FILED
01-29-2024
CLERK OF WISCONSIN
SUPREME COURT

No. 2021AP1450-OA

IN THE SUPREME COURT OF WISCONSIN

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS, AND RONALD ZAHN,

Petitioners,

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

Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, in her official capacity as a member of the Wisconsin Elections Commission, JULIE GLANCEY, in her official capacity as a member of the Wisconsin Elections Commission, ANN JACOBS, in her official capacity as a member of the Wisconsin Elections Commission, DEAN KNUDSON, in his official capacity as a member of the Wisconsin Elections Commission, ROBERT SPINDELL, JR., in his official capacity as a member of the Wisconsin Elections Commission, AND MARK THOMSEN, in his official capacity as a member of the Wisconsin Elections Commission,

Respondents,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, in his official capacity, AND JANET BEWLEY SENATE DEMOCRATIC MINORITY LEADER, on behalf of the Senate Democratic Caucus,

Intervenors-Respondents.

RESPONSE BY INTERVENOR-RESPONDENT WISCONSIN LEGISLATURE TO HUNTER INTERVENORS' MOTION FOR RELIEF FROM JUDGMENT

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INTRODUCTION

More than two years ago, the Wisconsin Governor proposed a remedy for Wisconsin's malapportioned congressional districts. Hunter Intervenors said that proposed remedy complied with all state and federal law and asked this Court to adopt it. *See* Hunter Br. 13 (Dec. 30, 2021). This Court did so in March 2022. *See Johnson v. Wis. Elections Comm'n* (*Johnson II*), 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402. And all thought the judgment here was final.

Then came a judicial election. Nearly $10 million from the Democratic Party funded the winning candidate's campaign.[1] On the campaign trail, she said *Johnson*'s remedial approach was "totally unfair," "something's wrong" with the State's congressional districts,[2] a "fresh

[1] *See Campaign contributions: PAC and Political Committee Contributors to: Janet C Protasiewicz (NP) – Supreme Court*, Wis. Democracy Campaign, https://perma.cc/9EZD-V69A.

[2] Channel 3000 / News 3 Now, *Wisconsin Supreme Court debate presented by News 3 Now and WisPolitics* at 29:20-30:10, YouTube, https://bit.ly/3HAtZtv [hereinafter *Supreme Court Debate*].

look at our maps" would be "welcome,"[3] and electing her could change "the outcome of the 2024 election."[4]

Hunter Intervenors, represented by the Democratic Party's leading law firm,[5] now ask this Court to make good on those promises. Having waited nearly 100 weeks since the Court decided *Johnson II*, they now want new congressional district lines in less than seven weeks' time. They allege no state or federal constitutional violation plagues the congressional districts. Their complaint is instead a political one: "the map perpetuates the partisan unfairness that has radically skewed Wisconsin's districting maps since 2011." Memo. ISO Mot. Relief J. 8. Districts are too "favorable to the Republican Party." *Id.* at 22.

[3] Shawn Johnson, *In a Supreme Court race like no other, Wisconsin's political future is up for grabs*, NPR (Apr. 2, 2023), https://perma.cc/W2YA-WPA2.

[4] @janetforjustice, Twitter (Mar. 27, 2023, 12:47 PM), https://perma.cc/YAL9-JR8R; Janet for Justice, Facebook (Apr. 3, 2023), https://perma.cc/HVD7-PXD5.

[5] *See Vendor/Recipient Profile:* Elias Law Group, Open Secrets, https://perma.cc/ZS8U-Z2V7 (reporting nearly $13 million from Democratic Congressional Campaign Committee for 2022 election cycle); *About*, Elias Law Group, https://perma.cc/DGA3-GU52 ("Elias Law Group is the nation's largest law firm focused on representing the Democratic Party, Democratic campaigns, nonprofit organizations, and individuals committed to securing a progressive future.").

The Court must deny the motion. The judgment has been final since 2022. Election deadlines are looming. And the path that Hunter Intervenors would put this Court on is unconstitutional in myriad respects.

BACKGROUND

A. After the 2020 census, the Legislature and the Governor were at an impasse over new redistricting legislation. *See Johnson v. Wis. Elections Comm'n* (*Johnson I*), 2021 WI 87, ¶¶2, 5, 399 Wis. 2d 623, 967 N.W.2d 469. Voters initiated this original action. *Id.* All agreed that the existing districts, enacted in 2011, were malapportioned, and this Court asked for proposed judicial remedies. *Id.* ¶¶5, 7.

The Court directed the parties to propose remedies that equalized population across all districts and complied with all other state and federal constitutional and statutory requirements. *See id.* ¶¶24-37. Beyond that, the Court held it had no power to redistrict anew or rebalance the political makeup of the Legislature. *Id.* ¶¶39, 45-63.

The Court emphasized that it could not do more than remedy the malapportionment claims. *Id.* ¶¶64-68. "[D]oing anything more

than securing legal rights would be profoundly incompatible with Wisconsin's commitment to a nonpartisan judiciary." *Id.* ¶75.

The Court selected the Governor's proposed remedy for congressional districts. *Johnson II*, 2022 WI 14, ¶52. The judgment became final, election officials carried out the judgment, and the 2022 elections came and went.

B. This Court's membership changed on August 1, 2023. The change was preceded by a judicial campaign filled with speeches about Wisconsin's "gerrymandered," "rigged," "unfair," and "wrong" districts.[6] In the winning candidate's words, "If you look at the dissent in the maps case"—meaning this case—"that dissent is what I tell you I agree with."[7]

One day after the Court's membership changed, a group of self-described Democrats by a self-described liberal law firm filed an action challenging the state's assembly and senate districts as

[6] *See, e.g.*, *Supreme Court Debate*, *supra*, n.2; Jessie Opoien & Jack Kelly, *Protasiewicz would 'enjoy taking a fresh look' at Wisconsin voting maps*, Cap Times (Mar. 2, 2023), https://perma.cc/THH2-VH3Q; Corrinne Hess, *Wisconsin Supreme Court candidate Janet Protasiewicz assails state's election maps as 'rigged,'* Milwaukee J. Sentinel (Jan. 9, 2023), https://perma.cc/8T33-Z5M6.

[7] Henry Redman, *Supreme Court candidates accuse each other of lying, extremism in sole debate*, Wis. Exam'r (Mar. 21, 2023), https://perma.cc/5KLA-S2FV.

unconstitutional. *See generally* Pet., *Clarke v. Wis. Elections Comm'n*, No. 2023AP1399-OA (Aug. 2, 2023). They did not challenge the congressional districts but suggested they would do so.[8] Nothing from Hunter Intervenors in this case.

