STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 13

ELIZABETH BOTHFELD; JO ELLEN BURKE; MARY COLLINS; CHARLENE GAEBLER-UHING; KATHLEEN GILMORE; PAUL HAYES; SALLY HUCK; THOMAS KLOOSTERBOER; ELIZABETH LUDEMAN; GREGORY ST ONGE; *and* LINDA WEAVER,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION; MARGE BOSTELMANN, ANN S. JACOBS, DON M. MILLIS, ROBERT F. SPINDELL, JR., CARRIE RIEPL, MARK L. THOMSEN, *in their official capacities as commissioners of the Wisconsin Elections Commission*; *and* MEAGAN WOLFE, *in her official capacity as administrator of the Wisconsin Elections Commission*,

Defendants.

Case No. 2025CV002432

Three-Judge Panel
Wis. Stat. §751.035

INTERVENOR-DEFENDANT WISCONSIN STATE LEGISLATURE'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

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REPLY

Plaintiffs cannot take back what they (correctly) told the Wisconsin Supreme Court last summer: because the Supreme Court entered the injunction for the congressional districts, only the Supreme Court may revisit them. Nothing in *Clarke*—decided two years before that representation—disturbs that truism. Plaintiffs' contrary arguments misrepresent *Clarke*. There is neither the time nor constitutional authority to change the congressional districts before the 2026 elections. But there is ample time to do all that remains in this case: dismiss Plaintiffs' complaint.

I. The *Johnson II* injunction is final and binding.

After *Clarke v. Wisconsin Elections Commission*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370, groups asked the Wisconsin Supreme Court to revisit the congressional districts three separate times. All three times, the Court declined. *See* Legis. Mot. to Dismiss 5. The *Johnson II* injunction prescribing those districts remains final and binding. *See Johnson v. Wis. Elections Comm'n* (*Johnson II*), 2022 WI 14, ¶52, 400 Wis. 2d 626, 971 N.W.2d 402. Plaintiffs' complaint can be dismissed for that reason alone.

A. Only the Supreme Court may modify *Johnson II*.

"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, 560 N.W.2d 246 (1997). That is especially so here, given Plaintiffs' requested relief: declare the *Johnson II* injunction unconstitutional and enjoin that injunction. *See* Compl.

p.26 ¶¶2-3. Plaintiffs offer no authority suggesting a circuit court may do such a thing. There is none. It would be "patently erroneous and usurpative." *State v. Grawien*, 123 Wis. 2d 428, 432, 367 N.W.2d 816 (Ct. App. 1985).

Plaintiffs offer only their gloss on *Clarke*. *Infra* I.B. But there is no dispute that *Clarke* disturbed only the injunction for the statehouse districts after finding them non-contiguous and left the injunction for the congressional districts untouched. *See Clarke*, 2023 WI 79, ¶3 ("[W]e enjoin the Wisconsin Election Commission from using the current *legislative* maps in future elections." (emphasis added)). This Court would thus have to do what "is not in [its] power"—"extend" *Clarke* and "break new ground," vacating the *Johnson II* injunction dictating the congressional districts, even after the Wisconsin Supreme Court declined to do so three times over. *State v. Gudgeon*, 2006 WI App 143, ¶14, 295 Wis. 2d 189, 720 N.W.2d 114; *see Est. of Wells by Jeske*, 174 Wis. 2d 503, 512, 497 N.W.2d 779 (Ct. App. 1993). Any "undoing" of that injunction is a task for the Wisconsin Supreme Court. *See Parks v. Waffle*, 138 Wis. 2d 70, 76, 405 N.W.2d 690 (Ct. App. 1987). This Court cannot "fashion a ruling which would effectively overrule or limit" it. *Id.*

B. *Clarke* did not "overrule" the *Johnson II* injunction.

1. Plaintiffs contend that *Clarke* makes their case an exception to the foregoing rule. It does not. Nothing in *Clarke* "overrule[s]" *Johnson* with respect to the final and binding injunction for the congressional districts. *Contra* Opp.1-2, 4-5, 11, 12 n.3, 18, 21, 33-34.

Plaintiffs' contrary arguments misrepresent *Clarke*. For example, Plaintiffs say that the Wisconsin Supreme Court "expressly overruled *Johnson*'s 'least-change' criterion in a decision finding that the state legislative maps it selected in *Johnson* violated the state constitution." Opp.4-5. That omits what "violated the state constitution" in *Clarke*. It was ***not*** the "'least-change' criterion." *Contra id.* It was non-contiguous pieces of statehouse districts. *See Clarke*, 2023 WI 79, ¶¶10-35.

