B. The *Hunter* Intervenor-Petitioners Also Failed To Satisfy The "Extraordinary Circumstances" Or "Significant Change In Circumstances" Prerequisites For Reopening *Johnson*

1. As relevant here, a party may obtain relief from a judgment under Subsection 806.07(1)(g) or (h) due to an actual and intervening change in circumstances since the entry of the judgment if the party shows—under Subsection 806.07(1)(g)—that "prospective application" of the challenged judgment or order is "no longer equitable," Wis. Stat. § 806.07(1)(g); *Kliesmet*, 211 Wis. 2d at ¶¶ 9, 12–13, or—under Subsection 806.07(1)(h)—that "other reasons justif[y] relief," Wis. Stat. § 806.07(1)(h); *Sukala*, 2005 WI 83, ¶ 9. Both Subsection 806.07(1)(g) or (h) impose heavy burdens on a movant to demonstrate the movant's entitlement to relief from the judgment, including because of the "legitimate public interest in the finality of judgments." *M.L.B.*, 122 Wis. 2d at 556 ("[F]inality is important and th[us] subsection (h) should be used sparingly."); *State ex rel. R.A.S. v. J.M.*, 114 Wis. 2d 305, 307–08, 338 N.W.2d 851 (Ct. App. 1983) (similar, as to Subsection (g)).

With respect to Subsection 806.07(1)(g), as relevant here, a movant may only possibly obtain relief from the judgment if the movant shows that the "prospective application" of the challenged

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judgment or order is "no longer equitable" due to "a significant change in circumstances warrant[ing]" relief, *Kliesmet*, 211 Wis. 2d ¶ 10, 12. Such a change could be, for example, "changed factual conditions [that] make compliance with the [judgment] substantially more onerous." *Rufo*, 502 U.S. at 384.

With respect to Subsection 806.07(1)(h), a movant may only possibly obtain relief from the judgment if the movant shows that, "in view of all the facts, 'extraordinary circumstances' exist which justify relief." *Cynthia M.S.*, 181 Wis. 2d at 625 (citation omitted). Under this "'extraordinary circumstances' test," *id.*, this Court must consider whether "the sanctity of the final judgment is outweighed by the incessant command of this Court's conscience that justice be done in light of *all* the facts." *Sukala*, 2005 WI 83, ¶ 12 (citation omitted). This Court has identified five non-exhaustive factors to guide this extraordinary-circumstances "examination": "[1] whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; [2] whether the claimant received the effective assistance of counsel; [3] whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the

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interest of deciding the particular case on the merits outweighs the finality of judgments; [4] whether there is a meritorious defense to the claim; and [5] whether there are intervening circumstances making it inequitable to grant relief." *Id.* ¶ 11 (citation omitted).

Finally, this Court has repeatedly concluded that a change in the law is not, standing alone, an extraordinary circumstance that justifies relief from a final judgment. *Brown v. Mosser Lee Co.*, 164 Wis. 2d 612, 623, 476 N.W.2d 294 (1991) ("[T]he overruling of prior precedent has never been considered grounds for reopening preexisting judgments based in whole or in part on that precedent."); *Sukala*, 2005 WI 83, ¶ 9; *accord Schwochert v. Am. Fam. Mut. Ins. Co.*, 166 Wis. 2d 97, 102, 479 N.W.2d 190 (Ct. App. 1991), *aff'd*, 172 Wis. 2d 628, 494 N.W.2d 201 (1993).

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2. The *Hunter* Intervenor-Petitioners failed to meet their heavy burden to show that they are entitled to relief from the *Johnson II* judgment under either Subsections (h) or (g). *See* Mem.14–35 (not distinguishing between these Subsections).

