 (2020).[2] During this period, there were "frequent[ ] complain[ts]" that Wisconsin's congressional maps were politically gerrymandered.

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[1] Available at https://ia800507.us.archive.org/4/items/esrp962424900/0001.001.pdf.

[2] Available at https://cdm16831.contentdm.oclc.org/digital/collection/p16831coll2/id/1942/rec/1.

Alexander McDonald Thomson, *A Political History of Wisconsin* 244 (1900).[3] In 1868, for example, critics accused the Legislature of enacting a "gerrymander" that permitted Republicans to win five of Wisconsin's six U.S. House seats. *See* A Horrible Democratic Plot, Daily Milwaukee News, March 17, 1869;[4] *Wisconsin Election—by Congressional Districts*, Waukesha Plaindealer (Nov. 26, 1867).[5] And, in 1890, a Democratic State Convention speaker denounced the State's map as a Republican gerrymander, Thomson, *supra*, at 244, given that 176,000 Republican voters "have seven representatives in Congress, while the 155,000" Democratic voters "have only two members," *id.*

There were also allegations of Democratic partisan-gerrymandering efforts. For example, in 1890, Democrats won the Legislature and the Governorship, Michael Keane, LRB, *Redistricting In Wisconsin* 7 (Apr. 1, 2016),[6] and the new majority drew a legislative-district map that purportedly "disregard[ed] geography in the make-up of the districts" and paid "little attention . . . to population." Thomson, *supra*, at 245; Keane, *supra*, at 7; LRB, *Redistricting In Wisconsin 2020*, *supra*, at 40; Chapter 482, Laws of 1891. After "Republicans sued," LRB, *Redistricting In Wisconsin 2020*, *supra*, at 40, alleging that the

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[3] Available at https://archive.org/details/politicalhistory00thom/page/n1/mode/2up.

[4] Available at https://www.newspapers.com/image/1299055615/ (subscription required).

[5] Available at https://www.newspapers.com/image/1067315746/ (subscription required).

[6] Available at https://cdm16831.contentdm.oclc.org/digital/collection/p16831coll2/id/2039/rec/12.

map violated various constitutional requirements, such as population equality and adherence to county or municipal lines, *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 725 (1892), this Court declared the map "void," *Cunningham*, 51 N.W. at 730. The parties did not raise, and the Court did not consider, any partisan-gerrymandering claim.

After the U.S. Supreme Court decided that the U.S. Constitution requires equally populated congressional districts, *Wesberry v. Sanders*, 376 U.S. 1 (1964), Wisconsin entered its modern era of decennial redistricting, *see* LRB, *Redistricting In Wisconsin 2020*, *supra*, at 47–73. For the next few redistricting cycles, there were only minor disputes over the congressional map, resolved without judicial intervention. *See* Keane, *supra*, at 13.

That changed in 2011, when certain plaintiffs challenged the 2011 congressional and legislative maps in *Baldus v. Members of Wisconsin Government Accountability Board*, 849 F. Supp. 2d 840 (E.D. Wis. 2012) (per curiam), including on partisan-gerrymandering grounds. *See id.* at 846–47. The district court eventually dismissed the partisan-gerrymandering claim for lack of a "workable" judicial standard. *Id.* at 853–54. In the course of doing so, the district court explained that the 2011 congressional map resulted from a "bipartisan process," where Republican drafters "consulted" with their "Democratic colleagues to discuss their preferences" and worked to "incorporate all of the feedback (not just the Republican comments) into" the map. *Id.* at 854. Thereafter, different plaintiffs challenged the 2011 legislative

maps as partisan gerrymanders but did not challenge the 2011 congressional map. *See Gill v. Whitford*, 585 U.S. 48, 52–60 (2018).

B. *Johnson II*'s Adoption Of Wisconsin's Current Congressional Map

1. In *Johnson II*, this Court assumed the "unwelcome task" of "redraw[ing]" Wisconsin's congressional districts after the Legislature and the Governor failed to agree on a map following the 2020 census. 2022 WI 14, ¶¶ 1–2.

This Court first defined the legal standards applicable to the adoption of a new congressional map in *Johnson I*. *Johnson v. WEC*, 2021 WI 87, ¶¶ 24–63, 399 Wis. 2d 623, 967 N.W.2d 469. *Johnson I* explained the requirements for congressional redistricting under federal and state law. *Id.* ¶¶ 24–38. This Court also acknowledged that the U.S. Constitution's Elections Clause vests the Legislature with broad "discretion to decide how congressional elections are conducted," *id.* ¶ 12 (citing U.S. Const. art. I, § 4), and correspondingly withheld that power from the judiciary, *id.* ¶¶ 69–71.

Johnson I analyzed whether "the partisan makeup of districts [was] a valid factor for [the Court] to consider," *id.* ¶ 7, and held that it was not because "partisan fairness presents a purely political question," *id.* ¶ 39, *see id.* ¶¶ 40–63. This Court reasoned that partisan-gerrymandering claims ask "[w]hether a map is 'fair' to the two major political parties," but the Wisconsin Constitution provides no "judicially manageable standards" to "determine the fairness of the partisan makeup of districts." *Id.* ¶¶ 39–40. This Court "searched in earnest" for "a right to partisan fairness," including in Article I, Section 1 and Article I, Section 22,

but "conclude[d] [that] the right does not exist" therein. *Id.* ¶ 53. "[T]he only Wisconsin constitutional limits [the Court has] ever recognized on the legislature's discretion to redistrict," are found in "Article IV, Sections 3, 4, and 5," which impose only "discrete requirements" irrelevant to partisan gerrymandering. *Id.* ¶ 63. Without constitutional standards, partisan fairness "presents a purely political question," *id.* ¶ 39, and is therefore "non-justiciab[le]," *id.* ¶ 51.

Johnson I also adopted a "least-change approach" for the Court to utilize when selecting remedial maps. *Id.* ¶ 72 (plurality op.); *id.* ¶ 82 n.4 (Hagedorn, J., concurring). The approach instructs the Court to "us[e] the existing maps," *id.* ¶ 72 (plurality op.)—including the 2011 congressional map "adopted by the legislature" and "signed by the governor," *id.* ¶ 64 (majority op.)—"as a template" for the new map "and implement[ ] only those remedies necessary to resolve constitutional or statutory deficiencies," *id.* ¶ 72 (plurality op.) (citation omitted); *id.* ¶ 82 (Hagedorn, J., concurring).

Thereafter, applying these principles, this Court in *Johnson II* adopted the Governor's proposed map because it "ma[d]e the least changes from existing congressional district boundaries [drawn in 2011] while complying with all relevant state and federal laws." 2022 WI 14, ¶ 25. This Court subsequently denied the Congressmen's Motion for Reconsideration. Order at 1, *Johnson*, No.2021AP1450-OA (Apr. 15, 2022).

2. This Court also adopted Wisconsin's state-legislative remedial maps in *Johnson III*, selecting the map that made the

"least changes" "while still complying with federal and state law." *Johnson v. Wis. Elections Comm'n,* 2022 WI 19, ¶ 72 401 Wis. 2d 198, 972 N.W.2d 559.