Contrary to Plaintiffs' repeated suggestion, *Clarke* is not an "overruling" of *Johnson* writ large. Petitioners in *Clarke* challenged the statehouse districts (dictated by *Johnson III*) on various grounds. *Id.* ¶¶2-3 & n.8. The Court resolved only one: that non-contiguities were unconstitutional. *Id.* ¶¶10-35. The Court then addressed how to remedy those non-contiguities. It was in that context—setting the ground rules to remedy the non-contiguities—that the Court "overruled" only "portions" of *Johnson*: "[W]e overrule any portions of *Johnson I, Johnson II,* and *Johnson III* that mandate a least change approach." *Id.* ¶63. Why? Because least-changes was "impractical," "unfeasible," did not "garne[r] consensus," and was deemed "in tension with established redistricting requirements," such as the contiguity requirement at issue in *Clarke* itself. *Id.* Nowhere in that list is Plaintiffs' theory: that a least-changes remedy is unconstitutional.[1]

[1] Such a constitutional holding would surely surprise other courts that have adopted redistricting remedies making few changes, tailoring any such remedy to the violation found so as not to confuse the judicial role with a legislative one. *See, e.g.*, *Baumgart v. Wendelberger*, 2002 WL 34127471, at *7 (E.D. Wis. May 30) ("The court undertook

Just the opposite—*Clarke* said "least change … *could* be relevant to traditional districting criteria" and agreed it was "commonly considered." *Id.* ¶62 (emphasis added). It overruled only those "portions" of *Johnson* that said a least-changes remedy was "*mandate[d].*" *Id.* ¶63 (emphasis added). In other words, even if this Court could extrapolate *Clarke* to the congressional districts, *but see supra* I.A, *Clarke* never said a least-changes approach was *verboten*. Only that it should not have been "mandate[d]." 2023 WI 79, ¶63.

2. Plaintiffs' remaining arguments cannot overcome the binding and final nature of the *Johnson II* injunction.

a. The Wisconsin Supreme Court has declined repeated opportunities to "disavow" *Johnson II* after *Clarke*, meaning the *Johnson II* injunction remains good law. *Parks*, 138 Wis. 2d at 75; *see* Legis. Mot. to Dismiss 5, 7-8. Among other opportunities, Plaintiffs, represented by the same counsel, presented not just "gerrymandering claims," *contra* Opp.12-13, but also the same separation-of-powers claim asserted here in their

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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." (emphasis added)); *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012) (adopting judicial remedy to alter only 2 districts while leaving 97 remaining legislatively enacted districts in place); *accord Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 528-29, 576 N.W.2d 245 (1998) ("We may differ with the legislature's choices, as we did and do here, but must never rest our decision on that basis lest we become no more than a super-legislature. Our form of government provides for one legislature, not two. It is for the legislature to make policy choices, ours to judge them based not on our preference but on legal principles and constitutional authority.").

petition for an original action: "Whether Wisconsin's congressional districting map violates separation-of-powers principles inherent in the Wisconsin Constitution because it was adopted by this Court according to a self-imposed 'least-change' requirement that is inconsistent with the judiciary's independent duties." Pet. for an Original Action 3, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (Wis. May 7, 2025) (Bothfeld Pet.). Yet the Supreme Court—with "a bench operating at full strength," Opp.12—denied that petition. Order, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (Wis. June 25, 2025). Plaintiffs wave off that and other "discretionary denials" and their earlier representation to the Wisconsin Supreme Court. Opp.13. Plaintiffs were right last summer. In their words, redistricting disputes uniquely "warrant [that Court's] original jurisdiction" and "no other court can provide Petitioners' requested relief." Bothfeld Pet. ¶¶97-98.[2]

b. All that remains of Plaintiffs' argument is a one-letter word: "a." Plaintiffs argue that the *Johnson II* injunction need only remain in effect "until … *a court otherwise directs*." Opp.14 (quoting *Johnson II*, 2022 WI 14, ¶52). Plaintiffs "read too much into too little," parsing that judicial opinion as though it were a statute. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 373 (2023). Even reading that language as though it were a statute, "***a***