To begin, the *Hunter* Intervenor-Petitioners failed to establish the first four factors of the "'extraordinary circumstances' test." *Cynthia M.S.*, 181 Wis. 2d at 625 (citation omitted). First,

the *Johnson II* judgment was "the result of the conscientious, deliberate and well-informed choice of the [*Hunter* Intervenor-Petitioners]," *Sukala*, 2005 WI 83, ¶ 11 (citation omitted), given their robust involvement in the *Johnson* litigation, *supra* pp.11–18. Second, the *Hunter* Intervenor-Petitioners "received the effective assistance of counsel" during the *Johnson* litigation, *Sukala*, 2005 WI 83, ¶ 11 (citation omitted), as they were represented by sophisticated counsel who regularly handle redistricting litigation nationwide. Third, the *Hunter* Intervenor-Petitioners are seeking relief from a judgment that resulted in "judicial consideration of the merits." *Sukala*, 2005 WI 83, ¶ 11 (citation omitted). And fourth, the *Hunter* Intervenor-Petitioners do not possess any "meritorious defense" to the remedial congressional map that *Johnson II* adopted, *Sukala*, 2005 WI 83, ¶ 11 (citation omitted), because they have not argued that this map is substantively unlawful, *supra* pp.41–42.

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The *Hunter* Intervenor-Petitioners also failed to establish the fifth factor of the "'extraordinary circumstances' test," *Cynthia M.S.*, 181 Wis. 2d at 625 (citation omitted)—namely, "whether there are intervening circumstances making it inequitable not to

grant relief," *Sukala*, 2005 WI 83, ¶ 11. This factor overlaps with the Subsection (g) inquiry relevant here. *See* Wis. Stat. § 806.07(1)(g) ("It is no longer equitable that the judgment should have prospective application.").

Again, the *Hunter* Intervenor-Petitioners' delayed filing of this Motion means that adopting new congressional maps would cause injustice to candidates for congressional office, their supporters, and the People as a whole. Congressional candidates and their supporters—including the undersigned, their challengers, and all other congressional candidates—have already been campaigning for months in anticipation of the upcoming election, spending significant time and money reaching out to voters in the districts that *Johnson II* established. Voters in these districts have gotten to know these candidates and may have donated time or money to their campaigns. Changing the district lines at the eleventh hour would significantly unsettle these campaign efforts, blindsiding both the candidates and the ordinary citizens, "caus[ing] unnecessary election chaos or confusion." *Johnson III,* 2022 WI 19, ¶ 138 (R.G. Bradley, J., concurring), *see id.*, ¶ 210 (Karofsky, J., dissenting); *Clarke*, 2023 WI 79, ¶ 56

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(recognizing "that [the 2024] legislative elections are fast-approaching, and that remedial maps must be adopted in time for the fall primary in August 2024"). About six weeks remain before March 15, 2024—the date WEC has disclosed as the deadline to adopt remedial maps for an orderly election. *Supra* p.20. Thus, Wisconsin is out of time to adopt a new congressional map for the 2024 elections. *Sukala*, 2005 WI 83, ¶ 11; *supra* p.20.

The undersigned would suffer prejudice should this Court undo *Johnson II*'s final judgment. *Sukala*, 2005 WI 83, ¶ 11; *supra* Part I.C. Having litigated the contours of their congressional districts in *Johnson*, and having no reason to believe *Clarke* would upend the *Johnson II* congressional map, the undersigned justifiably understood that this map would govern "all upcoming elections." *See Johnson II,* 2022 WI 14, ¶ 52. Unsettling this justifiable reliance on this final judgment, especially at this late date, would be highly prejudicial, as it would significantly harm the undersigned's ability to get to know their voters and run effective campaigns in time for the August primaries, while causing voter confusion and disenfranchisement. Thus, it is

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plainly "inequitable to grant [the *Hunter* Intervenor-Petitioners] relief." *Sukala*, 2005 WI 83, ¶ 11.

Finally, the *Hunter* Intervenor-Petitioners' gamesmanship deprived the undersigned of fair "notice" that *Clarke* could affect their legitimate interests in the *Johnson II* judgment, and of any fair "opportunity to be heard" in *Clarke*. *See Milewski v. Town of Dover*, 2017 WI 79, ¶ 23, 377 Wis. 2d 38, 899 N.W.2d 303 (citations omitted). As a result, the *Hunter* Intervenor-Petitioners' belated attempt to bootstrap *Clarke* to invalidate *Johnson II*'s remedial congressional map would prejudice the undersigned and their constituents. The undersigned are duty-bound to "promote and protect their [constituents'] interests" by representing them in the U.S. House of Representatives, *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1892); *accord McCormick v. United States*, 500 U.S. 257, 272 (1991). The "contours of the maps" of the districts "determin[e] which constituents the Congressmen must court for votes and represent in the legislature." *Johnson,* 902 F.3d at 579. Depriving the undersigned of the opportunity for a full and fair hearing on the

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lawfulness of their districts would be inequitable, weighing heavily against granting the *Hunter* Intervenor-Petitioners' motion.