In October, the Court accepted the *Clarke* petition for an original action, but only in part. The Court said there was no time to exercise its original jurisdiction over the *Clarke* petitioners' partisan-gerrymandering claims because of "the need for extensive fact-finding (if not full-scale trial)." *Clarke v. Wis. Elections Comm'n*, 2023 WI 70, --- Wis. 2d ---, 995 N.W.2d 779, 781. Still nothing from Hunter Intervenors in this case.

In December, the Court declared that its injunction in *Johnson III*, altering assembly and senate districts, was unconstitutional because some districts were not contiguous. *See Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶3, --- Wis. 2d ---, 998 N.W.2d 370. The Court

[8] *See* Scott Bauer, *Wisconsin lawsuit asks new liberal-controlled Supreme Court to toss Republican-drawn maps*, AP (Aug. 2, 2023), https://bit.ly/48M8mT9 ("Law Forward[] did not rule out a future challenge to the congressional maps, saying targeting the legislative maps is a 'first step.'"); *see also* Brief of Amici Curiae Law Forward et al. at 37, *Moore v. Harper*, 600 U.S. 1 (2023) (No. 21-1271) ("The law is developing in Wisconsin," and "state courts could soon be tasked with applying statutory limits on partisan gerrymandering of congressional districts").

invited parties to propose contiguity remedies and, as part of the guidance for those remedies, said it would not "mandate a least change approach," overruling any *Johnson* decision to the contrary. *Id.* ¶63. Still nothing from Hunter Intervenors in this case.

On Friday, January 12, 2024, parties in *Clarke* submitted their proposed remedies. The Governor, Senate Democrats, and two groups of self-described Democratic voters proposed statewide redraws that would move more than 3 million people into new assembly districts and more than 2 million people into new senate districts—more than 1 million more people than the Legislature moved with the 2011 redistricting legislation.[9] The proposals give large advantages to Democrats and pair 35 or more Republican incumbents and next to no Democrats.[10]

Only then did Hunter Intervenors surface in this case. On January 16, 2024, they filed what they call a "motion for relief from

[9] *See* Legislature's Response Remedial Br. 7-8, *Clarke v. Wis. Elections Comm'n*, No. 2023AP1399-OA (Jan. 22, 2024).

[10] Legislature's App'x to Response Remedial Br. App.41a-106a, *Clarke*, No. 2023AP1399-OA (Jan. 22, 2024) (Response Report of Sean P. Trende) (observing Democrats' proposals "all deviate substantially from what we would expect to see in a politics-neutral map").

judgment." They ask for new congressional districts before the forthcoming 2024 elections. Mot. Relief J. 3. There are less than seven weeks left before elections administrators have said districts must be in place.[11]

ARGUMENT

I. The motion is untimely.

Hunter Intervenors filed this motion nearly two years after the judgment in *Johnson II*. But in this Court, parties have "20 days after the date of the decision of the supreme court" to ask for reconsideration of this Court's judgments. Wis. Stat. §809.64. That window closed in March 2022, making this motion wildly untimely.

The 20-day rule—specific to this Court's procedures for reconsideration of decisions and judgments—applies here yet appears nowhere in Hunter Intervenors' extraordinary request. They instead rely on §806.07, but civil-procedure rules do not apply to matters in this Court that are covered by Chapter 809. *See id.* §809.84.

[11] *See* Response of Wis. Elections Comm'n 3, *Clarke*, No. 2023AP1399-OA (Oct. 16, 2023).

Even if §806.07 applied in this Court, Hunter Intervenors' motion would still be untimely. Such motions "shall be made within a reasonable time." *Id.* §806.07(2). Hunter Intervenors assert they did so, filing the motion "just weeks after the merits decision in *Clarke*." Memo. ISO Mot. Relief J. 17. That argument ignores everything that happened between *Johnson II* and this Hail Mary attempt to secure more Democrat seats in Congress.

More than two years ago, this Court detailed why proposed malapportionment remedies should make minimal changes from enacted district lines—here, 2011 Act 44. *See Johnson I*, 2021 WI 87, ¶81. The Court explained that "[t]he constitutional confines of [its] judicial authority must guide [its] exercise of power" in fashioning a remedy, and separation of powers required deference to existing lines. *Id.* ¶¶64-68; *see also id.* ¶84 (Hagedorn, J., concurring) (rejecting that the Court "should simply ignore the law on the books . . . and draft a new one more to its liking"). Hunter Intervenors did not move for reconsideration of that "'least-change' approach" announced back in November 2021. *Id.* ¶64. Nor did they object when the Court applied that

least-change approach in March 2022 to select the Governor's proposed congressional districts. *Johnson II*, 2022 WI 14, ¶52. Indeed, they said that remedy complied with all relevant state and federal law and asked this Court to adopt it. *See* Hunter Br. 13 (Dec. 30, 2021).

Hunter Intervenors instead waited until January 2024 with weeks to go before 2024 election deadlines. Their motion is untimely in every respect. Even if one considers the actual reason for their motion—the change in this Court's membership—it is untimely. A group of Democrats asked the Court to redraw legislative district lines in August 2023. *See Clarke*, No. 2023AP1399-OA. The Court took the case in part but said there was no time "for extensive fact-finding (if not a full-scale trial)" to adjudicate assertions about partisan fairness. *Clarke*, 995 N.W.2d at 781. Despite that warning, Hunter Intervenors waited until January 16, 2024. Why? Because days before, on January 12, 2023, parties in *Clarke* proposed remedies. And Hunter Intervenors

saw for the first time just how dramatically Democrat a redistricting do-over could be.[12]

Hunter Intervenors made no effort to make their motion within a reasonable time to afford the relief they seek. When *Clarke* said it "overrule[d]" portions of *Johnson* that "mandate a least change approach," 2023 WI 79, ¶63—fulfilling a campaign promise made nearly a year previous[13]—Hunter Intervenors still waited 25 days more. Election deadlines are nearly here. The Court has said again and again that there is a "need for expediency given that next year's elections are fast-approaching," *Clarke*, 2023 WI 79, ¶76, with no time for "extensive fact-finding," *Clarke*, 995 N.W.2d at 781. Having waited nearly 100 weeks to ask for reconsideration of *Johnson II*, Hunter Intervenors

[12] *See* Legislature's App'x to Response Remedial Br. App.41a-106a, *Clarke*, No. 2023AP-1399-OA (Jan. 22, 2024) (Response Report of Sean P. Trende) (observing "'tweaks' appear all over the map" submitted by the Governor "that "reflect[] the 'DNA of a gerrymander'" and that Democrats' proposals "all deviate substantially from what we would expect to see in a politics-neutral map").

