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SUPREME COURT

No. 2021AP1450-OA

In the Supreme Court of Wisconsin

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS *and* RONALD ZAHN, PETITIONERS,

BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, REBECCA ALWIN, CONGRESSMAN GLENN GROTHMAN, CONGRESSMAN MIKE GALLAGHER, CONGRESSMAN BRYAN STEIL, CONGRESSMAN TOM TIFFANY, CONGRESSMAN SCOTT FITZGERALD, LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA, GERALDINE SCHERTZ, KATHLEEN QUALHEIM, GARY KRENZ, SARAH J. HAMILTON, STEPHEN JOSEPH WRIGHT, JEAN-LUC THIFFEAULT, *and* SOMESH JHA, INTERVENOR-PETITIONERS,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, JULIE GLANCEY, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, ANN JACOBS, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, DEAN KNUDSON, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, ROBERT SPINDELL, JR., IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, *and* MARK THOMSEN, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, RESPONDENTS,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, IN HIS OFFICIAL CAPACITY, *and* JANET BEWLEY, SENATE DEMOCRATIC MINORITY LEADER, ON BEHALF OF THE SENATE DEMOCRATIC CAUCUS, INTERVENOR-RESPONDENTS.

RESPONSE OF THE CONGRESSMEN IN OPPOSITION TO *HUNTER* INTERVENOR-PETITIONERS' MOTION FOR RELIEF FROM JUDGMENT

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INTRODUCTION

On January 16, 2024, the *Hunter* Intervenor-Petitioners filed a challenge to this Court's *March 3, 2022* selection of Democratic Governor Tony Evers' remedial congressional map in *Johnson v. Wis. Elections Commission*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402, after holding that the map "complie[d] with the federal Constitution and all other applicable laws," *id.* ¶ 9. Governor Evers had based what became the *Johnson II* map on Wisconsin's 2011 congressional map, which map a federal court had explained was a bipartisan negotiated map. *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 853–54 (E.D. Wis. 2012) (per curiam). The *Hunter* Intervenor-Petitioners nevertheless ask this Court to throw out the *Johnson* Congressional map based upon the theory that *Clarke v. Wisconsin Elections Commission*, 2023 WI 79, 998 N.W.2d 370, retroactively renders that map unlawful. This Court should deny this untimely Motion, which is based upon the cynical hypothesis that this Court will throw out Governor Evers' proposed map because the map did not generate more Democratic Congressmen in the Wisconsin delegation in the 2022 elections.

As a threshold matter, the *Hunter* Intervenor-Petitioners' egregious delay in filing this Motion should be the end of the matter. The *Hunter* Intervenor-Petitioners should have raised their objections to *Johnson II*'s adoption of a remedial congressional map more than a year and a half ago, by filing a timely motion for reconsideration under Wis. Stat. § (Rule) 809.24(1). If that delay were not enough, the *Hunter* Intervenor-Petitioners did not even file their Motion on or around August 2, 2023, when the *Clarke* petitioners challenged the *Johnson* state legislative maps. The *Hunter* Intervenor-Petitioners' inexcusable delay has created a deeply unfair situation. To take just one example, the undersigned had no reason to participate in *Clarke*, given that the petitioners there decided only to challenge the state legislative maps. But now the *Hunter* Intervenor-Petitioners seek to bootstrap *Clarke* to invalidate the *Johnson II* congressional map. That clumsy maneuver, if successful, would deprive the undersigned of any fair notice or opportunity to be heard on issues critically impacting their core interests.

The *Hunter* Intervenor-Petitioners' Motion fails for multiple other reasons. *First*, *Clarke* overruled *Johnson*'s least-change-

focused approach and endorsed a different method for adopting a remedial state legislative map when a prior one is found to be unlawful. But that new approach is only relevant *after* a finding that a map is illegal in some respect; here, the *Hunter* Intervenor-Petitioners do not challenge the substantive lawfulness of the *Johnson II* congressional map. *Second*, *Clarke* did not (and could not have) overruled *Johnson*'s "least change" holding as to remedial congressional maps, in particular, given that any judicial changes to legislatively adopted maps (like the 2011 congressional map) are subject to the U.S. Constitution's Elections Clause, which is an issue upon which *Clarke* did not opine. *Third*, the *Hunter* Intervenor-Petitioners are not entitled to relief from the *Johnson II* judgment because they have not shown "extraordinary circumstances" or "significant change in circumstances" under either Wis. Stat. § 806.07(1)(g) or (h).

While this Court should have no trouble denying the *Hunter* Intervenor-Petitioners' Motion out of hand, if this Court were inclined to consider granting any relief, there is not enough time to adjudicate these issues fairly before the 2024 elections. Even following the timeline set by *Clarke* alone, there is not enough time

for the parties to propose, and for this Court to adopt, a new congressional map by the March 15, 2024, deadline that the Wisconsin Elections Commission has identified. In any event, far more time is necessary here than in *Clarke*, given that the *Hunter* Intervenor-Petitioners only just filed their Motion. Before proceeding any further, this Court would need to permit additional proceedings to address at least two threshold issues. First, this Court must afford the parties the opportunity to litigate fully whether reopening the judgment is equitable under Wis. Stat. § 806.07(1)(g) or (h), by allowing adversarial testing of the *Hunter* Intervenor-Petitioners' allegation that the map is a pro-Republican gerrymander. Second, this Court must also give the parties the chance to litigate the issue of whether the U.S. Constitution's Elections Clause requires that state courts use a "least changes" approach when adopting remedial congressional maps, as *Johnson* held. *Clarke* had no occasion to consider this Elections Clause issue, let alone decide whether to overrule *Johnson* on this point, because no congressional map was at issue.

This Court should deny the Motion in its entirety.

BACKGROUND

A. In 2011, the Wisconsin State Legislature adopted a new congressional map. *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶¶ 1, 8, 399 Wis. 2d 623, 967 N.W.2d 469 ("*Johnson I*"), *overruled in part by Clarke*, 2023 WI 79. After this map's enactment, certain plaintiffs challenged the map as an unconstitutional partisan gerrymander before a federal three-judge panel, in *Baldus*, 849 F. Supp. 2d at 840. While dismissing that partisan-gerrymandering claim for failure to identify a justiciable standard, the panel explained that based upon the evidence before that court, the 2011 congressional map was drafted in a "bipartisan process" that "incorporate[d] . . . feedback" from both Wisconsin Republicans and Wisconsin Democrats in Congress. *Id.* at 853–54. Thereafter, other plaintiffs challenged the 2011 Assembly map as a partisan gerrymander, while declining to challenge the 2011 congressional map on that basis. *See Gill v. Whitford*, 138 S. Ct. 1916, 1922–23 (2018).

