BY ORDER OF THE COURT

Date Signed: 3.31.26

s/ Julie Genovese	s/Emily Lonergan	s/Mark Sanders
Dane County Circuit Judge	Outagamie County Circuit Judge	Milwaukee County Circuit Judge
Branch 13	Branch 2	Branch 28

STATE OF WISCONSIN | CIRCUIT COURT JUDGE GENOVESE JUDGE LONERGAN JUDGE SANDERS | DANE COUNTY

ELIZABETH BOTHFELD, et al.,

Plaintiffs,

vs. Case No. 25 CV 2432

WISCONSIN ELECTIONS COMMISSION, et al.,

Defendants.

DECISION & ORDER

INTRODUCTION

In anticipation of the 2026 midterm elections, eleven Wisconsin voters filed this case in Dane County Circuit Court seeking to declare the congressional map adopted by our supreme court in 2022 unconstitutional and enjoin its use. These Plaintiffs allege that the map violates the separation-of-powers doctrine as well as Sections 1, 3, 4 and 22 of Article I of the Wisconsin Constitution.

The Wisconsin Supreme Court appointed this three-judge panel (the "Panel") pursuant to Wis. Stat. §751.035[1] to hear the case. Plaintiffs assert that the Wisconsin Supreme Court's recent decision in *Clarke v. Wisconsin Elections Commission*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370, invalidated the methodology used to create the map and therefore the map itself. Intervenor-Defendants urge the Panel to reject Plaintiffs' reading of *Clarke* and dismiss all claims. For the reasons stated, we deny Plaintiffs' Motion for Judgment on the Pleadings and grant the Intervenor-Defendants' Motion to Dismiss.

PROCEDURAL HISTORY

On July 21, 2025, Plaintiffs filed this action for declaratory judgment, asking the Dane County Circuit Court to declare the 2022 congressional map unconstitutional on four grounds:

> **Count 1**: The congressional map violates the separation-of-powers doctrine. By committing to the least-change directive when selecting the congressional map, the Wisconsin Supreme Court improperly substituted the partisan judgment that prevailed in the 2011 political process for its own. Compl., dkt. 9, ¶¶ 76-82.
>
> **Count 2**: The congressional map is the result of unlawful partisan gerrymandering, in violation of the Wisconsin Constitution's Equal Protection Guarantee in Article I, Section 1. *Id.*, ¶¶ 83-86.
>
> **Count 3**: The congressional map is the result of unlawful partisan gerrymandering, in violation of the Wisconsin Constitution's Free Speech and Association Guarantee in Article I, Sections 3 and 4. *Id.*, ¶¶ 87-93.
>
> **Count 4:** The congressional map is the result of unlawful partisan gerrymandering,

[1] Wis. Stats. §751.03(1) reads: Upon receiving notice under s. 801.50 (4m), the supreme court shall appoint a panel consisting of 3 circuit court judges to hear the matter. The supreme court shall choose one judge from each of 3 circuits and shall assign one of the circuits as the venue for all hearings and filings in the matter.

in violation of the Wisconsin Constitution's Free Government Guarantee in Article I, Section 22. *Id.*, ¶¶ 94-97.

The Wisconsin Elections Commission ("WEC"), its commissioners and its administrator were named as defendants. *Id.*, ¶¶ 27-29.

Upon filing the action in the Dane County Circuit Court, Plaintiffs petitioned the Dane County Clerk of Courts to notify the Clerk of the Wisconsin Supreme Court of the filing of this action pursuant to Wis. Stat. § 801.50(4m) and petitioned the Wisconsin Supreme Court to appoint a panel of three circuit court judges pursuant to Wis. Stat. § 751.035. Letter to COC, dkt. 10; Letter to Supreme Court, dkt. 11.