[13] *See, e.g.*, *Supreme Court Debate*, *supra*, n.2 ("[T]hat [least-change] methodology is totally unfair. We are a battleground State. We have very, very close statewide elections. . . . You look at Congress. You know, we have eight seats. Six are red. Two are blue—in a battleground State. So we know something's wrong.").

cannot demand new congressional districts in less than seven weeks' time.[14]

Their motion makes the same sorts of arguments that the *Clarke* petitioners made five months ago: "partisan unfairness" and "separation-of-powers principles." Memo. ISO Mot. Relief J. 17. By delaying, they flouted their "special duty to bring" election-related "claims in a timely manner." *Trump v. Biden*, 2020 WI 91, ¶30, 394 Wis. 2d 629, 951 N.W.2d 568; *accord Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, 393 Wis.2d 629, 948 N.W.2d 877. They give no reason for their failure to abide by the "[e]xtreme diligence and promptness . . . required in election-related matters." *Trump*, 2020 WI 91, ¶11. Under either §809.64, specific to this Court, or §806.07, invoked by Hunter Intervenors, their unreasonable delay bars re-opening a long-final judgment.

[14] In *Clarke*, the Wisconsin Elections Commission said modifications to district lines must be in place by March 15, 2024. *See* Response of Wis. Elections Comm'n 3, *Clarke*, No. 2023AP1399-OA (Oct. 16, 2023).

II. The motion is baseless.

A. Section 806.07 is not a basis for the relief Hunter Intervenors seek.

Hunter Intervenors invoke Wis. Stat. §806.07 for relief from judgment. Mot. Relief J. 2. Their motion is not only untimely but also fails for at least three additional procedural reasons.

1. First, §806.07 is a general rule of civil procedure that does not apply "where different procedure is prescribed by statute or rule." Wis. Stat. §801.01(2). A more specific rule governs reopening judgments in this Court. Section 809.64 specifically addresses "the supreme court" and allows "reconsideration of the judgment," but only within 20 days. That more "specific statute controls," *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶37, 302 Wis. 2d 358, 735 N.W.2d 30, and the request to reconsider *Johnson II* is untimely, *supra* Part I.

2. Even if §806.07 governed, Hunter Intervenors still could not obtain "relie[f] . . . *from* a judgment" or "order," *see* Wis. Stat. §806.07 (emphasis added), because there is no judgment or order against them.

Section 806.07 is "based on" Federal Rule of Civil Procedure 60(b). *See Mullen v. Coolong*, 153 Wis. 2d 401, 407, 451 N.W.2d 412 (1990). This Court has repeatedly looked to federal cases interpreting Rule 60(b) to interpret §806.07. *See, e.g.*, *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 545-46, 552, 363 N.W.2d 419 (1985).

Just as Rule 60(b) "provide[s] relief from the *existing obligations* created by a judgment or decree," 12 *Moore's Federal Practice* §60.25 (emphasis added), so too does §806.07, *see M.L.B.*, 122 Wis. 2d at 544 (use of post-judgment relief is "to obtain relief from a permanent injunction which has become unnecessary due to a change in conditions"). But here, *Johnson II* imposes no obligations on Hunter Intervenors; it "enjoin[s]" only the "Wisconsin Elections Commission." *See Johnson II*, 2022 WI 14, ¶52. Its "order[] to implement the congressional . . . maps submitted by Governor Evers for all upcoming elections" applies only to the Commission. *See id.* There is nothing for *Hunter Intervenors* to be relieved from.

3. What Hunter Intervenors are really asking for is new relief, and that poses a third hurdle. *See* Mot. Relief J. 3 (requesting Court

"[a]dopt a [new] plan"). The request for new relief—a do-over injunction—is distinct from a request for relief from judgment. And even if the proper party—the Commission—had sought new relief, this Court would lack the power to grant it.

Just as Federal Rule 60(b) contains "no provision . . . authorizing a court to modify or reopen a decree so as to provide additional relief," 12 *Moore's Federal Practice* §60.25, §806.07 cannot be interpreted to authorize reopening for a do-over injunction. Rather, the Rule 60(b) mechanism, and accordingly the §806.07 mechanism, is "available only to set aside a prior order or judgment; a court may not use [it] to grant affirmative relief in addition to the relief contained in the prior order or judgment." *Id.* Relief from judgment "may not create any new obligations, … even with ongoing injunctions." *Id.* Courts have long recognized that distinction. *See, e.g.*, *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 620 (8th Cir. 1987) (relief from judgment available "only to set aside a prior order or judgment," not "to impose additional affirmative relief"); *United States v. $119,980.00*, 680 F.2d 106, 107-08 (11th Cir. 1982) (court "had only the authority . . . to set aside

its order" and "could not impose [an] additional requirement"); *Puget Sound Gillnetters Ass'n v. U.S. Dist. Ct.*, 573 F.2d 1123, 1131 (9th Cir. 1978) (rule "deals with relief from judgments, not modification at the prevailing party's request to extend the judgment's scope"), *vacated on other grounds sub nom.*, *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1356 (5th Cir. 1972) ("further affirmative relief can not be sustained").

B. Section 806.07's requirements are not met.

Even if a §806.07 motion were proper, none of the enumerated circumstances warranting relief under §806.07 would exist here. Hunter Intervenors move for relief from judgment under two provisions only: "§ 806.07(1)(g) and (h)." Mot. Relief J. 2. In a footnote, Hunter Intervenors suggest that relief "may" be available "under subsection (f)" too. Memo. ISO Mot. Relief J. 19 n.5. None of these provisions applies.

1. Wis. Stat. §806.07(1)(g)

Subsection (g) allows relief from judgment if "[i]t is no longer equitable that the judgment should have prospective application."

Wis. Stat. §806.07(1)(g). This provision allows a party "to obtain relief from a permanent injunction which has become unnecessary due to a change in conditions." *M.L.B.*, 122 Wis. 2d at 544. No circumstances have rendered the *Johnson II* mandatory injunction "unnecessary" based on "a change of the conditions or the operative facts occurring after the 'judgment.'" *Id.* The State has not enacted new congressional redistricting legislation, so the *Johnson II* injunction is still necessary to ensure constitutional apportionment of Wisconsin's congressional districts. The United States has not conducted a new census, and *Johnson II*'s districts remain equally apportioned.