B. Following the 2020 census, the U.S. Constitution's "one person, one vote" rule required Wisconsin to redraw both its 2011 congressional district map, *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964); U.S. Const. art. I, § 2, and its 2011 state legislative map,

Reynolds v. Sims, 377 U.S. 533, 561 (1964); U.S. Const. amend. XIV, § 2, as the prior maps had become unconstitutionally malapportioned, *Johnson I*, 2021 WI 87, ¶ 1. Anticipating political gridlock, the *Johnson* Petitioners initiated this case on August 23, 2021, by filing of a Petition For Original Action—over 14 months before the November 8, 2022 election. Pet. Original Action ("*Johnson* Pet."), *Johnson,* No.2021AP1450-OA (Wis. Aug. 23, 2021). The *Johnson* Petitioners asserted the claim that the State's 2011 state legislative map and 2011 congressional-district map were now malapportioned and asked this Court to adopt remedial maps in advance of the 2022 election, given the political deadlock over the map-drawing process that ultimately occurred. *Johnson* Pet. ¶¶ 29–32, 45. This Court granted the *Johnson* Petition on September 22, 2021. Order, *Johnson,* No.2021AP1450-OA (Wis. Sept. 22, 2021), and the undersigned, the *Hunter* Intervenor-Petitioners,[1] and Governor Tony Evers (among others) intervened. Order, *Johnson*, No.2021AP1450-OA (Wis. Oct. 14, 2021).

[1] At the time of their intervention, the *Hunter* Intervenor-Petitioners were Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, and Kathleen Qualheim. *See* Mot. to Intervene, *Johnson,* No.2021AP001450-OA (Wis. Oct. 6, 2021). Only Lisa Hunter, Jacob Zabel, and John Persa filed the present Motion For Relief From Judgment. Mem. In Support Of Mot. ("Mem.") 9 n.2, *Johnson*, No.2021AP1450-OA (Wis. Jan. 16, 2024).

This Court issued *Johnson I* on November 30, 2021, 2021 WI 87—months before the March 1, 2022 date that the Wisconsin Elections Commission ("WEC") had put forward as the deadline needed for new maps, *see* WEC Letter Br., *Johnson*, No.2021AP1450-OA (Wis. Oct. 6, 2021). *Johnson I* entered the (uncontested) declarations that the 2011 congressional map and the 2011 state legislative map were now malapportioned under Article I, Section 2 and the Equal Protection Clause of the U.S. Constitution, respectively; identified the legal requirements for remedial congressional maps and state legislative maps in Wisconsin; and set out the process that this Court would use to adopt remedial maps, including the remedial congressional map. *Johnson I*, 2021 WI 87, ¶¶ 2, 16, 24–38, 64–79.

As for the legal requirements for a remedial congressional map in Wisconsin, *Johnson I* explained that such a map must comply with the U.S. Constitution's one person, one vote requirement, *id.* ¶ 25; the federal statutory prohibition on multimember congressional districts, *id.* ¶ 27; and the Voting Rights Act, *id.* *Johnson I* explained that it would not consider the "partisan fairness" of the congressional districts, as that presents

a "non-justiciable," "purely political question." *Id.* ¶¶ 39–40 (citing *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019)).

Johnson I held that this Court would follow the "least change approach," 2021 WI 87, ¶¶ 72–73, using the "existing maps 'as a template' and implementing only those remedies necessary to resolve constitutional or statutory deficiencies"—namely, as relevant here, the maps' malapportionment—so that the remedial maps "reflect the least change necessary" to the prior legislatively adopted maps to bring them into legal compliance, *id.* ¶ 72 (citation omitted). As to the remedial congressional maps, in particular, *Johnson I* recognized that its "least change" approach followed from the U.S. Constitution's Elections Clause, given the Legislature's constitutional role in congressional redistricting under that Clause. 2021 WI 87, ¶ 12. "[T]he United States Constitution does not substantially constrain state legislatures' discretion to decide how congressional elections are conducted," including as to the drawing and adopting of congressional redistricting maps. *Id.* (citing U.S. Const. art. I, § 4). So, when this Court adopts remedial maps, it must "[t]read[ ] [no] further than necessary to remedy [a map's] current legal deficiencies," so

as not to "intrude upon the constitutional prerogative of the political branches." *Id.* ¶ 64. Thus, *Johnson*'s least-changes holding as to congressional maps was based, at least in part, on the U.S. Constitution's Elections Clause. *See id.* ¶¶ 12, 64.

After this Court issued *Johnson I*, no party—including the *Hunter* Intervenor-Petitioners—moved for reconsideration, *see* Wis. Stat. § 805.17(3); instead, the parties prepared and submitted their proposed remedial maps to comply with *Johnson I*'s "least change approach," *see Johnson II*, 2022 WI 14, ¶ 5. Pursuant to a November 17, 2021 order, the parties in *Johnson* submitted their proposed remedial maps, supporting briefs, and expert reports by December 15, 2021; their response briefs addressing other parties' proposed remedial maps and expert reports by December 30, 2021; and their reply briefs in support of their proposed remedial maps by January 4, 2022. Order at 2, *Johnson*, No.2021AP1450-OA (Wis. Nov. 17, 2021). The undersigned, Governor Evers, the *Hunter* Intervenor-Petitioners, and the Citizen Mathematicians submitted proposed remedial congressional maps, along with supporting briefs and expert reports. *Johnson II*, 2022 WI 14, ¶ 7.

