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IN THE SUPREME COURT OF WISCONSIN

No. 2021AP1450-OA

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,
Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, DON MILLIS IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, ANN JACOBS IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, CARRIE RIEPL IN HER 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 DIANNE HESSELBEIN SENATE DEMOCRATIC MINORITY LEADER, ON BEHALF OF THE SENATE DEMOCRATIC CAUCUS,
Intervenors-Respondents.[1]

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[1] Like the Hunter Intervenors-Petitioners, pursuant to Wis. Stat. § 803.10(4), the Johnson Petitioners have substituted Wisconsin Election Commission members Don Millis and Carrie Riepl for their predecessors in those offices, Julie Glancey and Dean Knudson. Senate Democratic Minority Leader Dianne Hesselbein has also been substituted in place of her predecessor in office, Janet Bewley.

PETITIONERS' RESPONSE TO *HUNTER* INTERVENOR-PETITIONERS' MOTION FOR RELIEF FROM JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 4
INTRODUCTION 6
BACKGROUND 7
ARGUMENT 9
I. The Court should deny the motion for relief from the Johnson II congressional maps judgment because the motion is procedurally improper. 9
A. This motion is effectively an untimely motion to reconsider under Wis. Stat. § 809.64. 9
B. Wis. Stat. § 806.07 does not apply in this Court. 10
C. Relief from Judgment Cannot be awarded to a Party against Whom No Judgment Was Rendered. 12
D. This is not the same Court that decided *Johnson*. 13
II. Even if the Hunter Intervenors' motion was procedurally proper, the motion fails on the merits. 14
A. The *Johnson II* congressional maps comply with all state and federal laws. 14
B. There is no requirement under the state or federal constitution related to partisan makeup of Congressional districts. 18
C. The *Johnson II* Congressional maps do not violate the separation of powers. 19
D. The motion fails under either Wis. Stat. §§ 806.07(1)(g) or 806.07(1)(h). 21
i. Wis. Stat. § 806.07(1)(g) 21
ii. Wis. Stat. s. 806.07(1)(h) 23
III. In the alternative, the Court must impose an extended timeline to relitigate this case and (if necessary) adopt a new Congressional map. 23
CONCLUSION 25
CERTIFICATION REGARDING FORM AND LENGTH 26
CERTIFICATE OF SERVICE 26

TABLE OF AUTHORITIES

Cases

Allstate Ins. Co. v. Brunswick Corp., 2007 WI App 221, 305 Wis.2d 400, 740 N.W.2d 888 23

Baldus v. Members of Wis. Gov't Accountability Bd., 849 F.Supp.2d 840, 852 (E.D. Wis. 2012) 16

Baumgart v. Wendelberger, No. 01-C-0121, 2002 WL 34127471 (E.D. Wis. May 30. 2002) 15

Clarke v. Wis. Elections Comm'n, 2023 WI 79, 998 N.W.2d 370 ... passim

Dairyland Greyhound Park, Inc. v. Doyle, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408 10

Gill v. Whitford, 138 S. Ct. 1916 (2018) 20

In re Murchison, 349 U.S. 133 (1955) 24

Johnson v. Wis. Elections Comm'n, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469. ..... 7, 8, 18, 21

Johnson v. Wis. Elections Comm'n, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 ..... passim

Linden Land Co. v. Milwaukee Elec. Ry. & Lighting Co., 107 Wis. 493, 83 N.W. 851 (1900) 20

Miller v. Hanover Ins. Co., 2010 WI 75, 326 Wis.2d 640, 785 N.W.2d 493. 23

National Business Systems, Inc. v. AM Intern, Inc., 607 F.Supp. 1251 (N.D.Ill.1985) 22

Prosser v. Elections Bd., 793 F. Supp. 859 (E.D. Wis. 1992)..... 15

Rogers v. Tennessee, 532 U.S. 451 (2001) 24

Rouse v. Theda Clark Med. Ctr., Inc., 2007 WI 87, 302 Wis. 2d 358, 735 N.W.2d 30 11

Rucho v. Common Cause, 139 S. Ct. 2484 (2019)..... 18

Schauer v. DeNeveu Homeowner's Ass'n, Inc., 194 Wis. 2d 62, 533 N.W.2d 470 (1995) 12, 22

Schwochert v. Am. Family Mut. Ins. Co., 166 Wis.2d 97, 479 N.W.2d 190 (Ct. App. 1991) 23

Serv. Emps. Int'l Union Loc. 1 v. Vos, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 ..... 8, 20