Certain petitioners challenged *Johnson III*'s state-legislative maps in *Clarke*, invoking this Court's original jurisdiction. 2023 WI 79, ¶ 7. The *Clarke* petitioners argued that the state-legislative maps did not comply with the Wisconsin Constitution's contiguity requirement, that they were partisan gerrymanders, and, because this Court adopted them using the least-change approach, they violated the separation-of-powers doctrine. *Id.*

Clarke considered only the first claim on the merits and, ultimately, held that the *Johnson III* map violated our Constitution's contiguity requirement. *Id.* ¶ 34. Based on a review of the Wisconsin Constitution's text, *id.* ¶¶ 11–20, and this Court's precedent, *id.* ¶¶ 21–24, *Clarke* determined that territory within a state-legislative map "must be actually touching" to be constitutional, *id.* ¶ 30. Because it was undisputed that the *Johnson III* maps included non-contiguous districts, *id.* ¶ 31, the Court invalidated those maps, *id.* ¶ 30. As a result, the Court explained that it "need not address" any of the *Clarke* petitioners' alternative arguments. *Id.* ¶ 3 n.8

Clarke then turned to the "remedy" section of its opinion, where it discussed the "principles this [C]ourt [would] use in adopting remedial maps." *Id.* ¶¶ 56–76 (formatting altered). *Clarke* first stated that it was "overrul[ing] any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach" when "adopting remedial maps" and endorsed

different redistricting "principles that will guide the court's process in adopting remedial maps." *Id.* ¶ 63; *see id.* ¶¶ 60–63. *Clarke* explained that the *Johnson* litigation "illustrated" that the least-change approach "is unworkable in practice," *id.* ¶ 63, and "did not fit easily or consistently" with other "considerations essential to the mapmaking process," *id.* ¶ 62. *Clarke* recognized that there were still circumstances in which least change "could be relevant to traditional district criteria." *Id.* ¶ 62. *Clarke* explained that, when "adopting remedial legislative maps," *id.* ¶ 64, the Court would consider "other traditional districting criteria not specifically outlined in the Wisconsin or United States Constitution, but still commonly considered by courts tasked with formulating maps," such as "reducing municipal splits and preserving communities of interest," *id.* ¶ 68 (footnote omitted). The Court also held that it would "consider partisan impact when evaluating remedial maps." *Id.* ¶ 69.

C. This Court Rejects Two Challenges By Plaintiffs To The *Johnson II* Map

This Court thereafter rejected two attempts by Plaintiffs' counsel to challenge the *Johnson II* congressional map.

First, in January 2024, certain of the parties in *Johnson*, represented by Plaintiffs' counsel here, moved for relief from the *Johnson II* judgment, asking this Court to strike down the *Johnson II* map. R.60:167–72; *see* R.60:143–62, 163 n.6. As relevant here, these parties made three arguments: (1) *Clarke* rejected the least-change approach adopted in *Johnson I* and applied in *Johnson II*, R.60:154; (2) the *Johnson II* map is an unconstitutional partisan gerrymander, R.60:154; and (3) the *Johnson II* map violates the

separation-of-powers doctrine because this Court employed the "least change" approach, R.60:155. This Court denied the reconsideration motion on March 1, 2024. *See* R.60:239–43.

Second, in May 2025, some of Plaintiffs here, represented by their same counsel, filed an original-action petition with this Court, again challenging the *Johnson II* congressional map. *See* R.60:288–322. Their petition raised the same partisan-gerrymandering and separation-of-powers theories. In their filings, petitioners correctly recognized that because the *Johnson II* map "was adopted by this Court, no other court can provide [this] requested relief." R.60:320. On June 25, 2025, this Court denied the original-action petition. *See* R.60:448–54.

D. Plaintiffs Again Attack The *Johnson II* Map

1. Plaintiffs brought this action in July 2025, again challenging the *Johnson II* map on the same grounds. R.9 ¶¶ 83–97. Count I alleges the *Johnson II* map violates the separation-of-powers doctrine because this Court "improperly substituted the partisan judgment that prevailed in the 2011 political process for its own" by utilizing the least-change approach to adopt that map. R.9 ¶¶ 76–82. Counts II–IV allege that the *Johnson II* map is an unconstitutional partisan gerrymander. R.9 ¶¶ 83–97.

2. Simultaneously with the filing of their Complaint, Plaintiffs asked the Circuit Court Clerk to submit the Complaint to this Court, so this Court could appoint a three-judge panel pursuant to Wis. Stat. § 801.50(4m). R.10. This Court then opened a miscellaneous docket to consider Plaintiffs' request and accepted briefing from various parties. R.49:1–2. The Congressmen and Individual Voters intervened and opposed Plaintiffs' request.

Proposed Br. 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, *Bothfeld v. WEC*, No.2025XX1438 (Wis. Oct. 9, 2025). They argued that the appointment of an inferior panel would raise serious constitutional concerns because such a panel cannot constitutionally review or overrule any judgment from this Court. *Id.* at 24–27.

On November 25, 2025, this Court appointed a three-judge panel of the Circuit Court under Sections 801.50(4m) and Wis. Stat. § 751.035 ("Panel") and selected Dane County as the venue. R.58:4–5. In so doing, this Court held that those provisions "required" it "to appoint a three-judge panel." R.58:4. Concurring in part, Justice Hagedorn emphasized that whether the Panel could provide the "extraordinary" relief Plaintiffs requested was not at issue "at this stage," while noting the serious "legal roadblocks" that the Panel would need to "reckon[ ] with" before it could declare an "order of this court unconstitutional." R.58:6–7 (Hagedorn, J., concurring).

3. Now before the Circuit Court, Plaintiffs moved for judgment on the pleadings on their separation-of-powers claim. R.44. The Congressmen and Individual Voters opposed and also moved for dismissal of all of Plaintiffs' claims, R.145. The Congressmen and Individual Voters made four arguments relevant here. First, the Panel could not constitutionally afford Plaintiffs any relief because doing so would require an inferior

tribunal to declare unlawful this Court's *Johnson II* judgment. R.145:10–17. Second, Plaintiffs' claims raised only nonjusticiable political questions without grounding in the Wisconsin Constitution, including under *Johnson I*. R.145:17–29. Third, granting Plaintiffs relief would violate the U.S. Constitution's Elections Clause. R.145:29–38. Finally, laches barred Plaintiffs' challenge to the *Johnson II* map. R.145:38–40.

The Panel denied the Motion for Judgment on the Pleadings and granted the Motion To Dismiss, App.4–21, along with similar motions filed by the *Johnson* Intervenors, R.138, and the Legislature, R.141. Before considering the parties' arguments, the Panel questioned its "scope of authority" in this action, App.9–10 (formatting altered), and ultimately determined it was a "circuit court"—as opposed to "an arm of the state supreme court" or a "referee"—with "no endowment of additional powers" or "authority to supersede decisions of th[is Court]," App.10. The Panel then concluded that Plaintiffs failed to show "that they are entitled to judgment as a matter of law" on their separation-of-powers claim. App.14. Plaintiffs' separation-of-powers theory asked the Panel to "read into *Clarke* an analysis that it does not contain," App.14, as *Clarke* neither overruled *Johnson II* nor "reject[ed]" the least-change approach "based on a finding that there was a separation-of-powers violation," App.13. As to Plaintiffs' partisan-gerrymandering claims, the Panel determined that such claims are nonjusticiable under this Court's precedent. App.19–20.

STANDARD OF REVIEW

Whether a lower court correctly decided a motion for judgment on the pleadings is a question that this Court reviews de

novo. *Southport Commons, LLC v. Wis. Dep't Transp.*, 2021 WI 52, ¶ 18, 397 Wis. 2d 362, 960 N.W.2d 17. This Court reviews "a lower court's decision to grant or deny a motion to dismiss" de novo. *Wis. Mfrs. & Com. v. Evers*, 2022 WI 38, ¶ 7, 401 Wis. 2d 699, 977 N.W.2d 374. This Court reviews "question[s] of law," such as questions of constitutional interpretation, de novo. *Appling v. Walker*, 2014 WI 96, ¶ 17, 358 Wis. 2d 132, 853 N.W.2d 888.