This Court then heard oral argument on the various proposed remedial maps on January 19, 2022, and issued its *Johnson II* opinion selecting the remedial maps for the State on March 1, 2022, *id.*—the date WEC had disclosed as the deadline for an orderly election, *supra* p.13. *Johnson II* clarified what this Court would consider when applying the "least change" analysis declared in *Johnson I* for congressional districts. *Johnson II*, 2022 WI 14, ¶¶ 11–25 & nn.7–8. Specifically, this Court's "least change" approach considered two factors only: core retention maximization and compliance with all legal requirements. *Id.* *Johnson II* then adopted Governor Tony Evers' proposed remedial congressional map, as well as Governor Evers' proposed remedial state legislative maps. *Id.*, ¶¶ 7, 10, 52. This Court held that Governor Evers' proposed congressional map "complie[d] with the federal Constitution and all other applicable laws," *id.*, as well as with the Wisconsin Constitution's requirements that the "districts [be] contiguous, sufficiently equal in population, sufficiently compact, appropriately nested, and pay due respect to local boundaries," *id.* ¶ 9. Finally, this Court made similar conclusions in *Johnson II* as to Governor Evers' proposed state legislative map. *Id.* ¶¶ 8–9.

The undersigned and the Legislature both applied to the U.S. Supreme Court to review this Court's adoption of Governor Evers' proposed remedial maps in *Johnson II*. *See Grothman v. Wis. Elections Comm'n*, 142 S. Ct. 1410 (2022); *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398 (2022). The U.S. Supreme Court construed the Legislature's application as a petition for certiorari, granted the petition, and reversed this Court's adoption of Governor Evers' remedial state legislative maps on federal equal-protection grounds, *Wis. Legislature*, 595 U.S. at 406, a violation that this Court subsequently remedied on April 15, 2022, by adopting the Legislature's proposed remedial state legislative maps, *Johnson v. Wis. Elections Comm'n*, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559 ("*Johnson III*"), *overruled in part by Clarke*, 2023 WI 79. The U.S. Supreme Court denied the undersigned's application. *Grothman*, 142 S. Ct. 1410.[2]

Finally, and notably for purposes of the present Motion, the undersigned also timely moved this Court for reconsideration of

[2] In addition to their filing with the U.S. Supreme Court after *Johnson II*, the undersigned also moved this Court to, as relevant, permit all parties to submit new proposed remedial maps in light of *Johnson II*'s clarification of the "least change" approach. Congressmen's Emergency Mot., *Johnson*, No.2021AP1450-OA (Wis. Mar. 7, 2022). This Court denied that Motion. Order, *Johnson*, No.2021AP1450-OA (Wis. Apr. 15, 2022).

Johnson II, as to its adoption of Governor Evers' proposed congressional map. Congressmen's Mot. Recons., *Johnson*, No.2021AP1450-OA (Wis. Mar. 23, 2022) (also renewing the then-pending request to submit new proposed remedial maps). This Court denied that reconsideration motion, with Justice R.G. Bradley dissenting. Order, *Johnson*, No.2021AP1450-OA (Wis. Apr. 15, 2022). The *Hunter* Intervenor-Petitioners did not move for reconsideration of *Johnson II*.

C. Shortly after the 2023 Wisconsin Supreme Court election, Law Forward threatened to file a new lawsuit challenging the *Johnson* maps "in the weeks or months after Justice-elect Janet Protasiewicz is sworn in." Jack Kelly, *Liberal Law Firm to Argue Gerrymandering Violates Wisconsin Constitution*, The Cap Times (Apr. 6, 2023).[3] Law Forward's threat included challenging the *Johnson II* congressional map, as reflected in an amicus brief that Law Forward had filed in the U.S. Supreme Court. Br. Amici Curiae Law Forward, *et al.* Supp. Resp'ts at 31–37, *Moore v. Harper*, 600 U.S. 1 (2023) (No. 21-1271).

[3] Available at https://captimes.com/news/government/liberal-law-firm-to-argue-gerrymandering-violates-wisconsin-constitution/article_2dfb9757-6d2d-58ba-9461-10b3d20d5f00.html (last visited Jan. 29, 2024).

D. On August 2, 2023, the *Clarke* petitioners, represented by Law Forward, made good—in part—on their threats, filing a new petition for original action challenging some of the *Johnson* maps. Pet. Original Action, *Clarke*, No.2023AP1399-OA (Wis. Aug. 2, 2023). The *Clarke* petitioners claimed that *Johnson III*'s remedial *state legislative map*s were unconstitutional partisan gerrymanders, violated the Constitution's contiguity requirement, and violated the Constitution's separation of powers. *See id.* at 3–4. But, contrary to Law Forward's initial posturing, the *Clarke* petitioners decided not to sue over the *Johnson II* congressional map. Law Forward was unable to bring a claim for partisan gerrymandering against the *Johnson II* congressional map—despite its initial threat—because the map was based on the 2011 congressional map, which was the result of a bipartisan process, and it was Governor Evers who proposed the alterations to that map. And it could not raise its contiguity or separation-of-powers arguments against the *Johnson II* congressional map either, as that map violated neither of those theories.

On October 6, 2023, this Court granted the *Clarke* petition and provided an initial schedule for the litigation. *Clarke v. Wis.*

Elections Comm'n, 2023 WI 70, 995 N.W.2d 779. This Court limited the *Clarke* petitioners' case to their contiguity and separation-of-powers claims, including because the partisan-gerrymandering claim would "need [ ] extensive fact-finding (if not a full-scale trial)," which "counsels against addressing them at this time." *Id.* at 781 (citation omitted). This Court set an expedited briefing schedule that ordered all parties and would-be intervenors to file briefs by October 16, 2023, addressing, among other questions, "what standards should guide this Court in imposing a remedy for the constitutional violation(s)" that this Court may find in the *Johnson III*'s legislative maps. *Id.* at 781–82. WEC told this Court that it needed remedial maps in place by March 15, 2024, in order to administer orderly elections. WEC's Resp. at 3, *Clarke*, No.2023AP1399-OA (Wis. Oct. 16, 2023).