State ex rel. M.L.B. v. D.G.H., 122 Wis. 2d 536, 363 N.W.2d 419 (1985) 21, 22

State v. Harrison, 2020 WI 35, 391 Wis. 2d 161, 942 N.W.2d 310 17

Tietsworth v. Harley-Davidson, Inc., 2007 WI 97, 303 Wis. 2d 94, 120, 735 N.W.2d 418 9

Whitford v. Gill, 218 F. Supp 3d. 837 (W.D. Wis. 2016) 24

Wisconsin State AFL-CIO v. Elections Bd., 543 F. Supp. 630 (E.D. Wis. 1982) 16

Statutes

Wis. Stat. § 801.01(2) 10

Wis. Stat. § 806.07 ..... 10, 11, 12, 21

Wis. Stat. § 806.07(1)(g) 22

Wis. Stat. § 806.07(1)(h) 23

Wis. Stat. § 809.64 ..... passim

Wis. Stat. § 809.84 11

Rules

Fed. R. Civ. P. 60(b) 21

Fed. R. Civ. P. 60(b)(5) 22

INTRODUCTION

The current congressional maps—proposed by Governor Evers and adopted by this Court in *Johnson II*—are constitutional and comply with all applicable state and federal laws. The Hunter Intervenors-Petitioners' (herein, the "Hunter Intervenors") motion for relief from judgment should be denied because it is procedurally improper and fails on the merits.

The Hunter Intervenors argue that this Court's decision in *Clarke v. WEC*, which declined to follow "any portions of *Johnson I, Johnson II*, and *Johnson III* that mandate a least change approach," entitles them to equitable relief from the *Johnson II* decision, which applied the "least change" approach in the remedial phase. *See* Hunter Intervenors' Memorandum, January 16, 2024 at 8 (quoting *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶ 63, 998 N.W.2d 370). This argument is a nonstarter.

The Hunter Intervenors do not allege that the *Johnson II* congressional maps are unconstitutional or otherwise violate the law for any reason. Unlike in *Clarke,* where it was alleged—and this Court ultimately found—that the state legislative maps were unconstitutional because they lacked literal contiguity, the Hunter Intervenors make no such claim with respect to *Johnson II*'s congressional maps—nor could they. *See Clarke*, 2023 WI 79, ¶¶ 3, 7, 10–35.

Further, that the *Johnson II* Court declined to assess "partisan fairness" does not render the maps they selected unconstitutional, and the Hunter Intervenors do not allege that it does. The *Johnson II* Court had no constitutional obligation to consider "partisan fairness" at the remedial phase and, in fact, could not do so because "partisan fairness"

claims are nonjusticiable political questions. *See, e.g., Johnson v. Wis. Elections Comm'n (Johnson I)*, 2021 WI 87, ¶¶ 8, 39–63, 399 Wis. 2d 623, 967 N.W.2d 469.

A change in this Court's remedial-phase reasoning in a separate case—which is what the Hunter Intervenors' argument boils down to—is simply not enough to justify tossing the current congressional maps and starting over, especially because the current congressional maps have no constitutional flaws that need to be remedied. Although the Hunter Intervenors clearly want a particular outcome, they cannot simply ask this Court to alter a constitutionally compliant remedy because they think a remedy from the current Court would give them a more favorable result. They need more, and they lack any cogent legal argument enabling them to get the result they seek.

The Hunter Intervenors' motion for relief from judgment in *Johnson II* should be denied.

BACKGROUND

The *Johnson* litigation was about malapportionment—a constitutional violation present every ten years as soon as the federal decennial census is released. *See Johnson I,* 2021 WI 87, ¶¶ 5–6; *See also Johnson v. Wis. Elections Comm'n (Johnson II)*, 2022 WI 14, ¶¶ 1–2, 400 Wis. 2d 626, 971 N.W.2d 402. After the 2020 census was released, the Johnson Petitioners asked this Court to declare the then-existing maps unconstitutional, on a malapportionment basis, and to impose new maps if the Governor and Legislature failed in their constitutional duty to enact new maps. *Johnson I*, 2021 WI 87, ¶¶ 5–6.

Nothing about the *Johnson* litigation was novel. Indeed, the *Johnson* court granted the Petition and declared the 2011 maps

unconstitutional for one, and only one, reason: they no longer complied with the Wisconsin Constitution's population equality requirements. *Id.* ¶¶ 18–20. Moreover, the *only* reason this Court became involved in *Johnson* was because the Legislature and Governor were unsuccessful in enacting a new map through the legislative process–not because this Court is supposed to independently develop and adopt new maps. *See Id*. ¶19; *See also Johnson II*, 2022 WI 14, ¶¶ 1–2.