[2] Thirteen pages into their brief, Plaintiffs acknowledge that previous representation. They say it was just about the power of federal courts. Opp.13. But Plaintiffs rightly said "no other court," Bothfeld Pet. ¶98, and went on to observe that their separation-of-powers claim requires the Wisconsin Supreme Court "to adjudicate the scope of its own authority when adopting congressional maps," *id.* ¶99—*i.e.*, its authority to enter the *Johnson II* injunction.

court" does not mean "any court." The reference to "a court" was broad enough to encompass the U.S. Supreme Court's summary reversal of the *Johnson II* injunction for the statehouse districts. *Wis. Legis. v. Wis. Elections Comm'n*, 595 U.S. 398 (2022). Later on, it would be broad enough to encompass litigation *after* the next census "renders the current plan unusable." *Perry v. Perez*, 565 U.S. 388, 392 (2012). Beyond that, the word "a" does not override the basic rule that only the Supreme Court may "overrule, modify or withdraw" the *Johnson II* injunction for congressional districts. *Cook*, 208 Wis. 2d at 189.

II. Laches bars Plaintiffs' claims even though they seek prospective relief.

A. Plaintiffs suggest there is a "categorical[]" rule that laches cannot apply in this case. Opp.6. They are wrong. "[R]edistricting challenges are subject to the doctrine of laches because of the ten-year expiration date of electoral districts." *Chestnut v. Merrill*, 377 F. Supp. 3d 1308, 1314 (N.D. Ala. 2019). Plaintiffs cannot wait multiple election cycles to challenge Wisconsin's congressional districts, already settled by earlier litigation, just as plaintiffs could not wait multiple election cycles to challenge Alabama's congressional districts in the *Chestnut* litigation, which sought "solely prospective relief." *Id.*; *see, e.g.*, *White v. Daniel*, 909 F.2d 99, 102-05 (4th Cir. 1990) (applying laches to prospective redistricting challenge); *Sanders v. Dooly County*, 245 F.3d 1289, 1290-91 (11th Cir. 2001).

Plaintiffs' cited cases do not hold otherwise. *Clarke* did not announce a categorial rule that laches never applies. *Contra* Opp.6. Nor did *Clarke*'s rejection of laches in that case mean there is *no* time limit for plaintiffs to bring claims. *See* Legis. Mot. to Dismiss

11-12. As for *Navarro v. Neal*, "plaintiffs d[id] not dispute that the district court properly invoked the doctrine of laches to dismiss their claim for injunctive relief," and the court cited approvingly another election-law decision applying laches. 716 F.3d 425, 429 (7th Cir. 2013) (citing *Fulani v. Hogsett*, 917 F.2d 1028 (7th Cir. 1990)).

B. Every laches factor is met. Plaintiffs offer no explanation for their delay. They did not intervene in *Johnson*, or file suit before *Clarke* or reasonably after. Legis. Mot. to Dismiss 11-12. Even if the Wisconsin Supreme Court's 2024 decision denying the motion to reopen the congressional districts were the relevant benchmark, Opp.8, Plaintiffs offer no explanation for waiting another *16 months* to file this action, rather than file straight away. Plaintiffs' unjustified delay satisfies the first laches prong. *See Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶17, 393 Wis. 2d 308, 946 N.W.2d 101.

As to the second laches prong, the Legislature had no basis to anticipate this suit. *Contra* Opp.9. Before filing this action, Plaintiffs themselves told the Wisconsin Supreme Court that "no other court" could change the congressional districts. Bothfeld Pet. ¶98.

As to the third laches prong, Plaintiffs belittle the prejudice arguments. They are not reducible to "costs of litigation." *Contra* Opp.9. Plaintiffs' action poses real and substantial prejudice to voters, constituents, candidates, lawmakers, and election officials. *See Trump v. Biden*, 2020 WI 91, ¶¶24-28, 394 Wis. 2d 629, 951 N.W.2d 568. Already, voters who "have come to know their districts and candidates … will be confused by [any] change." *Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999); *see*

