STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

ELIZABETH BOTHFELD, *et al*.,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION, *et al*.,

Defendants.

Declaratory Judgment
Case No. 2025CV002432
Case Code: 30701

PLAINTIFFS' CONSOLIDATED OPPOSITION TO INTERVENORS' MOTIONS TO DISMISS AND REPLY IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

Intervenors make only a few distinct arguments across their 149 pages of collective briefing; none grows more persuasive through repetition. They start by challenging the timing of Plaintiffs' complaint, arguing that a July 2025 filing was too late. But they never dispute that plenty of time remains for prospective relief, which is enough on its own to defeat any laches defense.

Intervenors also insist that circuit courts are bound to comply with Supreme Court decisions. That is correct—and it is why Plaintiffs win. Intervenors would like to maintain the "least-change" map that the Wisconsin Supreme Court adopted in the *Johnson* litigation. But in *Clarke v. Wisconsin Elections Commission*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370, the Supreme Court overruled *Johnson* and the "least-change" mandate on which the current congressional map is based. There is no question that *Clarke* governs and binds this Panel. Plaintiffs seek a map that adheres to that more recent—and dispositive—decision.

In response to Plaintiffs' motion for judgment on the pleadings, Intervenors devote most of their energy to relitigating *Clarke*. This in and of itself is an admission that if *Clarke* means what it says, Plaintiffs win. *Clarke* does not just defeat Intervenors' jurisdictional defense by confirming that *Johnson* is no longer good law. It settles the merits of Plaintiffs' separation-of-powers claim by demarking the boundaries of judicial power when adopting remedial maps. Specifically, *Clarke* instructed that "courts can, and should, hold themselves to a different standard than the legislature regarding the partisanship of remedial maps," including by "tak[ing] care to avoid selecting remedial maps designed to advantage one political party over another." 2023 WI 79, ¶ 71.

Intervenors do not deny that *Johnson* failed to comply with this standard when it adopted the operative congressional map; indeed, that failure is why *Johnson* was overruled. Nor did *Clarke* provide any sort of amnesty for prior violations that continue to inflict prospective harm.

Intervenors are instead left to argue that *Clarke* failed to appreciate purported "least-change" virtues, but this Panel is not the proper audience for Intervenors' disappointment with binding precedent.

As for Plaintiffs' partisan gerrymandering allegations, Intervenors rely on dicta from *Johnson* (yes, the same *Johnson* that was *overruled*) in litigation that did not involve a single partisan gerrymandering claim. Intervenors also point to decisions in other jurisdictions that deemed gerrymandering nonjusticiable under other governing law. But Wisconsin law governs here. And across their many pages, Intervenors offer little analysis of the Wisconsin Constitution and its several provisions that authorize Plaintiffs' claims. That silence implicitly concedes that discrimination against voters because of their viewpoints is incompatible with core political rights that Wisconsin jealously protects.

Finally, Intervenors seek an escape hatch from Wisconsin state courts and state law by invoking the U.S. Constitution's Elections Clause. But no court anywhere has ever recognized the Elections Clause as a barrier to state courts adjudicating a challenge to a congressional map on state law grounds. Indeed, Intervenors' only Elections Clause citation explained that the Clause "does not insulate [maps drawn by] state legislatures from the ordinary exercise of state judicial review." *Moore v. Harper*, 600 U.S. 1, 22 (2023). And because Intervenors seek to invoke privileges that apply only to legislatures, there is no conceivable argument that the Elections Clause further insulates *court*-drawn maps from the ordinary exercise of state judicial review.

In sum, virtually every argument Intervenors make seeks to attack *Clarke* and avoid the unavoidable fact that it overruled *Johnson* as bad law. But this Panel has no basis to entertain Intervenors' battle with binding precedent. Because Wisconsin law is clear and settled, the Panel

must simply apply the straightforward precedent to the undisputed facts to ensure that the 2026 congressional elections proceed under a lawful congressional map.

BACKGROUND

In 2011, Wisconsin's Republican-controlled legislature and Republican governor enacted a congressional map designed to "maximize the chances for Republicans to be elected." *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 846 (E.D. Wis. 2012). True to form, the resulting map delivered substantial Republican advantages: over the following decade, Republicans consistently secured a disproportionate share of congressional seats relative to their statewide vote totals. Compl. ¶¶ 43–44. Other traditional measures of partisan fairness, including the efficiency gap (a metric that quantifies the percentage of "wasted" votes), confirmed a significant Republican bias beyond what could be attributed to Wisconsin's natural political geography. *Id.* ¶ 45.

Fast forward a decade to 2021, when new maps were required due to population changes that rendered the 2011 congressional and legislative maps non-compliant with "one person, one vote" requirements. *See Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (requiring equally apportioned congressional districts); *Reynolds v. Sims*, 377 U.S. 533, 558, 579 (1964) (similar for state legislative districts). But the Republican-controlled Legislature—itself an entrenched product of partisan gerrymandering—could not force another heavily biased configuration into law. Wisconsin voters had recently elected Tony Evers to the governorship, a statewide office immune from gerrymandering, on a platform to end partisan gerrymandering.[1] After Governor Evers vetoed

[1] Pursuant to his platform, Governor Evers created a nonpartisan "People's Maps Commission" comprised of regular Wisconsin citizens who proposed maps for the Legislature to consider. *See* Executive Order No. 66, The State of Wisconsin Office of the Governor, https://evers.wi.gov/Documents/EO/EO066-PeoplesMapsCommission.pdf.

the Legislature's proposed maps, and the Legislature refused a compromise to enact politically neutral configurations, the map-drawing task passed to the Wisconsin Supreme Court. Compl. ¶¶ 46–48.

The Court invited parties to propose new maps, but it pledged to select the submission that adhered most closely to the 2011 map—or, in its vernacular, to require a "least-change approach" to the judicial redistricting process. Well aware that "the 2011 maps entrenched a Republican advantage," *Johnson v. Wis. Elections Comm'n* ("*Johnson I*"), 2021 WI 87, ¶¶ 72, 76, 399 Wis. 3d 623, 967 N.W.2d 469, the Court adopted a congressional map that closely resembled the 2011 configuration. *See Johnson v. Wis. Elections Comm'n* ("*Johnson II*"), 2022 WI 14, ¶ 7, 400 Wis. 2d 626, 971 N.W.2d 402, *rev'd on other grounds sub nom. Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398 (2022).

As anticipated, nonpartisan evaluators ranked Wisconsin's congressional map in 2022 as one of the most distorted in the nation. One organization reviewed four different objective metrics of fairness and found on each one that the map was more skewed than almost any other state's; another neutral evaluator graded the map's partisan fairness with an "F." Compl. ¶¶ 69–70, 72. According to the efficiency gap, the Court-adopted congressional map is nearly *twice* as skewed as the 2011 map—which itself was the most biased congressional map Wisconsin had seen in modern history. *Id.* ¶¶ 68, 71. This skew was born out in the elections conducted under the map: Republicans expanded their majority in the state's congressional delegation, capturing six of the eight seats in both the 2022 and 2024 general elections, even though approximately half of Wisconsinites voted for Democrats in those elections to represent them. *Id.* ¶¶ 73–74.

It did not take long for the Wisconsin Supreme Court to recognize that the *Johnson* majority had strayed into lawless terrain. In 2023, the Court expressly overruled *Johnson*'s "least-change"

criterion in a decision finding that the state legislative maps it selected in *Johnson* violated the state constitution. *Clarke*, 2023 WI 79, ¶ 63. In doing so, the Court recognized that the "least-change" criterion was "in tension with established districting requirements," *id.*, including the court's duty to "remain politically neutral" and avoid "enact[ing] maps that privilege one political party over another," *id.* ¶ 70. As the Court emphasized, "it is not possible to remain neutral and independent by failing to consider partisan impact entirely," as the "least-change" criterion required it to do. *Id.* ¶ 71. Accordingly, *Clarke* struck down the *Johnson* Court's "least-change" directive, holding that this "judicially-created metric, not derived from the constitutional text," "cannot [be] allow[ed] . . . to supersede the constitution." *Id.* ¶ 62. *Clarke* enjoined continued use of the state legislative maps. But since only the state legislative maps were challenged in that case, the Court had no occasion in *Clarke* to enjoin the congressional map—which, though adopted under the now-repudiated "least-change" criterion, remains in use today.

In July 2025, Plaintiffs filed this lawsuit challenging the current congressional map on two grounds: first, that Wisconsin's separation-of-powers principles prohibit continued enforcement of a map selected pursuant to the "least-change" criterion found unconstitutional in *Clarke*; and second, that the map constitutes a partisan gerrymander in violation of the Wisconsin Constitution's equal protection, free government, and speech and association guarantees. Compl. ¶¶ 76–97. In September 2025, Plaintiffs moved for judgment on their separation-of-powers claim. Dkt. Nos. 43, 44. After the Wisconsin Supreme Court appointed a panel and selected Dane County Circuit Court as the venue, Order at 4–5, *Bothfeld v. Wisconsin Elections Commission*, No. 2025XX001438 (Wis. Nov. 25, 2025), three groups of movants were granted intervention as defendants. Dkt. Nos. 86, 115, 117. Each moved to dismiss and filed a brief in response to Plaintiffs' motion for judgment on the pleadings. Dkt. Nos. 141, 142 ("Leg. MTD"); 143 ("Leg.