This Court's judicial power required the Court in *Johnson* to appropriately tailor any remedy it imposed to the constitutional violation it identified, and nothing more. *Serv. Emps. Int'l Union Loc. 1 v. Vos*, 2020 WI 67, ¶ 47, 393 Wis. 2d 38, 946 N.W.2d 35 ("It goes to the appropriate reach of the judicial power to say what the law is, and to craft a remedy appropriately tailored to any constitutional violation."); *See also, infra*, Section II (C). By making only those changes necessary to remedy the constitutional violation before it—malapportionment—the *Johnson* Court's actions were consistent with that principle. *See Johnson I*, 2021 WI 87, ¶ 8. That the proper role of the judiciary is to remedy the constitutional violation before it, and nothing more, was not overruled by this Court's departure from the "least change" approach in *Clarke,* despite what Hunter Intervenors now claim. *See* Hunter Intervenors' Memorandum, January 16, 2024 at 10–13. Instead, the proper role of the judiciary in fixing constitutional violations, and nothing more, is a prevailing principle present in each and every case. *See e.g., infra*, Section II (A) (explaining that, in redistricting cases, courts have approached redistricting from a perspective that minimizes unnecessary change when remedying constitutional violations).

The current congressional map is constitutional and in compliance with all applicable state and federal laws. In *Johnson II*, the Hunter Intervenors acknowledged that fact and urged the Court to adopt the current congressional maps, arguing that it "compl[ied] with all relevant state and federal law." Hunter Intervenors' Resp. Brief, Filed December 30, 2021 at 13. They do not allege anything to the contrary now.

ARGUMENT

The Hunter Intervenors' motion for relief from judgment should be denied. First, it is procedurally improper. Second, even if this motion were properly brought, it fails on the merits for a variety of reasons. Alternatively, if the Court were to grant the motion, there must be additional time to properly re-litigate this case.

I. The Court should deny the motion for relief from the Johnson II congressional maps judgment because the motion is procedurally improper.

First, the Court should deny the motion for relief for four separate procedural reasons: (1) it is actually a motion for reconsideration under Wis. Stat. § 809.64 and is untimely; (2) Wis. Stat. § 806.07 does not apply to decisions of the Wisconsin Supreme Court; (3) relief from judgment cannot be awarded to a party against whom no judgment was rendered, and even if it can, Movants assert an improper basis for such relief; and (4) given that this is a different "court" than the one that decided *Johnson*, prudential concerns weigh against allowing an untimely motion for reconsideration.

A. This motion is effectively an untimely motion to reconsider under Wis. Stat. § 809.64.

Motions to reconsider decisions of this Court are governed by Wis. Stat. § 809.64. *Tietsworth v. Harley-Davidson, Inc.,* 2007 WI 97, ¶ 48, 303 Wis. 2d 94, 120, 735 N.W.2d 418; *Dairyland Greyhound Park, Inc. v.*

Doyle, 2006 WI 107, ¶ 286, 295 Wis. 2d 1, 719 N.W.2d 408 ("The decisions of this court are final if not set aside on a motion for reconsideration in the case in which the ruling was issued, Wis. Stat. § 809.64 (2003–04), or overturned by a federal court on a federal question.").

Wis. Stat. § 809.64 states as follows:

> A party may seek reconsideration of the judgment or opinion of the supreme court by filing a motion under s. 809.14[1] for reconsideration **within 20 days** after the date of the decision of the supreme court. (Emphasis added.)

This Court's decision in in this case adopting the congressional maps submitted by Governor Evers was dated March 1, 2022. *Johnson II*, 2022 WI 14, ¶ 52 ("To remedy the unconstitutional malapportionment of the 2011 congressional and state legislative maps, we adopt the Governor's proposed congressional and state legislative maps."). That means that pursuant to Wis. Stat. § 809.64 the Hunter Intervenors had until March 21, 2022, to move for reconsideration. They are approximately one year and ten months too late.

B. Wis. Stat. § 806.07 does not apply in this Court.

The Johnson Petitioners could not find any case that applies Wis. Stat. § 806.07 to decisions of *this* Court and the Hunter Intervenors have certainly not cited any such case. Per Wis. Stat. § 801.01(2), "Chapters 801 to 847 govern procedure and practice in circuit courts of this state in all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin except where different procedure is prescribed by statute or rule." The key provision of Wis. Stat. § 801.01(2) is that the procedures in Chapters 801 to 847 (which necessarily includes the procedures in 806.07) apply <u>except where different procedure is prescribed by statute or rule</u>. And relevant here, Wis. Stat. § 809.64

prescribes just that: a *different* procedure with different timing than Wis. Stat. § 806.07 and, therefore, it is the rule in Wis. Stat. § 809.64 applies.