3. The *Hunter* Intervenor-Petitioners' points here are unpersuasive.

First, the *Hunter* Intervenor-Petitioners claim that the "extraordinary circumstances" test should not apply here, Mem.15 n.4, but that is wrong. The *Hunter* Intervenor-Petitioners urge this Court to overlook the lack of extraordinary circumstances because they "do not seek time-barred relief that would have been available" under one of Section 806.07's other subsections, Mem.15 n.4, but extraordinary circumstances typically *are* required to justify relief under Section 806.07(1), regardless of whether the movant seeks relief that would otherwise be time-barred, Mem.15 n.4 (citing *Miller v. Hanover Ins. Co.*, 2020 WI 75, ¶ 34, 326 Wis. 2d 640, 785 N.W.2d 493). "Extraordinary circumstances" remains an essential element of a claim under Subsection 806.07(1)(h), *M.L.B.,* 122 Wis. 2d at 549, which "is appropriately used to address intervening changes in the law only in unique and extraordinary circumstances," *Sukala*, 2005 WI 83, ¶ 12.

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Second, the *Hunter* Intervenor-Petitioners' repeated reliance on *Mullen v. Coolong*, 153 Wis. 2d 401, 451 N.W.2d 412 (1990), to water down the extraordinary-circumstances standard is unavailing. Mem.15 & n.4, 20, 21. Plaintiff Mullen timely filed a petition for review with this Court raising a particular legal issue. *While plaintiff Mullen's petition was pending before this Court*, this Court granted review in a separate case—*Nicholson v. Home Insurance Companies*, 137 Wis. 2d 581, 405 N.W.2d 327 (1987)—which "posed the identical question of law raised by Mullen in her petition for review," *Mullen*, 153 Wis. 2d at 404. Yet, despite its grant in *Nicholson*, this Court denied Mullen's petition for review while *Nicholson* was pending. *Id.* at 404–05. "Meanwhile, after the petition for review in *Mullen I* was denied, and apparently unaware that *Nicholson* was pending," plaintiff Mullen "accepted a settlement offer of $500.000 to settle her claims," and the circuit court entered judgment in her case. *Id.* at 405. After this Court issued *Nicholson*, plaintiff Mullen moved for relief from judgment in the circuit court, and this Court affirmed the circuit court's grant of that motion, explaining that "[t]he determinative fact in this case is that [this Court] denied a petition for review in

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Mullen I at the very same time when the same issue was before [this Court] in *Nicholson*." *Id.* at 408 (emphasis added). Thus, despite plaintiff Mullen filing a timely petition for review challenging the *Mullen I* decision entered in her case, this Court denied that petition and then "reached the precise result [in *Nicholson* that] Mullen advocated in her petition for review in *Mullen I*." *Id.* These "unique facts" demonstrated that the circuit court's discretionary grant of relief from judgment was appropriate. *Id.*

This case is nothing like *Mullen*, given that the "determinative fact" justifying relief in *Mullen* is missing here. *Id.* at 408. In *Mullen*, the plaintiff's timely filed petition for review was "denied . . . at the very same time when the same issue was before [this Court] in *Nicholson*." *Id.* at 408. Here, *Hunter* Intervenor-Petitioners *never* timely moved for reconsideration of the *Johnson I* or *Johnson II* judgments, *supra* pp.15, 18, and *there was never a time when such a (nonexistent) reconsideration motion was pending* "at the very same time when the same issue was before [this Court] in [*Clarke*]," *Mullen*, 153 Wis. 2d at 408. In any event, as explained elsewhere in this Response, *see supra* Part II.A, the *Hunter* Intervenor-Petitioners' Motion does not present "the

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identical question of law" or the "identical arguments" as in *Clarke*, *Mullen*, 153 Wis. 2d at 404.