MJOP Br.); 144, 145 ("Cong. MTD"); 146 ("Cong. MJOP Br."); 138, 139 ("Johnson MTD"); 140 ("Johnson MJOP Br.").

ARGUMENT

I. Intervenors' threshold arguments fail.

To distract from the merits of Plaintiffs' claims, Intervenors challenge the timeliness of Plaintiffs' filing and this Panel's jurisdiction. Neither argument is persuasive.

A. Plaintiffs' claims are timely.

1. Laches does not apply to claims seeking prospective relief.

Intervenors' laches defense fails as a matter of law because Plaintiffs seek prospective injunctive relief to vindicate their rights in *future elections*—a context categorically outside the reach of laches. In election-related litigation, laches typically applies where a plaintiff sits on objections to preelection procedures until after the election, and then belatedly challenges the final election results. *See Trump v. Biden*, 2020 WI 91, ¶ 22, 394 Wis. 2d 629, 951 N.W.2d 568. In that circumstance, the delay renders it impossible for officials to re-administer the contested election under the requested procedures, giving rise to the affirmative defense. But as the Wisconsin Supreme Court has explained, districting challenges brought well before an election are fundamentally different, and laches is unavailable as an affirmative defense. *See Clarke*, 2023 WI 79, ¶ 43 n.20 (rejecting laches defense where Court was asked to "establish a process going forward so that constitutional maps are adopted in time for the next election"). This distinction reflects common sense: Where a court can offer relief for a future election, then a request for that relief is necessarily timely.

Federal courts across the country have endorsed this straightforward logic, rejecting laches defenses where plaintiffs sought to prevent injuries in future elections. *See, e.g.*, *Navarro v. Neal*, 716 F.3d 425, 429–30 (7th Cir. 2013) (reversing application of laches where plaintiffs sought "a

purely prospective remedy" "concerning elections to be held in future years"); *Envt'l Def. Fund v. Marsh*, 651 F.2d 983, 1005 n.32 (5th Cir. 1981) ("The concept of undue prejudice, an essential element in a defense of laches, is normally inapplicable when the relief is prospective."); *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867, 909 (E.D. Mich. 2019) (vacated on other grounds) (rejecting laches defense in partisan gerrymandering case because plaintiffs sought injunction against map's use in future elections).

In redistricting disputes, the case-initiation clock resets each time "an election occurs," *Blackmoon v. Charles Mix County*, 386 F. Supp. 2d 1108, 1115 (D.S.D. 2005), because injuries are "suffered anew each time a[n] election is held," *Smith v. Clinton*, 687 F. Supp. 1310, 1312–13 (E.D. Ark. 1988). Indeed, the documented experience of those injuries in early-decade elections may strengthen mid-decade claims for a new map. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 898–901 (W.D. Wis. 2016) (challenge filed in July 2015 to maps enacted in 2011, relying on results from the 2012 and 2014 elections). Consistent with these principles, *Clarke* explained that the laches inquiry in redistricting cases looks not to when the challenged map was adopted, but rather to when the next election will be held. *See Clarke*, 2023 WI 79, ¶ 42; *see also Thomas v. Bryant*, 366 F. Supp. 3d 786, 803 (S.D. Miss. 2019) (recognizing "[i]n the redistricting context," laches "is best considered as a defense to last-minute requests for injunctive relief, and should not be wielded more than a year before an election"), *vacated as moot sub nom. Thomas v. Reeves*, 961 F.3d 800 (5th Cir. 2020) (en banc). Because Plaintiffs filed their claims to prospective relief well over a year in advance of the 2026 elections (and *three years* in advance of the 2028 elections for which they also seek relief), there is no plausible argument that laches applies.

2. Intervenors cannot satisfy the laches elements in any event.

Even if laches were available as an affirmative defense in this case, it would still fail because Intervenors cannot establish the necessary elements. To succeed on a laches defense, Intervenors must prove that "(1) [Plaintiffs] unreasonably delay[ed] in bringing a claim; (2) [Intervenors] lack[ed] knowledge that [Plaintiffs] would raise that claim; and (3) [Intervenors are] prejudiced by the delay." *Clarke*, 2023 WI 79, ¶ 41.

Plaintiffs did not delay. The only way that Intervenors can argue delay is to misstate the basis of Plaintiffs' claims. Intervenors waste pages of ink insisting that it would be too late now to enjoin the map that Wisconsin administered from 2012 to 2020. *E.g.* Johnson MTD at 3. But Plaintiffs, of course, make no such request; they challenge the *current* map set to be used in *future* elections. None of the Intervenors can argue that summer 2025 was too late to challenge a map to be administered in November 2026.

Plaintiffs' claims arise from the Wisconsin Supreme Court's December 22, 2023, *Clarke* decision repudiating *Johnson*'s "least-change" criterion for remedial maps. Immediately after *Clarke* issued, certain parties in *Johnson* invited the Court to revisit its holding in light of *Clarke*'s correction. When the Court declined to do so on March 1, 2024, it was reasonable to conclude that a lawsuit initiated at that time would be unlikely to obtain relief in advance of the 2024 elections. *Cf. Clarke*, 2023 WI 79, ¶ 42 (rejecting laches defense against 2024 relief where petitioners "ran out of time [after *Johnson*] and could not obtain relief prior to the 2022 elections"). The question, then, is whether Plaintiffs unreasonably delayed after the 2024 elections to pursue relief for the 2026 elections. They did not. They filed an original-action petition in the Wisconsin Supreme Court in May 2025, and less than one month after the Court denied that petition on June 25, 2025, Plaintiffs filed their claims in Dane County Circuit Court on July 21, 2025. That was perfectly

diligent. *See id.* ("Given the timing of legislative elections, filing this case in August of 2023 is not unreasonable delay.").[2]

Intervenors did not lack knowledge of this suit. It is not plausible that Intervenors failed to anticipate this suit. Because the Wisconsin Supreme Court's original action docket is discretionary, it was natural to expect that Plaintiffs would litigate their claims in the ordinary course, starting in the trial court, when the original action petition was denied. *Cf.* Order, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Mar. 1, 2024) (Grassl Bradley, J., concurring) (recognizing the effort to seek relief from *Johnson* in light of *Clarke* "comes as no surprise"). And because the claims here mirror those in the original action petition—which all three sets of Intervenors opposed, *see* Non-Party Brief of Wisconsin Legislature, Amicus Brief of Billie L. Johnson et al, Congressmen's Proposed Response in Opposition, *Bothfeld v. Wisconsin Elections Comm'n*, Case No. 2025AP996-OA—Intervenors cannot credibly argue that they were "unaware of any potential claim" until this lawsuit was filed. *Wisconsin Small Businesses United, Inc. v. Brennan*, 2020 WI 69, ¶ 18, 393 Wis. 2d 308, 946 N.W.2d 101.

Intervenors are not prejudiced by the timing of Plaintiffs' filing. Intervenors also fail to show the requisite prejudice from any delay. They vaguely reference the costs of litigation (forgetting that they asked to join this suit), *see* Leg. MTD Br. at 14, and the typical consequences

[2] Because laches assesses the timeliness of Plaintiffs' filing, *see Clarke*, 2023 WI 79, ¶ 41 (laches concerns "the failure to promptly *bring a claim*") (emphasis added), any concern about the proximity of the 2026 elections based on the passage of time since Plaintiffs' filed this lawsuit would not support a laches defense. Indeed, while Plaintiffs have consistently sought to advance this litigation, *see, e.g.*, Dkt. Nos. 46, 65, 89, Intervenors have sought delay at every turn, *see, e.g.*, Congr. Proposed Br. at 14–24, *Bothfeld v. Wisconsin Elections Commission*, No. 2025XX001438 (Wis. Oct. 9, 2025) (Congressmen opposing appointment of a panel before the Wisconsin Supreme Court); Dkt. No. 45 (Congressmen urging court to pause proceedings pending appointment of a panel); Dkt. Nos. 71, 90 (Congressmen and Legislature opposing briefing schedule on Plaintiffs' pending motion).

of redistricting, *see id.*, but none of that has anything to do with delay. Intervenors object only to the litigation itself and the prospect that they may lose, not to its timing. As courts have made clear, the potential *merits* consequences of an adverse judgment cannot support a laches defense. *See, e.g.*, *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1286 (11th Cir. 2015) (explaining that prejudice must stem from the delay "rather than from the consequences of an adverse decision on the merits"); *Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1058 (5th Cir. 1985) (similar). *Clarke* properly rejected identical arguments: "litigation costs alone cannot constitute prejudice for laches purposes, and any disruption to the current state legislative districts is necessary to serve the public's interest in having districts that comply with each of the requirements of the Wisconsin Constitution." 2023 WI 79, ¶ 43.