This Court issued *Clarke* on December 22, 2023. *Clarke*, 2023 WI 79. In the merits section of *Clarke*, this Court held that *Johnson III*'s remedial state legislative maps were unconstitutional under the Wisconsin Constitution because many districts in those maps were non-contiguous. *Id.* ¶¶ 10–55. Then, in the remedies section, this Court "describe[d] the role of this

Court in the remedial [map-drawing] process" and "articulate[d] the principles the [C]ourt will follow when adopting remedial maps." *Id.* ¶ 56. As part of this remedies section, this Court overruled *Johnson*'s least-change-focused approach to drawing remedial state legislative maps, *id.* ¶ 63, meaning that this Court would no longer use the "least change" metric as "the overarching approach to adopting remedial maps," *id.* ¶ 62. Instead, this Court explained that "least change (if actually agreed upon) could be relevant to traditional districting criteria" and "balanced with other factors," in appropriate circumstances, as this Court evaluates potential remedial state legislative maps. *Id.*

E. On January 16, 2024—more than two years and one month after *Johnson I* adopted the "least change" approach, and more than a year and a half after *Johnson II* clarified that approach and adopted Governor Evers' congressional map—the *Hunter* Intervenor-Petitioners filed the present Motion, asking this Court to throw out the *Johnson II* Congressional map because *Clarke* rejected the least-changes-only approach to remedying constitutional violations, and to replace that map with a new one

for the 2024 elections. *See* Memo. Supp. Mot. ("Mem."), *Johnson*, No.2021AP1450-OA (Wis. Jan. 16, 2024).

ARGUMENT

I. The *Hunter* Intervenor-Petitioners' Motion Is Plainly Untimely Under Wis. Stat. § 806.07(2)

A. Section 806.07(2) requires that motions for relief from judgment "shall be made within a reasonable time." Wis. Stat. § 806.07(2). This is "necessary . . . to insure the orderly disposition of cases and encourage the finality of judgments, thus improving the administration of justice." *Rhodes v. Terry*, 91 Wis. 2d 165, 173, 280 N.W.2d 248 (1979). Without this reasonable-time rule, "anytime a case was subsequently reversed, overruled, or called into question" in a manner that even arguably affected a previous final judgment, the "wheels of justice [would grind] to a halt under the sheer weight of . . . requests" for relief from judgment. *Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶ 30, 282 Wis. 2d 46, 698 N.W.2d 610 (Wilcox, J., concurring).

To determine whether a motion for relief from judgment complies with Section 806.07(2)'s "reasonable time" requirement, this Court performs a "case by case analysis" encompassing a "thorough review of all relevant factors," *State ex rel. Cynthia M.S.*

v. Michael F.C., 181 Wis. 2d 618, 627, 630, 511 N.W.2d 868 (1994), and weighing the "particular facts and circumstances of the case," *Rhodes*, 91 Wis. at 173. A court must "achieve a balance between fairness in the resolution of disputes and the policy favoring the finality of judgments." *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 36, 273 Wis. 2d 76, 681 N.W.2d 190 (citation omitted). Thus, a court should only grant relief from judgment where "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.'" *Id.* (citation omitted). This "comprehensive review of all factors relevant" can proceed by considering "the basis for the moving party's delay, and prejudice to the party opposing the motion," along with any appropriate consideration of "extraordinary circumstances." *Cynthia M.S.*, 181 Wis. 2d at 627–28.

The *Hunter* Intervenor-Petitioners egregiously delayed in moving for relief from the *Johnson II* judgment—failing first to seek timely reconsideration, unlike the undersigned, and failing even to file their motion with the *Clarke* petitioners last August. *Infra* Part I.B. Further, the *Hunter* Intervenor-Petitioners' delay is highly prejudicial. *Infra* Part I.C.

B. The *Hunter* Intervenor-Petitioners' Motion For Relief is just an untimely request for reconsideration of *Johnson I* and/or *Johnson II*'s "least change" approach. *See* Wis. Stat. § (Rule) 809.24(1) (motion for reconsideration must be filed "within 20 days after the date of a decision"). Thus, the *Hunter* Intervenor-Petitioners' one-year-and-ten-month delay in filing this Motion after this Court decided *Johnson II* is inexcusable, and this Court should reject the Motion on this basis alone. *Vill. Of Trempealeau*, 2004 WI 79, ¶ 36; *Cynthia M.S.*, 181 Wis. 2d at 628.

All of the substantive arguments that the *Hunter* Intervenor-Petitioners put forward in their Motion For Relief From Judgment could have—and, indeed, should have—been raised in timely motions for reconsideration after *Johnson I* and/or *Johnson II*. *See* Wis. Stat. § (Rule) 809.24. Specifically, in their Motion now, the *Hunter* Intervenor-Petitioners claim that that the "least change" approach adopted in *Johnson* "lacked any basis in this Court's precedents, the Wisconsin Constitution, or past Wisconsin redistricting practice." Mem.17–21. They argue that the *Johnson II* congressional map is an "intolerable" partisan gerrymander because it was based on "Wisconsin's 2011

congressional map," which, in the *Hunter* Intervenor-Petitioners' view, "had a marked partisan skew." Mem.21–26. And they allege that the "least change" approach "undermine[s] Wisconsin's separation of powers" because, they claim, it infringes upon this Court's "duty to exercise independent judgment," rather than "[d]eferring" to the decisions of the political branches. Mem.26–31. These arguments belong in a timely, post-decision motion for reconsideration: each identifies "points of law" made in *Johnson I* and/or *Johnson II* that the *Hunter* Intervenor-Petitioners "allege[ ] to be erroneously decided," while providing "supporting argument." Wis. Stat. § (Rule) 809.24(1).

The undersigned's own timely motion for reconsideration of *Johnson II* demonstrates how and when the *Hunter* Intervenor-Petitioners should properly have raised the arguments to this Court. In the undersigned's view, *Johnson II* clarified *Johnson I*'s "least change" approach by explaining what factors this Court would consider—namely, core retention maximization and compliance with all other legal requirements—when adopting a proposed remedial congressional map. *See* Congressmen's Mot. Recons. 1–4, *Johnson*, No.2021AP1450-OA (Wis. Mar. 23, 2022).

So, given *Johnson II*'s development of *Johnson I* on this point, the undersigned asked this Court to reconsider *Johnson II*'s decision adopting the Governor's proposed map and to allow the parties to submit new proposed maps under *Johnson II*'s clarified "least changes" standard. *Id.* at 3–4. This Court, as noted, denied the undersigned's timely post-*Johnson II* reconsideration motion. Order, *Johnson*, No.2021AP1450-OA (Wis. Apr. 15, 2022).