Third, the *Hunter* Intervenor-Petitioners claim they were "never given a chance to propose a remedy informed by recognized redistricting principles," Mem.20, but that is false. The *Hunter* Intervenor-Petitioners fully aired their position with respect to the "proper remedial framework" in their *Johnson I* brief, as they acknowledge, Mem.20, and they could have timely filed for reconsideration of *Johnson I* or *Johnson II*. Yet, the *Hunter* Intervenor-Petitioners declined to move for reconsideration of either of those decisions, without putting forward any explanation. The undersigned, for their part, did timely move for reconsideration of the *Johnson II* decision, explaining their view that *Johnson II* clarified *Johnson I*s "least change" approach, justifying submission of another round of proposed maps from the parties. *Supra* p.18. The *Hunter* Intervenor-Petitioners had the same opportunity to seek reconsideration as the undersigned, and they cannot now claim to have "never [been] given a chance" to be heard on the issues in their Motion. Mem.20.

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Fourth, the *Hunter* Intervenor-Petitioners claim that relief from judgment is justified because the remedial congressional map "subjects Wisconsin voters to intolerable partisan unfairness," Mem.21–26, but this is supported by nothing more than a one-sided, untested presentation. As explained above, the only court to have considered the partisanship of the 2011 congressional map—which formed the basis of *Johnson II*'s remedial congressional map—concluded that this map resulted from a "bipartisan process" that incorporated input from both Republicans and Democrats. *Baldus*, 849 F. Supp. 2d at 853–54. Further, Governor Evers proposed the only changes to the 2011 congressional map before *Johnson II* adopted his remedial congressional map. *Supra* pp.16–17. Given this, if this Court does not reject this Motion outright, this Court must permit the undersigned to test the *Hunter* Intervenor-Petitioners' partisan-gerrymandering assertions through adversarial litigation before this Court, in which this Court must consider, among other elements, proof of (or lack of) impermissible partisan intent from the map-drawers. *See, e.g.*, *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 375 (2015); *Harkenrider v. Hochul*, 38

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N.Y.3d 494, 519 (2022); *League of Women Voters of Pa. v. Pennsylvania*, 178 A.3d 737, 786 (2018); *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting).

Finally, the *Hunter* Intervenor-Petitioners claim a right to relief under Subsection 806.07(1)(f), Mem.19 n.5, but this argument is wrong. *Clarke* overruled portions of *Johnson I* and *Johnson II* with respect to the procedural approach for remedial mapmaking, but it did not "reverse[ ] or otherwise vacate" that judgment. Wis. Stat. § 806.07(1)(f); *Clarke*, 2023 WI 79, ¶ 63. The *Hunter* Intervenor-Petitioners appear to concede as much, burying this argument in a footnote. Mem.19 n.5.

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III. If This Court Is Nevertheless Inclined To Reopen *Johnson*, Further Proceedings Are Necessary

If this Court considers accepting *Hunter* Intervenor-Petitioners' invitation to reopen the *Johnson II* judgment, *but see supra* Part I–II, it should make clear that there is not enough time to decide all of the issues that the *Hunter* Intervenor-Petitioners have raised before the 2024 elections.

Given that the *Hunter* Intervenor-Petitioners did not file their Motion For Relief From Judgment until January 16, 2024, there is not enough time for this Court to conduct litigation to

adopt a remedial congressional map in advance of the 2024 elections, even relying solely on the schedule this Court set in *Clarke*. This Court already recognized in *Clarke* "that [the 2024] legislative elections are fast-approaching, and that remedial maps must be adopted in time for the fall primary in August 2024." *Clarke*, 2023 WI 79, ¶ 56. Further, as WEC explained in *Clarke*—and as the *Hunter* Intervenor-Petitioners appear to concede—remedial maps must be in place by March 15, 2024, for WEC to conduct an orderly election. *Supra* p.20. Thus, if this Court were to order the drawing of new remedial congressional maps here, this Court's process would have to complete *in only about six weeks of time, at best*. That is not enough time.