Nor is there a problem of "evidentiary prejudice." Johnson MTD Br. at 11. Intervenors complain of potential difficulties in establishing the intent "of the drafters of the 2011 map," *id.*, but that is not a problem at all, and certainly not a laches issue. Plaintiffs' separation-of-powers claim presents a pure question of law and requires no additional evidence. *See infra* II.C. Plaintiffs' partisan gerrymandering claims, in turn, will be proved with statistical analysis of the current map's partisan skew—which is at no risk of going stale—and citations to the *Johnson* record. *See* Compl. ¶¶ 68–74. Moreover, because Plaintiffs carry the burden of proof on these claims, any prejudice accruing from the absence of evidence would afflict *them*, not Intervenors. *See State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 33, 389 Wis. 2d 516, 936 N.W.2d 587 (explaining evidentiary prejudice occurs when a plaintiff's delay "has curtailed *the defendant's* ability to present a full and fair defense on the merits") (emphasis added). And *even if* Intervenors desired that evidence for their defense, any difficulty accessing that evidence would not be attributable to Plaintiffs' delay. Plaintiffs challenge the map adopted in *Johnson* due to the Wisconsin Supreme

Court's ruling in *Clarke*; even if Plaintiffs initiated their challenge the day after *Clarke* (or even the day after *Johnson*), Intervenors would face analogous challenges accessing evidence about the 2011 map's drafting. Accordingly, every element of laches is absent here.

B. This Panel has the authority and obligation to grant relief.

Intervenors' objections to this Panel's jurisdiction fail to recognize both fundamental principles of judicial review and Wisconsin law's broad grant of authority to circuit courts. They compile volumes of citations recognizing variations of the principle that "[t]he supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." Leg. MTD at 9 (quoting *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997)). Yet they neglect to apply that law to the most important fact of this case—*Clarke overruled Johnson*. *See Clarke*, 2023 WI 79, ¶ 63 ("[W]e overrule any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach."). In *Clarke*, the Wisconsin Supreme Court overruled *Johnson*'s least-change mandate, modified the criteria for remedial maps, and withdrew *Johnson*'s pronouncements about courts' obligation to ignore partisan impact. *See id.* ¶¶ 70–71. That explicit rejection of *Johnson* indisputably binds this Panel. *See Sustache v. Am. Fam. Mut. Ins. Co.*, 2007 WI App 144, ¶ 19, 303 Wis. 2d 714, 735 N.W.2d 186 ("When decisions of the supreme court are in conflict, we follow the court's most recent pronouncement.").

Plaintiffs are not asking this Panel to second-guess any element of *Johnson*'s holding that survives *Clarke*'s restoration of appropriate remedial districting criteria. They simply seek to vindicate their rights to participate in upcoming congressional elections that comply with operative state law, as conclusively determined by the Wisconsin Supreme Court. Because the current congressional map assigns Plaintiffs to districts that were unlawfully adopted due to singular reliance on a "least-change" "metric, not derived from the constitutional text, [that *Johnson* allowed] to supersede the constitution," *Clarke*, 2023 WI 79, ¶ 62, this Panel is bound by *Clarke*

to remedy that harm. To do so, it enjoys "all the powers" necessary for "the full and complete administration of justice." Wis. Stat. § 753.03.[3]

Intervenors seek to conjure contrary edicts from a series of administrative orders, *see, e.g.*, Leg. MTD at 2, but none of those orders supersedes or otherwise overrules *Clarke*. First, Intervenors point to the Wisconsin Supreme Court's unexplained denial of a motion to reopen *Johnson*. *See* Order, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Mar. 1, 2024). That denial was silent as to the Court's reasoning; it certainly did not say it was rejecting *Clarke* or otherwise resurrecting "least-change" as a legitimate first-order criterion for judicial redistricting. Rather, the only clue about the Court's decision-making was Justice Protasiewicz's notice that she "decline[d] to participate" in the proceeding because she "was not a member of the court when it issued its [*Johnson II*] decision and order." Order of Justice Protasiewicz Declining to Participate and Denying Recusal Motion, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Mar. 1, 2024). It remains perfectly sensible that the Court preferred these issues of statewide importance ultimately to be decided by a bench operating at full strength.

Second, Intervenors point to orders denying petitions—one from Plaintiffs, another from unrelated parties—inviting the Court to adjudicate gerrymandering claims in an original action. *See* Order, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (Wis. June 25, 2025); Order,

[3] In response, Intervenors collect cases confirming only that an enjoined party cannot *violate* an injunction until it is set aside. *See Cline v. Whitaker*, 144 Wis. 439, 439, 129 N.W. 400 (1911) (explaining an injunction "is binding on the person restrained" until "set aside in some proper proceeding"); *State ex rel. Fowler v. Cir. Ct. of Green Lake Cnty.*, 98 Wis. 143, 73 N.W. 788, 790 (1898) (explaining the "sole remedy *of the party*" subject to an injunction is a motion to vacate) (emphasis added); *Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶ 50, 303 Wis. 2d 94, 122, 735 N.W.2d 418, 431 (holding "a trial court *whose judgment or final order has been affirmed* by the appellate court on the merits has no authority to reopen the case" (emphasis added)). None of these cases bar affected non-parties from challenging an injunction whose legal basis has been overruled.

Felton v. Wis. Elections Comm'n, No. 2025AP999-OA (Wis. June 25, 2025). Again, those discretionary denials are not merits determinations. To appreciate the distinction between administrative orders and precedential legal analysis, the Panel need look no further than Intervenors' own briefing. *See, e.g.*, Leg. MJOP Br. at 9 n.2 (emphasizing that "the Wisconsin Supreme Court did not decide how Plaintiffs' claims would fare" when it convened this three-judge Court); Cong. MTD at 17 (similar). And even if one were to attempt to divine clues about the Court's unstated reasoning in denying the petitions, the best evidence is in *Clarke*'s explanation of why the Court declined to adjudicate partisan gerrymandering claims in that case: While recognizing such claims "raise important and unresolved questions of statewide significance," it concluded that "the need for extensive fact-finding (if not a full-scale trial) counsels against addressing them at this time." *Clarke v. Wis. Elections Comm'n*, 2023 WI 70, 409 Wis. 2d 372, 375, 995 N.W.2d 779. This action is therefore free of the wrinkles that likely led the Wisconsin Supreme Court to decline the previous invitations to consider similar claims.

All of this is consistent with Plaintiffs' prior representation to the Wisconsin Supreme Court that "no other court can provide Plaintiffs' requested relief" on "purely state law claims." Pet. for Original Action ¶ 98, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (Wis. May 7, 2025). In context, it is clear that Plaintiffs were explaining that no *federal* court could grant relief on Plaintiffs' "purely state law claims." *Id*; *See also id.* ¶ 100 ("Federal courts other than the U.S. Supreme Court are precluded from hearing challenges to this Court's decisions."); *id.* ¶ 101 ("And the U.S. Supreme Court does not have jurisdiction over Plaintiffs' purely state law claims."). To be sure, Plaintiffs argued there were efficiency reasons for bypassing the lower state courts, *id.* ¶ 103, but they appreciate that original actions are both entirely discretionary and highly unusual, *see* Wis. S. Ct. IOP III(B)(3), and they accept the Court's preference to defer to a lower-

court's fact-finding and legal analysis in the first instance. The Wisconsin Supreme Court retains authority to be the ultimate arbiter of Plaintiffs' rights, whether exercising its original or appellate jurisdiction. That truism is no barrier to their request for a favorable ruling from this Panel that the Justices may later affirm.

As Intervenors are fond of quoting, the *Johnson* Court stated that the maps it issued would remain in place "until new maps are enacted into law *or a court otherwise directs*." *Johnson II*, 2022 WI 14, ¶ 52 (emphasis added); *see, e.g.*, Leg. MTD at 7–8. Note the indefinite article—*a court*. It could have said "or until *we* otherwise direct," but instead the Court properly recognized the residual power of lower courts to provide prospective relief when facts or law change. This Panel is "a court," and it is empowered to direct a new map that faithfully reflects Wisconsin law.

II. Plaintiffs are entitled to judgment on their separation-of-powers claim.

None of the arguments advanced by Intervenors in response to Plaintiffs' motion precludes judgment on the pleadings. *Clarke* forecloses continued enforcement of a congressional map adopted based on the "least-change" criterion, Plaintiffs have alleged a cognizable separation-of-powers violation based on the defect identified in *Clarke*, and the factual issues Intervenors invoke relate to Plaintiffs' partisan gerrymandering claims—not the separation-of-powers claim that is the subject of the pending motion.

A. *Clarke* renders prospective enforcement of a "least-change" congressional map unconstitutional.

In *Clarke v. Wisconsin Elections Commission*, the Wisconsin Supreme Court repudiated the "least-change" framework employed in *Johnson II*, which produced the current congressional map, because that framework departed from the judiciary's constitutional role as a politically neutral decisionmaker. The Court explained that "least-change" lacked grounding in constitutional text, proved unworkable, and devolved into an assortment of metrics untethered to constitutionally

required criteria. 2023 WI 79, ¶¶ 60–63. The Court further concluded that *Johnson*'s "politically mindless" commitment to the "least-change" criterion violated the judiciary's duty to serve as a "politically neutral and independent institution." *Id.* ¶ 71.

Central to *Clarke* was the Court's reaffirmation of judicial neutrality as a constitutional imperative. The Court emphasized that, "[u]nlike the legislative and executive branches, which are political by nature," the judiciary "must remain politically neutral" to avoid ratifying "the most grossly gerrymandered results." *Id.* ¶¶ 70–71. The Court further clarified that maintaining neutrality *requires* judges to consider partisan impact because judges "should not select a plan that seeks partisan advantage—that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda." *Id.* ¶ 70 (quoting *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶ 12, 249 Wis. 2d 706, 639 N.W.2d 537, in turn quoting *Prosser v. Elections Bd.*, 793 F. Supp. 859, 867 (W.D. Wis. 1992)).