ARGUMENT

I. This Court Should Order This Case Dismissed Because The Only Constitutional Methods For Challenging This Court's Judgments Are A Motion For Rehearing Or An Original-Action Petition

A. Article VII of the Wisconsin Constitution "vest[s]" the State's "judicial power" in a "*unified* court system," with "*one* supreme court" at the top. Wis. Const. art. VII, § 2 (emphases added). Article VII also provides that this Court has "superintending and administrative authority over all courts." *Id.* § 3(1). The phrases "*unified* court system," "*one* supreme court," and "authority over *all* courts," *id.* §§ 2–3 (emphases added), necessarily mean that this Court has the constitutional "power to exercise fully and completely the jurisdiction of superintending control over all inferior courts," *State ex rel. Fourth Nat'l Bank of Phila. v. Johnson*, 103 Wis. 591, 79 N.W. 1081, 1091–92 (1899). Indeed, "when the framers of the constitution sp[oke] of a supreme court, they intended to convey the idea of the highest tribunal in the judicial department of the government." *Att'y Gen. v. Blossom*, 1 Wis. 317, 322 (1853). So, "[t]he constitution provides that this [Court] shall be a court of last resort[ ]—a court whose judgments,

so far as they relate to state polity, are final and conclusive." *Ean v. Chi., M. & St. P. Ry. Co.*, 101 Wis. 166, 76 N.W. 329, 330 (1898).

It follows from these constitutional principles that inferior courts cannot review, much less reverse, this Court's judgments. *See* Wis. Const. art. VII, § 3(1). To the contrary, all inferior courts in Wisconsin must follow this Court's judgments, with this Court alone possessing the authority to review and overturn them. *See, e.g.*, *Blossom*, 1 Wis. at 322; *Ean*, 76 N.W. at 330. Lower courts hold "no power to vacate or set [ ] aside" the judgments of this Court, *Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶ 50, 303 Wis. 2d 94, 735 N.W.2d 418 (citation omitted), or to contradict "the expressed or implied mandate of [an] appellate court," *id.* ¶ 32; *see Fourth Nat'l Bank*, 79 N.W. at 1091–92.

This Court may exercise its exclusive power to review its own judgments in two well-established ways. First, "[a] party" to a judgment from this Court "may seek reconsideration" of a "judgment" by submitting a motion with this Court "within 20 days after the date of the decision." Wis. Stat. § (Rule) 809.64. Second, a party can file with this Court an original-action petition, *id.* § (Rule) 809.70, initiating a new action in this Court's original jurisdiction challenging a prior judgment, as occurred in *Clarke*.

B. Plaintiffs challenged this Court's *Johnson II* map below, asking the Panel of the Circuit Court—an inferior court—to declare this Court's *Johnson II* judgment unconstitutional. *See* R.9:26. But the Panel, "consisting of 3 circuit court judges," Wis. Stat. § 751.035(1), possesses "no power to vacate or set [ ] aside" this Court's judgments, *Tietsworth*, 2007 WI 97, ¶ 50 (citation

omitted), under the above-discussed principles. The Panel is an inferior tribunal, both as a constitutional matter and as a statutory matter, and so has "no authority to supersede decisions of [this] Court." App.10; *see Fourth Nat'l Bank*, 79 N.W. at 1092; Wis. Stat. § 751.035.

To prevail in their lawsuit, Plaintiffs would need the Panel to "vacate" or "set [ ] aside," *Tietsworth*, 2007 WI 97, ¶ 50, this Court's *Johnson II* judgment, R.9:26, which no lower court can do. Plaintiffs contend that by adopting the *Johnson II* map, this Court "abdicated" its "charge" to "exercise its independent judgment" "by using criteria that guaranteed that the 2011 partisan skew would be perpetuated," R.9 ¶ 10, and resulted in an "extreme Republican gerrymander," R.9 ¶ 11. To remedy that alleged defect, Plaintiffs requested that the Panel "declare the [*Johnson II*] map unconstitutional and enjoin Defendants from conducting any further elections under [that] unlawful map until it is replaced with a lawful alternative." R.9 ¶ 14. As some of Plaintiffs and their counsel previously acknowledged—consistent with the principles articulated above, *supra* pp.21–22—Wisconsin's congressional map was "adopted by [this] Court" pursuant to the *Johnson II* judgment, R.9 ¶ 66, so "no other court can provide [their] requested relief," R.60:320. The Panel thus cannot enter judgment in Plaintiffs' favor. The only way for Plaintiffs to obtain the relief they seek would be through either a reconsideration motion filed in *Johnson II* itself, Wis. Stat. § (Rule) 809.64, or an original action, *id.* § (Rule) 809.70. But this Court has rejected several attempts to invoke those procedures to set aside the

Johnson II judgment, including in Plaintiffs' own cases raising the same arguments. *See supra* pp.17–18.

C. Plaintiffs assert that this Court "has the authority to apply its own precedent to the current map," Br.28, and "instruct," Br.29, the Panel as to what it should do on remand. This misses the constitutional point. This Court is sitting as an *appellate* court here, Wis. Stat. § 751.035(3), meaning that it is *reviewing* the orders or judgments of the Panel, *Blossom*, 1 Wis. at 322–23; Wis. Stat. § 808.09. So, while this Court can review the Panel's orders, only the Panel can enter the judgment in this case, *see* Wis. Stat. § 808.09. The Panel, in turn, is a constitutionally inferior court, and as explained above, the Constitution does not permit a lower court to set aside a judgment issued by this Court, *see supra* pp.21–22. Contrary to Plaintiffs' apparent view, this Court cannot override these principles by deputizing an inferior court to do something that a court cannot do as a constitutional matter. "[C]onstitutional judges take no power from the constitution, [and] can take none from the legislature, to subdelegate their judicial functions." *Van Slyke v. Trempealeau Cnty. Farmers' Mut. Fire Ins. Co.*, 39 Wis. 390, 392 (1876); *see also State ex rel. Universal Processing Servs. of Wis., LLC v. Cir. Ct. of Milwaukee Cnty.*, 2017 WI 26, ¶ 75, 374 Wis. 2d 26, 892 N.W.2d 267.

That does not leave this Court powerless to set aside its own judgments if it determines thereafter that those judgments violate the law. This Court can grant a motion for reconsideration, Wis. Stat. § (Rule) 809.64, as both the Congressmen and Plaintiffs' counsel previously sought as to the *Johnson II* judgment, *see supra*

pp.15, 17–18. Or it can set aside the judgment after receiving a meritorious petition for original action, Wis. Stat. § (Rule) 809.70, as in *Clarke*, 2023 WI 79, ¶ 7, and as some of Plaintiffs sought before, *see supra* p.18. What this Court cannot constitutionally do is direct an inferior court to set aside this Court's judgment, as Plaintiffs envision here.

This same constitutional-structural point defeats Plaintiffs' argument that they "did not ask the panel to sit in review of *Johnson II* in the first instance," but rather "simply" asked it to "apply" *Clarke*—which "expressly overruled *Johnson II*." Br.28. Even if *Clarke* had overruled portions of the *opinion* in *Johnson II*, Br.28; *but see infra* pp.30–31, *Clarke* did not overrule the *judgment* in *Johnson II*, *see In re O'Brien's Est.*, 273 Wis. 223, 227, 77 N.W.2d 609 (1956). Such a ruling would not have even made sense, since the plaintiffs in *Clarke* did not challenge the congressional map that *Johnson II*'s judgment adopted. "There is a wide difference between [a court's] 'decisions' and 'opinions.'" *In re O'Brien's Est.*, 273 Wis. at 227. "A court's ultimate decision"—that is, its judgment—"is separate from the court's opinion." *State v. Castillo*, 213 Wis. 2d 488, 491, 570 N.W.2d 44 (1997). That is why "a party may not petition this [C]ourt for review if it merely disagrees with the rationale expressed in the [lower court's] opinion." *Id.* (citations omitted). It is also why this Court's "overruling of prior precedent" does not invalidate "preexisting judgments based in whole or in part on that precedent" or qualify as "grounds for reopening" those "preexisting judgments." *See Brown v. Mosser Lee Co.*, 164 Wis. 2d 612, 623, 476 N.W.2d 294 (1991). In the same

way, an inferior Panel cannot "apply," Br.28, a subsequent decision from this Court to set aside an earlier judgment of this Court.