As for Hunter Intervenors' stated partisanship and separation-of-powers concerns, Memo. ISO Mot. Relief J. 21-31, those are not a "change in conditions." They were fully addressed in *Johnson*. *See, e.g.*, *Johnson I*, 2021 WI 87, ¶64 (discussing "constitutional confines of our judicial authority," observing that "existing maps were adopted by the legislature" and "signed by the governor," explaining that the Court cannot "[t]read[] further than necessary to remedy the[] current legal deficiencies" of that existing law without "intrud[ing] upon the

constitutional prerogatives of the political branches and unsettl[ing] the constitutional allocation of power"); *id.* ¶45 ("The people have never consented to the Wisconsin judiciary deciding what constitutes a 'fair' partisan divide; seizing such power would encroach on the constitutional prerogatives of the political branches.").

That leaves only Hunter Intervenors' argument that an intervening decision of this Court in another case, *Clarke*, is enough of a "change in conditions" to reopen the judgment in this case. It is not.

To begin, *Clarke* said this specifically: "'[L]east change' is unworkable in practice. As such, we overrule any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach." 2023 WI 79, ¶63. That statement about what the Court would do prospectively in *Clarke* has no bearing on what the Court has already done here. The Court in *Clarke* simply said it would not "*mandate* a least change approach." *Id.* (emphasis added) The Court did not say that such an approach was *prohibited.* Nor could it say such a thing, when the very reason for the least-changes approach in this case was as a way of abiding by the careful division of the separation of powers.

The "least-changes" label is simply a description of this Court's judicial role in ordering redistricting remedies. As in any case, a Court in a redistricting case is not *legislating*; it is prescribing a mandatory injunction. And any such judicial remedy cannot "[t]read[] further than necessary to remedy th[e] current legal deficiencies" of existing law—here 2011 Act 44—lest it "intrude upon the constitutional prerogatives of the political branches and unsettle the constitutional allocation of power." *Johnson I*, 2021 WI 87, ¶64; *see also Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶46, 393 Wis. 2d 38, 946 N.W.2d 35 (court cannot "order far broader relief than necessary"); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (judicial remedy must be "dictated by the extent of the violation established").

Nor does *Clarke*'s departure from the least-changes approach for remedies in that case make *Johnson II* inequitable.[15] A later change in law renders a permanent injunction inequitable when (1) "one or

[15] Quite the opposite—as the Legislature has argued in *Clarke*, departing from existing lines beyond what is necessary to remedy the contiguity in that case will raise serious state and federal constitutional questions about the impartiality of those proceedings and disenfranchisement of voters, among others. *See generally* Legislature's Response Remedial Br., *Clarke*, No. 2023AP1399-OA (Jan. 22, 2024).

more of the obligations placed upon the parties has become impermissible under . . . law," or (2) "when the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 388 (1992).

Applied here, *Johnson II* imposed no "obligations" on Hunter Intervenors, let alone ones that have become "impermissible." *Id.* Nor did *Clarke* "make legal what" the *Johnson II* injunction "was designed to prevent"—the use of malapportioned districts in forthcoming elections. *Id.*; *see United States v. Tennessee*, 615 F.3d 646, 653 (6th Cir. 2010) (movant's burden to "put forward 'new court decisions or statutes that make legal what once had been illegal'"); *cf. Agostini v. Felton*, 521 U.S. 203, 240 (1997) ("inequitable" to maintain "a continuing injunction" preventing action when later law made the action "perfectly consistent with the" Constitution).

Put another way, nothing in *Clarke* says that there is a constitutional defect in the existing congressional districts prescribed by *Johnson II*. There is thus no basis for revisiting them, especially not on Hunter Intervenors' belated timeline. That "injunction, whether right

or wrong, is not subject to impeachment." *See De Filippis v. United States*, 567 F.2d 341, 343-44 (7th Cir. 1977) ("This provision does not allow relitigation of issues that have been resolved by the judgment.").

Contrary to Hunter Intervenors' arguments, it would be *inequitable* to reopen *Johnson*. A statewide redraw replacing a lawful map weeks before election deadlines commence would be grossly inequitable. *See infra* Parts III-IV. It would undermine the separation of powers and the public interest. *Cf. State ex rel. Smith v. Zimmerman*, 266 Wis. 307, 312, 63 N.W.2d 52 (1954) ("no more than one legislative apportionment may be made in the interval between two federal enumerations" for state legislature). Hunter Intervenors have shown no irreparable harm for such extraordinary relief. *See Pure Milk Prod. Coop. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). And they've left parties no time for an opportunity to put on evidence that would be required if the Court starts down Hunter Intervenors' path of debating what is "fair" to Democrats. *See Clarke*, 995 N.W.2d at 781. Hunter Intervenors' motion jeopardizes the integrity of

forthcoming elections and considerable reliance interests of voters, constituents, candidates, and congressmembers. *See Blue Diamond Coal Co. v. Trs. of the UMWA Combined Benefit Fund*, 249 F.3d 519, 528 (6th Cir. 2001) ("Th[e] interest in finality is related to another equitable interest—that parties rely on final judgments once the disputes have been fully and vigorously adjudicated.").

2. Wis. Stat. §806.07(1)(h)

Subsection (h) allows consideration of "[a]ny other reasons justifying relief from the operation of the judgment." Wis. Stat. §806.07(1)(h). "Under this subsection, relief is warranted only when 'extraordinary circumstances' are present." *Connor v. Connor*, 2001 WI 49, ¶41, 243 Wis. 2d 279, 627 N.W.2d 182. "Extraordinary circumstances may exist only in extreme and limited cases." *Id.* ¶43.

a. Hunter Intervenors falsely imply that the extraordinary-circumstances requirement has been adopted by this Court only in "recent cases," Memo. ISO Mot. Relief J. 15-16 n.4, but this Court adopted that test at least as far back as 1985. *See M.L.B.*, 122 Wis. 2d at 549-50 ("the 'extraordinary circumstances' test is an appropriate way to approach claims for relief under sec. 806.07(1)(h)"). This Court has

repeatedly applied the test since that "seminal case," *Miller v. Hanover Ins.*, 2010 WI 75, ¶¶66-67, 326 Wis. 2d 640, 785 N.W.2d 493 (Walsh Bradley, J., concurring) ("subsection (h) 'should be used sparingly' and should not be interpreted 'so broadly as to erode the concept of finality'"); *accord id.* ¶¶35-36 (majority op.). Against this overwhelming weight of authority, Hunter Intervenors cite just one case to manufacture "tension in its precedents." Memo. ISO Mot. Relief J. 16 n.4 (citing *Mullen*, 153 Wis. 2d at 408-11). But that case also applied the test, as have several others. *See Mullen*, 153 Wis. 2d at 411 ("trial court acted within its discretion under the *unique circumstances* of this case" (emphasis added)); *see also Schauer v. DeNeveu Homeowners Ass'n, Inc.*, 194 Wis. 2d 62, 76, 533 N.W.2d 470 (1995) ("Absent such '*unique facts*,' relief will generally be denied." (emphasis added)); *Sukala v. Heritage Mut. Ins.*, 2005 WI 83, ¶12, 282 Wis. 2d 46, 698 N.W.2d 610 ("Paragraph (1)(h) is appropriately used to address intervening changes in the law only in *unique and extraordinary circumstances*." (emphasis added)).