Clarke thus establishes a clear constitutional rule: judicial redistricting authority must be exercised with scrupulous political neutrality, and any methodology—including "least-change"—that binds a court to preserve a prior legislative agenda rather than exercise independent judgment cannot be reconciled with that rule. In *Johnson*, the Court adopted the current congressional map only after committing itself to a "least-change" criterion, pledging to replicate the 2011 configuration as much as possible. *Johnson I*, 2021 WI 87, ¶¶ 7, 39, 72–73. The map now in force thus reflects the Court's application of the very methodology *Clarke* later held incompatible with the judiciary's constitutional role.

Intervenors strain to evade *Clarke*'s force with a variety of arguments, but in the end, each shares a fatal flaw: they require disagreeing with *Clarke* itself, not Plaintiffs' application of it. Intervenors primarily argue that *Clarke* merely overruled the prospective "mandate" of

"least-change" but did not hold that all maps adopted based on the "least-change" criterion are unconstitutional. *E.g.*, Johnson MJOP Br. at 9. But that reading cannot be reconciled with what the Court actually said. Specifically, *Clarke* resolved that *Johnson I*'s single-minded focus on "least-change" allowed "a judicially-created metric, not derived from the constitutional text, to supersede the constitution." *Clarke*, 2023 WI 79, ¶ 62. Whatever prerogative legislators may or may not have to aggrandize their own power, the Court was clear that "courts can, and should, hold themselves to a different standard than the legislature regarding the partisanship of remedial maps." *Id.* ¶ 71. "As a politically neutral and independent institution," the judiciary must "take care to avoid selecting"—or enforcing—"remedial maps designed to advantage one political party over another," recognizing that "it is not possible to remain neutral and independent by failing to consider partisan impact entirely." *Id.*

That is *a constitutional holding about judicial power*, not a tweak to redistricting etiquette. *Clarke* therefore did not merely withdraw a judicial methodology; it held that courts *lack constitutional authority* to entrench prior legislative policy choices—particularly partisan ones—through myopic adherence to a "least-change" criterion. A map whose judicial adoption was dictated by "least-change" therefore rests on the same constitutional defect, one that is inflicted anew with each election governed by those district lines.[4]

[4] Johnson Intervenors further argue that the traditional redistricting principles of core retention and preserving communities of interest are close enough proxies to the "least-change" criterion to justify the congressional maps. Johnson MJOP Br. at 9–11. But the *Johnson* court was divided on what "least-change" actually meant—whether it was "core retention," "minimizing population deviations" or local government splits, or something else. *Clarke*, 2023 WI 79, ¶ 61. In any event, the problem *Clarke* identified was prioritizing the "least-change" criterion over *all other* redistricting principles: The judiciary "must consider numerous constitutional requirements when adopting remedial maps" and "cannot allow a judicially-created metric, not derived from the constitutional text, to supersede the constitution." *Clarke*, 2023 WI 79, ¶ 62; *see also id.* ¶ 68 (explicitly incorporating "preserving communities of interest" as one relevant districting criteria

Intervenors further attempt to cabin *Clarke* by arguing that its discussion of the "least-change" criterion appears only in the remedies section of the opinion—not the liability section—and therefore has no bearing on the separation of powers. *E.g.*, Cong. MJOP Br. at 24. That is a false dichotomy that elevates form over substance. *Clarke*'s remedial holding rests on a constitutional diagnosis: the "least-change" criterion required courts to exercise power in a manner inconsistent with judicial independence. 2023 WI 79 ¶¶ 62, 70–71. A constitutional defect in the exercise of judicial power does not vanish simply because it is revealed in the course of crafting a remedy. Moreover, in the redistricting context, the remedy *is* the map—a constitutionally defective remedial process produces a constitutionally defective map that remains constitutionally defective when enforced. *Cf. Harkenrider v. Hochul*, 38 N.Y.3d 494, 517, 197 N.E.3d 437, 451 (2022) (invalidating state legislative maps after holding procedural defect rendered them unconstitutional).

Intervenors' efforts to restrict *Clarke*'s repudiation of the "least-change" criterion to state legislative maps—and not congressional maps—is artificial and lacks any legal or logical basis. *See* Johnson MJOP Br. at 11.[5] *Clarke*'s rejection of the "least-change" criterion and its articulation of a judicial neutrality framework do not turn on the type of districts at issue. They rest on first principles about what courts may and may not do when exercising redistricting authority. The Court repeatedly framed its analysis in institutional terms by distinguishing its role from the

among several). Simply rebranding "least-change" as "core retention-ish" or "communities-of-interest preservation-like" does not cure the defect *Clarke* identified.

[5] Intervenors raised this same meritless argument to support their position that the Wisconsin Supreme Court should dismiss Plaintiffs' action instead of appointing a three-judge panel. *See* Congressmen's Response to Plaintiffs' Initial Brief at 14, *Bothfeld v. Wisconsin Election Comm'n*, Case No. 2025XX001438. This false distinction failed then and it fails now. *See* Order, *Bothfeld v. Wisconsin Elections Comm'n*, Case No. 2025XX001438 (Nov. 25, 2025) (rejecting Intervenors' arguments and appointing three-judge panel).

Legislature's and emphasizing that when the judiciary exercises redistricting authority, "the resolution must be judicial, not political." *Clarke*, 2023 WI 79, ¶ 70. To be sure, the Court explicitly overruled the "least-change" portions of *Johnson II*—a case that involved congressional districts, not just state legislative districts. *Id.* ¶ 63.[6]

Clarke therefore confirms that a methodology that entrenches prior partisan policy choices is incompatible with the judicial role, whether applied to state legislative or congressional maps. Intervenors' attempts to limit its scope—by confining it to remedies or particular district types—ignore this constitutional principle and rest on a fundamental disagreement with *Clarke*'s reasoning itself. But that is a disagreement they must take up with the Wisconsin Supreme Court, not this Panel.

B. Plaintiffs identify a clear separation of powers violation.

The continued enforcement of the current congressional map violates the separation of powers. Wisconsin's congressional map was improperly selected based on a "judicially-created metric" that constrained the Court's judgment and subordinated constitutional requirements to prior legislative policy choices—an approach the Wisconsin Supreme Court has since held is inconsistent with the judicial role and "cannot [be] allow[ed] . . . to supersede the constitution." *Id.* ¶¶ 62, 70–71. By committing itself to a framework that required adherence to those legislative choices rather than the exercise of independent constitutional judgment, the *Johnson* court

[6] To the extent Intervenors argue that *Clarke* is distinguishable because the state legislative maps there also suffered from a noncontiguity defect, *e.g.*, Johnson MJOP Br. at 11, that distinction is unavailing. *Clarke* did not need to overrule the "least-change" criterion to remedy noncontiguity; the Court could have simply ordered new contiguous maps. That *Clarke* went further and expressly repudiated "least-change" demonstrates that the constitutional defect extended to the methodology itself, not merely the resulting map. Moreover, the separation-of-powers violation is the judicial abdication—the Court's advance commitment to a previous legislature's partisan priorities over constitutional requirements. *See infra* II.B. That violation occurs regardless of whether the resulting map also suffers from other defects.

abdicated "what is unmistakably core judicial power." *See Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 56, 382 Wis. 2d 496, 914 N.W.2d 21.

Intervenors' arguments to the contrary fail. The Johnson Intervenors argue that no "intrusion" into another branch occurred, the Legislature contends that cases confirming judicial independence are "inapposite," and the Congressmen claim that adherence to the "least-change" criterion does not constitute judicial abdication. *See* Johnson MJOP Br. at 12–14; Leg. MJOP Br. at 15–16; Cong. MJOP Br. at 19–23. Each of these positions rests on a different—though equally incorrect—understanding of the governing doctrine.

The Johnson Intervenors are plainly wrong that Wisconsin's separation-of-powers doctrine requires Plaintiffs to allege that the judiciary displaced an enacted law or seized legislative authority. The separation of powers is violated not only by usurpation or encroachment, but by *abdication*—that is, by failing to exercise judicial power in the manner the Constitution requires. *See Tetra Tech*, 2018 WI 75, ¶ 48 ("The separation of powers prevents us from abdicating core power just as much as it protects the judiciary from encroachment by other branches."). A methodology that requires courts to abandon their neutrality and substitute nonjudicial policy preferences for independent constitutional judgment violates the judiciary's constitutional role just as surely as one that intrudes on another branch. *See Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 38, 376 Wis. 2d 147, 897 N.W.2d 384 (emphasizing that "a truly independent judiciary must be free from control by the other branches of government" and noting the Court has "consistently rejected any attempt to coerce judges in their exercise of the essential case-deciding function of the judiciary" (citations omitted)). Surely Intervenors would concede, for example, that a court that committed to ruling for the party whose briefs were printed on the fanciest paper stock was

violating its judicial role, regardless of whether other legislative or executive prerogatives were directly inhibited.

The Legislature's response—minimizing the relevance of cases confirming the judiciary's duty to act independently—fares no better. The Legislature attempts to distinguish *Gabler* and *Tetra Tech* on the grounds that they concerned judicial deference to administrative agencies, but that misses the point. Those cases establish a fundamental principle: the separation of powers prohibits the judiciary from adopting constraints on its decisionmaking that require it to abdicate its core constitutional responsibilities. *See Gabler*, 2017 WI 67, ¶ 37 (holding it is "the judiciary's exclusive responsibility to exercise judgment"); *Tetra Tech*, 2018 WI 75, ¶ 48 (explaining that the separation-of-powers doctrine "prevents [the judiciary] from abdicating [its] core power"). The identity of the entity to which a court improperly defers is irrelevant; what matters is the abdication itself.

