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2025CV002432

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

INTERVENOR-DEFENDANT WISCONSIN STATE LEGISLATURE'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

Plaintiffs ask this Court to "declare that Wisconsin's congressional map violates separation of powers" and to "enjoin its use going forward." (Dkt. 44:16.) By "congressional map," they mean a final judgment of the Wisconsin Supreme Court. *See Johnson v. Wis. Elections Comm'n* (*Johnson II*), 2022 WI 14, ¶52, 400 Wis. 2d 626, 971 N.W.2d 402. Whatever this Court might think of the wisdom of *Johnson II*, no circuit court may "enjoin its use." After all, "[t]he 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). Plaintiffs said so themselves mere months before moving this Court to declare a Wisconsin Supreme Court judgment unconstitutional. *See* Pet. for an Original Action ¶98, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (Wis. May 7, 2025) ("Because Petitioners bring purely state law claims against a map that was adopted by th[e] [Wisconsin Supreme] Court, no other court can provide Petitioners' requested relief.").

But now? Plaintiffs say this Court can simply replace the *Johnson II* injunction in the light of follow-on redistricting litigation in *Clarke v. Wisconsin Elections Commission*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370. But *Clarke* was specific to the State's Assembly and Senate districts. After *Clarke*, the Wisconsin Supreme Court denied requests to revisit the congressional districts—three times. *See* Order, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Mar. 1, 2024) (denying motion for relief from *Johnson II* judgment);

Order, *Felton v. Wis. Elections Comm'n*, No. 2025AP999-OA (Wis. June 25, 2025) (denying petition for original action); Order, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (Wis. June 25, 2025) (same). And for good reason. Congressional districts implicate the U.S. Constitution's Elections Clause, which tasks "the Legislature" with redistricting. U.S. Const. art. I, §4, cl. 1. *Johnson II*'s deference to the existing congressional district lines, enacted by the Legislature in 2011, was fully consistent with the federal constitutional rule that "state courts do not have free rein" to redraw districts as a Legislature might. *Moore v. Harper*, 600 U.S. 1, 34, 36 (2023); *see also Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam) (observing redistricting is "an inherently … legislative—not judicial—task"); *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 528-29, 576 N.W.2d 245 (1998) (Wisconsin courts are not "super-legislature[s]").

For these reasons and those in the Legislature's contemporaneously filed motion to dismiss, the Court should deny Plaintiffs' motion for judgment on the pleadings and dismiss Plaintiffs' complaint.

BACKGROUND[1]

A. In November 2011, Wisconsin enacted 2011 Wisconsin Act 44, prescribing new congressional districts. Act 44 was challenged and upheld in federal court, *Baldus v.*

[1] The Legislature's contemporaneously filed motion to dismiss also recounts relevant background facts. This counterstatement of the facts contains additional material facts regarding *Clarke*, invoked by Plaintiffs as the primary basis for their motion for judgment on the pleadings.

Members of Wis. Gov't Accountability Bd., 849 F. Supp. 2d 840, 853-54 (E.D. Wis. 2012) (three-judge court), and used in the ensuing five congressional elections.

A decade later, the 2020 census showed those districts were malapportioned. The Legislature introduced new congressional redistricting legislation, making few changes to the 2011 districts. *See* 2021 Senate Bill 622; *see also Johnson II*, 2022 WI 14, ¶14 (2021 legislation kept 93.5% of people in existing districts). But the Governor vetoed that legislation. *See* Wis. Governor's Veto Message, 2021 Senate Bill 622 (Nov. 18, 2021). So the 2011 districts remained the "law[] currently on the books." *Johnson v. Wis. Elections Comm'n* (*Johnson I*), 2021 WI 87, ¶85, 399 Wis. 2d 623, 967 N.W.2d 469 (Hagedorn, J., concurring).

With an impasse looming between the Legislature and the Governor, voters initiated an original action alleging that the 2011 districts were malapportioned. *Johnson I*, 2021 WI 87, ¶5; *see Wesberry v. Sanders*, 376 U.S. 1 (1964) (requiring equally populated congressional districts). The Wisconsin Supreme Court granted the petition for an original action and commenced proceedings to remedy the *Johnson* Petitioners' malapportionment claims. *Id.* ¶¶5-6.