On November 25, 2025, the Wisconsin Supreme Court appointed this Panel to hear the case. *Bothfeld v. Wisconsin Elections Comm'n,* 2025 WI 53, 418 Wis. 2d 545, 27 N.W.3d 508. The Wisconsin State Legislature (the "Legislature"), Congressmen Glenn Grothman, et al. (the "Congressmen"), and Billie Johnson et al. (the "Johnson Intervenors") were permitted to intervene as defendants (collectively, the "Intervenor-Defendants"). Orders Granting Mots. to Intervene, dkts. 86, 115, 117.

The case is now before this Panel on competing Motions for Judgment on the Pleadings and to Dismiss. Plaintiffs have moved for judgment on the pleadings on their separation-of-powers claim. Mot. for J. on the Pleadings, dkt. 43. Intervenor-Defendants move to dismiss all of Plaintiffs' claims. Mots. to Dismiss, dkts. 138, 141, 144. Defendants, Wisconsin Elections Commission and named officials, take no position on the motions.

FACTUAL BACKGROUND

This case is rooted in over a decade of legislative and judicial action regarding Wisconsin's electoral maps. Following the 2010 census, the Republican-controlled Wisconsin State Legislature enacted new congressional district boundaries to account for population shifts throughout the state. These boundaries were signed into law by Governor

Scott Walker in 2011. 2011 Wis. Act 44. Plaintiffs allege these electoral maps (the "2011 maps") reflect an extreme partisan skew.

After the subsequent census in 2020, the legislature again re-drew both the state legislative boundaries and the congressional district lines in response to demographic changes. On this occasion, however, Governor Tony Evers vetoed the proposed congressional and legislative maps, leaving the 2011 maps in effect despite their noncompliance with the Wisconsin and United States Constitutions due to intervening population shifts.

The resulting impasse prompted Wisconsin voters to file an original action in our supreme court seeking judicial redistricting. *Johnson v. Wisconsin Elections Comm'n ("Johnson I")*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469. In *Johnson I*, the Wisconsin Supreme Court determined that the 2011 maps no longer satisfied state and federal requirements and articulated the criteria to govern adoption of new maps. *Id.*, ¶¶ 2-4. The court instructed that remedial maps must bring the existing maps into compliance with the United States Constitution, the Wisconsin Constitution, and the Voting Rights Act. The court held, however, that it would consider only federal and state constitutional and statutory requirements —it would not consider partisan composition, which it characterized as a nonjusticiable political question. *Id.*, ¶¶ 39-52. The court further announced that it would apply a "least-change approach" in fashioning remedial maps, utilizing the legislature's 2011 maps as a "template" and "implement[ing] only those remedies necessary to resolve constitutional or statutory deficiencies." *Id.*, ¶ 72.

The parties in *Johnson I* submitted proposed maps for the court's consideration. *Johnson v. Wisconsin Elections Comm'n ("Johnson II")*, 2022 WI 14, ¶ 5, 400 Wis. 2d 626, 971 N.W.2d 402. In *Johnson II*, applying the least-change approach, our supreme court adopted the Governor's proposed congressional, state senate, and state assembly maps. *Id.*,

¶ 19. The congressional map was chosen because it achieved population equality while making the least change from existing boundaries and complied with state and federal law. *Id.*, ¶¶ 19-25. The same criteria guided the adoption of state legislative districts.[2]

A year later in *Clarke*, however, the Wisconsin Supreme Court took a different view of the judiciary's role in redistricting cases. 2023 WI 79, 410 Wis. 2d 1. Faced with a constitutional challenge to the state legislative districts, the court determined that the state maps violated the contiguity requirement of the Wisconsin Constitution. *Id.*, ¶ 3. In deciding on remedial maps, the court overruled *Johnson I*, *II*, and *III* to the extent that those cases mandated a least-change methodology. *Id.*, ¶ 63. Describing the plaintiffs' extreme partisan gerrymandering claim to be an "important and unresolved legal question," the court declined to decide the issue, but indicated that partisan fairness was one factor the court could consider in adopting remedial maps. *Id.*, ¶¶ 7, 69-71.