The Congressmen, for their part, do not dispute that *Tetra Tech* and *Gabler* establish principles that apply beyond the context of judicial deference to executive agencies. But they fail to grasp the relevance here, apparently because they assume redistricting is always a legislative task to which courts must defer. That assumption is incorrect when, as here, the political branches failed to enact a redistricting plan and the judiciary had to exercise its own constitutional authority to adopt one. *See Johnson I*, 2021 WI 87, ¶ 18. In such a circumstance, redistricting becomes a *judicial* task that must be exercised with neutrality and independent judgment, not blind deference to prior legislative choices. *See Clarke*, 2023 WI 79, ¶¶ 70–71. In that context, *Tetra Tech* applies directly: the "least-change" criterion required courts to approach redistricting cases with "an a priori commitment to letting [a nonjudiciary entity] decide" questions assigned to judges. 2018 WI 75, ¶ 55. The Congressmen's failure to recognize this parallel does not make it any less direct.

Intervenors further argue that the *Johnson* Court's adoption of the "least-change" criterion appropriately "honor[ed]" the Legislature's authority to redistrict. *E.g.*, Cong. MJOP Br. at 23. That argument is, in effect, a defense of the "least-change" criterion and an attack on *Clarke* itself. But as discussed *supra* II.A, *Clarke*'s repudiation of the "least-change" criterion is binding here, rendering Intervenors' attempt to rehabilitate the *Johnson* court's redistricting framework meritless. Intervenors' insistence that a judicially adopted map can ignore partisan fairness under the guise of minimalism cannot be reconciled with *Clarke* and simply ignores binding, recent precedent of the Wisconsin Supreme Court.

C. Intervenors identify no material factual dispute that precludes judgment as a matter of law.

Plaintiffs' separation-of-powers claim does not rest on any contested facts. *Contra, e.g.*, Johnson MJOP Br. at 14–15. Unlike Plaintiffs' partisan gerrymandering claims—which will require expert discovery—the separation-of-powers claim presents a purely legal question: whether the adoption of a "least-change" map violated the judiciary's constitutional duty to exercise independent and politically neutral judgment. Resolving that question does not require any findings about the alleged partisan judgments of 2011, the motivations of individual justices, or the political effects of the map today.

The separation-of-powers claim rests on three uncontestable legal premises established by binding precedent and the procedural posture of this case: (1) the current congressional map was drawn and adopted pursuant to the "least-change" criterion, *see Johnson II*, 2022 WI 14, ¶ 7; (2) the Wisconsin Supreme Court has expressly overruled the use of the "least-change" criterion as inconsistent with the judiciary's role under the Wisconsin Constitution, *see Clarke*, 2023 WI 79, ¶ 63; and (3) absent judicial intervention, the "least-change" map will be used in the next three election cycles, *see* U.S. Const. art. I, § 2; Wis. Const. art. IV, § 3. Each of these propositions

follows from published judicial decisions and the operation of Wisconsin election law, not from contested factual allegations. Indeed, in their answers to the Complaint, Intervenors recognized that these allegations "set[] forth legal conclusions" and "refer[] to . . . state judicial decision[s], which speak[] for [themselves]." Dkt. No. 119 (answering allegations in paragraph 51, 65, and 82); *see also* Dkt. 88 (answering same allegations).

By contrast, any factual "allegations and disputes," Johnson MJOP Br. at 14, Intervenors raise have no bearing on the outcome of Plaintiffs' separation-of-powers claim. Take, for instance, the supposed factual dispute about whether "partisan judgments . . . prevailed in 2011." *Id.* Irrelevant. Whether or not the Wisconsin Legislature enacted a partisan gerrymander in 2011, it is indisputable that the Wisconsin Supreme Court in *Johnson II* adopted a congressional map that consciously ignored partisan fairness. Applying the now-overruled least-change criterion, the Court abdicated its judicial authority by seeking to replicate the 2011 map—whatever its flaws and features—rather than exercise independent judgment. As *Clarke* explained, the Court must go out of its way to "take care to *avoid* selecting remedial maps designed to advantage one political party over the other." *Clarke*, 2023 WI 79, ¶ 71 (emphasis added). "Importantly, . . . it is *not possible* to remain neutral and independent by failing to consider partisan impact entirely." *Id.* (emphasis added). In *Johnson II*, the Court explicitly disclaimed any consideration of the partisan impact of its court-adopted map. 2022 WI 14, ¶¶ 4, 11. That judicial *abdication* is the separation-of-powers violation. *Clarke*, 2023 WI 79, ¶ 62 ("We cannot allow a judicially-created metric, not derived from the constitutional text, to supersede the constitution.").

The Panel should not be distracted from resolving Plaintiffs' separation-of-powers claim by Intervenors' efforts to smuggle in factual disputes from Plaintiffs' partisan gerrymandering claims. The so-called factual disputes Intervenors identify are potentially relevant only to

Plaintiffs' partisan gerrymandering claims. For *those* claims, the Panel may need to resolve, for instance, Plaintiffs' allegations that the current congressional map exhibits extreme partisan skew and favors and disfavors voters based on their partisan affiliation. *See infra* § III. But that is an issue for another day. At this point, the first issue the Panel must resolve on the merits—and possibly *only* issue, if the Panel grants Plaintiffs' motion—is Plaintiffs' purely legal separation-of-powers claim, which applies *Clarke*'s holding to the congressional map. Intervenors seek to conflate those distinct claims; the Panel should not. Rather, the Panel should grant Plaintiffs' motion for judgment on the separation-of-powers claims as a matter of law.

D. This Panel can and should order relief for the 2026 election.

Intervenors suggest that it is too late for this Panel to remedy the constitutional violation in this state's congressional map before the 2026 election. *E.g.*, Leg. MTD Br. at 14. But courts have repeatedly ordered new maps to be adopted in election years—including significantly later into the election cycle than we are in now. For example, on March 23, 2022, the U.S. Supreme Court barred the use of Wisconsin's state legislative maps for the 2022 election, recognizing that even then there remained "sufficient time to adopt [new] maps consistent with the timetable for Wisconsin's August 9th primary election." *Wis. Legislature*, 595 U.S. at 401. Pursuant to that order, the Wisconsin Supreme Court adopted new maps on April 15, 2022—the date candidates could begin circulating nominating petitions. Wis. Stat. § 8.15(1). That timeline made sure Wisconsinites would vote under lawful maps without "caus[ing] unnecessary election chaos or confusion." *Johnson v. Wisconsin Elections Comm'n* ("*Johnson III*"), 2022 WI 19, ¶ 138, 401 Wis. 2d 198, 972 N.W.2d 559 (Grassl Bradley, J., concurring). If April 15 left sufficient time to implement new maps in 2022, then mid-January 2026—nearly three months earlier in the election cycle—surely does as well. Given that Plaintiffs acted promptly in filing this lawsuit, *see supra* I.A.2, the

calendar should not prevent the Panel from ensuring the upcoming elections proceed under a lawful map.

This Panel has well-established mechanisms to ensure relief for the 2026 elections if it grants Plaintiffs' motion for judgment on the pleadings. The parties are all on notice of the potential opportunity to propose new maps, allowing remedial proceedings to commence immediately on an expedited basis. Accordingly, the Panel could follow the process *Clarke* established: urge the political branches to enact new maps while simultaneously proceeding toward a court-adopted remedial map to ensure timely relief, ultimately adopting a map only if the political branches fail to do so. *See Clarke*, 2023 WI 79, ¶ 4; *see also* Court Order re Post-Decision Matters, *Clarke v. Wisconsin Elections Comm'n*, Case No. 23AP1399 (Dec. 22, 2023) (appointing consultants to evaluate proposed remedial maps and setting expedited briefing schedule for map selection).[7]

Plaintiffs' motion for judgment on their separation-of-powers claim presents an opportunity for the Panel to resolve this litigation on the merits, as a matter of law, and in time for the 2026 election. That motion is now fully briefed and ripe for resolution, and Intervenors have offered nothing to foreclose relief on this claim. Accordingly, the Court should grant Plaintiffs' pending motion to ensure Wisconsin's upcoming congressional elections are held consistent with Wisconsin law.

[7] Alternatively, the Court could adopt the People's Commission map, *see People's Maps Commission*, State of Wisconsin Dep't of Admin., https://doa.wi.gov/Pages/PMC-Report.aspx (last visited Jan. 20, 2026)—prepared by an independent nonpartisan commission following six months of public hearings and input across all eight of Wisconsin's congressional districts that was already vetted for compliance with state and federal law—as an interim remedy for 2026.