The Wisconsin Supreme Court took a "least change" approach, making only minimal changes to existing districts to restore population equality. Acknowledging the Court had only "the power to provide a judicial remedy" for the malapportionment claim and no power "to legislate[,]" the Court held its "judicial remedy should reflect the least

change necessary for the maps to comport with relevant legal requirements" and "[u]s[e] the existing maps as a template." *Id.* ¶¶71-72 (plurality op.) (cleaned up). After all, those 2011 districts remained the unrepealed law and were "passed in accordance with the constitutional process and reflect the policy choices the people made through their elected representatives." *Id.* ¶85 (Hagedorn, J., concurring). The Court's remedial task was "making only necessary modifications" to remedy the malapportionment claim. *Id.* That "least-change approach is nothing more than a convenient way to describe the judiciary's properly limited role in redistricting." *Id.* ¶72 (plurality op.); *accord id.* ¶85 (Hagedorn, J., concurring).

The Wisconsin Supreme Court ultimately selected the Governor's proposed remedy and entered an injunction requiring the Wisconsin Elections Commission to make slight adjustments to the 2011 legislatively enacted congressional districts to restore them to population equality. *Johnson II*, 2022 WI 14, ¶¶13-19. Nearly 95% of Wisconsinites remained in their existing districts. *Id.* ¶14. Still today, the *Johnson II* injunction for congressional districts remains in place. The Wisconsin Supreme Court issued that injunction with instructions that it was to remain in place "for all upcoming elections" and "until new maps are enacted into law or a court otherwise directs." *Johnson II*, 2022 WI 14, ¶52.

B. In 2023, the Wisconsin Supreme Court accepted a new original action to revisit the State Assembly and Senate districts. *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, 410

Wis. 2d 1, 998 N.W.2d 370. As for the congressional districts, the Wisconsin Supreme Court denied every request to revisit the *Johnson II* injunction. Order, *Johnson*, No. 2021AP1450-OA (Wis. Mar. 1, 2024); Order, *Felton*, No. 2025AP999-OA (Wis. June 25, 2025); Order, *Bothfeld*, No. 2025AP996-OA (Wis. June 25, 2025).

In the *Clarke* original action, Plaintiffs claimed the state legislative districts were non-contiguous, in violation of Wisconsin Constitution article IV sections 4 and 5. *Clarke*, 2023 WI 79, ¶2. The Wisconsin Supreme Court agreed and commenced remedial proceedings. For those remedial proceedings, the Court overruled the "least-change approach" used in *Johnson*. *Id*. ¶¶60-63. But *Clarke* did not purport to resolve whether *Johnson*'s remedial approach remained appropriate for Wisconsin's congressional districts. The court, for example, observed a least-change approach was not prescribed by "constitutionally or statutorily mandated" redistricting criteria in state law for the state legislative districts, *id*. ¶62, but had no occasion to consider to what extent a least-change approach would be consistent with supreme federal law's vesting of authority in "the Legislature" for congressional districts. *See* U.S. Const. art. I, §4, cl.1; U.S. Const. art. VI, cl.2; *see also Moore*, 600 U.S. at 36 (cautioning that a state court cannot "arrogate to [itself] the power vested in state legislatures to regulate federal elections").

The Wisconsin Supreme Court has since declined to extend *Clarke* to the congressional districts three separate times. First in early 2024, intervening petitioners in *Johnson*, represented by Plaintiffs' same counsel, asked the Wisconsin Supreme Court to