b. On the merits, Hunter Intervenors are wrong that a change in law warrants re-opening. *See Agostini*, 521 U.S. at 239 ("Intervening

developments in the law by themselves rarely constitute the extraordinary circumstances required for relief"). For that reason, "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 sec. 806.07(1)(h)." *Schwochert v. Am. Fam. Mut. Ins.*, 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); *see also Blue Diamond*, 249 F.3d at 524 (collecting cases showing "[i]t is well-established that a change in decisional law is usually not, by itself, an 'extraordinary circumstance,' . . . even if a law is invalidated on state or federal constitutional grounds").

Contrary to Hunter Intervenors' assertions, *Mullen* is not to the contrary. The "determinative fact" in *Mullen* was that this Court "denied [the claimant's] petition for review . . . *at the very same time* when the same issue was before" it in the case that would overrule a lower court-decision depriving her of a money judgment. *See Sukala*, 2005 WI 83, ¶19 (emphasis added) (quoting *Mullen*, 153 Wis. 2d. at 408). *Johnson* was final before *Clarke* was filed and well before *Clarke* repudiated the least-changes "mandate" for the *Clarke* remedies. *Mullen*,

moreover, involved only a request for "reentry of the judgment" the claimant had won, not an extraordinary request for a new injunction. *See Mullen*, 153 Wis. 2d. at 405.

c. Re-opening *Johnson* in light of *Clarke* would require Hunter Intervenors to establish "five interest of justice factors in determining whether extraordinary circumstances are present." *Miller*, 2010 WI 75, ¶41. Those factors are:

> [1] whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; [2] whether the claimant received the effective assistance of counsel; [3] whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; [4] whether there is a meritorious defense to the claim; and [5] whether there are intervening circumstances making it inequitable to grant relief.

M.L.B., 122 Wis. 2d at 552-53.

Hunter Intervenors make no mention of these factors. Their arguments are thus "underdeveloped," *see Clarke*, 2023 WI 79, ¶37 n.16, and this Court should "not develop one for" them, *see Fabick v. Evers*, 2021 WI 28, ¶135 n.22, 396 Wis. 2d 231, 956 N.W.2d 856 (Walsh

Bradley, J., dissenting). The failure to show that the factors constitute extraordinary circumstances is fatal. *See Miller*, 2010 WI 75, ¶41.

Even if they had tried to make an argument, Hunter Intervenors still lose. The first factor does not apply because Hunter Intervenors submitted "proposed maps that comply with the least-change approach." Hunter Br. 8 (Dec. 15, 2021). And they expressly invited the Court to "select the Governor's map." Hunter Br. 13 (Dec. 30, 2021). The judgment in *Johnson II* was therefore "the product of a deliberate, well-informed choice." *See Miller*, 2010 WI 75, ¶50. They were effectively represented, this Court considered the merits in *Johnson*, and Hunter Intervenors have no "defense to the claim" that they themselves brought. *See id.* ¶56 (question is whether it is "reasonably likely that [the claimant] will prevail on the *merits* of this case" (emphasis added)). And there are *obviously* "intervening circumstances making it inequitable to grant relief." *Id.* ¶57. Granting a statewide redraw so close to the 2024 election will cause considerable prejudice to voters, candidates, and other parties' due process rights. *Infra* Parts

III-IV; *see Blue Diamond*, 249 F.3d at 528 ("that parties rely on final judgments" is "another equitable interest").

3. Wis. Stat. §806.07(1)(f)

Hunter Intervenors halfheartedly assert in a footnote that relief from judgment "may" be permitted "under subsection (f)." Memo. ISO Mot. Relief J. 19 n.5. This provision provides relief from judgment if "[a] prior judgment upon which the judgment is based has been reversed or otherwise vacated." Wis. Stat. §806.07(1)(f). But *Clarke* did not "reverse[] or otherwise vacate[]" *Johnson II*'s injunction and order relief related to congressional maps, *id.*, as Hunter Intervenors admit, Memo. ISO Mot. Relief J. 19 n.5 ("*Clarke* expressed the Court's intent to 'overrule'—rather than to 'reverse' or 'otherwise vacate . . . .'"). Hunter Intervenors' undeveloped argument is foreclosed by this Court's precedent. *Schauer*, 194 Wis. 2d at 65-66 ("we hold that sec. 806.07(1)(f) does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled in an unrelated proceeding").

III. The Court cannot give Hunter Intervenors the do-over they seek.

Even if there were some procedural basis for re-opening *Johnson*, there are at least five reasons why the Court could not issue a new injunction prescribing new congressional districts. Any such attempt would be subject to further appeals.

A. The Court cannot redistrict anew absent proof of a constitutional violation.

Hunter Intervenors do not allege there is anything unconstitutional about the existing congressional districts adopted in *Johnson II*. Earlier in *Johnson*, they said the Governor's proposed remedy complied with all "state and federal law." Hunter Br. 13 (Dec. 30, 2021). Now they say they do not like the districts on what can only be described as policy grounds. *See, e.g.*, Hunter Br. 22-23. There is no conceivable basis for this Court to upset the existing district lines for those policy reasons, just as the Legislature could not upset existing district lines mid-decade for policy reasons. *See Smith*, 266 Wis. at 319 ("no more than one legislative apportionment may be made in the interval between two federal enumerations" for state legislature). Any other rule would allow this Court to revisit *Johnson* endlessly.

B. The Court does not have "free rein" given the U.S. Constitution's Elections Clause.

The federal Elections Clause states that "the Legislature" will prescribe congressional district lines. U.S. Const. art. I, §4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

Applied here, in 2011, the Legislature passed and the Governor signed into law Act 44, which created new congressional districts. *See* 2011 Wis. Act 44 (codified at Wis. Stat. §§3.11-3.18). That legislative act is what the federal Elections Clause contemplates and Congress expects: "So long as a State has 'redistricted in the manner provided by the law thereof' . . . the resulting redistricting plan becomes the presumptively governing map." *Ariz. State Legislature v. Ariz. Ind. Redist. Comm'n*, 576 U.S. 787, 811 (2015) (quoting 2 U.S.C. §2a(c)). Act 44 was challenged and upheld in federal court, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012) (three-judge court), and used in the ensuing five congressional elections.