III. Plaintiffs state viable partisan gerrymandering claims.[8]

The facts underlying Plaintiffs' partisan gerrymandering claims are straightforward and, at this stage, must be accepted as true. *See Notz v. Everett Smith Grp., Ltd.*, 2009 WI 30, ¶ 15, 316 Wis. 2d 640, 764 N.W.2d 904. Wisconsin's current congressional map systematically disadvantages voters who favor Democratic candidates and advantages those who favor Republicans. Compl. ¶¶ 1–2. As Plaintiffs alleged, the map packs Democratic voters into Districts 2 and 4, resulting in "landslide, supermajority elections in favor of Democratic candidates in those districts," and cracks Democratic voters across Districts 1, 3, 5, and 6, "resulting in predictable Republican victories across those Districts." Compl. ¶ 67. Four separate statistical measures of partisan gerrymandering all point to the same conclusion: Wisconsin's congressional map exhibits some of the most extreme partisan skew the nation. Compl. ¶¶ 69–70. The predictable and intended result of this partisan gerrymandering is that Republican candidates consistently and reliably win six of Wisconsin's eight congressional seats, even though Wisconsin *voters* statewide tend to cast ballots for Democratic and Republican candidates in equal measure. Compl. ¶¶ 73–74. This stacking of the deck in favor of some voters and against others, solely due to their partisan affiliation, cannot be squared with the Wisconsin Constitution.

Intervenors respond with a shrug. They argue, for instance, that partisan gerrymandering claims are too tough for courts to work through, so the Panel should not even try. But many other state courts have successfully adjudicated partisan gerrymandering claims, so Intervenors' failure of imagination cannot bar relief here. They also argue that the Wisconsin Supreme Court already

[8] The Panel need only reach Intervenors' motions to dismiss Plaintiffs' partisan gerrymandering claims if the Panel decides *not* to grant Plaintiffs' motion for judgment on their separation- of-powers claim. Accordingly, both logically and as a practical matter, Plaintiffs' motion for judgment should be resolved first.

resolved the question—even though the case they cite did not involve a partisan gerrymandering claim, and even though the Court more recently reaffirmed that the propriety of partisan gerrymandering remains an "important and unresolved" question under Wisconsin law. *Clarke*, 2023 WI 79, ¶ 7. In short, Intervenors' objections cannot support dismissal. Wisconsin's Constitution, properly applied, prohibits partisan gerrymandering, and there is no obstacle to the Panel granting Plaintiffs relief. The Panel should thus deny the Intervenors' motions to dismiss Plaintiffs' partisan gerrymandering claims.

A. The Wisconsin Constitution prohibits partisan gerrymandering.

Partisan gerrymandering violates multiple provisions of the Wisconsin Constitution, each of which supports an independent cause of action.

Equal Protection. Partisan gerrymandering violates the Wisconsin Constitution's guarantee of equality under the law. Article I, section 1 of the Wisconsin Constitution declares that "[a]ll people are born equally free and independent"; that principle has long been understood to "condemn[] laws which grant special privileges to a favored class." *In re Christoph*, 205 Wis. 418, 237 N.W. 134, 135 (1931). Wisconsin's founders made "equality before the law the very corner stone of their plan of government," preserving in Article I, section 1 an "emphatic protest against special privileges to any favored person or class." *Black v. State*, 113 Wis. 205, 89 N.W. 522, 527 (1902).

This guarantee applies with full force to voting rights. Article I, section 1 protects the right to vote "in the same manner, at the same time, and with the same effectiveness" as other voters. *State ex rel. Binner v. Buer*, 174 Wis. 120, 182 N.W. 855, 858 (1921). From its earliest redistricting cases, the Wisconsin Supreme Court has emphasized "the rights of the people to have full effect given to the political power of each elector." *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440,

51 N.W. 724, 735 (1892) (Pinney, J., concurring). The right to vote includes "the right to make use of the vote in a most effectual manner." *Buer*, 182 N.W. at 860.

Accordingly, the Wisconsin Supreme Court has recognized a constitutional "right to secure equal representation." *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 55, 132 N.W.2d 249 (1965). In *Sylvester*, the Court invalidated a scheme under which "a small minority of citizens in many counties [could] control a majority of the votes cast," reaffirming that Wisconsin's equal protection clause rests on "the basic principle of equality among voters" and "the fundamental principle that representative government is one of equal representation." *Id.* at 47, 54–55. Vote dilution based on geography or classification cannot be justified "within the constitutional restrictions of the equal-protection clause." *Id.* at 58; *see also La Crosse Cnty. v. City of La Crosse*, 108 Wis. 2d 560, 562, 322 N.W.2d 531 (Ct. App. 1982).

Partisan gerrymandering violates these settled principles by disadvantaging voters who favor a particular political party. That is why state courts across the country have applied similar equal protection principles in reading their state constitutions to prohibit partisan gerrymanders. *See, e.g.*, *In re 2021 Redistricting Cases*, 528 P.3d 40, 57, 92 (Alaska 2023) (recognizing that "partisan gerrymandering is unconstitutional" under "two principles of equal protection"—the right to an equally weighted vote and the right to an equally powerful vote (citation omitted)); *Grisham v. Van Soelen*, 539 P.3d 272, 284 (N.M. 2023) (applying state equal protection clause and holding that "egregious partisan gerrymandering can effect vote dilution to a degree that denies individuals their inalienable right to full and effective participation in the political process") (citation modified). Sorting Wisconsin voters into districts based on their partisan affiliation is fundamentally irreconcilable with the constitutional principle of equal protection under the law.

Free Speech and Association. Partisan gerrymandering also violates rights to free speech and association. Wisconsin's Constitution provides unusually robust protection for political speech and political association. Article I, section 3 guarantees that "[e]very person may freely speak, write and publish his sentiments on all subjects," and that "no laws shall be passed to restrain or abridge the liberty of speech." *State v. Pierce*, 163 Wis. 615, 158 N.W. 696, 698 (1916). Article I, section 4 separately protects "[t]he right of the people peaceably to assemble, to consult for the common good, and to petition the government." Wis. Const. art. I, § 4. This bundle of rights is sacrosanct and represents a "corner stone[]" of Wisconsin's democratic institutions. *Pierce*, 158 N.W. at 698.

Wisconsin courts have repeatedly emphasized that Wisconsin's free-speech guarantee is especially strong. It is "more definite and sweeping" than comparable provisions in other constitutions, *Pierce*, 158 N.W. at 698, and political speech in particular is "afforded the highest level of protection" because it is "the right most fundamental to our democracy," *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶ 47, 363 Wis. 2d 1, 866 N.W.2d 165. These protections extend not only to outright bans on speech, but also to laws that "abridge"—that is, diminish or render less effective—the exercise of constitutional rights. *Pierce*, 158 N.W. at 698 ("The ordinary meaning of the word 'abridge' is to diminish or to lessen, but not to cut off entirely.").

Partisan gerrymandering abridges speech and association. By design, it diminishes the effectiveness of political expression and political association based on viewpoint. Indeed, as Plaintiffs allege in their complaint, the challenged congressional map ensures that voters who associate with and advocate for the disfavored political party are far less likely to translate their speech, organizing, and votes into electoral success, while voters supporting the favored party

enjoy amplified political power. The fact that disfavored voters may still speak, associate, and cast ballots does not cure the constitutional injury; the government burdens speech when it deliberately renders that speech less effective because of its content or viewpoint. *See Johnson I*, 2021 WI 87, ¶ 108 (Dallet, J., dissenting) ("[T]he problem with extreme partisan gerrymandering isn't that it literally denies people the right to vote or run for office. It's that extreme gerrymandering distorts the political process so thoroughly that those rights can become meaningless.").

The map also burdens associational rights by undermining voters' ability to band together to elect candidates who represent their shared political views. Partisan gerrymandering "weakens [a party's] capacity to perform all its functions" by making fundraising, organizing, and candidate recruitment substantially more difficult for the disfavored group. *Gill v. Whitford*, 585 U.S. 48, 81 (2018) (Kagan, J., concurring). Wisconsin's Constitution does not permit the State to structure electoral districts to penalize political participation and association on a partisan basis.

Free Government Guarantee. Article I, section 22 of the Wisconsin Constitution declares that "[t]he blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." Wis. Const. art. I, § 22. This provision is not merely aspirational. For over a century, Wisconsin courts have read section 22 as an "'implied inhibition' against governmental action with which any legislative scheme must be in compliance," possessing "quite as much efficiency as would express limitations." *Jacobs v. Major*, 139 Wis. 2d 492, 509, 407 N.W.2d 832 (1987) (quoting *State ex rel. Milwaukee Med. Coll. v. Chittenden*, 127 Wis. 468, 107 N.W. 500, 517–18 (1906)).

The Wisconsin Supreme Court has repeatedly relied on the Free Government Guarantee to invalidate legislation that departs from fundamental principles of justice or confers arbitrary

advantages on favored classes. In *In re Christoph*, for example, the Court struck down a statute granting special privileges to certain landowners because it rested on an "arbitrary and unreasonable" classification incompatible with free government. 237 N.W. at 135. In *Stierle v. Rohmeyer*, the Court invoked section 22 to invalidate a statutory scheme imposing a grossly disproportionate forfeiture, warning that when "things so monstrous as this are contemplated," courts must heed the admonitions of Article I, section 22. 218 Wis. 149, 260 N.W. 647, 655 (1935).

Partisan gerrymandering squarely implicates these concerns. By entrenching one political party in power and insulating it from electoral accountability, partisan gerrymandering abandons "justice, moderation, [and] temperance," Wis. Const. art. I, § 22, in favor of extreme legislative self-interest. It distorts elections so that outcomes are effectively predetermined, depriving citizens of meaningful participation in choosing their representatives and undermining the consent of the governed. *See Johnson I*, 2021 WI 87, ¶ 106 (Dallet, J., dissenting) (explaining that partisan gerrymandering "robs the people of their most important power—to select their elected leaders") (citing *The Federalist* No. 37, at 4 (James Madison)). Few legislative acts more directly threaten "the blessings of a free government." Wis. Const. art. I, § 22.