Clarke enjoined the use of the state legislative maps adopted in the *Johnson* litigation. *Id.*, ¶ 77. Plaintiffs now ask this Panel to do the same for the congressional map adopted in *Johnson II*. Plaintiffs argue that *Clarke's* reasoning applies with equal force to the congressional map and renders the least-change methodology employed in the *Johnson* cases a separation-of-powers violation. They also assert that the congressional map is unconstitutional because it is the result of extreme partisan gerrymandering and thus violates Sections 1, 3, 4 and 22 of Article I of the Wisconsin Constitution.

[2] With respect to the state legislative maps, the United States Supreme Court later reversed *Johnson II* on the issue of whether additional Black-majority districts were required. *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U.S. 398 (2022). Thereafter, these maps were adjusted—again with a least-change methodology. *Johnson v. Wisconsin Elections Comm'n ("Johnson III")*, 2022 WI 19, ¶ 72, 401 Wis. 2d 198, 972 N.W.2d 559. The United States Supreme Court did not address the congressional map.

SCOPE OF AUTHORITY

The Panel believes it prudent to address the unique forum in which this case is being heard. Although Wisconsin courts have a long history of hearing electoral districting cases, the courts have been unable to decide on the best forum or procedure for deciding these cases.

In 2002, the Wisconsin Supreme Court stated that an original action was the proper way to challenge redistricting maps, declaring that "there is no question but that this matter warrants this court's original jurisdiction; any reapportionment or redistricting is by definition, *publici juris*, implicating the sovereign rights of the people of this state." *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶ 17, 249 Wis. 2d 706, 639 N.W.2d 537. The *Jensen* court recognized, however, that there was "no established protocol for adjudication of redistricting litigation" and "a procedure would have to be devised and implemented, encompassing, at a minimum, deadlines for development and submission of proposed plans, some form of factfinding (if not full-scale trial), legal briefing, public hearing and decision." *Id.*, ¶ 20. Because the maps were already subject to a federal challenge, the *Jensen* court declined to exercise its original jurisdiction. *Id.*, ¶ 25. The court contemplated hearings, however, to initiate rule-making procedures to address factfinding (by a commissioner or panel or special masters or otherwise). *Id.*, ¶ 24. Nothing resulted from that endeavor.[3]

More recently, two members of the Wisconsin Supreme Court expressed their belief that federal courts, insulated from the political process and with more experience conducting redistricting trials, were better equipped to hear these cases. *Johnson v.*

[3] After *Jensen*, Chief Justice Abrahamson appointed a Redistricting Committee that was tasked with proposing procedural rules to be used by the court in the event of a future redistricting challenge, but the proposed procedural rules were ultimately not adopted, and the Redistricting Committee was discharged. *See* S. Ct. Order 02-03, *In the matter of the adoption of procedures for original action cases involving state legislative redistricting*, issued Jan. 30, 2009.

Wisconsin Elections Comm'n ("Johnson III"), 2022 WI 19, ¶¶ 158, 401 Wis. 2d 198, 972 N.W.2d 559 (Karofsky, J., dissenting) ("Our initial miscalculation was embarking on this journey in the first place, when a majority of this court granted the petitioners' original petition. I joined the dissent from that grant because of the numerous 'reasons for preferring a federal forum' not least of which was that this court had 'no experience in drawing district maps.'"); *see also Johnson I*, 2021 WI 87, ¶ 88 (Dallet, J. dissenting) ("[F]ederal courts, composed of judges insulated from partisan politics by lifetime appointments, are best suited to handle redistricting cases.")

Justice Karofsky recognized the challenges of factfinding in original jurisdiction cases, noting Wis. Stat. § 751.09 would allow the Wisconsin Supreme Court to retain jurisdiction over the legal issues while arranging "for proper fact finding and examination of expert witnesses, either in front of all of the Justices or through a referee...." *Johnson III*, 2022 WI 19, ¶ 185 (Karofsky, J., dissenting).