reopen *Johnson* and revisit the congressional districts given *Clarke*'s rejection of a "least changes" remedy for the state legislative districts. The court rejected that request. *See* Order, *Johnson*, No. 2021AP1450-OA (Wis. Mar. 1, 2024). Again in 2025, the court denied a petition for a new original action asking to revisit the *Johnson II* injunction on grounds that districts were malapportioned. *See* Order, *Felton*, No. 2025AP999-OA (Wis. June 25, 2025). Then again in 2025, the court denied a petition for a new original action brought by Plaintiffs here, represented by Plaintiffs' same counsel, asking to revisit the *Johnson II* injunction because *Clarke* compelled it. *See* Order, *Bothfeld*, No. 2025AP996-OA (Wis. June 25, 2025). In that proposed original action, Plaintiffs claimed that "[b]ecause Petitioners bring purely state law claims against a map that was adopted by th[e] [Wisconsin Supreme] Court, no other court can provide Petitioners' requested relief." Pet. for an Original Act ¶98, *Bothfeld*, No. 2025AP996-OA (Wis. May 7, 2025). Proposed intervenors similarly argued that because the Wisconsin Supreme Court "imposed the current congressional map in *Johnson II*, only th[at] Court has the authority to enjoin that map or otherwise alter the order that requires Respondents to hold elections under the map." Mot. to Intervene by Wis. Bus. Leaders for Democracy et al. Ex.1 ¶16, *Bothfeld*, No. 2025AP996-OA (Wis. June 5, 2025).

C. Despite Plaintiffs' representations to the Wisconsin Supreme Court, Plaintiffs initiated this action in July 2025. It comes more than 3 years after the *Johnson II* injunction, nearly 14 years after the enactment of 2011 Wisconsin Act 44, and after 3 failed attempts

to convince the Wisconsin Supreme Court to revisit *Johnson II*. Their complaint challenges the political fairness of Wisconsin's congressional districts, alleging they are an unconstitutional "partisan gerrymander" and violate "separation-of-powers principles." *E.g.*, Compl. ¶¶1-7. Plaintiffs named the Wisconsin Elections Commission, including its commissioners and administrator, as Defendants. But throughout Plaintiffs' complaint, they challenge the alleged fairness of the Legislature's 2011 redistricting legislation and the *Johnson II* injunction for perpetuating that alleged unfairness. *E.g.*, Compl. ¶¶8-12, 35-58, 66-75. Plaintiffs have since moved for judgment on the pleadings for their separation-of-powers claim. Echoing their failed petition for an original action, they contend that *Clarke* compels jettisoning the *Johnson II* injunction and putting in place new court-drawn congressional districts. *See* Dkt. 44:3. The Legislature has intervened to move to dismiss Plaintiffs' complaint and oppose Plaintiffs' motion for judgment on the pleadings.

LEGAL STANDARD

A motion for judgment on the pleadings is inappropriate where the complaint fails to state a "claim for relief," accepting as true "the facts pleaded by the plaintiff, and all reasonable inferences therefrom." *Schuster v. Altenberg*, 144 Wis.2d 223, 228, 424 N.W.2d 159, 161 (citation omitted). Judgment on the pleadings should be denied if there are "no circumstances" in which a plaintiff can recover, or where there is a material fact issue. *Id.*; *cf. Soderlund v. Zibolski*, 2016 WI App 6, ¶1, 366 Wis. 2d 579, 584-85, 874 N.W.2d 561, 563-64 (holding that defendant was entitled to judgment on the pleadings and dismissing

plaintiff's complaint where the claims were "foreclosed" by precedent or otherwise unsupported); *see also League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶¶13, 42, 387 Wis. 2d 511, 929 N.W.2d 209 (ordering dismissal at the motion-to-dismiss stage when the Court held that plaintiffs' "interpretation of constitutional and statutory provisions" did not support claim for relief).

ARGUMENT

I. Only the Wisconsin Supreme Court Can Set Aside *Johnson*'s Final Judgment and Injunction Demarcating the Congressional Districts.

Plaintiffs ask this Court to do something it cannot do: set aside a final judgment and permanent injunction entered by the Wisconsin Supreme Court. The "congressional map" targeted in Plaintiffs' motion (at 3, 7, 8, 9, 11, 12, 16) is in fact a Supreme Court decision. *See Johnson II*, 2022 WI 14, ¶52. But Plaintiffs never grapple with the "rather extraordinary" nature of their request to have this Circuit Court declare that the Supreme Court did something unconstitutional in *Johnson II* and to vacate the permanent injunction. *Bothfeld v. Wis. Elections Comm'n*, 2025 WI 53, 418 Wis. 2d 545, 27 N.W.3d 508, 511 (Hagedorn, J., concurring in part and dissenting in part).