Treating partisan gerrymandering as actionable under section 22 is fully consistent with Wisconsin precedent. Like the schemes invalidated in *Christoph* and *Stierle*, partisan gerrymandering arbitrarily advantages one class of citizens while disadvantaging another, not based on neutral principles but on partisan allegiance. Section 22 exists precisely to guard against such "encroachment on the liberty and freedom of the citizens of this state." *Allen v. State*, 183 Wis. 323, 197 N.W. 808, 810 (1924). The breadth of section 22 is a feature, not a flaw, reflecting the Framers' deliberate choice to protect free government through fundamental principles rather

than exhaustive enumeration. Plaintiffs have thus stated a viable claim under the Free Government Guarantee.

B. Partisan gerrymandering claims are justiciable under the Wisconsin Constitution.

The Panel should reject Intervenors' invitation to find that partisan gerrymandering claims are nonjusticiable and thereby consign Wisconsin voters to continue to suffer unconstitutional maps. *See* Cong. MTD at 17–20. The Wisconsin Constitution forecloses this plea for self-imposed judicial helplessness. Under the Wisconsin Constitution, "*[e]very person* is entitled to a certain remedy in the laws for *all injuries*, or wrongs," and justice must be administered "*completely and without denial*." Wis. Const. art. I, § 9 (emphases added). This grant of power and responsibility to Wisconsin courts to remedy violations of individual rights is far more robust than any provision in Article III of the U.S. Constitution. In fact, the Wisconsin Supreme Court has often interpreted the Wisconsin Constitution to provide greater protection to individual liberty than the federal Constitution even when there *are* analogous provisions. *See, e.g., State v. Knapp*, 2005 WI 127, ¶¶ 57–62, 285 Wis. 2d 86, 700 N.W.2d 899 (interpreting Wisconsin Constitution's bar on compelled self-incrimination more broadly than analogous federal protection); *State v. Doe*, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977) (explaining the Court has "never hesitated" "to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court under the Fourteenth Amendment." (citing *Carpenter v. Dane*, 9 Wis. 249 (1859); *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1923))). Intervenors' reliance on federal case law finding there is no justiciable claim for partisan gerrymandering under the federal constitution is thus misplaced: Whether partisan gerrymandering claims are justiciable federally has no bearing on whether they are justiciable in Wisconsin courts.

Intervenors nonetheless ask this Panel to give up because (they claim) it is too tough to find a "manageable standard[]" to apply to partisan gerrymandering claims. Johnson MTD Br. at 14. But "other state courts" have found "judicially manageable standards for judging when partisan gerrymandering is excessive." *Johnson I*, 2021 WI 87, ¶ 104, (Dallet, J., dissenting); *see, e.g.*, *Grisham v. Van Soelen*, 539 P.3d 272, 289 (N.M. 2023); *In re 2021 Redistricting Cases*, 528 P.3d at 92 (Alaska 2023); *League of Women Voters of Pa. v. Pennsylvania*, 645 Pa. 1, 178 A.3d 737, 814, 821 (Pa. 2018); Order, *League of Women Voters of Utah v. Utah State Legislature*, Case No. 220901712 (3rd Dist. Ct. Utah Nov. 10, 2025); *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194, at *46 (Md. Cir. Ct. Mar. 25, 2022); *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363, 416 (Fla. 2015). As the *Rucho* majority acknowledged in finding partisan gerrymandering claims not justiciable federally, "*state constitutions* can provide standards and guidance for state courts to apply" to such claims. *Rucho v. Common Cause*, 588 U.S. 684, 719 (2019) (emphasis added). In her dissent in *Rucho*, Justice Kagan described a three-part test adopted by several courts that looks to intent, effects, and causation. *Id. at* 735–36 (Kagan, J., dissenting) ("If you are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day"). "There is no reason why" this panel "could not develop similar standards to judge such claims in Wisconsin." *Johnson I*, 2021 WI 87, ¶ 104 (Dallet, J., dissenting). Accordingly, manageable standards exist to evaluate partisan gerrymandering claims, and this is no basis to dismiss Plaintiffs' claims.[9]

[9] The Panel need not decide now *which* standard should be adopted. The only issue before the Panel is whether Plaintiffs' partisan gerrymandering claims should be dismissed because it would be impossible to develop such standards. *See Wausau Tile, Inc. v. Cnty. Concrete Corp*., 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999) ("Unless it seems certain that no relief could be granted under any set of facts that the plaintiff could prove, dismissal of the complaint is improper."). The Panel could order briefing at a later juncture, if necessary, on the proper standard.

C. Plaintiffs' partisan gerrymandering claims are neither settled nor precluded.

Contrary to Intervenors' suggestions, *see* Johnson MTD Br. at 12–13, the Wisconsin Supreme Court has not settled the issue of partisan gerrymandering, and Plaintiffs' claims are not precluded. The statements from *Johnson I* seized on by Intervenors came in the context of whether the *Court itself* should consider partisan fairness in adopting a *remedial* map. *Johnson I,* 2021 WI 87, ¶ 39 ("This Court Will Not Consider the Partisan Makeup of Districts"). After all, the Court in *Johnson I* was confronted only with a *malapportionment* claim—that is, a challenge to the unequal populations in Wisconsin's congressional districts after the 2020 census—*not* a partisan gerrymandering claim. As Justice Dallet explained in dissent, "nobody argues that we should strike down any existing map on the basis that it is an extreme partisan gerrymander," so the majority discussion of the topic is no more than an "advisory opinion." *Id.* ¶ 103 (Dallet, J., dissenting). And since the Court's statements on partisan gerrymandering were not "necessary for its decision" on the malapportionment claim before it, this Panel is "not bound by [those] statements." *State v. Matson*, 2003 WI App 253, ¶ 24, 268 Wis. 2d 725, 674 N.W.2d 51 (quotation omitted); *see also Am. Fam. Mut. Ins. Co. v. Shannon*, 120 Wis. 2d 560, 565, 356 N.W.2d 175 (1984) (explaining a "dictum is a statement not addressed to the question before the court or necessary for its decision" and courts are not bound by dicta). Indeed, the Court previously reversed a lower court that gave improper weight to dicta, explaining the lower court was wrong to conclude it "was required to give equal weight to every statement in our opinions." *State v. Koput*, 142 Wis. 2d 370, 386 n.12, 418 N.W.2d 804 (1988). Rather, lower courts should "evaluate statements in our opinions on the basis of whether they constitute dictum." *Id*.

In any event, *Johnson I*'s statements on partisan fairness in redistricting are no longer good law. *Clarke* expressly "overrule[d] any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach." *Clarke*, 2023 WI 79, ¶ 63. *Johnson I*'s conclusion that the Court

would not consider partisan skew was the basis for its least-change approach. 2021 WI 87, ¶ 76 (rejecting arguments that the Court should consider partisan skew in favor of the "neutral" least-change criterion). Accordingly, *Clarke* overruled the portions of *Johnson I* on which Intervenors rely. *Clarke*, 2023 WI 79, ¶ 71 (rejecting least-change criterion and explaining instead that the Court must "take care to avoid selecting remedial maps designed to advantage one political party over another" and so must consider "partisan impact . . . in adopting remedial legislative maps").

To the extent there could be any remaining doubt whether *Johnson I*'s discussion of partisan fairness in redistricting foreclosed partisan gerrymandering claims, the Court removed that doubt in *Clarke* when it reaffirmed that the propriety of partisan gerrymandering is "an important and ***unresolved*** legal question." 2023 WI 79, ¶ 7 (emphasis added). It is telling that, across their 75-plus pages of motion to dismiss briefing, the three Intervenors each fail to engage with or even acknowledge this portion of *Clarke*. The reason is clear: It fatally contradicts Intervenors' argument that *Johnson I* conclusively settled the issue of partisan gerrymandering under Wisconsin law. Plaintiffs' partisan gerrymandering claims are thus not precluded by existing case law.

IV. The Elections Clause does not immunize an unconstitutional map from state court review.

As the foregoing demonstrates, Intervenors face a recurring problem: Wisconsin law—as enshrined in the Wisconsin Constitution and interpreted by the Wisconsin Supreme Court—is uniformly against them. That leaves Intervenors desperate to identify some federal issue, *any federal issue*, as their ticket to shop for a federal forum with different judges and different rules. Their search having yielded nothing in existing law, Intervenors ask this Panel to be the first in the country to reinterpret the U.S. Constitution's Elections Clause, U.S. Const. art. I, § 4, cl. 1, to

require judges to perpetuate partisan gerrymanders. But the primary case they offer in support of that proposition—*Moore v. Harper*—says the opposite.

Article I, Section 2, clause 1 of the U.S. Constitution obligates States to reapportion congressional districts after each decennial census, *see Wesberry v. Sanders*, 376 U.S. 1, 13–14 (1964), and the Elections Clause gives state legislatures "the initial power to draw [those] districts," *Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004) (plurality opinion). Intervenors propose that where a state legislature fails to adopt a new map that maintains the prior decade's partisan skew, state courts must adopt such a configuration for them. *See, e.g.*, Cong. MTD at 30 ("To respect a state legislature's exercise of its federal authority under the Elections Clause, state-court remedies may only correct any defect and adopt a least-changes map."). But that has never been the law.