II. Plaintiffs' Separation-Of-Powers Claim Has No Grounding In Wisconsin Law And, If Accepted Here, Would Violate The Elections Clause

A. *Clarke* Did Not Retroactively Turn *Johnson II* Into A Separation-of-Powers Violation

Plaintiffs contend that this Court's adoption of the *Johnson II* congressional map violated our Constitution's separation-of-powers doctrine because this Court "displace[d]" its "responsibility to exercise independent judgment" in favor of "partisan bias" perpetuated by "the political branches" in the 2011 congressional map. Br.20–21. Plaintiffs' unprecedented separation-of-powers theory finds no support in the Wisconsin Constitution or this Court's caselaw.

1. The Wisconsin Constitution "creates three separate coordinate branches of government" and "vest[s]" each "with a specific core governmental power." *Evers v. Marklein*, 2024 WI 31, ¶ 9, 412 Wis. 2d 525, 8 N.W.3d 395 ("*Marklein I*") (citation omitted). The Constitution provides that "[t]he legislative power shall be vested in a senate and assembly; [t]he executive power shall be vested in a governor; and [t]he judicial power of this state shall be vested in a unified court system." *Id.* (citations omitted); *see* Wis. Const. art. IV, § 1; Wis. Const. art. V, § 1; Wis. Const. art. VII, § 2. "[T]he separation of powers doctrine" is "[i]mplicit in this tripartite division." *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 11, 376 Wis. 2d 147, 897 N.W.2d 384 (brackets omitted; citations omitted).

Each branch possesses both "core powers" and "shared powers" under our Constitution. *Marklein I*, 2024 WI 31, ¶ 10 (citation omitted). "Core powers" fall within the "zones of authority constitutionally established for each branch of government upon which any other branch of government is prohibited from intruding." *Id.* (citations omitted). "Core powers" are not to be shared; "*any* exercise of authority [of one branch's core powers] by another branch of government is unconstitutional." *Id.* (citations omitted). "[S]hared powers," conversely, "lie at the intersections of the[ ] exclusive core constitutional powers" and may be exercised by the other branches, so long as the branches do not substantially interfere with or unduly burden each other. *Id.* ¶ 11 (citations omitted); *see State v. Horn*, 226 Wis. 2d 637, 644, 594 N.W.2d 772 (1999). The separation-of-powers doctrine prohibits one branch from "abdicating core power" so that another branch can exercise it. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 48, 382 Wis. 2d 496, 914 N.W.2d 21 (lead op. of Kelly, J.) (citing *In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 503, 236 N.W. 717 (1931)). In other words, the "coordinate branches of the government should not abdicate or permit others to infringe upon such powers as are exclusively committed to them by the constitution." *Gabler*, 2017 WI 67, ¶ 31 (citations omitted; alterations omitted).

It is "the judiciary's exclusive responsibility to exercise judgment in cases and controversies arising under the law" and "to say what the law is" when resolving such disputes. *Id.* ¶ 37 (citations omitted). The core power of Wisconsin's courts is to

"interpret[ ] and apply[ ] [the] laws made and enforced by coordinate branches of state government" and "finally decide rights and responsibilities as between individuals." *Id.* (citations omitted); *see also, e.g.*, *State v. Williams*, 2012 WI 59, ¶ 36, 341 Wis. 2d 191, 814 N.W.2d 460; *State v. Van Brocklin*, 194 Wis. 441, 443, 217 N.W. 277 (1927). "[O]nly the judiciary," and no other branch, "may authoritatively interpret and apply the law in cases before [the] courts," *Tetra Tech*, 2018 WI 75, ¶ 54 (lead op. of Kelly, J.)—and "[n]o aspect of the judicial power is more fundamental," *Gabler*, 2017 WI 67, ¶ 37.

2. Nothing in our Constitution's text or this Court's caselaw supports an argument that this Court's application of the least-change approach when adopting the *Johnson II* map violated the separation-of-powers doctrine.

In *Johnson I*, this Court held that it would employ a "least-change approach" for adopting Wisconsin's remedial maps. 2021 WI 87, ¶¶ 64–81. The least-change approach, as relevant here, instructed this Court to "us[e] the existing map[ ] 'as a template'" for the remedial congressional map "and implement[ ] only those remedies necessary to resolve constitutional or statutory deficiencies" in the then-existing 2011 congressional map, *id.* ¶ 72 (citation omitted), which map had been "adopted by the legislature, signed by the governor, and survived judicial review by the federal courts," *id.* ¶ 64. As applied to congressional maps, in particular, this approach respects the fact that the U.S. Constitution's Elections Clause vests the Legislature with "discretion to decide how congressional elections are conducted," *id.* ¶ 12 (citing U.S.

Const. art. I, § 4), including regarding the drawing of congressional districts, *see id.* ¶ 64. This Court's application of "least-change" approach "remed[ied] the constitutional defects in the existing plan"—its malapportionment, *id.* ¶ 66—without "intrud[ing] upon the constitutional prerogatives of the political branches," *id.* ¶ 64. As this Court explained, this approach "was applied in numerous cases during the last two redistricting cycles" and has "general acceptance among reasonable jurists." *Id.* ¶ 73 (collecting cases).

Johnson I's adoption of the least-change approach was simply an interpretation of how the Court would draw a remedial congressional map. As discussed more fully below, this Court's application of the "least-change" approach respects the power that the U.S. Constitution's Elections Clause vests in state legislatures to regulate federal elections. *Infra* Parts II.B, III.B.

To the extent that *Johnson I*'s adoption of the "least-change approach" as to congressional maps also relied upon this Court's then-applicable interpretation of Wisconsin law, it reflected the Court's then-extant view of the proper method for adopting remedial redistricting maps, *see id.* ¶¶ 72–78, which method has widespread usage in "numerous cases," and "general acceptance among reasonable jurists," *id.* ¶ 73. While this Court subsequently adopted a different approach for selecting remedial state-legislative maps in *Clarke*, 2023 WI 79, *see supra* pp.16–17, that change in this Court's doctrine does not retroactively make *Johnson I*'s endorsement of the least-change approach a violation of the separation of powers. This Court can choose not to follow precedent for any number of reasons, including that it is

"unworkable in practice" or "unsound in principle." *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶ 99, 264 Wis. 2d 60, 665 N.W.2d 257. As discussed below, *Clarke* did not ground its rejection of the least-change approach for remedial state-legislative maps in any holding based on the separation of powers.

3. Plaintiffs' separation-of-powers argument rests upon their assertion that *Clarke* "repudiat[ed]" "all maps adopted pursuant to" the least-change approach, including the current congressional map by holding that all prior maps violate the separation of powers. Br.24–25. Plaintiffs' argument finds no support in *Clarke*.