Looking at the same issue through a second lens, Wis. Stat. § 809.84 states that:

> An appeal to the court is governed by the rules of civil procedure as to all matters not covered by these rules unless the circumstances of the appeal or the context of the rule of civil procedure requires a contrary result.

This statute again states that the rules in Chapter 809 trump the procedures found elsewhere in Chapters 801-847. Wis. Stat. § 809.64 "covers" the matter of requests for reconsideration. Thus, that is the rule that governs here and not Wis. Stat. § 806.07.

Further, when dealing with statutory construction, the specific overrules the general. *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶ 37, 302 Wis. 2d 358, 381, 735 N.W.2d 30, 41 ("This is in accordance with the canon of statutory construction providing that where a general statute and a specific statute apply to the same subject, the specific statute controls.")

Here, the specific rule that governs motions for reconsideration in this Court is Wis. Stat. § 809.64. Moreover, if the opposite result was true and Wis. Stat. § 806.07 applied to decisions of this Court, then nothing would prevent parties from moving to reconsider decisions of this Court on a regular basis under Wis. Stat. § 806.07, and with no time limit, simply by arguing that "equity" requires reversal. There would be no finality at all, even with respect to decisions of this Court. That would be an unwise result.

C. Relief from Judgment Cannot be awarded to a Party against Whom No Judgment Was Rendered.

But even if Wis. Stat. § 806.07 applies, the Hunter Intervenors are not entitled to relief from the judgment in *Johnson II* because the judgment was not imposed against them, and therefore, they have nothing to seek relief from. Wis. Stat. § 806.07 states that a court "may relieve a party or legal representative from a judgment" under the grounds set forth in the statute. But the Hunter Intervenors cannot be relieved from a judgment that was not entered against them. The judgment was entered against WEC not the Hunter Intervenors.

Moreover, even if this Court somehow concludes that the Hunter Intervenors *can* seek relief from a judgment against a third party, their motion is still improper because they request relief on an improper basis: the *Clarke* Court's decision to overturn the "least changes" approach does not authorize reopening this case.

Under Wis. Stat. § 806.07, relief from judgment is not authorized "on the ground that the law applied by the court in making its adjudication has been subsequently overruled in an unrelated proceeding." *Schauer v. DeNeveu Homeowner's Ass'n, Inc.*, 194 Wis. 2d 62, 75, 533 N.W.2d 470 (1995) (explaining that Wis. Stat. § 806.07(1)(f) does not authorize relief on this basis). *Clarke* is separate from, and unrelated to, the *Johnson* litigation because *Clarke* involves the state legislative maps, which it held unconstitutional for problems not present in the congressional maps: a lack of literal contiguity due to the existence of municipal islands. *See Clarke*, 2023 WI 79, ¶ 3. Here there are no allegations of such issues with the congressional maps. The only argument the Hunter Intervenors make that they are entitled to relief

from *Johnson II* is because they say Court's *reasoning* has changed. This is not enough.

D. This is not the same Court that decided *Johnson*.

The twenty-day time requirement in Wis. Stat. § 809.64 achieves a particular purpose not expressly stated in the statute: the time deadline in the statute means that the same Court that decided a case originally will decide motions to reconsider the decision. If a party ignores the time limit in Wis. Stat. § 809.64, the party cannot seek reconsideration at a later time when the Court's membership has changed.

Parties can seek to have a decision overruled (as opposed to reconsidered) by a new court, but that would only occur if a new case is filed, that new case is fully litigated and the new case makes its way to and is accepted by the Supreme Court.

The Hunter Intervenors seek a short cut to that requirement and ask a new court (with new personnel) to reconsider a decision of a previous court without having to file a new case, state a viable claim, allow the other parties to litigate the new case and see if the new case makes its way to and is accepted by the Supreme Court.

The Hunter Intervenors seek this short cut because they know that they do not have a viable new case to file. They know that the existing congressional maps do not violate any state or federal requirements. They certainly do not allege any such violations.

Instead, they want to make a so-called political gerrymandering argument, even though there is no such claim that has been recognized under the law and attempt to do so based solely on an attached expert report that has not been tested under cross-examination and which the other parties have not been given an opportunity to rebut. Moreover, it

would be done with one justice who was not on the Court at the time *Johnson* was decided and, as a result, did not participate in oral argument or court conferencing.