In 2021, the Census showed that Act 44's congressional districts were malapportioned. The Legislature and Governor reached an impasse over new redistricting legislation, so parties came to this Court for a judicial remedy. *See Johnson I*, 2021 WI 87, ¶¶4-5. This Court's power to resolve an impasse over congressional lines is informed by the U.S. Constitution's Elections Clause, as well as the Wisconsin Constitution. While this Court has power to remedy the malapportionment claim, *cf. Branch v. Smith*, 538 U.S. 254, 272-73 (2003), it cannot redistrict *carte blanche* as though it were the Legislature. When a state court is put in the unsavory position of adjusting districts, "it necessarily does so in the manner provided by state law," and "[i]t must follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature." *Id.* at 274 (cleaned up). To say otherwise would be to assume that this Court is exercising legislative power, when the state constitution vests it only with "judicial power," Wis. Const. art. VII, §2. And because redistricting is "an inherently . . . legislative—not judicial—task," *Jensen v. Wis. Elections Bd.*, 2002 WI

13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537, the Court cannot "tread[] further than necessary to remedy" the malapportionment. *Johnson I*, 2021 WI 87, ¶64; *see Moore v. Harper*, 600 U.S. 1, 25 (2023) ("whatever authority [i]s responsible for redistricting, that entity remain[s] subject to constraints set forth in the State Constitution").

Johnson II already remedied the malapportionment, and there is nothing more for this Court to do. Hunter Intervenors' request that this Court issue a new injunction that is more favorable to Democrats runs counter to these state and federal constitutional requirements. When addressing a State's congressional district lines, "state courts do not have free rein." *Moore*, 600 U.S. at 34. They "may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections" under the Elections Clause, *id.* at 36; *accord id.* at 38 (Kavanaugh, J., concurring) (emphasizing same). Hunter Intervenors are inviting this Court to do just that.

C. Reopening *Johnson II* as Hunter Intervenors envision would violate due process.

Proceeding as Hunter Intervenors suggest would jeopardize due process guarantees in at least two ways.

1. For the reasons stated in the accompanying recusal motion and brief, the Court also cannot issue a new injunction in this redistricting case with Justice Protasiewicz's participation.[16] Due process mandates recusal when a judge's participation in a case creates a "serious risk," "based on objective and reasonable perceptions," of "actual bias" and "prejudgment." *Caperton v. A.T. Massey Coal. Co.*, 556 U.S. 868, 884 (2009); *see Williams v. Pennsylvania*, 579 U.S. 1, 8-9, 12-14 (2016). In the context of judicial elections, there is a constitutionally intolerable risk of bias "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds . . . when the case was pending or imminent." *Caperton*, 556 U.S. at 884. Likewise, "when the judge has prejudged the facts or the outcome of the dispute before her," due

[16] The Legislature, Johnson Petitioners, and Congressmembers have jointly filed a recusal motion with this response brief. The motion requests the recusal of Justice Protasiewicz from all aspects of this case, including the decision to grant or deny Hunter Intervenors' motion.

process is violated. *Franklin v. McCaughtry*, 398 F.3d 955, 962 (7th Cir. 2005); *accord Caperton*, 556 U.S. at 884.

Should the Court grant Hunter Intervenors' motion without recusal, the "specific circumstances" would be rife with "objective risk of actual bias," *Caperton*, 556 U.S. at 881, 886, and any further proceedings would be infected with reversible structural error, *Williams*, 579 U.S. at 12-14. Due process entitles parties to a proceeding where "no member of the court is 'predisposed to find against [them].'" *Williams*, 579 U.S. at 16. And for the reasons briefed in the accompanied recusal motion, it cannot be assured here.

2. Separately, due process requires "the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). In the redistricting context "this court must act *as a court*, and provide, in this as in any other case, all of the procedural protections that due process and the right to be heard require." *Jensen*, 2002 WI 13, ¶22. "The hearing must be 'at a meaningful time and in a meaningful manner.'" *Goldberg*, 397 U.S. at 267. And "where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine

adverse witnesses." *Id.* at 269; *see also Greene v. McElroy*, 360 U.S. 474, 496 & n.25 (1959) ("confrontation and cross-examination are basic ingredients in a fair trial"). Indeed, Wisconsin law prohibits courts from resolving factual disputes without a hearing. *See, e.g.*, *Indus. Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶66 n.13, 299 Wis. 2d 81, 726 N.W.2d 898 ("an evidentiary hearing, rather than simply oral argument based on briefs, affidavits, and depositions, is necessary to resolve the [factual] disputes").

As *Clarke* has shown, remedial proceedings that consider "partisan impact" as Hunter Intervenors request will generate substantial factual disputes. It would violate due process to deny parties an opportunity to test experts with cross-examination, a hearing for fact-finding, and other features of ordinary civil litigation. Any "depart[ure] from the accepted and usual course of judicial proceedings," *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010) (per curiam), will deprive parties of a meaningful opportunity to litigate proposed remedies and the equities. "Courts enforce the requirement of procedural regularity on others, and must follow those requirements

themselves." *Id.* at 184. Exempting this case from normal procedural rules and judicial impartiality will only compound the due process violations. *See Allen v. Georgia*, 166 U.S. 138, 140 (1897); *accord Jordan v. Massachusetts*, 225 U.S. 167, 174-75 (1912).

D. Hunter Intervenors lose on the balance of the equities.

A new injunction would require a new showing of irreparable harm. *See Pure Milk*, 90 Wis. 2d at 800. Hunter Intervenors' unexcused delay refutes any contention that they will suffer irreparable harm absent a new injunction before the 2024 elections. *See, e.g.*, *Shaffer v. Globe Prot., Inc.*, 721 F.2d 1121, 1123 (7th Cir. 1983); *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248-49 (11th Cir. 2016). And the balance of the equities is decidedly *against* re-opening *Johnson* and devising new congressional districts. *Supra* pp. 24-25.