Chestnut, 377 F. Supp. 3d at 1317 (faulting delayed action for leaving insufficient time to "educate voters on where the newly drawn district lines lay"). In addition, if Plaintiffs were to prevail, that would trigger a *third* round of redistricting in the Legislature, which already passed redistricting legislation in 2021 (vetoed) and then again in 2024 in response to *Clarke* (approved), on now-outdated census data. *See Chestnut*, 377 F. Supp. 3d at 1317 ("forc[ing] the state of Alabama to redistrict twice in two years—once based on nine-year-old census data—would result in prejudice").[3] Repeatedly revisiting districts creates "large potential for disruption." *White*, 909 F.2d at 104; *see Reynolds v. Sims*, 377 U.S. 533, 583 (1964) ("Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system … ."). As for Plaintiffs' insistence on lightning-fast changes before 2026, the prejudice compounds. Last-minute changes cause "voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). And candidates already beginning the campaign process in existing districts would have to begin anew, "los[ing] the benefit of the campaigning they have already undertaken" and "money already spent." *Simkins v. Gressette*, 495 F. Supp. 1075, 1081 (D.S.C.), *aff'd*, 631 F.2d 287 (4th Cir. 1980).

[3] Any remedial process would begin by offering the Legislature the first opportunity to redistrict. *See, e.g.*, *Clarke*, 2023 WI 79, ¶57.

III. Plaintiffs have not stated any claim redressable by a court.

A. *Clarke* says nothing about a separation-of-powers violation.

1. Plaintiffs contend *Clarke* already decided their separation-of-powers claim. It did not. *Clarke* held that the statehouse districts violated the Wisconsin Constitution's contiguity requirement. 2023 WI 79, ¶¶2-3. Nowhere does *Clarke* say least-changes remedies violate separation of powers. The majority mentioned separation of powers only once—in saying it *declined* to address separation-of-powers arguments. *Id.* ¶3 n.8.

Plaintiffs' arguments stray from *Clarke*'s discussion about least-changes remedies. Plaintiffs tell this Court that *Clarke* "held" the least-changes "methodology" was "incompatible with the judiciary's constitutional role." Opp.15. They say *Clarke* deemed the use of that methodology a "constitutional defect." Opp.16, 18 n.6. These constitutional holdings are nowhere in *Clarke*.[4] The Court said only that it would "not consider least change" for the remedial proceedings in that case, 2023 WI 79, ¶60, and that least-changes should not be "mandate[d]," *id.* ¶63. *Clarke* never called that least-changes methodology constitutionally defective. *Contra* Opp.16-18. Far from it, *Clarke* agreed "least change"

[4] Plaintiffs also repeat the same misrepresentation of *Clarke* that the Legislature already identified in its response to Plaintiffs' motion for judgment on the pleadings. *See* Legis. Opp. to Mot. for Judgment on the Pleadings 14. Plaintiffs repeat that *Clarke* "held" the least-changes "approach" was "inconsistent with the judicial role and 'cannot [be] allow[ed] … to supersede the constitution.'" Opp.18 (alterations in original). *Clarke* never said least-changes was "inconsistent with the judicial role," *contra id.*, only that such considerations should be "secondary" if considered at all, 2023 WI 79, ¶62. And *Clarke* never said the approach itself would "supersede the constitution," *contra* Opp.18, but instead that such secondary considerations should not supersede "constitutionally or statutorily mandated" criteria such as contiguity, 2023 WI 79, ¶62.

considerations still "could be relevant" and "balanced with other factors" in other cases. 2023 WI 79, ¶62. The Court just wasn't going to do so in the *Clarke* remedial proceedings. *Id.*

Plaintiffs' arguments also stray from *Clarke*'s brief discussion about how the Court would consider "partisan impact" for the *Clarke* remedial proceedings. *See id.*, ¶¶69-71. Plaintiffs contend that the Court's discussion of "partisan impact" was "*a constitutional holding about judicial power*." Opp.16 (emphasis in original). They say the Court "held that courts *lack constitutional authority* to entrench legislative policy choices." *Id.* (emphasis in original). No citations follow these broad claims. Here's how *Clarke* actually addressed "partisan impact": It was the last of the considerations discussed. *See* 2023 WI 79, ¶¶69-71. The Court *distinguished* "partisan impact" from "constitutionally mandated criteria such as equal apportionment or contiguity." *Id.* ¶71. Meaning, partisan impact was "one of many factors" to consider but "will not supersede" other "constitutionally mandated criteria." *Id.* And while the Court made the important observation that it "must remain politically neutral," *id.* ¶70, it never defined neutrality as Plaintiffs say it did. *See, e.g.*, Opp.18 (contending without citation that "a methodology that entrenches prior partisan policy choices is incompatible with the judicial role"); Opp.15 (court cannot "preserve a prior legislative agenda"). *But see Baumgart*, 2002 WL 34127471, at *7 (equating "neutral" with using existing districts as the benchmark). *Clarke* simply said the Court would "take care to avoid selecting remedial maps designed to advantage one political party over

another." 2023 WI 79, ¶71. What constituted an "advantage" was never decided for the statehouse districts, let alone for the congressional districts. *See* 2023 Wis. Act 94 (mooting *Clarke* remedial proceedings by enacting new statehouse districts).