The counter-argument may be made that it is the "Court" that has jurisdiction of the case–even if its membership changes–and the Johnson Petitioners do not dispute that, but the point is that the rule in place prevents this very thing from happening by imposing a 20-day time limit. Prudential concerns suggest that ignoring the time limit in Wis. Stat. § 809.64 puts every decision of this Court in jeopardy for years on end with no finality so long as a party can argue that "equity" is on its side.

II. Even if the Hunter Intervenors' motion was procedurally proper, the motion fails on the merits.

Even if this motion were properly brought before the Court, it fails on the merits: (1) The congressional maps in issue comply with all state and federal laws, as both this Court *and the Hunter Intervenors themselves* have acknowledged; (2) "partisan fairness" is not a cognizable cause of action under state or federal law; and (3) there is no violation of the separation of powers. The motion therefore fails under either Section 806.07(1)(g) or (1)(h), and should be denied.

A. The *Johnson II* congressional maps comply with all state and federal laws.

The congressional maps adopted by this Court in *Johnson II* comply with all state and federal laws, and the movants do not attempt to claim otherwise. Instead, they begin with a misunderstanding of this Court's recent decision in *Clarke*, and from that they claim the congressional maps are unlawful. The Hunter Intervenors argue that this Court "struck the 'least change' principle in its entirety out of Wisconsin law." Hunter Intervenors' Memorandum, January 16, 2024 at

8. But movants overstate and misrepresent what this Court did in *Clarke* in order to serve their point and attempt to stretch the law in their favor.

This Court's opinion in *Clarke* overruled "any portions of *Johnson I, Johnson II, and Johnson III* that mandate a least change approach." *Clarke*, 2023 WI 79, ¶63. But overturning a mandate is a far cry from saying that a legal principle may never be used and has become unlawful. The *Clarke* opinion plainly left open the possibility that some form of "least change" *could be* relevant to traditional redistricting criteria at some point, but was not requiring it nor was it planning to use that in adopting new legislative maps to replace the *Johnson III* maps. *Clarke*, 2023 WI 79, ¶62. In fact, applying valid, long-standing redistricting principles will result in a least changes-type approach.

For example, it is widely acknowledged that a goal of core retention is moving as few voters as possible into new districts and that doing so serves legitimate state interests. *See, e.g., Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758, 764, 133 S.Ct. 3, 183 L.Ed.2d 660 (2012); *see also Karcher v. Daggett,* 462 U.S. 725, 740 (1983).

Indeed, without mentioning "least changes" as a legal requirement, the District Court panel in the 2002 redistricting noted that it "undertook its redistricting endeavor in the most neutral way it could conceive—by taking the 1992 reapportionment plan as a template and adjusting it for population deviations." *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at * 7 (E.D. Wis. May 30. 2002), *amended,* No. 01-C-0121, 2002 WL 34127473 (E.D. Wis. July 11, 2002). Other courts have done similar. *Prosser v. Elections Bd.,* 793 F. Supp. 859, 870–71 (E.D. Wis. 1992) (basing its court-drawn plan on the "two best submitted plans," and "creat[ing] the least perturbation in the

[current] political balance of the state."); *Baldus v. Members of Wis. Gov't Accountability Bd.,* 849 F.Supp.2d 840, 849, 852 (E.D. Wis. 2012) (moving the fewest number of people and minimizing senate disenfranchisement is preferable).

Communities of interest is another redistricting concern that implicates a "least changes" approach. Many communities have voted together for extended periods of time and keeping those communities together in new maps is facilitated by making the fewest changes necessary to the existing map. *Wisconsin State AFL-CIO v. Elections Bd.,* 543 F. Supp. 630, 636 (E.D. Wis. 1982) ("Closely related to the goal of maintaining the integrity of county and municipal lines is the objective of preserving identifiable communities of interest in redistricting.").

Following and applying these traditional and long-implemented redistricting principles will result in a "least change"-like result, and this Court has not held that such a result is unconstitutional.

What's more, the Court in *Johnson II* found separately and independently that the Governor's congressional maps not only had complied with its "least change" requirement, but also that the maps complied with all other state and federal laws. *Johnson II*, 2022 WI 14, ¶25. That is, regardless of whether least changes were in place or not, the maps fully comply with the law.

Importantly, though, it was not just this Court who said the *Johnson II* congressional maps complied with state and federal law, it was the *Hunter Intervenors themselves*, who explained that the Governor's maps (which were selected as the Court's congressional maps in *Johnson II*) comply "with all relevant state and federal law." Hunter Intervenors Brief, Filed December 30, 2021 at 13. They now attempt to

rewrite history and argue that the map has no "basis in Wisconsin redistricting principles." Hunter Intervenors' Memorandum, January 16, 2024 at 16. But they cannot have it both ways, and this Court should not allow them to change their position on the legality of the Governor's maps in this way.