As detailed in the Legislature's contemporaneously filed motion to dismiss, only the Wisconsin Supreme Court can revisit the *Johnson II* injunction, which remains in place today to prescribe the metes and bounds of the State's congressional districts. *See* Legislature's Motion to Dismiss at 7-10. The *Johnson II* injunction "must be obeyed while

in existence." *State ex rel. Fowler v. Cir. Ct. of Green Lake Cnty.*, 98 Wis. 143, 73 N.W. 788, 790 (1898) (same). Having failed to convince the Supreme Court to revisit *Johnson II* in an original action last summer, Plaintiffs must concede the injunction remains in existence. *Supra* at 7. The Supreme Court remains "the only state court with the power to overrule, modify or withdraw language" from *Johnson II. Cook*, 208 Wis. 2d at 189.

The Court need not take the Legislature's word for it. Plaintiffs said so themselves. In their petition for an original action, Plaintiffs told the Wisconsin Supreme Court that "[b]ecause Petitioners bring purely state law claims against a map that was adopted by this Court, no other court can provide Petitioners' requested relief," *i.e.*, replace the *Johnson II* injunction. Pet. for Original Action ¶98, *Bothfeld*, No. 2025AP996-OA (May 7, 2025). The Wisconsin Supreme Court denied the petition. By Plaintiffs' own logic, that marks the end of the road for their attempt to redo Wisconsin's congressional districts. Nothing has changed since Plaintiffs made those representations to the Wisconsin Supreme Court.[2] Plaintiffs' motion for judgment on the pleadings must be denied, in

[2] Because their complaint implicates redistricting, Wisconsin law "required" the Wisconsin Supreme Court to convene this three-judge Court. *Bothfeld v. Wis. Elections Comm'n*, 2025 WI 53, 418 Wis. 2d 545, 27 N.W.3d 508, 510. In doing so, the Wisconsin Supreme Court did not decide how Plaintiffs' claims would fare and instead left it for this Court to decide in the first instance Plaintiffs' "rather extraordinary plea" to have this Court sit in review of the Wisconsin Supreme Court. *Id.* at 511 (Hagedorn, J., concurring in part and dissenting in part); *see also, e.g.*, *Shapiro v. McManus*, 577 U.S. 39 (2015) (requiring a three-judge court to be convened to decide whether to dismiss partisan gerrymandering claims, even though such claims were routinely deemed nonjusticiable).

recognition of the basic rule that a circuit court cannot undo what remains a final judgment and injunction of the Wisconsin Supreme Court. *L.W.V. of Wis.*, 2019 WI 75, ¶¶13, 42, 387 Wis. 2d 511, 929 N.W.2d 209.

II. *Clarke* Is Not Grounds for Jettisoning *Johnson II*.

Plaintiffs contend that the Wisconsin Supreme Court's intervening decision in *Clarke* allows this Court to vacate the *Johnson II* injunction. Indeed, Plaintiffs go so far as to say that "under binding Wisconsin precedent, the current congressional map is unlawful." (Dkt. 44:8.) And in their view, "vertical stare decisis" demands a judgment in their favor. (Dkt. 44:9.) Plaintiffs have nothing to support those broad assertions.

A. *Clarke* involved only *state legislative districts*, not congressional ones. *See Clarke*, 2023 WI 79, ¶2. Although *Clarke* said the "least-change" approach was not "mandated," *see id.* ¶63, it had no occasion to address whether that remedial approach remains appropriate in congressional redistricting litigation as a means of ensuring that state courts do not "transgress the ordinary bounds of judicial review" and unconstitutionally "arrogate to themselves the power vested in state legislatures to regulate federal elections" by the U.S. Constitution's Elections Clause. *Moore*, 600 U.S. at 36; *see* U.S. Const. art. I, §4, cl.1; *see also Johnson I*, 2021 WI 87, ¶72 (plurality op.) (observing that the least-change approach is simply "a convenient way to describe "the Wisconsin Constitution's limitations on the judicial power"); *id.* ¶85 (Hagedorn, J., concurring) (similar).