E. Laches precludes relief.

Finally, Hunter Intervenors' request for new lines is barred by laches. *See Trump*, 2020 WI 91, ¶11 ("if a party seeking extraordinary relief in an election-related matter fails to exercise the requisite diligence, laches will bar the action"). They want new district lines "in time for the 2024 congressional elections," Mot. Relief J. 3—*i.e.*, a new

mandatory injunction. They cannot obtain that extraordinary equitable relief because their delay is inexcusable. *See Trump*, 2020 WI 91, ¶¶10-22. In other redistricting cases, litigants seeking relief before the 2024 elections initiated their lawsuits more than a year ago, while other redistricting litigants who waited to bring their challenges until 2023 (still before Hunter Intervenors) are not attempting to seek relief before the 2024 elections.[17] Even *Clarke*'s regrettable application of laches cannot justify granting relief with weeks to spare before election deadlines. *See Clarke*, 2023 WI 79, ¶42 ("filing this case in *August* of 2023 is not unreasonable delay") (emphasis added)).

As for the other laches factors, there was no reason to expect their belated challenge, especially after they sat back for five months while *Clarke* was ongoing. *Trump*, 2020 WI 91, ¶23; *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶18, 393 Wis. 2d 308, 946 N.W.2d 101. And everyone—the parties here, voters, constituents, candidates,

[17] *See, e.g.*, Third Am. Compl., *S.C. State Conf. of the NAACP v. Alexander*, No. 3:21-cv-3302 (D.S.C. May 6, 2022); *see also, e.g.*, Compl., *League of Women Voters v. Utah Legis.*, No. 220901712 (Utah 3d D. Ct.) (Mar. 17, 2022); Compl., *Tenn. State Conf. of the NAACP v. Lee*, No. 3:23-cv-832 (M.D. Tenn. Aug. 9, 2023) (seeking relief before 2026 elections).

congressmen, and election officials—are prejudiced by their untimeliness. *See Trump*, 2020 WI 91, ¶24. Even if there were any basis for revisiting *Johnson II*—there is not—there is no time to do so without putting off the 2024 elections. *Infra* Part IV.

A statewide redraw will "result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). And there is insufficient time to educate voters or for candidates to campaign adequately, *see Chestnut v. Merrill*, 377 F. Supp. 3d 1308, 1317 (N.D. Ala. 2019) (raising concerns about "educat[ing] voters on where the newly drawn district lines lay"); *Simkins v. Gressette*, 495 F. Supp. 1075, 1081 (D.S.C.), *aff'd*, 631 F.2d 287 (4th Cir. 1980) ("They would lose the benefit of the campaigning they have already undertaken and they would have to begin the campaign process again in a new district," potentially losing benefit of "money already spent"). The Legislature would "surely [be] placed 'in a less favorable position'" by a delay that "deprive[s] [it] of the opportunity to" enact new maps or propose new remedies on a fair schedule. *See Brennan*, 2020 WI 69, ¶¶24-25. The prejudice here is not

mere "litigation costs," *contra Clarke*, 2023 WI 79, ¶43, but instead the unprecedented disruption to the parties, voters, candidates, and congressmembers of re-doing what was already done in this case.

IV. There is insufficient time before 2024 congressional election deadlines commence.

In August 2023, more than 5 months before election deadlines, this Court refused to hear partisan-gerrymandering challenges to Wisconsin's legislative districts because of "the need for extensive fact-finding (if not a full-scale trial)." *Clarke*, 995 N.W.2d at 781. Now, less than seven weeks before the Wisconsin Elections Commission would have to implement any changes to district lines, Hunter Intervenors want to redistrict anew.

There is no time before 2024 election deadlines commence to properly consider Hunter Intervenors' motion, give the political branches an opportunity to redistrict, and conduct further remedial proceedings. Any assessment of partisanship will raise a host of issues that require expert discovery and factfinding. That cannot be done in such short time without sacrificing parties' due process rights. Nor

can the Court redraw congressional districts without injecting intolerable uncertainty and confusion into the 2024 elections.

A. The motion is the first step of many.

This Court cannot simply grant Hunter Intervenors' motion and declare its existing *Johnson II* injunction void. The allegations in a motion are only the first step. *See M.L.B.*, 122 Wis. 2d at 557. If those allegations suggest relief may be warranted under §806.07, "a hearing shall be held on the truth or falsity of the allegations." *Id.* For example, Hunter Intervenors' attach an "expert affidavit" that makes myriad assumptions that "the 2022 Plan clearly creates a substantial advantage for the Republican Party." Rodden Aff. ¶2. The parties have had no opportunity to contest the relevance of such an assertion or its accuracy, and it would be highly improper to require the parties to do so as part of their 11-day response deadline to this motion to reopen, which borders on the frivolous for all of the preceding reasons.

Only after the Court determines "the truth of the allegations and upon consideration of any other factors bearing upon the equities" may the Court "decide what relief if any should be granted the claimant and upon what terms." *M.L.B.*, 122 Wis. 2d at 557; *see also*

Miller, 2010 WI 75, ¶34 ("a hearing must be held"); *Sukala*, 2005 WI 83, ¶10 ("a hearing will be held"). So even if the motion had raised the possibility that relief is warranted, this Court would need to hold a hearing before altering the existing *Johnson II* injunction. Alternatively, as this is an original action, "the court may refer issues of fact . . . to a circuit court or referee for determination." Wis. Stat. §751.09.

B. The Court must give the Legislature the first opportunity to redistrict.

Should the Court vacate the *Johnson II* congressional map, the Legislature must have the first opportunity to redistrict. "[I]n our constitutional order [redistricting] remains the legislature's duty." *Johnson I*, 2021 WI 87, ¶19; *see also Jensen*, 2002 WI 13, ¶10. That is even more so for redistricting congressional maps, as the federal Elections Clause "specifically reserve[s]" that duty "to state legislatures." *Moore*, 600 U.S. at 37; *supra* Part III.B.

Hunter Intervenors claim that because the *Johnson II* map was a malapportionment impasse remedy, the Court need not give the political branches the first opportunity to enact a new map. Memo. ISO

Mot. Relief. J. 33-34. But they omit that the *Zimmerman* litigation also concerned a malapportionment impasse remedy, and the Court there gave the Legislature every opportunity to fix the malapportioned districts, including an entire election cycle and then two more months. *See State ex rel. Reynolds v. Zimmerman*, 23 Wis. 2d 606, 128 N.W.2d 16 (1964); *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 569-71, 126 N.W.2d 551 (1964) ("although the legislative process has not produced a redistricting act from 1961 to the present, it is appropriate that the senate, the assembly, and the governor have a further opportunity . . . to enact a valid plan").