With this history, the case comes before the Panel through an order under Wis. Stat. § 751.035. The Wisconsin Supreme Court created this Panel after denying multiple petitions for original actions and without mention of appointing a referee to conduct necessary factfinding under § 751.09. Section 751.035 is a relatively new statute, and it has not been used before to address a redistricting case. Neither the statute nor the order appointing this Panel provides guidance on the Panel's authority or scope. Is this Panel a circuit court, an arm of the state supreme court, a referee or something else? Is the mission purely factfinding, or is the Panel authorized to rule on legal issues too? Since § 751.035 states those appointed to a panel are to be "circuit court judges," we will act as a circuit court and will assume no endowment of additional powers or responsibilities. As circuit court judges, we conclude that the Panel possesses no authority to supersede decisions of the Wisconsin Supreme Court.

PANEL'S ANALYSIS AND CONCLUSIONS

I. Plaintiffs' Motion for Judgment on the Pleadings (Separation of Powers)

A. Legal Standard

On a motion for judgment on the pleadings under Wis. Stat. § 802.06(3), courts assess the sufficiency of the complaint and answer to determine if there is a genuine issue for trial. *McNally v. Cap. Cartage, Inc.*, 2018 WI 46, 381 Wis. 2d 349, 912 N.W. 2d 35. A motion for judgment on the pleadings is treated like a motion for summary judgment if affidavits or issues outside the pleadings are considered. *Id.*; *Magnum Radio v. Brieske*, 217 Wis.2d 130, 135, 577 N.W.2d 377, 378 (Ct. App. 1998). The court's analysis begins by assessing whether the complaint states a claim for which relief may be granted, assuming the facts pled by the plaintiff and all reasonable inferences following are true. *Schuster v. Altenberg*, 144 Wis .2d 223, 228, 424 N.W.2d 159, 161 (1988). If a claim for relief is stated, the court turns to the responsive pleadings to determine if a material factual issue exists. *Id.* If no genuine issue of material fact exists, the court may determine that the moving party is entitled to judgment as a matter of law. *Id.*

B. Discussion

According to Plaintiffs, the Wisconsin Supreme Court violated the separation-of-powers doctrine in the *Johnson* litigation by failing to exercise independent judgment and instead employing the least-change methodology which used the extremely partisan 2011 maps as a template. Specifically, Plaintiffs allege that the Wisconsin Supreme Court abdicated its authority "by committing to the now-defunct least-change directive when selecting the congressional map." As a result, "the Wisconsin Supreme Court improperly substituted the partisan judgment that prevailed in the 2011 political process as its own." Compl., dkt 9, ¶ 80.

"The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, is implicit in the division of governmental powers among the judicial, legislative and executive branches." *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 772, 775 (1999) (internal quotation omitted). The default rule is that "legislative power is to be exercised by the legislative branch, executive power is to be exercised by the executive branch, and judicial power is to be exercised by the judicial branch," but there are exceptions. *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 33, 393 Wis. 2d 38, 946 N.W.2d 35.

"A separation-of-powers analysis ordinarily begins by determining if the power in question is core or shared." *Id.*, ¶ 35. "Core powers are understood to be the powers conferred to a single branch by the constitution." *Id.* Shared powers, by contrast, "lie at the intersections of these exclusive core constitutional powers." *Id.* "The branches may exercise power within these borderlands but no branch may unduly burden or substantially interfere with another branch." *Id.* Courts "must be assiduous in patrolling the borders between the branches." *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 45, 382 Wis. 2d 496, 914 N.W.2d 21. Thus, the Panel's analysis must begin by determining the scope of the judiciary's powers in redistricting cases.

Article VII, § 2 of the Wisconsin Constitution outlines the power of the judiciary:

> The judicial power of this state shall be vested in a unified court system consisting of one supreme court, a court of appeals, a circuit court, such trial courts of general uniform statewide jurisdiction as the legislature may create by law, and a municipal court if authorized by the legislature under section 14.