Nothing prevented the *Hunter* Intervenor-Petitioners from similarly moving for reconsideration after *Johnson I* and/or *Johnson II*. That is, after *Johnson I* and/or *Johnson II*, the *Hunter* Intervenor-Petitioners were fully capable of arguing to this Court, in a timely reconsideration motion, that the "least change" approach adopted by this Court lacked a sufficient basis in Wisconsin law, permitted intolerable partisan unfairness in the State's remedial congressional map, and violated Wisconsin's separation of powers, while asserting the very reasons articulated in their Motion here. *See* Mem.17–31. The *Hunter* Intervenor-Petitioners did not file such a motion, and they have not even attempted to offer any excuse for that failure now. *See* Mem.31–33. So, while the *Hunter* Intervenor-Petitioners claim that they

were "never given a chance [in the *Johnson* litigation] to propose a remedy informed by recognized redistricting principles," Mem.20, that is the role of timely reconsideration motions, *see* Wis. Stat. § (Rule) 809.24(1).

If the *Hunter* Intervenor-Petitioners were being candid, they would have explained that they chose not to file this Motion within the 20-day period for reconsideration, *id.*, because they believed that they had little prospect of success before this Court, as constituted then. But the *Hunter* Intervenor-Petitioners choosing to wait to bring the claims in their Motion until the composition of this Court has changed is not a valid basis for delay. *See Vill. Of Trempealeau*, 2004 WI 79, ¶ 36; *Cynthia M.S.*, 181 Wis. 2d at 628. "The decision to overturn a prior case must not be undertaken merely because the composition of this Court has changed." *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶ 95, 264 Wis. 2d 60, 665 N.W.2d 257 (citing *State v. Stevens*, 181 Wis. 2d 410, 442, 511 N.W.2d 591 (1994) (Abrahamson, J., concurring)). To hold otherwise would only "undermine[ ] confidence in the reliability of court decisions." *Id.*

While this Court in *Clarke* rejected the laches argument raised against the *Clarke* petitioners' contiguity claim, 2023 WI 79, ¶¶ 41–43, that laches holding does not excuse the *Hunter* Intervenor-Petitioners' extreme delay here. *Clarke* considered whether *Johnson III*'s state legislative map was unconstitutional based on a contiguity argument that no party in *Johnson* had previously raised, and thus that this Court had not previously considered. 2023 WI 79, ¶ 7. Here, in contrast, the parties already raised and exhaustively litigated the issue of whether the least-change-focused approach should apply to the adoption of remedial congressional maps in *Johnson*, and this Court specifically decided that issue when it concluded, in *Johnson I*, that it would follow that approach. *See* 2021 WI 87, ¶¶ 64–79.

In any event, the *Hunter* Intervenor-Petitioners' delay in bringing their claims here is much worse than the *Clarke* petitioners' wait. In *Clarke*, the petitioners brought their claims in August 2023, *Clarke*, 2023 WI 70, providing this Court over five months—a period that this Court believed respected "the need for expediency" in the case, 2023 WI 79, ¶ 76—to resolve the claims and adopt remedial legislative maps before the March 15, 2024

deadline that WEC had disclosed to this Court. WEC Resp. at 3, *Clarke*, No.2023AP1399-OA (Wis. Oct. 16, 2023)). The *Hunter* Intervenor-Petitioners waited until *January of the election year* to do the same, thereby depriving this Court and the parties of the opportunity to consider meaningfully the issues raised in their Motion, even on an expedited basis. *Contra Clarke*, 2023 WI 70.

C. The *Hunter* Intervenor-Petitioners' delay is prejudicial.

With regard to the People, the *Hunter* Intervenor-Petitioners' delay in challenging the *Johnson II* congressional map created justifiable reliance on that map. Waiting to bring a redistricting challenge until after a challenged plan has governed elections can cause voter confusion because, especially after an election, "voters have come to know their districts and candidates," *Fouts v. Harris,* 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999), *aff'd sub nom. Chandler v. Harris,* 529 U.S. 1084 (2000)—including, for example, by volunteering for, or donating to, their candidates' campaigns in their districts—and so they "will be confused by change," *id.* By challenging the *Johnson II* remedial congressional map now, only about six weeks before the WEC must receive redistricting maps to run an orderly election, WEC Resp. at 3,

Clarke, No.2023AP1399 (Wis. Oct. 16, 2023), the *Hunter* Intervenor-Petitioners seek to upset the People's legitimate reliance interest and create deep uncertainty for the 2024 election and, more broadly, for the rest of the decade.

As to all congressional candidates and their supporters in the Wisconsin, including the undersigned and their supporters, the *Hunter* Intervenor-Petitioners' delay threatens their legitimate reliance interests in *Johnson II*'s remedial congressional map. All congressional candidates—incumbents and challengers alike—have been working diligently to understand the needs, concerns, and interests of their respective districts by investing time and resources to develop relationships with constituents, all based on the understanding that the *Johnson II* map would govern "all upcoming elections." *Johnson II,* 2022 WI 14, ¶ 52; *accord League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 579 (6th Cir. 2018). That is, congressional candidates have invested substantial time developing the "relationship between" themselves as "representative[s]"—either incumbent representatives or hopeful representatives—and their "constituent[s]," so that they may win election in 2024 and effectively serve their districts. *League of*

Women Voters of Mich., 902 F.3d at 579. For example, as Congressman Steil previously explained to this Court, his district changed significantly under the *Johnson II* congressional map, absorbing several new communities that he had not previously represented. Second Aff. Congressman Bryan Steil, ¶¶ 6–8, *Johnson*, No.2021AP1450 (Wis. Mar. 7, 2022). Thus, Congressmen Steil had to expend significant time and resources to develop the "requisite close relationship" to secure the votes and represent the interests of these new constituents. *Id.* ¶ 8. Other congressional candidates, incumbent and challenger alike, have likewise expended similarly significant time and resources.

The undersigned's reliance on the *Johnson II* remedial map was unquestionably reasonable and justified. The only two lawsuits filed to challenge the State's remedial maps—*Clarke* and *Wright v. Wisconsin Elections Commission*, 2023 WI 71, 995 N.W.2d 771[4]—concerned *only* the remedial state legislative maps. *See Clarke*, 2023 WI 79; *Wright*, 995 N.W.2d 771, 772 (Ziegler, C.J., concurring). So, because *Clarke* did not involve the undersigned's interests, they had no reason to participate in *Clarke*. But the

[4] This Court denied the *Wright* Petition for Original Action on October 6, 2023. *See Wright*, 2023 WI 71.