The doctrine of judicial estoppel bars the Hunter Intervenors from "abusing the court system" by taking such an inconsistent position. *State v. Harrison*, 2020 WI 35, ¶ 26, 391 Wis. 2d 161, 942 N.W.2d 310 (citation omitted). Judicial estoppel applies when (1) the current position is clearly inconsistent with the earlier position; (2) the facts at-issue are the same in both cases; and (3) "the party to be estopped … convinced the first court to adopt its position." *Id.* ¶ 27 (citation omitted). These three elements are indisputably satisfied here. In *Johnson II*, the Hunter Intervenors argued that the Governor's map "complies with all relevant state and federal law requirements" Hunter Intervenors' Brief, December 30, 2021 at 13, but now argue (without any justiciable basis) that they do not. The facts in dispute here are unchanged *and* the Governor's maps, which the Hunter Intervenors advocated for, were selected in *Johnson II*. Judicial estoppel therefore bars the Hunter Intervenor's argument here now.

The *Johnson II* Congressional maps comply with all relevant state and federal laws, as the Hunter Intervenor and this Court have already determined. Those Congressional maps are not the same as the *Johnson III* legislative maps which this Court found to violate the state constitution. There is no suggestion, nor could there be, that the Congressional maps violate any state or federal law.

B. There is no requirement under the state or federal constitution related to partisan makeup of Congressional districts.

Next, the Hunter Intervenors attempt to revive a previously failed argument by asking this Court, once again, to consider partisanship. *See, e.g.,* Hunter Intervenors' Brief, October 25, 2021 at 1-11. The Court rejected their arguments then, and with no change in facts, they now simply ask the Court to reconsider.

But, as noted, those arguments failed. This Court has already made clear that considering partisanship is inappropriate, because doing so raises a "purely political question," is "untethered to legal rights," and lacks "any judicially manageable standards." *Johnson I,* 2021 WI 87, ¶¶ 39–63.

The United States Supreme Court has also held that there are no "judicially discernible and manageable" standards to judge the partisan "fairness" of a map. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498 (citation omitted), 2502 (2019). In *Rucho*, the Supreme Court rejected all of the various proposals to measure partisan effects as "indeterminate and arbitrary." 139 S. Ct. at 2502–06. At bottom, all such methods depend on "prognostications as to the outcome of future elections, … invit[ing] 'findings' on matters as to which neither judges nor anyone else can have any confidence." *Id.* 2503 (citation omitted). And engaging in such analysis necessarily entangles courts in "the extraordinary step of reallocating power and influence between political parties." *Id.* 2502. Thus, if this Court were to select a new map based in part on some prediction about its partisan effects, the result would be arbitrary, fundamentally unfair, and violate the Johnson Petitioners' due process rights to a fair tribunal.

The *Johnson II* congressional maps submissions were reviewed, by this Court based on purely neutral redistricting criteria without regard to partisanship. This Court should decline the Hunter Intervenors' request to revive their "partisanship" argument, and deny the motion for relief in its entirety.

C. The *Johnson II* Congressional maps do not violate the separation of powers.

Finally, movants argue that continuing to enforce this Court's *Johnson II* congressional maps decision violates the separation of powers doctrine. But that argument is equally flawed.

In its December 22, 2023, decision in *Clarke v. WEC,* this Court did not decide whether the state legislative maps adopted in *Johnson III* violated the separation of powers doctrine. *Clarke*, 2023 WI 79, ¶ 3, n.8 (concluding that it was unnecessary to reach the separation of powers argument because a finding of noncontiguity was sufficient to declare the current state legislative maps unconstitutional). As the *Clarke* litigation illustrated, the separation of powers arguments on this issue are absurd, unworkable, and would destroy the ability of any court to remedy redistricting impasses.

But without another basis for overturning the congressional maps (such as noncontiguity), the Hunter Intervenors focus on what they call a "separation of powers" argument, which amounts to no more than arguing that the *Johnson* Court got the law wrong. Specifically, the Hunter Intervenors argue that enforcement of the current congressional map violates the separation of powers doctrine because the *Johnson* court relied on a "least change" approach when selecting the Governor's proposed congressional maps. But, they point to no conflict between the legislative, executive and judicial branches: they simply argue that by

utilizing a "least change" approach, the *Johnson II* court got the law wrong because it did not "independently analyze" the Governor's proposed map and in particular did not analyze the partisan outcomes. Hunter Intervenors Memorandum, January 16, 2024 at 26–31. This is simply wrong: both because the *Johnson II* Court got the law right, but also, because getting the law wrong would not be a "separation of powers" issue.