Finally, Plaintiffs' gloss on *Clarke*—that the Wisconsin Constitution requires courts to be agnostic to "prior legislative policy choices," Opp.16—is also at odds with how courts approach redistricting remedies and the federal Elections Clause. The U.S. Supreme Court has long directed courts to "take guidance from the State's recently enacted plan in drafting an interim plan"—even if the enacted plan "was itself unenforceable"—because that plan "reflects the States's policy judgments." *Perry*, 565 U.S. at 393; *see Upham v. Seamon*, 456 U.S. 37, 40-41 (1982) ("a court must defer to the legislative judgments the plans reflect"); *White v. Weiser*, 412 U.S. 783, 795 (1973) (holding courts should "honor state policies in the context of congressional reapportionment"); *accord Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971). And the U.S. Supreme Court has cautioned state courts that they cannot "arrogate to themselves the power vested in state legislatures to regulate federal elections," including redistricting specifically, when the Elections Clause assigns such authority to "the Legislature." *Moore v. Harper*, 600 U.S. 1, 36 (2023); *infra* III.C. No "constitutional rule," Opp.15, especially not one absent in *Clarke*, can supersede that federal constitutional demand.

2. No other authorities establish any separation-of-powers violation. Citing *Gabler*, Plaintiffs contend the judiciary cannot "adop[t] constraints on its decisionmaking that

require it to abdicate its core constitutional responsibilities." Opp.20. But then Plaintiffs identify no underlying "constitutional responsibilit[y]" that *Clarke*—or any other decision—says the Wisconsin Supreme Court abdicated with respect to the congressional districts. The Wisconsin Supreme Court concluded that the Governor's remedial proposal for the congressional districts, chosen in *Johnson II*, "compl[ied] with all relevant state and federal laws." 2022 WI 14, ¶25. The Court declined to revisit that holding three separate times. *See* Legis. Mot. to Dismiss 5. And in *Clarke,* the Court observed that "partisan impact" was *not* a constitutionally required redistricting criterion and instead only a secondary consideration. 2023 WI 79, ¶¶68, 71.

Citing *Tetra Tech*, Plaintiffs also conflate the judiciary's role *vis-à-vis* administrative agencies with the judiciary's role *vis-à-vis* the Legislature in a congressional redistricting dispute. The roles are not the same, for the U.S. Constitution specifically tasks "the Legislature" with congressional redistricting, U.S. Const. art. I, §4, cl. 1, and state courts must be cautious not to "arrogate" that policymaking authority to themselves, *Moore*, 600 U.S. at 36. Contrary to Plaintiffs' arguments that "the political branches failed to enact a redistricting plan," Opp.20, a congressional redistricting plan—Act 44—was still "on the books" and reflected "policy choices the people made through their elected representatives." *Johnson v. Wis. Elections Comm'n* (*Johnson I*), 2021 WI 87, ¶85, 399 Wis. 2d 623, 967 N.W.2d 469 (Hagedorn, J., concurring). When voters challenged Act 44 as malapportioned in *Johnson*, the least-change approach was a permissible means of

ensuring the Court did "not pre-empt the legislative task nor 'intrude upon state policy any more than necessary'" to remedy the malapportionment. *White*, 412 U.S. at 795.

B. The Wisconsin Supreme Court already rejected Plaintiffs' partisan gerrymandering theories, and that ruling is binding.