Clarke did *not* hold that all maps adopted via the least-change approach violate the separation-of-powers doctrine, *see* 2023 WI 79, ¶¶ 56–76; *see supra* pp.16–17, contrary to Plaintiffs' assertions, Br.20–26. *Clarke* decided only that courts should not employ the least-change approach to adopt remedial state-legislative maps going forward. *See* 2023 WI 79, ¶¶ 56–76. As the Panel correctly explained, this is clear from the structure of the *Clarke* opinion. App.13–14. In the liability section of its opinion, *Clarke* held that the *Johnson III* maps violated our Constitution's contiguity requirements. 2023 WI 79, ¶¶ 10–35. In the remedy section of the opinion, *Clarke* overruled *Johnson I*'s instruction to utilize the least-change approach when drawing remedial state-legislative maps. *Id.* ¶¶ 56, 60–63. That organization demonstrates that *Clarke*'s approach for adopting remedial maps is relevant *only after* a court has found that a redistricting map is unlawful. *See id.* ¶¶ 56–76. Had *Clarke* concluded that a map adopted through the least-change approach thereby violated the

separation-of-powers doctrine, this Court would have included that holding in the liability section of its opinion—not in the remedies section. Instead, the "focus[ ]" of *Clarke* was on its "finding that the maps violated the contiguity requirements" of our Constitution, App.13, which conclusion, again, was discussed in the liability section, *Clarke*, 2023 WI 79, ¶¶ 7–9.

Indeed, *Clarke* did not even invoke the separation-of-powers doctrine in any respect. *Clarke* concluded that the "least change" approach was "unworkable in practice," "[a]s illustrated across the course of the *Johnson* litigation," such that it "overrule[d]" any portions of *Johnson I* that "mandate a least change approach." 2023 WI 79, ¶ 63. That is a change in legal doctrine, based upon this Court's experience gained through "the course of the *Johnson* litigation," after seeing its application "in practice." *Id.* ¶ 63. Such a change reflects the way "history" can "benefit" this Court and its ability to reconsider a prior decision, *Evers v. Marklein*, 2025 WI 36, ¶¶ 26, 36–39, 417 Wis. 2d 453, 22 N.W.3d 789, which does not mean that the prior decision was somehow a violation of the separation-of-powers doctrine. All told, that this Court no longer using the least-change approach for state-legislative maps, based upon difficulties in its application, in no way suggests that use of that approach violated the separation of powers.

Plaintiffs argue that *Johnson I*'s least-change approach requires "excessive," Br.24, or "blind deference to the political branches," Br.16, akin to great weight deference that this Court invalidated in *Tetra Tech*. But great weight deference required the courts to defer to agencies regarding the *meaning of the law*, which

is the Court's core function. *Tetra Tech*, 2018 WI 75, ¶ 55. *Johnson I* adopted the least-change approach based on this Court's independent assessment of "[t]he constitutional confines of [its own] judicial authority," 2021 WI 87, ¶ 64, even if this Court has now taken a different view of the law, at least as to remedial state-legislative map drawing.

Plaintiffs also assert that "[d]eferring to political actors no longer in office [ ] abdicates the judiciary's responsibility to act with independence." Br.22. But as this Court explained in *Johnson I*, the Legislature's 2011 congressional map was "codified as [a] statute[ ], without a sunset provision, and ha[d] not been supplanted by new law." 2021 WI 87, ¶ 72 n.8. This Court declining to disturb the political judgments when correcting population deviations in an otherwise lawful 2011 map via the least-change approach is no different than the Court declining to disturb the political judgments in an otherwise lawful statute enacted by legislators no longer in office in other contexts. *See Warehouse II, LLC v. State Dep't of Transp.*, 2006 WI 62, ¶ 14, 291 Wis. 2d 80, 715 N.W.2d 213 ("We defer to the policy choices of the legislature and we assume that the legislature's intent is expressed in the statutory language it chose.").

4. Even if this Court were to recognize Plaintiffs' novel separation-of-powers theory, this Court must, at a minimum, affirm the Panel's denial of Plaintiffs' Motion for Judgment on the Pleadings and remand for further development, as Plaintiffs' theory depends upon highly contested disputes of fact

inappropriate for judgment on the pleadings. *Southport Commons, LLC*, 2021 WI 52, ¶ 18.

Plaintiffs' separation-of-powers theory requires resolution of numerous factual questions.

It first necessitates resolution of whether, as a matter of fact, the *Johnson II* map "subordinates constitutional and statutory criteria to the judicially created least-change metric," such that "it cannot stand as an exercise of judicial redistricting authority and thus cannot be constitutionally enforced in future elections." Br.28. That inquiry requires factfinding about, for example, what factors this Court considered when adopting the *Johnson II* map, what level of consideration this Court gave each factor, and whether this Court chose the *Johnson II* map even though other traditional redistricting criteria would have otherwise caused this Court to adopt a different map. Indeed, it is not even clear what particular criteria Plaintiffs believe this Court subordinated in adopting the *Johnson II* map, given that this Court already found that the *Johnson II* map "compl[ies] with all relevant state and federal laws." 2022 WI 14, ¶ 25.

Plaintiffs' separation-of-powers theory is also based upon their assertion that while "some deference to a decade-old map" may be "warranted," "excessive judicial deference violates the separation of powers." Br.24. Whether this Court employed deference that was "excessive"—whatever that means—is a question that cannot be resolved without fact finding. To adjudicate Plaintiffs' theory, the Panel would need to determine how much deference this Court gave to the 2011 congressional

map, ascertain the line between "some" and "excessive," and then decide whether *Johnson II* crossed that line.

Plaintiffs' theory further relies on the factual assumption—heavily disputed by the Congressmen and Individual Voters—that the 2011 congressional map was "infected with partisan bias." Br.12. Determining the accuracy of that claim would require "extensive fact-finding (if not a full-scale trial)." *Clarke v. WEC*, 2023 WI 70, 409 Wis. 2d 372, 375, 995 N.W.2d 779. Plaintiffs themselves appeared to concede this point at a scheduling conference in front of the Panel with respect to the adjudication of their "partisan gerrymandering claims," as they stated those claims were "fact-based, warranting discovery, and potentially a trial." R.148:11–12. Notably, the only court that reviewed the 2011 congressional map determined that it was the result of a "bipartisan" process, *Baldus*, 849 F. Supp. 2d at 853–54, and it was Governor Evers who proposed the modification to the 2011 map that *Johnson II* adopted, 2022 WI 14, ¶¶ 13–25, so presumably there would need to be discovery into that aspect as well.

B. Holding A Map Violates A State Constitution Precisely Because That Map Respects The Judgments That The "Legislature" Adopted Violates The Elections Clause

The U.S. Constitution's Elections Clause vests state legislatures with the authority to draw congressional maps, limiting state courts reviewing those maps to "the ordinary bounds of judicial review," so as not to "arrogate to themselves the power vested in state legislatures to regulate federal elections." *Moore v. Harper*, 600 U.S. 1, 36 (2023). Plaintiffs' separation-of-powers theory turns the Elections Clause on its head, requiring courts to

override the Legislature's policy judgments precisely because they are the Legislature's judgments.

1. The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*." U.S. Const. art. I, § 4 (emphasis added). The only exception that the Elections Clause provides is for Congress to "make or alter such Regulations" "by law." *Id.* Pursuant to that power, Congress has required that, if the number of Representatives in a State is unaltered after an apportionment, Representatives "shall be elected from the districts then prescribed by the law of such State," "[u]ntil a State is redistricted in the manner provided by the law thereof." 2 U.S.C. § 2a(c). Thus, if a state legislature chooses not to redistrict after apportionment, the governing district lines will continue unchanged. *Id.*

The U.S. Supreme Court clarified the role of state courts in resolving state-law challenges to congressional redistricting maps in its landmark decision in *Moore*, recognizing the Elections Clause's limitations. There, North Carolina voters and certain other plaintiffs challenged North Carolina's congressional map as a partisan gerrymander under the North Carolina Constitution. 600 U.S. at 11. The parties put forth two contrary positions. The legislative defendants defending the map asserted that the Elections Clause "insulates state legislatures [drawing congressional maps] from review by state courts for compliance with state law," *id.* at 19, while the plaintiffs argued that state courts have "free rein" to determine state law, *id.* at 34.