The *Johnson* Court independently analyzed all of the maps to make sure that they complied with all relevant laws and concluded that the Governor's congressional map was the most compliant. *Johnson II*, 2022 WI 14, ¶¶13–25. Therefore, the *Johnson* Court fully fulfilled its judicial role.

As noted above, the role of the judiciary is to fix whatever constitutional violation(s) it identifies and do nothing more. *See e.g., Serv. Emps. Int'l Union Loc. 1 v. Vos*, 2020 WI 67, ¶ 47, ("It goes to the appropriate reach of the judicial power to say what the law is, and to craft a remedy appropriately tailored to any constitutional violation."); *Linden Land Co. v. Milwaukee Elec. Ry. & Lighting Co.*, 107 Wis. 493, 83 N.W. 851, 856 (1900) ("To go further, and enjoin other acts which, if done, do not affect the rights in litigation in any way, is simply an exercise of arbitrary power, which cannot be defended for a moment."); *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) ("[A] plaintiff's remedy must be 'limited to the inadequacy that produced [his] injury in fact.'") (citation omitted). That is precisely what the *Johnson II* Court did.

The *Johnson* litigation was *only* about malapportionment, and the 2011 maps were unconstitutional for one, and only one reason: they no longer complied with the Wisconsin Constitution's population equality

requirements. *See Johnson I*, 2021 WI 87, ¶¶18–20; *Johnson II*, 2022 WI 14, ¶ 2. The Johnson Court fixed that problem and did it with a congressional map that the Hunter Intervenors agreed was consistent with all state and federal law. Ongoing enforcement of the current congressional maps is not a separation of powers problem.

In addition, the Hunter Intervenors claim that the *Johnson II* Court violated the separation of powers doctrine by abdicating its duty to consider partisan fairness when adopting a new congressional map. But, as explained above, neither Wisconsin nor federal law imposes such a duty on the court. *See also Johnson I*, 2021 WI 87, ¶¶39–63. Thus, the *Johnson II* Court's decision not to consider partisan outcomes was not an abdication of its duties, but an appropriate acknowledgment of its proper judicial role and the reality that claims of partisan fairness are nonjusticiable in Wisconsin.

The decision against that argument in *Johnson II* does not create a separation of powers problem. The *Johnson II* Court imposed the current congressional maps in a manner consistent with the proper role of the judiciary, which is to remedy the constitutional violation before it and nothing more. This does not violate the separation of powers doctrine.

D. The motion fails under either Wis. Stat. §§ 806.07(1)(g) or 806.07(1)(h).

i. Wis. Stat. § 806.07(1)(g)

Wis. Stat. § 806.07 is based on Fed. R. Civ. P. 60(b). *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 542, 363 N.W.2d 419 (1985). As a result, this Court has long held that courts in Wisconsin should "refer to Wisconsin cases interpreting [806.07] and to federal cases interpreting Rule 60(b) of the Federal Rules of Civil Procedure." *Id.*

This Court has further noted that Fed. R. Civ. P. 60(b)(5), on which Wis. Stat. § 806.07(1)(g) is based, "was intended to preserve for the courts the power to alter final judgments having an ongoing impact when the facts as determined in the original action have changed to a degree that the final judgment must also be changed to comport with the new conditions." *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 544, 363 N.W.2d 419 (1985). Further, this Court has explained that "[t]he chief use of Rule 60(b)(5) apparently has been to obtain relief from a permanent injunction which has become unnecessary due to a change in conditions." *Id*.

Here, no conditions have changed at all. All of the facts now are as they were when *Johnson II* was first decided. The only thing that *has* changed is how much emphasis this Court has said it will place on "least change" as a principle when deciding which state legislative maps to adopt in a separate redistricting case. But even if *Clarke* were not limited to state legislative maps, it would still be of no help to the Hunter Intervenors' 806.07(1)(g) argument. In interpreting its federal analog, this Court has held: "[t]he cases interpreting Rule 60(b)(5) have consistently held that "a change in applicable law does not provide a sufficient basis for relief under [Rule] 60(b)(5)." *Schauer*, 194 Wis. 2d at 73, *citing National Business Systems, Inc. v. AM Intern, Inc.*, 607 F.Supp. 1251, 1254 (N.D.Ill.1985) (additional citations omitted).