For nearly a century, the U.S. Supreme Court has expressly recognized that where a state legislature's proposed configuration is vetoed by the governor (as in Wisconsin in 2022), the Elections Clause cannot resuscitate the legislature's preferred map into law. *See Smiley v. Holm*, 285 U.S. 355, 368 (1932). Instead, state courts are "specifically encouraged" in those instances to take up the map-drawing pens themselves. *Scott v. Germano*, 381 U.S. 407, 409 (1965); *see Growe v. Emison*, 507 U.S. 25, 30–31 (1993). And when state judges have recognized partisan fairness as a guiding map-drawing criterion, the Supreme Court has endorsed their prerogative to do so. *See Gaffney v. Cummings*, 412 U.S. 735, 752–54 (1973).

In *Gaffney*, for instance, the state legislature and a backup bipartisan commission each failed to enact a districting plan following the census, which caused the task to pass to a board comprised of three state judges. *See id.* at 736. That judicial board "consciously and overtly adopted and followed a policy of 'political fairness,' which aimed at a rough scheme of proportional representation of the two major political parties." *Id.* at 738. Rejecting arguments that

the three judges should have eschewed any consideration of partisan impact, the U.S. Supreme Court explained that such a "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results." *Id.* at 753. Even accidental gerrymandering is a travesty, but rarely does it remain an accident: "it is most unlikely," the Court continued, "that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended." *Id.* States are under no obligation to bind themselves to judicial gerrymandering in that way.

It is no wonder, then, that courts tasked with adopting a new map have consistently emphasized their obligation to affirmatively *avoid* becoming pawns in partisan machinations. *See, e.g.*, *Prosser v. Elections Bd.*, 793 F. Supp. 859, 867 (W.D. Wis. 1992) (when adopting map "consistent with judicial neutrality," "[j]udges should not select a plan that seeks partisan advantage—that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda—even if they would not be entitled to invalidate an enacted plan that did so"); *Baumgart v. Wendelberger*, Nos. 01-C-0121, 02-C-0366, 2002 WL 34127471, at *4 (E.D. Wis. May, 30, 2002) (rejecting parties' proposed plans because "the partisan origins" of one submission were "evident" and "appear to have been designed to ensure Republican control of the Senate," while alternative "plans are riddled with their own partisan marks"); *Carter v. Chapman*, 270 A.3d 444, 470 (Pa.), *cert. denied sub nom. Costello v. Carter*, 143 S. Ct. 102 (2022) (deeming it "appropriate to evaluate proposed plans through the use of partisan fairness metrics"); *Maestas v. Hall*, 274 P.3d 66, 76 (N.M. 2012) ("To avoid the appearance of partisan politics, a judge should not select a plan that seeks partisan advantage."); *Wilson v. Eu*, 823 P.2d 545, 576–77 (Cal. 1992) (rejecting plans submitted by parties to avoid endorsing an unknown but intended political consequence); *Burling v. Chandler*, 804

A.2d 471, 483 (N.H. 2002) (same); *Jackson v. Nassau Cnty. Bd. of Supervisors*, 157 F.R.D. 612, 615 (E.D.N.Y. 1994) (applauding districting plan submitted by a special master who concentrated his energies on devising a plan that "(i) contained the least amount of district-wide population deviation possible, and (ii) was the most fair politically"); *Good v. Austin*, 800 F. Supp. 557, 566–67 (E.D. Mich. 1992) (analyzing "political fairness" of court-drawn plan because it was "apparent that a districting map devised entirely according to nonpolitical criteria could inadvertently result in a plan that unfairly favored one political party over the other"); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 659 (N.D. Ill. 1991) (three-judge panel) (judicially adopting a map that "best meets the constitutional requirements of population equality and fairness to racial and language minorities, while achieving a politically fair projected distribution of congressional seats across party lines"); *Legislature v. Reinecke*, 516 P.2d 6, 38 (Cal. 1973) (affirming redistricting plan proposed by special masters and deeming it "appropriate to consider whether the recommended plans are politically fair").[10]

Intervenors cite no authority interpreting the Elections Clause to require state courts adopting new districting maps to lend their imprimatur to a prior decade's partisan skew—they ask this Panel to be the *first court ever* to reach that holding—so they rely on a few out-of-context snippets from *Moore*. *See, e.g.,* Leg. MTD at 18. In *Moore*, however, the Supreme Court *rejected* an Elections Clause challenge to a state court injunction of a legislatively enacted partisan gerrymander. *See* 600 U.S. at 37. The legislative defendants there argued that the Elections Clause

[10] None of the cases Intervenors cite in support of their least-change view requires courts to perpetuate a partisan skew. *Abrams v. Johnson*, 521 U.S. 74, 86 (1997), for example, *rejected* arguments that the trial court was obligated to mirror legislative policies. *White v. Weiser*, 412 U.S. 783, 797 (1973), held merely that a federal court was not required to minimize population deviations at the expense of neutral legislative preferences. And *Perry v. Perez*, 565 U.S. 388, 392–93 (2012), held that the trial court need not use an outdated prior-decade's map as a template, but should instead look to a more recent map enacted through the political process.

required state court judges to accept a legislature's enacted map, even if that map exhibited extreme partisan bias in violation of state law. *See id.* at 19. Rejecting that view, the Supreme Court confirmed that the "Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review." *Id.* at 22.

The Elections Clause-hook here is significantly weaker than the one rejected in *Moore*. In *Moore*, the North Carolina General Assembly pointed to the Elections Clause's vesting of initial power in state legislatures as an argument in defense of a map *enacted by the legislature*—even as the Court confirmed that power is limited by state law. Here, however, Intervenors seek to preserve a map *adopted by a court*. Because the Elections Clause does not regard even legislatively-adopted maps as sacrosanct, it would be frivolous to extend that deference to a judicially-adopted map. And it is altogether impossible to do so under the authority of *Moore*, which preserved state courts' authority to invalidate politically skewed congressional maps. Intervenors focus narrowly on *Moore*'s simple observation that "state courts may not 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, but courts do not pilfer power from legislatures when they apply their own precedents (here, *Clarke*) to their own maps (here, the districts adopted in *Johnson*). Applying precedent to fact *is* the ordinary work of judicial review.

And while Intervenors suggest there is something inherently illegitimate about state law prohibitions against partisan bias, *see* Leg. MTD at 19 (positing that courts cannot "strike a new political balance"), the U.S. Supreme Court has rejected that argument, too. After concluding that the *federal* Constitution does not prohibit partisan gerrymandering, the Court emphasized that its "conclusion does not condone excessive partisan gerrymandering" or "condemn complaints about districting to echo into a void" because state courts remain perfectly capable of enforcing their

own state-law restrictions against the practice. *Rucho*, 588 U.S. at 719 (favorably citing Florida Supreme Court decision striking down legislatively enacted congressional districting plan). *Moore* reaffirmed this principle: "State courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause." 600 U.S. at 37 (leaving undisturbed state court judgment enjoining map as an unconstitutional partisan gerrymander under North Carolina Constitution). The question this case presents, then, is whether Wisconsin law requires courts to depart from a "least-change" map-drawing criterion when necessary to avoid perpetuating partisan bias. The most Intervenors can say is that if the answer to that question is "no," then the Elections Clause would foreclose Plaintiffs' claim. But then they must concede the reverse is also true: if Plaintiffs have pleaded state-law claims, then the Elections Clause is no obstacle. Either way, the state law analysis will be conclusive—same as any other state law case in state court.

As a final gambit, the Congressmen propose that Congress required least-change redistricting when it enacted 2 U.S.C. § 2a(c). *See* Cong. MTD at 34. It did no such thing. That section provides that, "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment," elections shall be held under the prior decade's map. 2 U.S.C. § 2a(c). As the Supreme Court explained, this means that when a state legislature fails to enact new maps *and* "state and federal courts" have failed to adopt their own configuration in time, then existing maps will be reused because there is no other conceivable alternative. *Branch v. Smith*, 538 U.S. 254, 272 (2003) (plurality). In other words, Section 2a(c) is merely a "last-resort remedy to be applied when, on the eve of a congressional election, no constitutional redistricting plan exists and there is no time for either the State's legislature *or the courts* to develop one." *Id.* at 275 (emphasis

added). Nothing about that failsafe restricts courts from construing and applying state-law restrictions against partisan bias when crafting congressional maps.

CONCLUSION

Ultimately, the outcome of the pending motions will determine whether Intervenors will succeed in their ongoing effort to force Plaintiffs and all other Wisconsin voters to suffer yet another election cycle under a congressional map that violates the Wisconsin Constitution many times over. In service of that goal, Intervenors have deployed every delay tactic in their arsenal and thrown every conceivable argument at the wall. None of them sticks. To the contrary, Intervenors' arguments before this Panel only underscore that their actual dispute is with the Wisconsin Supreme Court's holding in *Clarke*—binding precedent that compels the Panel to strike down the congressional map—and their litigation-by-a-thousand-cuts strategy is intended only to forestall that inevitable result. This Panel should not countenance that effort.

Because Plaintiffs' motion for judgment on their separation-of-powers claim is fully briefed, presents purely legal questions, and can be remedied through established judicial procedures, the Panel can and should grant the motion, order relief that ensures Wisconsin's 2026 congressional elections proceed under a lawful map, and otherwise deny Intervenors' motions to dismiss.

Dated: January 20, 2026

By: *Electronically signed by Barret V. Van Sicklen*

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