"By vesting the judicial power in a unified court system, the Wisconsin Constitution entrusts the judiciary with the duty of interpreting and applying laws made and enforced by coordinate branches of state government." *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 37, 376 Wis. 2d 147, 897 N.W.2d 384. The separation of powers prevents courts "from

abdicating core power just as much as it protects the judiciary from encroachment by other branches." *Tetra Tech EC*, 2018 WI 75, ¶ 48. "Resolute resistance to intrusions across the constitutionally constructed judicial perimeter does not represent a power play by one branch vis-à-vis another." *Gabler*, 2017 WI 67, ¶ 39.

Plaintiffs argue that the current congressional map violates the separation-of-powers doctrine because the judiciary abdicated its authority to interpret and apply the law when it employed the least-change methodology. While the Wisconsin Supreme Court did reject the least-change methodology in *Clarke*, it did not do so based on a finding that there was a separation-of-powers violation. 2023 WI 79, ¶¶ 60-63. Instead, the court rejected the methodology because it lacked an agreed definition and scope. *Id.*, ¶¶ 61-63. The *Clarke* decision contains no separation-of-powers analysis, and while the court emphasized the need for the judiciary to reach an independent judgment, it did not find the *Johnson* courts failed to exercise a core judicial power.

In *Clarke*, the Wisconsin Supreme Court handled the analysis of the state legislative maps in two relevant parts which we will refer to as the constitutional violation and remedy.[4] 2023 WI 79, ¶ 9. In the "violation section", the court analyzed whether the state legislative maps were unconstitutional. *Id.* While the court accepted review and ordered briefing on the separation-of-powers question, it never engaged in a discussion of the issue. Instead, it focused its decision upon a finding that the maps violated the contiguity requirements contained in Article IV, Sections 4 and 5 of Wisconsin Constitution. *Id.*, ¶¶ 8-9. After reaching its conclusion that the state legislative maps were unconstitutional because they were not contiguous, the court then turned to the remedy:

[4] The five headings contained in the *Clarke* decision are as follows: I. Background, II. Contiguity, III. Defenses, IV. Remedy, and V. Conclusion. 2023 WI 79. Relevant to this Decision and Order are the contiguity analysis which this Panel refers to as the constitutional violation section and the remedy discussion. Notably, the Wisconsin Supreme Court did not reach its discussion on least change until the Remedy section. *Id.*

enjoining the use of the maps in future elections and explaining the process in crafting remedial state legislative maps. *Id.*,¶ 9.

Plaintiffs ask this Panel to read into *Clarke* an analysis that it does not contain. The Wisconsin Supreme Court did not find the state legislative maps were unconstitutional because of the least-change methodology. Rather, the court found that the maps were unconstitutional because they violated the contiguity requirements under the Wisconsin Constitution. In the "remedy" section, the court undertook to "articulate the principles the court will follow when adopting remedial maps." *Id.*, ¶ 56. It was only in this context that the court addressed and overruled the least-change approach. *Id.*, ¶ 63.

To find a separation-of-powers violation in the congressional map independent of *Clarke*, this Panel would have to scrutinize the *Johnson II* decision and conclude that the Wisconsin Supreme Court violated the separation-of-powers doctrine by abdicating its constitutional role. While the Panel can rely on *Clarke* to remove the least-change mandate when adopting remedial maps, the Panel cannot conclude on its own that our highest court in the *Johnson II* decision violated the separation-of-powers doctrine. *See generally Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d at 256 ("[T]he supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case").

Without a clear holding from the Wisconsin Supreme Court that the abandonment of the least-change methodology applies to more than the crafting of remedial maps, this Panel has no basis to find the current congressional map invalid. As the Intervenor-Defendants argue, nothing in *Clarke* undermines the conclusion that the *Johnson II* map otherwise complies with all relevant laws. Johnson Resp. Br., dkt. 140 at 11; Congressmen Resp. Br., dkt. 146 at 3-5. Because Plaintiffs have not shown that they are entitled to judgment as a matter of law, their motion for judgment on the pleadings is denied.

Moreover, because only the Wisconsin Supreme Court can determine whether it violated the separation-of-powers doctrine when it applied the least-change methodology, this claim must be dismissed.