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For comparison, in *Clarke,* it took this Court about five months from the date of the filing of the petition challenging *Johnson II*'s remedial state legislative maps to declare those maps unconstitutional, demonstrating that these extremely weighty issues take appropriate time to be decided correctly. *Clarke*, 2023 WI 79; *supra* pp.20–21. Further, after *Clarke* struck down those maps, this Court provided the parties with additional time to draw proposed remedial maps for this Court's own thorough

consideration. Specifically, this Court provided the parties with three weeks to submit proposed maps and expert reports (January 12, 2024) and an additional ten days to file responses to other parties' proposed maps (January 22, 2024). Order at 3, *Clarke*, No.2023AP1399-OA (Wis. Dec. 22, 2023). This Court also provided its court-appointed consultants with almost six weeks to prepare their written report (February 1, 2024), *id.* at 4, with the parties having an additional week thereafter to file responses to that report (February 8, 2024), *id.* Further, as the experience of *Clarke* shows, the complex, delicate process of drawing remedial maps inevitably triggers important motions practice among the parties, requiring additional time for the parties and this Court to resolve properly. *See generally* Dkt., *Clarke*, No.2023AP1399-OA (Wis.).

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In any event, even the timetable set by *Clarke* would not be adequate for this Court to resolve this litigation, given the need for this Court to address at least two threshold issues before it could even possibly consider new proposed remedial congressional maps.

First, before this Court could even possibly adopt a new remedial congressional map to replace the one adopted in *Johnson II*, this Court must allow for full litigation over the

partisan-gerrymandering issues that the *Hunter* Intervenor-Petitioners have raised in their Motion, as part of their burden under Wis. Stat. § 806.07(1)(g) and (h). Mem.21–26. The *Hunter* Intervenor-Petitioners believe that it is equitable to grant relief from *Johnson II*'s remedial congressional map because that map "subjects Wisconsin voters to intolerable partisan unfairness," Mem.21–26, thus establishing the "extraordinary circumstances" or "significant change in circumstances" needed to upset the *Johnson II* judgment's finality here, *see* Mem.15 n.4. Even if this Court were to entertain the fiction that the *Hunter* Intervenor-Petitioners' Motion was timely, and even if this Court were to accept their misreading of *Clarke, by the Hunter Intervenor-Petitioners' own logic*, the *Johnson II* map should remain in place—*i.e.*, the *Hunter* Intervenor-Petitioners should *not* obtain relief from the *Johnson II* judgment—if the remedial congressional map is not a partisan gerrymander. *See* Mem.15 n.4, 21–26. Accordingly, to have the fair opportunity to defend against the *Hunter* Intervenor-Petitioners' Motion, *see City of W. Covina*, 525 U.S. at 240, this Court must allow the undersigned to rebut the allegation that the *Johnson II* congressional map is a partisan

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gerrymander. Finally, it is worth repeating here that the only neutral tribunal to have considered whether the 2011 congressional map—upon which *Johnson II*'s remedial congressional map is heavily based—was impermissibly partisan found that it was the result of a "bipartisan process," *Baldus*, 849 F. Supp. 2d at 853–54, and the only changes to that 2011 map in *Johnson II* were proposed by Governor Evers, *supra* pp.16–17.

Second, this Court must also afford the undersigned a fair opportunity to be heard on their claim that the Elections Clause requires that state courts use a "least changes" approach when adopting remedial congressional maps, as discussed above, which issue *Clarke* never considered. *See supra* Part II.A.2. Given that remedial congressional maps were not before this Court in *Clarke*, *Clarke* had no occasion to consider or decide this federal Elections Clause issue in *Johnson II*. Thus, if this Court were to consider whether to reopen *Johnson II*, this Court must provide all parties with the opportunity to brief this Elections Clause issue fully, and should also consider holding oral argument on this issue. *See City of W. Covina*, 525 U.S. at 240.

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CONCLUSION

This Court should deny the *Hunter* Intervenor-Petitioners' Motion For Relief From Judgment.

Dated: January 29, 2024.

Respectfully submitted,

Electronically signed by Misha Tseytlin
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