Clarke is not grounds for calling the *Johnson II* districts "unlawful" by implication. (*Contra* Dkt. 44:8.) Only the Wisconsin Supreme Court, consistent with its "law-declaring" role, may overrule or extend precedent to new cases. *State v. Grawien*, 123 Wis. 2d 428, 432, 367 N.W.2d 816, 818 (Ct. App. 1985) (noting that only the "Wisconsin Supreme Court" "has been designated by the constitution and the legislature as a law-declaring court," so "a court of appeals decision which effectively overrules a controlling decision of the Wisconsin Supreme Court is patently erroneous and usurpative"); *see also State v. Gudgeon*, 2006 WI App 143, ¶¶8, 14, 295 Wis. 2d 189, 198, 720 N.W.2d 114, 118 (observing that "if it were our decision to make, we would extend" a precedent to the case, but "*it is not in our power* to break new ground in this area") (emphasis added)); *Krawczyk v. Bank of Sun Prairie*, 174 Wis. 2d 1, 7, 496 N.W.2d 218, 220 (Ct. App. 1993) ("declin[ing]" to create a new exception based on reasoning from a supreme court opinion because "it is for the supreme court, not this court, in which the constitution has reposed the primary law-declaring function in the state's judicial system"); *see also Est. of Wells by Jeske v. Mount Sinai Medical Center*, 174 Wis. 2d 503, 512, 497 N.W.2d 779, 783 (Ct. App. 1993) (observing that "it is not within [the] power" of courts to "alter or expand upon that which the supreme court has previously decided"); *Blum v. 1st Auto & Cas*. Ins. Co., 2010 WI 78, ¶89, 326 Wis. 2d 729, 765-66, 786 N.W.2d 78, 96 (Roggensack, J., concurring in part and dissenting in part) (recognizing that a "decision is 'overruled' when it is 'set aside as precedent by *expressly deciding* that it should no longer be

controlling law" (emphasis added) (cleaned up)). Nor can Plaintiffs assert that *Clarke* retroactively invalidated the permanent injunction in *Johnson II* for Wisconsin's congressional districts when it did not so much as mention them. (*Contra* Dkt. 44:8); *Chamberlain v. Milwaukee & M.R. Co.*, 11 Wis. 238, 250 (1860) (the legal question was not "settled" by a prior case when the "court was not called on to examine the question, nor does the opinion assume to examine or decide it").

If *Clarke* is to be extended to the congressional districts and thereby invalidate the still-in-place *Johnson II* injunction, it is the Wisconsin Supreme Court that must say so. *Supra*, Part I. And yet, the Wisconsin Supreme Court has repeatedly declined to do just that. Plaintiffs' original action filed last summer repeatedly invoked *Clarke* as a reason for revisiting the congressional districts and doing away with the *Johnson II* injunction. Plaintiffs contended that *Johnson II*'s "adoption of the current congressional map … inflicts an independent—and especially pernicious—legal violation" and "grossly exceeded judicial authority," citing *Clarke*. Memo. in Support of Pet. for Original Action at 13, *Bothfeld v. Wis. Elections Comm'n*, No. 2025AP996-OA (Wis. May 7, 2025). And still, the Wisconsin Supreme Court denied the petition. Order, *Bothfeld*, No. 2025AP996-OA (Wis. June 25, 2025). Similarly, the month after *Clarke*, Plaintiffs' same counsel asked to reopen *Johnson* given *Clarke*'s rejection of a "least changes" remedy; the Wisconsin Supreme Court denied that motion too. Order, *Johnson*, No. 2021AP1450-OA (Wis. Mar.

1, 2024); *see also* Order, *Felton*, No. 2025AP999-OA (Wis. June 25, 2025) (denying third request to revisit congressional districts).

B. Plaintiffs are also wrong to assume *Clarke* establishes a separation-of-powers violation. Three times, Plaintiffs assert that *Clarke* said *Johnson*'s least-changes remedial approach "'supersede[d] the constitution.'" (Dkt. 44:3.) (purporting to quote *Clarke*, 2023 WI 79, ¶62); *see also id.* 8, 9. But that is not what *Clarke* said.