II. Intervenor-Defendants' Motions to Dismiss (Partisan Gerrymandering)

The three remaining claims allege that the 2022 congressional map is unconstitutional because it perpetuates partisan unfairness from the 2011 map. Plaintiffs argue that by "cracking" and "packing" Democratic voters into two congressional districts, the map violates Wis. Const. Article 1, § 1 (Equal Protection Guarantee); Article 1, §§ 3, 4 (Free Speech and Association Guarantee); and Article 1, § 22 (Free Government Guarantee).

A. Legal Standard

"A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693 (citations omitted). The motion looks only within the four corners of the complaint. *See Wausau Tile, Inc. v. County Concrete Corp.*, 226 Wis. 2d 235, 245, 593 N.W.2d 445, 450 (1999). For purposes of determining whether a complaint is legally sufficient, the court: (1) accepts all facts pleaded as true; (2) derives all reasonable inferences from those facts; and (3) construes those facts and inferences in the light most favorable to the plaintiff. *Preston v. Meriter Hosp., Inc.*, 2005 WI 122, ¶ 13, 284 Wis. 2d 264, 700 N.W.2d 158. The court does not add facts in the process of construing a complaint, and legal conclusions stated in the complaint need not be accepted as true. *Data Key*, 2014 WI 86, ¶ 19. "(T)he complaint should be dismissed as legally insufficient only if it appears to a certainty that no relief can be granted under any set of facts that the plaintiff can prove in support of [the] allegations." *Strid v. Converse*, 111 Wis. 2d 418, 422, 331 N.W.2d 350, 353 (1983)

B. Discussion

Intervenor-Defendants' primary argument is that both the federal and Wisconsin courts have already decided that these claims present nonjusticiable political questions. Once again, this Panel lacks clear direction on whether or how Plaintiffs' partisan gerrymandering claims are to be addressed. Both federal and Wisconsin courts have long grappled with how best to analyze allegations of partisan unfairness in electoral maps, and the guidance continues to change.

1. Federal Courts

The 2011 congressional map was challenged in *Baldus v. Members of Wisconsin Government Accountability Board*, 849 F. Supp. 2d 840 (E.D. Wis. 2012). On the justiciability of the plaintiffs' partisan gerrymandering claim, a federal three-judge panel held that the plaintiffs had the initial burden of pleading a workable standard to apply. *Id.* at 854. The *Baldus* panel left open the possibility of a partisan gerrymandering claim, stating:

> [P]erhaps the court will find some day that the First Amendment also protects persons against state action that intentionally uses their partisan affiliation to affect the weight of their vote. Legislative districts drawn behind a Rawlsian veil of ignorance would arguably give each voter the best chance to express his or her views without anyone putting a thumb on the scale in advance.

Id. at 853-54.

Because the plaintiffs did not identify a workable standard, the *Baldus* panel determined it was unable to evaluate the merits of the partisan gerrymandering claim. *Id.* at 854.

However, the *Baldus* panel went on to find that bipartisan discussions had occurred, and the process employed did not suggest an abuse of partisan advantage. *Id.* The map avoided putting incumbents together in the same district and did not flip districts from

majority-Democrat to majority-Republican or vice versa. *Id.* As a result, the *Baldus* panel held the intervenor-plaintiffs could not succeed on their partisan gerrymandering claim. *Id.*

In *Whitford v. Gill*, another federal three-judge panel assessed a "cracking and packing" challenge to Wisconsin's 2011 state maps and concluded that the 2011 maps' partisan effect could not be justified by the legitimate state concerns and neutral factors that traditionally bear on the reapportionment process. 218 F. Supp. 3d 837, 912 (W.D. Wis. 2016). Applying the federal constitution, the *Whitford* panel considered arguments similar to those raised by the Plaintiffs in this case. *Id.* at 854-55. Like *Baldus*, the *Whitford* panel was receptive to a constitutional challenge based on political gerrymandering, reasoning: "It is clear that the First Amendment and the Equal Protection Clause protect a citizen against state discrimination as to the weight of his or her vote when that discrimination is based on the political preferences of the voter." *Id.* at 883.