Hunter Intervenor-Petitioners now seek retroactively to invalidate the *Johnson II* congressional map based on *Clarke*. Had the undersigned had any reason to anticipate that such a bizarre collateral attack on the congressional map was forthcoming based on what *Clarke* decided, they would have sought to intervene in *Clarke* to explain why any clarification or modification of *Johnson*'s "least changes" approach should not occur and, at minimum, should not apply to remedial congressional maps. *See infra* Part II.A.2. Thus, the *Hunter* Intervenor-Petitioners' delay here has deprived the undersigned of fair "notice" that *Clarke* could affect their legitimate interests in the *Johnson II* judgment and any "meaningful" "opportunity for a hearing" in *Clarke*. *City of W. Covina v. Perkins*, 525 U.S. 234, 240 (1999).

D. The *Hunter* Intervenor-Petitioners' limited arguments regarding timeliness are all wrong. Mem.31–33.

The *Hunter* Intervenor-Petitioners concede that the reasonable-time inquiry under Section 806.07(2) must consider "all relevant fact[or]s," Mem.31 (quoting *Cynthia M.S.*, 181 Wis. 2d at 627), but they then analyze only *one* supposedly relevant factor to the timeliness inquiry: this Court issuing *Clarke* on December 22,

2023, "over three weeks" before the *Hunter* Intervenor-Petitioners filed their Motion here, Mem.32. This is not the relevant time period for determining whether their Motion meets the "reasonable time" requirement. Rather, the *Hunter* Intervenor-Petitioners could have—and, indeed, should have—raised all of the arguments against the *Johnson II* judgment that they raise here in a timely filed motion for reconsideration, filed either within 20 days after *Johnson I* and/or *Johnson II*. *Supra* Part I.B. At minimum, the *Hunter* Intervenor-Petitioners could have asserted these arguments at the same time as the *Clarke* petitioners. Yet, the *Hunter* Intervenor-Petitioners do not even try to explain why they did not assert their challenge at those points in time. In any event, even if the *Hunter* Intervenor-Petitioners had some credible reason for not filing this Motion until now, that would not overcome the other powerful reasonable-time factors—namely, the extreme prejudice resulting from their delay. *See Cynthia M.S.*, 181 Wis. 2d at 627–28.

The *Hunter* Intervenor-Petitioners then cite *Cynthia M.S.*, *id.*, but that case is entirely unavailing, Mem.31–32. In *Cynthia M.S.*, this Court affirmed a circuit court's order that the petitioner

had timely moved for relief from a paternity-action judgment, although the petitioner waited 11 years to seek relief. 181 Wis. 2d at 620–23, 627–30. This Court rested its decision primarily on three factors: (a) the petitioner was "unsophisticated," "had been intimidated by the entire [legal] process," and "lack[ed] [ ] experience with both the legal process and with [paternity] testing of this type"; (b) the circuit court found that the respondent "would not suffer prejudice" and had "elected not to present any evidence of prejudice"; and (c) in the "context of a paternity suit," "circumstances may exist that contribute to a mother's delay in pursuing a paternity action." *Id.* at 628–29. Here, the *Hunter* Intervenor-Petitioners are represented by sophisticated counsel; the prejudice would be substantial if relief were granted, *see supra* Part I.C; and none of the sensitivities particular to paternity actions bear even remotely in the redistricting context.

II. The *Hunter* Intervenor-Petitioners' Motion Is Fatally Flawed In Multiple Other Respects

Under Section 806.07, a court may "relieve a party or legal representative from a judgment" upon a timely request if, among other specified reasons: "(g) It is no longer equitable that the judgment should have prospective application" in light of an

intervening change in circumstances, Wis. Stat. § 806.07(1)(g); or "(h) [there are] [a]ny other reasons justifying relief from the operation of the judgment" in light of an intervening change in circumstances, *id.* § 806.07(1)(g). A party seeking relief from judgment under either Subsection 806.07(1)(g) or Subsection 806.07(1)(h) faces a heavy burden. *See Wis. Dep't of Corr. v. Kliesmet*, 211 Wis. 2d 254, 260–61, 564 N.W.2d 742 (1997) (addressing Subsection 806.07(1)(g)); *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 549–50, 363 N.W.2d 419 (1985) (addressing Subsection 806.07(1)(h)). Further, Section 806.07 is "based" on Federal Rule of Civil Procedure 60(b), thus federal Rule 60(b) precedent may provide "assistance in construction of sec. 806.07." *M.L.B.*, 122 Wis. 2dat 542.

Obtaining relief under either Subsection 806.07(1)(g) or Subsection 806.07(1)(h) requires the party to make two showings. First, to even be eligible for relief under either Subsection, a party must identify an intervening, legally relevant change. *See Sukala*, 2005 WI 83, ¶¶ 13–14, 18. Then, for relief under Subsection 806.07(1)(g), in particular, the party must show that the "prospective application" of the challenged judgment or order is "no

longer equitable" due to "a significant change in circumstances warrant[ing]" relief, *Kliesmet*, 211 Wis. 2d ¶¶ 9, 12 (citation omitted), such as "changed factual conditions [that] make compliance with the [judgment] *substantially* more onerous," *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992) (emphasis added). As for relief under Subsection 806.07(1)(h), the movant must show that the intervening change in circumstances presents "extraordinary circumstances" to justify upsetting "the sanctity of the final judgment." *M.L.B.*, 122 Wis. 2d at 549–50.

The *Hunter* Intervenor-Petitioners failed to make either required showing. The *Hunter* Intervenor-Petitioners have not shown that *Clarke*'s overruling of *Johnson I*'s least-change-focused approach is a relevant intervening change in circumstances for two independent reasons. *Infra* Part II.A.1–2. And in any event, the *Hunter* Intervenor-Petitioners have not shown that *Clarke*'s adoption of a different remedial approach presents "extraordinary circumstances" or a "significant change in circumstances" as to justify any relief. *Infra* Part II.B.

A. *Clarke*'s Holding That The "Least Change" Approach Is No Longer Mandatory When Replacing Unlawful State Legislative Maps Does Not Retroactively Make The *Johnson* Congressional Map Unlawful

The *Hunter* Intervenor-Petitioners' assert that *Clarke* constitutes a change in circumstances that entitles them to relief. But the *Hunter* Intervenor-Petitioners are wrong for two independently sufficient reasons. First, *Clarke* never suggested that the new approach that this Court would use to remedy the state legislative maps' contiguity violation would invalidate or otherwise unsettle any prior maps that are not themselves infected with any unconstitutionality or illegality. *Infra* Part II.A.1. Second, even if *Clarke* did retroactively cast doubt on the validity of any prior, lawfully drawn remedial maps, it did not do so with respect to any prior *congressional* maps. *Infra* Part II.A.2.