1. The winning claim in *Clarke* was not a separation-of-powers claim but instead that state legislative districts did not "consist of contiguous territory" as required by the Wisconsin Constitution article IV, sections 4 and 5. *See Clarke*, 2023 WI 79, ¶¶10-35. The Court then went on to discuss how to remedy that constitutional violation. *See Clarke*, 2023 WI 79, ¶¶60-71. The Court did not hold that *Johnson*'s remedial approach was unconstitutional. (*Contra* Dkt. 44:3, 8, 9) (purporting to quote *Clarke*, 2023 WI 79, ¶62). Rather, the quoted portion of the Court's opinion simply observed that *Johnson* should not have allowed a "judicially-created" least-changes metric, "not derived from the [state] constitutional text, to supersede the [state] constitution," *Clarke*, 2023 WI 79, ¶62—*e.g.*, "to supersede" the Wisconsin Constitution's express contiguity requirement for state legislative districts or other express requirements in state and federal law for state legislative districts, *id.* at ¶¶65-67. Indeed, the majority deemed it "conceivabl[e]" to have a "constitutionally or statutorily mandated" "least change" redistricting criterion. *Id.* ¶62, Its quibble with *Johnson* was that such a criterion was not in fact constitutionally or

statutorily mandated for the state legislative districts and should not have taken precedence over other such criteria. But nowhere in the *Clarke* majority opinion does the phrase "separation of powers" even appear, *except* to identify a question presented that the Court *did not* decide. *See Clarke*, 2023 WI 79, ¶¶7-8.

2. Plaintiffs' remaining separation-of-powers arguments fare no better. Plaintiffs contend the judiciary's exercise of "independent judgment" is impaired by the least-change approach. Dkt. 44:12. And Plaintiffs fault *Johnson II* for "improperly substitut[ing] the partisan judgment that prevailed in the 2011 political process for [the court's] own." *Id.* at 9.

As an initial matter, *Clarke* departed from *Johnson* and said it would "consider partisan impact" for proposed remedies. 2023 WI 79, ¶69. But *Clarke* said such considerations were second to "constitutionally mandated criteria such as equal apportionment or contiguity." *Id.* ¶71. In other words, "partisan impact" is *not* on the list of "constitutionally mandated" redistricting criteria. *Id.* In all events, *Clarke* resolved before deciding how the Court could reliably measure "partisan impact" when the State enacted new legislative districts, mooting the need for further remedial proceedings. *See* Order, *Clarke v. Wis. Elections Comm'n*, No. 2023AP001399 (Sept. 24, 2024). It thus left for another day debates over what court-made "partisan judgment," (Dkt. 44:9), could ever be appropriate and never touched what further limitations the federal Elections Clause imposes for congressional redistricting litigation.

More fundamentally, Plaintiffs have the constitutional concerns backwards. Deference to the "partisan judgment that prevailed in the 2011," *id.*, is consistent with the Elections Clause. Redistricting is a task for "the Legislature" and state courts cannot arrogate that legislative authority. U.S. Const. art. I, §4, cl. 1; *Moore*, 600 U.S. at 36; *accord Jensen*, 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537 (observing that redistricting is "an inherently … legislative—not judicial—task"); *Flynn*, 216 Wis. 2d at 528-29, 576 N.W.2d 245 (1998) (Wisconsin courts are not "super-legislature[s]"). Redistricting remedies routinely defer to the State's most recently enacted plan and otherwise do not intrude on the political branches' policy judgments more than necessary. *See Perry v. Perez*, 565 U.S. 388, 393 (2012) (per curiam) (courts "should take guidance from the State's recently enacted plan"); *White v. Weiser*, 412 U.S. 783, 795 (1973) (courts "should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary'"). Here too, *Johnson II* was wise not to ignore the policy judgments made by the Legislature with respect to the 2011 congressional districts. See *Johnson I*, 2021 WI 87, ¶81 ("the constitution precludes the judiciary from interfering with the lawful policy choices of the legislature.").

Plaintiffs' cited cases regarding the judiciary's "independent judgment" are not to the contrary. They are inapposite, concerning judicial deference to administrative agencies on questions of law. *Tetra Tech v. Wis. Dept. of Rev.*, 382 Wis.2d 496, 545, 547, 2018

WI 75, ¶¶55, 58, 914 N.W.2d 21 (ending the practice of deferring to agencies' interpretations of law); *Gabler v. Crime Victims Rights Board*, 376 Wis. 147, 151, 2017 WI 67, ¶¶1-2, 897 N.W.3d 384, 386 (holding that the separation of powers were violated when an "executive branch entity" possessed the "authority to pass judgment and impose discipline on a judge's exercise of core judicial powers"). Even *Clarke* itself did not go so far as to suggest that deference to the Legislature's policy choices violated the separation of powers. 2023 WI 79, ¶71 (observing that "partisan impact" will be one of "many factors" courts can consider in "adopting remedial legislative maps" but will "not supersede constitutionally mandated criteria").