That is, a change in case law, if such a change were even applicable to the congressional maps which were adopted by this Court in *Johnson II,* is simply not a sufficient basis to grant the Hunter Intervenors' motion under Wis. Stat. § 806.07(1)(g). There are no changed circumstances here.

ii. Wis. Stat. s. 806.07(1)(h)

Wis. Stat. § 806.07(1)(h) is also of no help to the movants either, and for similar reasons. A change in case law simply cannot give all parties in all cases a chance to come back and seek relief from prior judgments.

Wis. Stat. § 806.07(1)(h) is a "catch all" provision allowing a party to seek relief from a judgment for "[a]ny other reasons justifying relief from the operation of the judgment." But granting relief under Wis. Stat. § 806.07(1)(h) requires "extraordinary circumstances" that "justify[ ] relief in the interest of justice." *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶ 35, 326 Wis.2d 640, 785 N.W.2d 493.

Here, there are no extraordinary circumstances. Again, there are no factual changes at all being claimed by movants, only changes in how this Court will apply the law in a separate case. "The general rule is that 'a change in the judicial view of an established rule of law is not an extraordinary circumstance which justifies relief from a final judgment under [Wis. Stat. § 806.07(1)(h)].'" *Allstate Ins. Co. v. Brunswick Corp.*, 2007 WI App 221, ¶ 7, 305 Wis.2d 400, 740 N.W.2d 888 (alteration in original) (quoted source omitted) (capitalization omitted); accord *Schwochert v. Am. Family Mut. Ins. Co.*, 166 Wis.2d 97, 103, 479 N.W.2d 190 (Ct. App. 1991), aff'd, 172 Wis.2d 628, 494 N.W.2d 201 (1993) (same).

As a result, the Hunter Intervenors' motion under Wis. Stat. § 806.07(1)(h) also fails.

III. In the alternative, the Court must impose an extended timeline to relitigate this case and (if necessary) adopt a new Congressional map.

In the alternative, if this Court is going to reconsider the *Johnson II* decision, this Court must impose an extended timeline to properly

relitigate this case and (if necessary) adopt new congressional maps, consistent with due process requirements.

The due process clause requires "[a] fair trial in a fair tribunal," *In re Murchison*, 349 U.S. 133, 136 (1955), and protects against "unfair and arbitrary judicial action." *Rogers v. Tennessee*, 532 U.S. 451, 467 (2001).

Consistent with due process, this Court must not reconsider *Johnson II* and order the imposition of new congressional maps on an even more abbreviated schedule than that in *Clarke*. The *only* claim the Hunter Intervenors have raised in support of their motion for relief from judgment is that the current congressional maps must be replaced because they were imposed by a court that focused on "least change" and did not consider partisan fairness. As explained above, a change in the Court's reasoning is not proper grounds for granting relief from judgment. And, the Hunter Intervenors' only remaining claim is that they desire the congressional maps to be considered on a "partisan fairness" basis. But if this Court wishes to assess the partisan fairness of the congressional maps, it must hold a full-scale trial with extensive fact-finding before even beginning to assess whether the current map and/or any proposed replacement maps are "fair" on a partisan basis. *See, e.g., Whitford v. Gill*, 218 F. Supp 3d. 837 (W.D. Wis. 2016). The nature of the "partisan fairness" issue (and in particular, the lack of judicially manageable standards for assessing it) entitles all parties to ample opportunity for briefing and input, and is not something that can be rushed into place before the 2024 elections. *See Id*. Ensuring a "fair trial and a fair tribunal" requires more. *In re Murchison*, 349 U.S. at 136.

For these reasons, due process requires an extended timeline for assessing the merits of the Hunter Intervenors' claims, and the merits of

any remedy this Court may impose if it finds, for some reason, that the current congressional map violates the Wisconsin Constitution.

CONCLUSION

For the foregoing reasons, the Johnson Petitioners respectfully request that this Court deny the Hunter Intervenors' motion for relief from judgment. In the alternative, if this Court grants the motion, the Johnson Petitioners request an extended timeline for re-litigating this case, consistent with due process.

DATED this 29th day of January, 2024.

Respectfully submitted,

Lucas T. Vebber

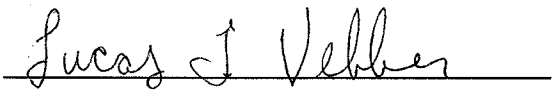
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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 5,527 words as calculated by Microsoft Word.

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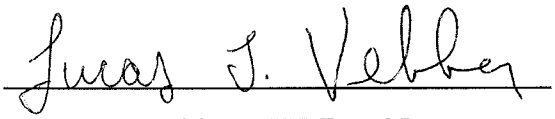
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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a copy of this brief to be served upon counsel for each of the parties via email.

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