1. *Clarke* Did Not Purport To Hold That Any Map Adopted Under The Least-Change-Focused Approach Is Now Unlawful

Clarke did not affect the lawfulness of any lawful, prior-adopted maps, as *Clarke*'s own reasoning makes clear.

a. In *Clarke*, this Court heard two constitutional challenges brought by the petitioners to the remedial state legislative maps that this Court had adopted in *Johnson III*. *Clarke*, 2023 WI 79,

¶¶ 2–3, 3 n.8, 8. Specifically, this Court considered a claim that the remedial state legislative maps violated the Wisconsin Constitution's contiguity requirement, *Clarke*, 2023 WI 79, ¶¶ 2–3, and that the process of adopting the *Johnson III* remedial state legislative maps—with this Court adopting as a remedial map the same map previously passed by the Legislature, but vetoed by the Governor—violated the separation of powers, *id.* ¶¶ 2–3 & n.8, 8; *id.* ¶ 192 n.5 (R.G. Bradley, J., dissenting) (citing *Johnson III*, 2022 WI 19, ¶187 (Karofsky, J., dissenting)).

Clarke then agreed with the petitioners' contiguity claim and declared the *Johnson III* remedial state legislative maps unconstitutional under the Wisconsin Constitution. *Id.* ¶¶ 1–3, 10–35, 56 (majority op.). As *Clarke* held, a significant number of districts in the *Johnson III* remedial state legislative maps "include separate, detached territory." *Id.* ¶ 1. But Article IV, Sections 4 and 5 of the Wisconsin Constitution require "Wisconsin's state legislative districts [to] be composed of physically adjoining territory." *Id.* ¶ 3. So, "[b]ecause the current state legislative districts [adopted by this Court in *Johnson III*] contain separate, detached territory," they "therefore violate the

constitution's contiguity requirements." *Id.*¶ 3; *see also id.* ¶¶ 10–35, 56.

Only *after* holding that the *Johnson III* remedial state legislative maps were unconstitutional did *Clarke* then turn to the question of how to remedy the infirmity in the *Johnson III* remedial state legislative maps. *Id.* ¶¶ 3–4, 9, 56. That is, *Clarke* "*first* address[ed] whether the existing state legislative districts violate the Wisconsin Constitution's contiguity requirements" *and then*, in the remedies section of its opinion, "explain[ed] the process and relevant considerations that will guide this Court in adopting remedial maps" to correct that constitutional violation. *Id.* ¶ 9 (emphasis added). The reason for this, as this Court explained, is that only "when faced with unconstitutional maps" does this Court then have the "role to adopt valid remedial maps," *id.* ¶ 58, necessarily raising the question of what "principles this court will use in adopting remedial maps," *id.* ¶ 60.

Clarke's overruling of *Johnson*'s least-change-focused approach to drawing remedial state legislative maps occurred solely in the remedies section of the *Clarke* opinion. *Id.* ¶¶ 56, 60–63. In *Johnson I*, this Court had held that its "role" when adopting

remedial maps was to take "the 'least change' approach," meaning that this Court would adopt a remedial map that "reflect[s] the least change from the prior maps necessary to comport with relevant legal requirements." *Id.* ¶¶ 60–61 (quoting *Johnson I*, 2021 WI 87, ¶ 72) (citation omitted; alterations omitted)). *Clarke* held that this least-change-focused approach "was far more complicated in reality," "did not fit easily or consistently into the balance of other requirements and considerations essential to the mapmaking process," and "is unworkable in practice." *Id.* ¶¶ 61–63. Thus, *Clarke* overruled *Johnson I*'s least-change-focused approach and adopted different "principles that will guide this Court's process in adopting remedial maps." *Id.* ¶ 63. *Clarke*'s new "principles" for adopting remedial state legislative maps may still include consideration of "least change" as a relevant factor, to be "balanced with other factors," so long as "least change" is not "the overarching approach to adopting remedial maps." *Id.* ¶ 62.

So, in sum, *Clarke* first deciding the legality of the challenged maps and only then moving to remedies after determining the maps were unlawful shows that *Clarke*'s new

process for adopting remedial maps is *only* relevant *after* this Court has determined that a map is illegal.

b. Here, this proper reading of *Clarke* as conditioning the application of its approach to adopting remedial maps on a finding that a map is unlawful defeats the *Hunter* Intervenor-Petitioners' Motion. Nothing in *Clarke* casts doubt on the legality of the *Johnson II* congressional map. The *Hunter* Intervenor-Petitioners have not formally challenged *any* substantive portion or feature of the *Johnson II* congressional map. *See generally* Mem.14–35; *accord* Mem.21–26. Thus, the *Hunter* Intervenor-Petitioners cannot show that the *Clarke* decision is an actual and intervening change in law, so as to even be eligible for relief from judgment under Subsections 806.07(1)(g) or 806.07(1)(h). *Kliesmet*, 211 Wis. 2d at ¶¶ 9, 12–13; *Sukala*, 2005 WI 83, ¶¶ 13, 18.

c. The *Hunter* Intervenor-Petitioners' arguments that *Clarke* rendered the *Johnson II* congressional map unlawful fail.

The *Hunter* Intervenor-Petitioners claim that because *Clarke* rejected *Johnson*'s remedial approach, the *Johnson II* congressional map now has "no basis in current law," Mem.17, but that is wrong. The U.S. Constitution gives States the right to

congressional representation, U.S. Const. art. I, § 2, while also vesting the State Legislature with wide latitude to determine how those representatives are elected, *id.* § 4. Wisconsin law, in turn, provides for the drawing of congressional maps, Wis. Stat. §§ 3.11–.18, and this Court understands that it may step in to complete that task as a judicial remedy in the event the legislative process fails to result in an enacted map, *see Johnson I*, 2021 WI 87, ¶¶ 64–71; *Clarke*, 2023 WI 79, ¶¶ 57–58. This Court did that in *Johnson II*, adopting a remedial congressional map. *See supra* pp.16–17. Thus, it is the U.S. Constitution and Wisconsin law that provide the lawful bases for *Johnson II*'s remedial congressional map, bases that *Clarke* clearly did not disturb.