III. *Johnson*'s Remedial Approach Respected the U.S. Constitution's Assignment of Redistricting Power to "the Legislature," Not State Courts.

Nor is there any basis for declaring *Johnson II*'s "least changes" remedial approach effectuated an "unlawful" congressional redistricting plan. (Dkt. 44:9-10.) Detailed above, the constitutionality of the *Johnson II* injunction is a determination for only the Wisconsin Supreme Court to make. *Supra*, Part I. *Clarke* did not disturb the *Johnson II* injunction for congressional districts. *Supra*, Part II. And given the United States Constitution's assignment of redistricting authority to "the Legislature," *see* U.S. Const. art. I, §4, cl.1, there was every reason to defer to the Legislature's last-enacted congressional districts.

When congressional districts are at issue, courts do not have "free rein" to redistrict anew. *Moore*, 600 U.S. at 34. Despite Plaintiffs' claims that the state court must

exercise its own "partisan judgment," (Dkt. 44:9), the U.S. Constitution says redistricting is for the Legislature. U.S. Const. art. I, §4, cl. 1. A "least change" remedial approach is simply a way of ensuring that the judiciary does not overstep that limited authority in congressional redistricting litigation. *See Johnson I*, 2021 WI 87, ¶72 (plurality op.) (describing least-changes approach as "a convenient way to describe "the Wisconsin Constitution's limitations on the judicial power in redistricting cases); *accord id.*¶85 (Hagedorn, J., concurring) (same).

Plaintiffs' contrary arguments suggest redistricting remedies must start from scratch, as though the court were a super-legislature redistricting anew. But state courts cannot constitutionally "arrogate … power vested in state legislatures to regulate federal elections." *Moore*, 600 U.S. at 36; *accord id.* at 38 (Kavanaugh, J., concurring) (same). When remedying constitutional violations, courts do not substitute their own policy judgments for the legislature's; they remedy the constitutional violation found and do no more. *See, e.g.*, *Perry*, 565 U.S. at 396 (holding that the district court "exceeded its mission to draw interim maps" because it "substituted its own" judgment for the state Legislature's); *Upham v. Seamon*, 456 U.S. 37, 40-41 (1982) ("[A] court" may not "substitute[] its own reapportionment preferences for those of the state legislature" and must instead "defer to the legislative judgments" even when a court "is required to effect an interim legislative apportionment plan"); *see also Flynn*, 216 Wis. 2d at 528-29, 576 N.W.2d 245. Were state courts to "[t]read[] further than necessary to remedy ... legal deficiencies,"

especially for congressional districts, they would "intrude upon the constitutional prerogatives of the political branches." *Johnson I*, 2021 WI 87, ¶64 (majority op.).

The *Johnson II* injunction is in keeping with that federal constitutional requirement. The Wisconsin Supreme Court issued a limited injunction to remedy petitioners' malapportionment claim without otherwise upending the existing districts. That approach reflected "the judiciary's properly limited role in redistricting" by "implementing only those remedies necessary to resolve constitutional … deficiencies." *Id.* ¶72 (plurality op.). Plaintiffs' extraordinary request that this Court vacate that remedy as "unlawful" and redistrict anew (Dkt. 44:8-9, 16) would "transgress the ordinary bounds of judicial review," contrary to the federal Elections Clause. *Moore*, 600 U.S. at 36; *accord id.* at 38 (Kavanaugh, J., concurring) (same).

CONCLUSION

For the foregoing reasons, the Legislature respectfully requests that this Court deny Plaintiffs' motion for judgment on the pleadings and dismiss Plaintiffs' complaint.

Dated: January 12, 2026

Respectfully submitted,

Electronically signed by Matthew M. Fernholz

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