Hunter Intervenors alternatively "request that the Court order the same parallel remedial process as in *Clarke* . . . to ensure a valid map is in place for the 2024 election cycle." Memo. ISO Mot. Relief. J. 34 n.6 (citing *Clarke*, 2023 WI 79, ¶76). In other words, they want this Court's remedial process to "proceed concurrently" with any legislative process. *Clarke*, 2023 WI 79, ¶76. The Court now knows that a concurrent process is a recipe for failure. *See* Legislature's Memo. ISO Reconsideration 20-21, 28-30 (Dec. 28, 2023), *Clarke*, No. 2023AP1399-

OA. Given the campaign promises, the Governor and Democrats have "pin[ned] their hopes on the new liberal-controlled Wisconsin Supreme Court ordering that new maps be drawn that are more beneficial to them."[18] For instance, the Legislature has passed redistricting legislation adopting more than 99% of the Governor's proposed remedy in *Clarke*. *See* 2023 Wis. Assembly Bill 415.[19] Democratic legislators said there was no time to consider the legislation—without explaining how there was enough time in this Court.[20] And when the Governor asked whether he'd sign it, the Governor responded, "I won't sign it" and said it is "dead in the water."[21]

[18] Scott Bauer, *Wisconsin Assembly Republicans pass sweeping redistricting reform, but likely veto awaits*, AP (Sept. 15, 2023), bit.ly/576PLKJU.

[19] *See Wisconsin State Assembly Floor Session* at 14:25-14:48, Wis. Eye (Jan. 24, 2024), https://bit.ly/3tZSTzS (Statement of Assembly Speaker Robin Vos: "the Governor is getting 99 percent of what he asked for" while "undo[ing] the most egregious political gerrymanders in this map"); *id.* at 31:35-31:51 (Statement of Rep. John Macco: "It's not 99 percent; it's 99.93 percent. And somehow or another, that's the gerrymandering? It's not moving me out of my district by 581 feet, or my colleague by 15 feet? That's not the gerrymandering?").

[20] *See id.* at 10:05-10:09 (Statement of Rep. Greta Neubauer: "the people of Wisconsin deserve better than an eleventh-hour bill"); *see also id.* at 12:01-12:15 (Statement of Assembly Speaker Robin Vos: "we gave our Democrat colleagues the ability to adopt the map exactly—exactly—as drawn by Governor Evers. What was their answer? 'No.'").

[21] @GovEvers, Twitter (Jan. 24, 2024, 4:09 PM), https://bit.ly/3UdbX8k.

C. Remedial proceedings would require substantial fact-finding and expert discovery.

There is not sufficient time before 2024 election deadlines to conduct the remedial proceedings contemplated by Hunter Intervenors in a way that comports with due process, *supra*. Hunter Intervenors ask the Court to adopt a new congressional map "in time for the 2024 congressional elections." Mot. Relief J. 3. They request that the Court "solicit the parties to prepare proposed maps" and then, in evaluating proposals and selecting a map, "follow the law *as clarified by Clarke*"—unrestrained by "least change" and considering "partisan impact." Memo. ISO Mot. Relief J. 33-34.

Remedial proceedings cannot be accomplished in the time remaining. Last year, cases before the Wisconsin Court of Appeals took roughly 15 months.[22] Likewise, cases in Wisconsin's state and federal trial courts took more than 9 months on average to resolve, *excluding* cases that go to trial.[23] After waiting nearly 2 years from *Johnson II*, more than 5 months from the *Clarke* petition, and weeks until new

[22] *See Court of Appeals Annual Report-2022* at 3, Wis. Ct. Sys., https://bit.ly/3SjfjFF.

[23] *See Federal District Court Management Statistics – Profiles*, U.S. Courts, https://bit.ly/46NPIcF; *Circuit court caseload statistics*, Wis. Ct. Sys., https://bit.ly/4774wmi.

districts must be in place, Hunter Intervenors cannot fast-track this case in a way that would deny parties' rights to fully litigate remedies.

Any further remedial proceedings would require substantial factfinding and expert discovery. As *Clarke* has shown, proposed remedies touting partisan fairness raise substantial factual disputes. Those remedial proceedings have none of the guardrails of this Court's approach in this case, where parties were instructed to defer to existing state law and not consider partisanship. Because of those guardrails, the parties were able to agree no discovery was required beyond expert reports. *See* Proposed Joint Discovery Plan 2 (Dec. 3, 2021). There will be no such agreement here, just as there has been no such agreement in *Clarke*. *See*, *e.g.*, *Ohio A. Philip Randolph Inst. v. Householder*, 367 F. Supp. 3d 697, 717-19 (S.D. Ohio 2019) (finding genuine disputes of material fact on "partisan effect" of legislative maps).

Months ago, this Court already admonished that there is insufficient time for the fact-finding that will be required to adjudicate questions of partisan fairness. *See Clarke*, 995 N.W.2d at 781. There is no basis for declaring now—seven weeks before district lines must be

set—that there is sufficient time for the same factfinding (and full-scale trial) required to adjudicate "partisan impact" of proposed remedies, Memo. ISO Mot. Relief. J. 34.

D. Any eleventh-hour changes to congressional districts risk intolerable uncertainty and voter confusion.

There is insufficient time to complete remedial proceedings on Hunter Intervenors' desired schedule without injecting intolerable uncertainty and confusion into the 2024 elections. Hunter Intervenors want this Court to redraw congressional districts unrestrained by "least change" and considering "partisan impact." Memo. ISO Mot. Relief. J. 33-34.

Such sweeping, last-minute changes to election rules risk "work[ing] a needlessly 'chaotic and disruptive effect upon the electoral process.'" *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (per curiam). It is a "bedrock tenet of election law" that "[w]hen an election is close at hand, the rules of the road must be clear and settled." *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring). Courts therefore must refrain from "swoop[ing] in and re-

do[ing] a State's election laws in the period close to an election." *Id.* at 881.

At this point in the election calendar, and with all that remedial proceedings would require, the Court must maintain the status quo for the 2024 elections. *See, e.g.*, *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 215-16 (Iowa 2020) ("declin[ing] on the eve of this election to invalidate the legislature's statute"); *Moore v. Lee*, 644 S.W.3d 59, 65-67 (Tenn. 2022) (finding plaintiff's "alleged harm is outweighed by the significant harm the injunction will inflict on the Defendants and the public interest"); *Carson v. Simon*, 978 F.3d 1051, 1062 (8th Cir. 2020) (per curiam) (similar).

CONCLUSION

The Court should deny Hunter Intervenors' motion and reject any invitation to alter congressional districts with only weeks to go before districts must be in place.

Dated this 29th day of January, 2024.

Respectfully submitted,

Electronically Signed by
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CERTIFICATION REGARDING LENGTH AND FORM

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.81, which governs the form of documents filed in this court where Chapter 809 does not expressly provide for alternate formatting. The length of this response is 8,607 words as calculated by Microsoft Word.

Dated this 29th day of January, 2024

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