The *Hunter* Intervenor-Petitioners also argue that the *Johnson II* congressional map may violate the separation of powers, Mem.26–31, but that argument has no basis in *Clarke*, and thus it does not identify any legally relevant intervening change in the law under Subsections 806.07(1)(g) or 806.07(1)(h), *Kliesmet*, 211 Wis. 2d at ¶¶ 9, 12–13; *Sukala*, 2005 WI 83, ¶¶ 13, 18. Indeed, *Clarke* expressly *declined* to consider any separation-of-powers argument against the remedial state legislative maps at issue

there, given its contiguity holding, thus specifically disclaiming any development in Wisconsin's separation-of-powers doctrine since *Johnson II*. *Clarke*, 2023 WI 79, ¶ 3 n.8.

In any event, the *Hunter* Intervenor-Petitioners' separation-of-powers argument is wrong. They claim that *Johnson II*'s remedial congressional map may violate the separation of powers because *Clarke* requires consideration of the "partisan impact" of a map, Mem.28 (quoting *Clarke*, 2023 WI 79, ¶ 71), but that portion of *Clarke* comes from its remedial section and thus does not impose a "partisan impact" requirement for a congressional map to be substantively lawful, *supra* pp.39–41 (citing *Clarke*, 2023 WI 79, ¶¶ 56, 60–63). Next, they cursorily argue that *Johnson*'s least-change-focused approach "does not properly discharge th[e] [Court's] responsibility" to "exercise its independent judgment," Mem.29, but *Johnson I* independently determined all substantive legal requirements for proposed remedial congressional maps, 2021 WI 87, ¶¶ 24–38, and then *Johnson II* independently concluded that Governor Evers' proposed map both satisfied these requirements and best fulfilled the least-change-focused approach, 2022 WI 14, ¶¶ 13–25. Finally, they claim that *Johnson*'s least-

change-focused approach may violate the separation of powers by giving "deference to any *one* political branch," Mem.30 (emphasis added), but this approach respects "the constitutional prerogatives of [both] the *political branches*," *Johnson I*, 2021 WI 87, ¶ 64 (emphasis added), and here, *Johnson II* adopted Governor Evers' proposed remedial congressional map, 2022 WI 14, ¶¶ 13–25, which map was based on the "bipartisan," legislatively adopted 2011 map, *Baldus*, 849 F. Supp. 2d at 853–54.

2. *Clarke* Did Not Address Whether Its Remedial Approach Applies To Congressional Maps In Light Of Article I, Section 4 Of The U.S. Constitution

a. In *Johnson I*, this Court recognized that the Elections Clause of the U.S. Constitution vests the Legislature with broad "discretion to decide how congressional elections are conducted," 2021 WI 87, ¶ 12 (citing U.S. Const. art. I, § 4), which extends to the drawing and enacting of congressional redistricting maps. Given the Legislature's constitutional role in congressional redistricting, *Johnson I* recognized that this Court's own role in drawing remedial congressional maps must be correspondingly limited. 2021 WI 87, ¶ 64. When this Court is called upon to adopt a remedial congressional map, this Court must "[t]read[ ] [no]

further than necessary to remedy [a map's] current legal deficiencies," "because the constitution . . . precludes the judiciary from interfering with the lawful policy choices of the legislature." *Id.* ¶¶ 64, 81; *see also id.* ¶ 12. This federal constitutional framing shows that *Johnson I*'s holding that this Court must apply the "least change" approach when adopting a remedial congressional map is necessarily based on, at least in part, federal Elections Clause considerations. *See id.* ¶¶ 12, 64.

The U.S. Supreme Court's post-*Johnson* decision in *Moore v. Harper*, 600 U.S. 1 (2023), further supports *Johnson*'s application of the "least change" approach with respect to remedial congressional maps based upon the Election Clause. In *Moore*, the Court held that the Elections Clause imposes limits on state-court intervention in congressional redistricting. 600 U.S. at 37. The Court explained that, in interpreting state redistricting law, "state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by" the Elections Clause. *Id.* So, if a state court does stray beyond those "bounds of ordinary judicial review" when considering state legislative action over redistricting, that would

be a federal Elections Clause violation that the U.S. Supreme Court stands ready to review. *See id.*

b. In *Clarke*, this Court considered *only* a challenge to the remedial state legislative maps, and it found those maps unconstitutionally non-contiguous under the Wisconsin Constitution, before then discussing the approach it would adopt to remedy the constitutional error. 2023 WI 79, ¶¶ 1–2. So, because *Clarke* involved only a state constitutional challenge to *Johnson III*'s remedial state legislative maps—to the exclusion of *Johnson II*'s remedial congressional map—this Court had no reason to discuss the U.S. Constitution's Elections Clause or its effect on the remedial map-drawing process for congressional maps. Therefore, *Clarke* did not overrule *Johnson II*'s least-change-focused approach as to remedial congressional maps—an approach that, as explained above, flows from the federal Elections Clause not at issue in *Clarke*. *Supra* pp.44–46.

c. Reading *Clarke* as having *sub silentio* rejected the least-change-focused approach for remedial congressional maps would violate the Elections Clause, a point that the undersigned would develop if this Court ordered briefing on the issue. *See infra*

Part III. To summarize very briefly, the Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*." U.S. Const. art. I, § 4 (emphasis added). As the U.S. Supreme Court held in *Moore*, the Elections Clause prohibits a state court from exceeding the "bounds of ordinary judicial review" when reviewing state-legislative action over congressional redistricting. 600 U.S. at 37. A court refusing to apply a "least change" approach when adopting a congressional map exceeds the "bounds of ordinary judicial review." *Id.* A straightforward hypothetical shows why: if a state court had to remedy a redistricting map that was malapportioned by only 100 persons, that court would obviously violate the Election Clause by drawing an entirely new map that gave no regard to the map that the Legislature had previously adopted. This Court would be engaging in *substantive redistricting*—making policy judgements about what map is "best" as a normative matter, rather than simply fixing the constitutional defect before it—which is a role that the Election Clause reserves to each State's legislature.

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

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

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).

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.

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

(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

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

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.

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

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

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.

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

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.

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.

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.).

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

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.

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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