The U.S. Supreme Court opted for a middle ground, cautioning state courts against adopting forced or novel interpretations of state law to insert themselves into congressional redistricting. *See id.* While "the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law," it likewise does not provide "state courts" "free rein" when reviewing a congressional map. *Id.* State courts must assure themselves that their decisions "do not evade federal law" by "read[ing] state law in such a manner as to circumvent federal constitutional provisions." *Id.* at 34–35. If it were otherwise, state courts would "transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." *Id.* at 36. Should a state court "so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures," the U.S. Supreme Court stands ready to "review." *Id.* at 37.

In his *Moore* concurrence, Justice Kavanaugh discussed the "standard a federal court should employ to review a state court's interpretation of state law in a case implicating the Elections Clause" to determine whether it exceeds the bounds of "ordinary state court review." *Id.* at 38 (Kavanaugh, J., concurring). He contemplated three options, each "convey[ing] essentially the same point: Federal court review of a state court's interpretation of state law in a federal election case should be deferential, but deference is not abdication." *Id.* at 38–39 & n.1. Justice Kavanaugh ultimately recommended Chief Justice Rehnquist's standard from

Bush v. Gore, 531 U.S. 98 (2000), which instructs that state courts cannot "'impermissibly distort[ ]' state law 'beyond what a fair reading required.'" *Id.* at 38 (citation omitted). This standard applies to state-court interpretations of state constitutions and that, when considering such an interpretation, courts "necessarily must examine the law of the State as it existed prior to the action of the [state] court." *Id.* at 39 (citation omitted).

2. Adopting Plaintiffs' separation-of-powers argument and invalidating the *Johnson II* map because it adheres as much as practicable to the Legislature's adopted map, while simply correcting population inequalities, would "transgress the ordinary bounds of judicial review" in clear violation of the Elections Clause under *Moore*. 600 U.S. at 36 (majority op.). Indeed, a clearer violation of the Elections Clause principles that the U.S. Supreme Court articulated in *Moore* is hard even to hypothesize.

Plaintiffs claim that this Court violated the separation-of-powers by respecting the Legislature's prior policy choices because those choices were allegedly too partisan. *See* R.9 ¶¶ 77–82. But the Elections Clause vests the Legislature—not courts—with broad "discretion to decide how congressional elections are conducted," *Johnson I*, 2021 WI 87, ¶ 12 (citing U.S. Const. art. I, § 4), including the drawing of congressional maps, *see id.* ¶ 64, such that the courts "lack the authority to make the political decisions that the Legislature and the Governor can make through their enactment of redistricting legislation," *id.* ¶ 71. Going "further than necessary to remedy [a map's] current legal deficiencies" by overturning the Legislature's policy judgments

"would intrude upon the constitutional prerogatives of the political branches and unsettle the constitutional allocation of power." *Id.* ¶ 64. Thus, this Court's application of the least-change approach in adopting the remedial congressional map *respected* the Elections Clause's "deliberate choice" to vest redistricting power only in the Legislature. *Moore*, 600 U.S. at 34. Adopting Plaintiffs' theory would turn the Elections Clause on its head. Given that the Elections Clause mandates respect for legislative policy choices, *see White v. Weiser*, 412 U.S. 783, 795 (1973), striking down the map *because of* that respect would exceed "the ordinary bounds of judicial review," *Moore*, 600 U.S. at 36.

Endorsing Plaintiffs' separation-of-powers theory would also violate the Elections Clause by "impermissibly distort[ing]" Wisconsin law "as it existed prior to th[is] action" far "beyond what a fair reading required." *Id.* at 38–39 (Kavanaugh, J., concurring) (citation omitted). As explained above, nothing in our Constitution or this Court's existing precedent supports Plaintiffs' novel separation-of-powers challenge to the *Johnson II* least-change map. *Supra* pp.28–30. Adopting Plaintiffs' separation-of-powers theory to invalidate a congressional map would necessarily "impermissibly distort[ ]" the law "beyond" any "fair reading"—contrary to the Elections Clause. *Moore*, 600 U.S. at 38–39 (Kavanaugh, J., concurring) (citation omitted).

III. Plaintiffs' Partisan-Gerrymandering Theory Is Meritless And Adopting It Here Would Violate The Elections Clause

A. *Johnson I* Correctly Held That Partisan-Gerrymandering Claims Raise Nonjusticiable Issues Not Grounded In The Constitution

This Court in *Johnson I* held that "the partisan makeup of districts" is not "a valid factor for [the Court] to consider," 2021 WI 87, ¶¶ 7, 39, and that "the Wisconsin Constitution says nothing about partisan gerrymandering," *id.* ¶ 53. Given that Plaintiffs do not ask this Court to overturn *Johnson I*, this Court should simply affirm the Panel's conclusion that "Plaintiffs' partisan gerrymandering claims are barred by *Johnson I*." App.20. And even putting that waiver point aside, *Johnson I* correctly held in the first instance that partisan-gerrymandering claims are "political question[s]" that Wisconsin courts cannot constitutionally "consider." 2021 WI 87, ¶¶ 39–40.

1. A court can exercise "[t]he judicial power," Wis. Const. art. VII, § 2, only if a case presents a "justiciable" "controversy," *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2001 WI 65, ¶ 37, 244 Wis. 2d 333, 627 N.W.2d 866, such as when a claim involves "judicially discoverable and manageable standards" based upon the Constitution, *In re John Doe Proceeding*, 2004 WI 65, ¶ 27 n.9, 272 Wis. 2d 208, 680 N.W.2d 792 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Whether a claim provides judicially manageable standards grounded in our Constitution depends upon an analysis of the Constitution's text, *see Johnson I*, 2021 WI 87, ¶¶ 44–49, 51–63, our State's history, *id.* ¶ 50, and this Court's precedent, *Vincent v. Voight*, 2000 WI 93, ¶ 2 n.2, 236 Wis. 2d 588, 614 N.W.2d 388.

Our Constitution imposes only two requirements on congressional maps, both under Article I, Section 1: they must not be the product of racial gerrymandering and must create districts with as close to equal population as possible. Wis. Const. art. I, § 1; *see Johnson I*, 2021 WI 87, ¶¶ 25, 28–33. There are no other constitutional requirements for partisan fairness in our Constitution, and no judicially manageable standards to enforce any such mandate.

This Court reached this conclusion in *Johnson I*. Tasked with determining the standards applicable to adopting remedial redistricting maps, *Johnson I* held that partisan-gerrymandering claims are "quintessentially" "political question[s]" that Wisconsin courts cannot constitutionally "consider" when adopting a congressional map. 2021 WI 87, ¶¶ 39–40. This Court reasoned that "there are no 'judicially discoverable and manageable standards' by which to judge partisan fairness," *id.* ¶ 40, and that "[t]he people have never consented to the Wisconsin judiciary deciding what constitutes a 'fair' partisan divide[,] [so] seizing such power would encroach on the constitutional prerogatives of the political branches," *id.* ¶ 45 (citation omitted).