The United States Supreme Court vacated and remanded, rejecting partisan-asymmetry metrics such as the efficiency gap as a basis for standing, because such metrics demonstrated the effect that a gerrymander has on the fortunes of political parties, not on the votes of particular citizens. *Gill v. Whitford*, 585 U.S. 48, 50 (2018).

A year later, the United States Supreme Court declared partisan gerrymandering claims to be nonjusticiable political questions under the federal constitution. *Rucho v. Common Cause*, 588 U.S. 684, 718 (2019). The *Rucho* court expressly stated that it was not condoning excessive partisan gerrymandering or holding that such claims cannot be heard in any venue. *Id.* at 719. Instead, *Rucho* opined that there are no workable standards under federal law, but the states through their statutes and constitutions could develop standards and guidance for the state courts to apply. *Id.*

2. Wisconsin Supreme Court

The Wisconsin Supreme Court's recent contributions to the question of partisan

fairness in redistricting reflect differing approaches. In *Johnson I*, Justice Grassl Bradley's lead opinion stated that "after searching in earnest," the court could not find a right to partisan fairness in the Wisconsin Constitution. *Johnson I*, 2021 WI 87, ¶ 53. The majority opinion was specific in its holding:

> We hold: (1) redistricting disputes may be judicially resolved only to the extent necessary to remedy the violation of a justiciable and cognizable right protected under the United States Constitution, the VRA, or Article IV, Sections 3, 4, or 5 of the Wisconsin Constitution;
>
> (2) the partisan makeup of districts does not implicate any justiciable or cognizable right; and
>
> (3) this court will confine any judicial remedy to making the minimum changes necessary in order to conform the existing congressional and state legislative redistricting plans to constitutional and statutory requirements.

Id., ¶ 8.

While Justice Hagedorn did not join this paragraph, he did indicate agreement with the three holdings in his concurring opinion, stating:

> I concur in the majority's conclusions that: (1) remedial maps must comply with the United State Constitution, the Voting Rights Act; and Article IV Sections 3, 4 and 5 of the Wisconsin Constitutions;(2) we should not consider the partisan makeup of districts; and (3) our relief should modify existing maps under a least-change approach.

Id., ¶ 82, n. 4 (Hagedorn, J., concurring)

Where Justice Hagedorn diverged was that he advocated for the ability to consider other redistricting criteria when presented with multiple maps that met the requirements outlined in the majority opinion. *Id.*, ¶ 83.

In her dissent, Justice Dallet asserted that federal courts were better suited to address state partisan fairness claims and advocated for traditional redistricting criteria. *Id.*, ¶¶ 88, 94-99. Additionally, because *Johnson I* did not involve a partisan gerrymandering claim, Justice Dallet dismissed the majority's discussion of partisan

fairness claims as an "advisory opinion." *Id.*, ¶ 103.

Two years later, the Wisconsin Supreme Court accepted an original action challenging the state legislative districts based on contiguity and separation-of-powers grounds. *Clarke v. Wisconsin Elections Commission*, 2023 WI 70, 409 Wis. 2d 372, 995 N.W. 2d 779. The court declined to hear the plaintiffs' extreme partisan gerrymandering claims because they would require "extensive fact-finding," which is ill-suited to an original action before the Wisconsin Supreme Court. *Id.* at 375. However, the court suggested that petitioners' extreme partisan gerrymandering claims presented an "important and unresolved legal question." *Id.*

As is to be expected, Intervenor-Defendants rely on *Johnson I* and argue that the Wisconsin Supreme Court analyzed the same constitutional provisions Plaintiffs raise—Article I, §§ 1, 3, 4, and 22—and concluded a right to partisan fairness does not exist. 2021 WI 87, ¶¶ 53-63. Plaintiffs meanwhile dismiss this discussion as dicta, and cite Justice Dallet's dissent, quoting the "advisory opinion" language, and the *Clarke* statement that partisan gerrymandering is an "important and unresolved legal question" Pls.' Consolidated Resp. Br., dkt. 151, at 41-42.