Plaintiffs' partisan gerrymandering theories likewise fail to state a claim. In *Johnson I*, the Wisconsin Supreme Court addressed every constitutional provision upon which Plaintiffs here again rely. *Compare Johnson I*, 2021 WI 87, ¶53, *with* Compl. ¶¶83-97. It concluded there was no "right to partisan fairness in Article I, Sections 1, 3, 4, or 22 of the Wisconsin Constitution," *Johnson I*, 2021 WI 87, ¶53, and those provisions leave no "judicially manageable standards" to adjudicate allegations of partisan unfairness, *id.* ¶39. Nothing in *Clarke* "overrule[s]" that portion of *Johnson*. *Contra* Opp.2 ("yes, the same *Johnson* that was overruled"). *Clarke* expressly declined to revisit those constitutional provisions. *See Clarke*, 2023 WI 79, ¶69 (observing the Court "declined to hear the issue of whether extreme partisan gerrymandering violates the Wisconsin Constitution" and did "not decide whether a party may challenge an enacted map on those grounds"). And *Clarke* distinguished considerations of "partisan impact" from "established districting requirements set out in state and federal law." *Id.* ¶63; *see id.* ¶¶70-71.

Accordingly, *Johnson I* compels dismissal of Plaintiffs' gerrymandering claim. It cannot be reduced to dicta. *Contra* Opp.2, 33. In *Johnson*, intervenors put the meaning of those provisions squarely "before the court" and "necessary for its decision." *Am. Fam.*

Mut. Ins. Co. v. Shannon, 120 Wis. 2d 560, 565, 356 N.W.2d 175 (1984). When they argued existing districts were "a partisan gerrymander," the Court held "the partisan makeup of districts does not implicate any justiciable or cognizable right" and would not be considered in remedial proceedings. *Johnson I*, 2022 WI 14, ¶¶2, 7-8 (plurality op.); *accord id.* ¶82 n.4 (Hagedorn, J., concurring). Only the Wisconsin Supreme Court can revisit that binding decision. *See Cook*, 208 Wis. 2d at 189.

C. What Plaintiffs ask this Court to do is anything but "ordinary."

1. Plaintiffs' prevailing theory that "prior legislative policy choices" should be eschewed, Opp.16, runs headlong into the federal Elections Clause. "The Framers were aware of electoral districting problems" and "settled" on "assigning the issue to the state legislatures." *Rucho v. Common Cause*, 588 U.S. 684, 699 (2019); *accord Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 7 (2024) ("state legislative authority"). "[S]tate courts do not have free rein" to redistrict anew as if they were the Legislature. *Moore*, 600 U.S. at 34. For all the foregoing reasons compelling dismissal, Plaintiffs' case "transgress[es] the ordinary bounds of judicial review." *Id.* at 36.

Plaintiffs' cited cases are not to the contrary. In *Gaffney v. Cummings*, the Court *upheld* the state's plan and observed redistricting is primarily "political" and "intended to have substantial political consequences." 412 U.S. 735, 749, 753 (1973); *see also Growe v. Emison,* 507 U.S. 25, 34 (1993) (States have the "primary responsibility for apportionment of their federal congressional … districts"). In *Baumgart*, decided before *Rucho*, the court

started with existing districts "as a template." 2002 WL 34127471, at *7. None refutes *Moore*'s caution: that courts cannot replace the legislature's policy choices with their own. 600 U.S. at 34, 36; *accord Flynn*, 216 Wis. 2d at 528-29.

2. Plaintiffs' insistence on new congressional districts before the 2026 election confirms this is no "ordinary" litigation. *Moore*, 600 U.S. at 36. There is no time, *contra* Opp.1, 23-24, as the Legislature has maintained, *e.g.*, Dkt. 90. The timing of *Wisconsin Legislature* is not analogous. *Contra* Op.23. Among other distinctions, leading up to that decision, the parties were already before the Wisconsin Supreme Court, having conducted many months of remedial proceedings. *Johnson II*, 2022 WI 14, ¶5. Here, in contrast, a mere 25 days would remain before WEC's stated deadline, *see* Tr. Sched. Conf. 14:18-15:16, and there have been no remedial proceedings, let alone proceedings before the Wisconsin Supreme Court.[5] That rush to judgment would leave this case looking little like ordinary litigation. *Contra Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶22, 249 Wis. 2d 706, 639 N.W.2d 537.

[5] Remedial proceedings entail a reasonable opportunity for the Legislature to redistrict and, failing that, briefing, expert reports, and depositions, followed by an evidentiary hearing required for inevitable disputed facts like measuring "partisan impact" or subjective criteria. *E.g.*, *Harper v. Hall*, 886 S.E.2d 393, 428-31 (N.C. 2023) (describing expert issues); *see Indus. Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶66 n.13, 299 Wis. 2d 81, 726 N.W.2d 898 (requiring evidentiary hearing for fact disputes).

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Respectfully submitted,

Electronically signed by Matthew M. Fernholz

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