This Court assured itself that our Constitution "says nothing about partisan gerrymandering." *Id.* ¶ 53 (formatting altered). This Court searched Article I, Sections 1, 3, 4, and 22, for "a right to partisan fairness" but found that one "does not exist" in any of those provisions. *Id.* ¶¶ 53–63. Rather, "the only Wisconsin constitutional limits [that this Court has] ever recognized on the legislature's discretion to redistrict" are the "discrete requirements" imposed by Article IV, Sections 3–5, which do not

involve partisan gerrymandering. *Id.* ¶ 63. *Johnson I* confirmed, therefore, that there is no "reservoir of additional [redistricting] requirements" outside of Article IV, Sections 3–5. *Id.* *Johnson I* also determined that recognizing partisan-gerrymandering claims would force mapdrawers to disregard the "traditional redistricting criteria" required by our Constitution to adopt a map that achieves "the 'right'" party balance, given that "Democrats tend to live close together in urban areas, whereas Republicans tend to disperse into suburban and rural areas." *Id.* ¶ 48. Although redistricting according to those criteria "may not" result in districts that are "politically competitive," their utilization is nevertheless constitutionally "mandated" as to legislative districts. *Id.*[7]

2. *Johnson I* was correct to conclude that our Constitution does not recognize partisan-gerrymandering claims, as nothing in the text of our Constitution, our State's history, or this Court's precedent supplies judicially discoverable and manageable standards to adjudicate such claims.

As for our Constitution's text, Plaintiffs have attempted to ground their three partisan-gerrymandering claims on four different provisions. R.9 ¶¶ 83–97. Count II relies on the equal-protection guarantees found in Article I, Section 1, R.9 ¶¶ 83–86; Count III is based on the free association and speech guarantees of Article I, Sections 3 and 4, R.9 ¶¶ 87–93; and Count IV is

[7] While Justice Hagedorn did not join paragraph 8 of *Johnson I*, which summarized the Court's holdings, *Johnson I*, 2021 WI 87, ¶ 8, he joined the portions of *Johnson I* that specifically set out the Court's nonjusticiability-partisan-gerrymandering holdings, *id.* ¶¶ 39–63. Further, Justice Hagedorn separately made clear that he agreed with those holdings in his concurring opinion. *Id.* ¶ 82 n.4 (Hagedorn, J., concurring); App.18.

brought under the "free government" guarantee of Article I, Section 22, R.9 ¶¶ 94–97.

There is no "right to partisan fairness" in any of the provisions Plaintiffs invoke—and thus they do not establish judicially manageable standards to adjudicate partisan-gerrymandering claims, which rely on "partisan fairness"—as *Johnson I* rightly concluded after "search[ing] in earnest." 2021 WI 87, ¶¶ 53–63. The equal-protection guarantees of Article I, Section 1, R.9 ¶¶ 83–86, cannot support a partisan-gerrymandering claim because "partisan affiliation"—which "shift[s] from one election to the next," 2021 WI 87, ¶ 56—is not a "permanent," "immutable characteristic" protected by our Constitution, *id.* ¶¶ 54–58 (citation omitted). Article I, Sections 3 and 4, R.9 ¶¶ 87–93—which protect the related freedoms of speech, press, assembly, and petition—fare no better, as those provisions "do not inform redistricting challenges," *Johnson I*, 2021 WI 87, ¶ 59. Further, "[n]othing about the shape of a district infringes" those freedoms, as "[e]ven after the most severe partisan gerrymanders, citizens remain free to run for office, express their political views, endorse and campaign for their favorite candidate, vote, and otherwise influence the political process through their expression." *Id.* ¶ 60 (citation omitted). And Article I, Section 22 likewise fails to support a partisan-gerrymandering claim, R.9 ¶¶ 94–97, because it supplies no standard for partisan fairness and is not "an open invitation to the judiciary to rewrite duly enacted law," *Johnson I*, 2021 WI 87, ¶ 62 (citation omitted).

Our State's history does not support any judicially manageable standards for partisan-gerrymandering claims either. Plaintiffs do not even try to identify historical support for their partisan-gerrymandering theory. *See generally* Br.29–38. So far as the historical record reflects, the Framers did not even discuss, let alone adopt, a constitutional prohibition on partisan gerrymandering. *See supra* pp.10–11. And no one even judicially challenged a Wisconsin congressional map as a partisan gerrymander until a failed effort in 2011. *See supra* pp.11–14.

It is thus unsurprising that nothing in this Court's precedent establishes judicially manageable standards to adjudicate Plaintiffs' partisan-gerrymandering claims. This Court's precedent establishes only that this Court may "declare[ ]" a map "void" when it violates "express provisions of the constitution and those limitations necessarily or conclusively implied from it"—as opposed to "the natural, social, or political rights of the people" not specifically enshrined in our Constitution. *Cunningham*, 81 Wis. 440, 508–09 (Pinney, J., concurring); *see also id.* at 725, 730 (majority op.); *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551, 566 (1964). And while Plaintiffs invoke general "principles" from various cases from this Court that, in their view, "[p]artisan gerrymandering violates," Br.30–32 (citing, *e.g.*, *Cunningham*, 81 Wis. at 501), these are not "judicially discoverable and manageable standards," *In re John Doe Proceeding*, 2004 WI 65, ¶ 27 n.9 (citation omitted).

In the absence of any supporting text, history, or precedent, there are no judicially manageable standards for adjudicating

partisan-gerrymandering claims on the doctrinal level. For example, to adjudicate Plaintiffs' claims, courts would have to determine, among other imponderables: (a) when a map has become too "partisan," *see Johnson I*, 2021 WI 87, ¶ 52; (b) whether (and how much) the analysis changes if a particular election or another is especially close between the parties, *see id.* ¶ 48; (c) whether (and how much of) a map's "partisanship" is owing to the relative strengths and weaknesses of the particular candidates or parties at issue; and (d) whether (and how much) a "partisan skew" is due to geography or demographics, *see id.* ¶ 52; and on and on. As nothing provides principled, constitutionally grounded answers to these questions, courts cannot adjudicate such claims.

3. Plaintiffs did not ask this Court to overrule *Johnson I*, and because this Court does not *sua sponte* overrule its own cases, *see, e.g.*, *Evers*, 2025 WI 36, ¶ 25, *Johnson I* is dispositive here. Plaintiffs' assertions that *Clarke* "affirmed" that the justiciability of partisan-gerrymandering claims is an "unresolved legal question" fail. Br.30 (citation and emphasis omitted).

Plaintiffs contend that this Court "has already repudiated the *Johnson I* statements" that concluded that partisan-gerrymandering claims are nonjusticiable in Wisconsin, Br.30, but that is wrong. *Johnson I*'s conclusion that partisan-gerrymandering claims are nonjusticiable is a clear holding from a majority of this Court. *See Johnson I*, 2021 WI 87, ¶¶ 40–63; *see also id.* ¶ 8 (plurality op.); *id.* ¶ 82 n.4 (Hagedorn, J., concurring) (joining the majority except for ¶¶ 8, 69–72, and 81, and also concurring in the conclusion that the Court "should not consider

the partisan makeup of districts"). This conclusion was necessary to *Johnson I*'s holding because this Court needed to determine whether to assess the partisan fairness of a proposed redistricting map before it could adopt one. *Id.* ¶ 7 (majority op.). That is why *Johnson I* expressly stated: "[w]e *hold* . . . the partisan makeup of districts does not implicate any justiciable or cognizable right," 2021 WI 87, ¶ 8 (plurality op.); *id.* ¶ 82 (Hagedorn, J., concurring), in a section titled "Procedural History *And Holding*," *id.* ¶ 5 (majority op.) (formatting altered) (emphasis added).

Plaintiffs claim that *Clarke* rejected those "statements" in a line saying that the "extreme-partisan-gerrymandering claim" there presented an "important and unresolved legal question." Br.30 (citation and emphasis omitted). But *Clarke* "declined to address" the argument that the state-legislative maps were the result of partisan gerrymandering. 2023 WI 79, ¶ 7. A single sentence about a claim that was not accepted for review cannot overrule this Court's detailed, carefully reasoned holding in *Johnson I*. *See Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶¶ 94–95, 264 Wis. 2d 60, 665 N.W.2d 257 (citations omitted); *accord* App.20. Further, because *Clarke* considered only state-legislative maps, 2023 WI 79, ¶¶ 2–4, it could not change *Johnson I*'s requirements as to congressional maps given the Elections Clause implications of judicially changing congressional maps, *see supra* Part II.B; *infra* Part II.B.