Again, this Panel must stay within its lane as a "circuit court." The Wisconsin Supreme Court addressed the exact same assertion that Plaintiffs set forth here—whether there is a right to partisan fairness in the Wisconsin Constitution —and a majority of our supreme court held that there is no such right.

A few excerpts from *Johnson I* make this point beyond a doubt. The Wisconsin Supreme Court stated: "The Wisconsin Constitution's 'textually demonstrable constitutional commitment' to confer the duty of redistricting on the state legislature evidences the non-justiciability of partisan gerrymandering claims." 2021 WI 87, ¶ 51. Later on, the court dismissed as a "fiction" the underlying premise of partisan

gerrymandering claims—"that partisan affiliation is permanent and invariably dictates how a voter casts every ballot." *Id.*, ¶ 56. Nothing could be clearer than the court's statement, after considering the text of Article I, §§ 1, 3, 4, and 22 of the Wisconsin Constitution, "we conclude the right [to partisan fairness] does not exist." *Id.*, ¶ 53.

Clarke addressed none of those statements directly. Granted, *Clarke* did not outright reject the partisan gerrymandering claims presented in that case, but the *Clarke* court did not hold that partisan gerrymandering claims are independent causes of action. 2023 WI 79, ¶¶ 7, 69-71. The court did state, however, that partisan fairness was one factor the judiciary should consider when adopting remedial maps. *Id.*, ¶ 69.

Since *Clarke* did not overrule the holding in *Johnson I* that partisan gerrymandering is a nonjusticiable political question, this Panel cannot assume that such a claim is in fact justiciable. As previously noted, the supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case. *Cook v. Cook,* 208 Wis. 2d 166, 189; *see also State v. Arberry*, 2017 WI App 26, ¶ 5, 375 Wis. 2d 179, 895 N.W.2d 100, *aff'd*, 2018 WI 7, 379 Wis. 2d 254, 905 N.W.2d 832 ("Neither we nor the circuit court may overrule a holding of our supreme court") Thus, the Panel agrees with Intervenor-Defendants that Plaintiffs' partisan gerrymandering claims are barred by *Johnson I*, and only the Wisconsin Supreme Court can rule otherwise.

CONCLUSION

In denying the Plaintiffs' Motion for Judgment on the Pleadings and granting Intervenor-Defendants' Motions to Dismiss, this Panel is not endorsing the current congressional map. Rather, we, as circuit court judges, do not have the authority to read into a Wisconsin Supreme Court case an analysis that it does not contain.

Without a clear statement from our highest court, we are unable to find that the Wisconsin Supreme Court in *Johnson II* abdicated its authority in violation of the

separation-of-powers doctrine. Should the Wisconsin Supreme Court determine that it did indeed abdicate its authority and that the neutral redistricting criteria[5] outlined in *Clarke* should control, we stand ready to apply that standard and engage in any necessary factfinding the court deems appropriate.

Likewise, we cannot overrule the holding of our highest court that there is no recognized claim for excessive partisan gerrymandering. Should the Wisconsin Supreme Court determine that such a claim is justiciable, this Panel is prepared to engage in the "extensive fact-finding"[6] necessary to the resolution of such claims.

ORDER

Now therefore, Plaintiffs' Motion for Judgment on the Pleadings is DENIED. Intervenor-Defendants' Motions to Dismiss are GRANTED. This is a final order for purposes of appeal.

[5] *Clarke* outlined a number of principles to guide the process in adopting remedial legislative maps, including: population equality requirements; compliance with federal law; reducing municipal splits and preserving communities of interest; and partisan impact. (The contiguity requirement in the state constitution would likely not apply to the congressional map since it specifically addresses assembly districts). 2023 WI 79, ¶¶64-70.

[6] *See Clarke v. Wisconsin Elections Commission*, 2023 WI 70, 409 Wis. 2d 372, 995 N.W. 2d 779 (declining to exercise original jurisdiction on partisan gerrymandering claim)