If Plaintiffs wanted this Court to overturn *Johnson I*'s partisan-gerrymandering holding, 2021 WI 87, ¶¶ 40–52, they should have asked this Court to do so under the *stare decisis*

factors, *Johnson Controls*, 2003 WI 108, ¶¶ 94–95. Having failed to do so, their partisan-gerrymandering claims fail. *See Evers*, 2025 WI 36, ¶ 25 (where "neither party asked the court to revisit" a prior decision, this Court will apply its "earlier reasoning").

None of the provisions that Plaintiffs rely upon in their Brief say anything about partisan gerrymandering and thus cannot provide the judicially manageable standards to adjudicating their claims. *See supra* pp.41–42.

Plaintiffs first invoke Article I, Section 1, but it protects "immutable" characteristics, and partisan affiliation "shift[s] from one election to the next." *Johnson I*, 2021 WI 87, ¶ 56 (citation omitted). That the Alaska Supreme Court found that its constitutional equal protection guarantees prohibit partisan gerrymandering based on its "Constitutional Convention minutes, the 1999 amendments' legislative history, and [its own] case law," *In re 2021 Redistricting Cases*, 528 P.3d 40, 92 (Alaska 2023), and the New Mexico Supreme Court reached a similar conclusion as to its constitution, *Grisham v. Van Soelen*, 2023-NMSC-027, ¶ 30, 539 P.3d 272, 284, says nothing about whether our Constitution does the same, *contra* Br.32. This is particularly so given that Plaintiffs provide no historical or other comparable support for their theory in our State's history. *See supra* pp.42–43. Nor does Plaintiffs' reliance on the rights of "free speech and association" under Article I, Sections 3 and 4 fare any better. Partisan gerrymandering does not "abridge[ ] speech and association" by "diminish[ing] the effectiveness of political expression and political association based on viewpoint." *Contra* Br. 33–34. As *Johnson I*

recognized, "[n]othing about the shape of a district infringes anyone's ability to speak, publish, assemble, or petition," and that is true "[e]ven after the most severe partisan gerrymanders." 2021 WI 87, ¶¶ 59–60. And while Plaintiffs contend that this Court repeatedly utilizes the free-government guarantee of Article I, Section 22 to "invalidate legislation that departs from fundamental principles of justice," Br.25, Article I, Section 22, mandates "moderation" and "temperance," which does not support "fabricat[ing] a legal standard of 'fairness,'" *Johnson I*, 2021 WI 87, ¶ 62.

Finally, Plaintiffs fail to identify judicially manageable standards for adjudicating their partisan-gerrymandering claims, going so far as to tell this Court that it need not determine "the precise standards" that apply, but just assert that some unspecified "manageable standards *exist*." Br.36–37. That alone should doom Plaintiffs' efforts in this case. Plaintiffs would have the Panel decide on remand whether *this Court* engaged in partisan gerrymandering when it adopted the *Johnson II* map, with *no standards* as to *how* the Panel is supposed to decide that.

B. Throwing Out The *Johnson II* Congressional Map On Partisan-Gerrymandering Grounds Would Violate The Elections Clause

Plaintiffs asked the Panel to declare the *Johnson II* map unconstitutional because it "perpetuate[s] the partisan bias baked into the 2011 map by committing to adopting a map that reflected the 'least-change' to the Republicans' already-gerrymandered 2011 map." R.9 ¶ 51. The Panel invalidating a congressional map that respects as much as possible the political judgments of the

Legislature based on a partisan-gerrymandering theory that has no support in our Constitution, our history, or this Court's precedent would transgress the Elections Clause's guardrails, as articulated in *Moore*, 600 U.S. at 36.

The *Johnson II* map—proposed by Governor Evers—preserved 94.5% of the 2011 map and remedied only its malapportionment. 2022 WI 14, ¶¶ 7, 14–15, 19. This Court confirmed that the *Johnson II* map "compl[ied] with all relevant state and federal laws," *id.* ¶ 25, and that "partisan fairness presents a purely political question" that it could not consider, *Johnson I*, 2021 WI 87, ¶ 39. Yet, Plaintiffs ask this Court to throw out the *Johnson II* map because it "perpetuate[s] the partisan bias baked" into the previous maps. R.9 ¶ 51. And they base their request on the same provisions of our Constitution that this Court already "searched in earnest" and concluded that they said nothing about partisan gerrymandering. *See supra* pp.41–42. Thus, accepting Plaintiffs' theory would require the Court to "impermissibly distort" "exist[ing]" Wisconsin law far "beyond what a fair reading required." *Moore*, 600 U.S. at 38–39 (Kavanaugh, J., concurring) (citation omitted).

The Elections Clause concerns here are even more acute given that this Court adopted the *Johnson II* map in part out of "respect" for the Elections Clause's "deliberate choice" to "expressly vest[ ] power to carry out its provisions in '*the Legislature*' of each State," *Moore*, 600 U.S. at 34 (emphasis added), and "honor[ed]" the Legislature's "policies" as "expressed" in the 2011 congressional map, *White*, 412 U.S. at 795, as much as

possible. To provide Plaintiffs their requested relief—in addition to overturning this Court's precedent and rewriting the Constitution, *supra* pp.40–43—the Court would have to "arrogate to [itself] the power vested in state legislatures to regulate federal elections," *Moore*, 600 U.S. at 36, and "unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution," *id.* at 37.

IV. Laches Bars Plaintiffs' Challenge

The doctrine of laches bars a claim "when a claimant's failure to promptly bring a claim causes prejudice to the party having to defend against that claim." *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶ 11, 393 Wis. 2d 308, 946 N.W.2d 101. The application of laches requires that: "(1) a party unreasonably delays in bringing a claim; (2) a second party lacks knowledge that the first party would raise that claim; and (3) the second party is prejudiced by the delay." *Id.* ¶ 12.

Each element is satisfied here. First, Plaintiffs' unexplained delay in bringing their election-related claims is "unreasonable." *Brennan*, 2020 WI 69, ¶ 14. Plaintiffs could have brought this action after *Johnson II* adopted the congressional map in March 2022. While Plaintiffs contend that *Clarke* overruling the least-change approach gave rise to this action, Br.41, they still unreasonably waited two years after *Clarke* to initiate this action. And given their acknowledgement that "this Court's original action docket is discretionary," Br.41, Plaintiffs' decision to wait until after this Court rejected their original-action petition to initiate this action was likewise unreasonable, *contra* Br.41. Second, the Congressmen and Individual Voters "lack[ed]

knowledge that [Plaintiffs] would raise th[ese] claim[s]," *Brennan*, 2020 WI 69, ¶ 12, especially given that this Court already rejected Plaintiffs' attempts to bring them, *contra* Br.42. And, contrary to Plaintiffs' claims, it was not "natural," Br.41, to assume Plaintiffs would ask an inferior court to invalidate this Court's judgment after this Court rejected multiple attempts to reconsider *Johnson II* under the only available methods to challenge that judgment, *supra* pp.21–26. Third, the Congressmen and Individual Voters, as well as the public, will suffer significant prejudice if this action proceeds given the settled expectations that the *Johnson II* map would govern for the remainder of this decade. *See Trump v. Biden*, 2020 WI 91, ¶¶ 11–12, 394 Wis. 2d 629, 951 N.W.2d 568 (citation omitted); *Brennan*, 2020 WI 69, ¶¶ 18–27.

CONCLUSION

This Court should affirm the judgment of the Panel.

Dated: August 20, 2026

Respectfully submitted,

Electronically signed by Misha Tseytlin

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CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 10,683 words.

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