IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, et al.,

Plaintiffs,

v. No. 15-cv-421-jdp

BEVERLY R. GILL, et al.,

Defendants;

and

THE WISCONSIN STATE ASSEMBLY,

Intervenor-Defendant.

PLAINTIFFS' BRIEF IN SUPPPORT OF CONSIDERING FIRST AMENDMENT ASSOCIATION CLAIMS WITHIN THE SUPREME COURT'S MANDATE

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND AND PROCEDURAL HISTORY 1

ARGUMENT 4

I. The Mandate Rule Governs the Scope of Proceedings Before this Court. 4

II. The Supreme Court Remanded to Allow Plaintiffs to Prove Their Injuries, Including First Amendment Associational Injuries. 7

A. The Supreme Court's *Whitford* Opinions Permit Adjudication of the First Amendment Right of Association Claims. 8

B. In the Alternative, this Court May Properly Consider Plaintiffs' Theory Because It Arises for the First Time on Remand. 15

III. Plaintiffs Have Alleged and Intend to Prove at Trial Their Associational Injuries. 18

IV. This Court Should Not Address Issues Outside the Mandate of the Supreme Court. 20

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Benisek v. Lamone, 348 F. Supp. 3d 493 (D. Md. 2018) 19

Calvert Fire Insurance Co. v. Will, 586 F.2d 12 (7th Cir. 1978) 12, 14

Carmody v. Board of Trustees of the University of Illinois, 893 F.3d 397 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 798 (2019) 6

Christianson v. Colt Industries Operating Corp., 486 U.S. 800 (1988) 17

Common Cause v. Rucho, 318 F. Supp. 3d 777 (M.D.N.C. 2018) 15, 19

Creek v. Village of Westhaven, 144 F.3d 441 (7th Cir. 1998) 4

Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017) 13

Expressions Hair Design v. Schneiderman, 877 F.3d 99 (2d Cir. 2017) 13

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

Hays v. Louisiana, 936 F. Supp. 360 (W.D. La. 1996) 15

Invention Submission Corp. v. Dudas, 413 F.3d 411 (4th Cir. 2005) 10

Kovacs v. United States, 739 F.3d 1020 (7th Cir. 2014) 4, 5

League of Women Voters of Michigan v. Benson, 373 F. Supp. 3d 867 (E.D. Mich. 2019) 19

Moore v. Anderson, 222 F.3d 280 (7th Cir. 2000) 6, 17

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 12

Ohio A. Philip Randolph Institute v. Householder, 373 F. Supp. 3d 978 (S.D. Ohio 2019) 19

Pearson v. Edgar, 153 F.3d 397 (7th Cir. 1998) 20

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) 10

Planned Parenthood of Southeastern Pennsylvania v. Casey, 510 U.S. 1309 (Souter, Circuit Justice 1994) 11

Quern v. Jordan, 440 U.S. 332 (1979) 4, 5, 17

Rockwell International Corp. v. United States, 549 U.S. 457 (2007) 10

Shapiro v. McManus, 136 S. Ct. 450 (2015) 17

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) 5

United States v. Adams, 746 F.3d 734 (7th Cir. 2014) 6, 8, 20

United States v. Husband, 312 F.3d 247 (7th Cir. 2002) 6

United States v. Morris, 259 F.3d 894 (7th Cir. 2001) 6

United States v. Obi, 542 F.3d 148 (6th Cir. 2008) 9

United States v. Polland, 56 F.3d 776 (7th Cir. 1995) 4

United States v. Simms, 721 F.3d 850 (7th Cir. 2013) 4, 9

United States v. White, 406 F.3d 827 (7th Cir. 2005) 4

United States v. Young, 66 F.3d 830 (7th Cir. 1995) 4, 8

Whitford. *Rucho v. Common Cause*, 138 S. Ct. 2679 (2018) 15

Whitford v. Gill, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018) 15

STATUTES

28 U.S.C. § 2106 8

OTHER AUTHORITIES

Jon O. Newman, *Decretal Language: Last Words of an Appellate Opinion*, 70 Brook. L. Rev. 727 (2005) 8

7C Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1920 (3d ed. 2007) 17

INTRODUCTION

Plaintiffs' claims under the First Amendment right of association fall within the scope of the Supreme Court's mandate in this case. Recognizing the unusual nature of the case, the Supreme Court remanded to provide Plaintiffs an opportunity to discover and present at trial additional evidence of their injuries sufficient to confer Article III jurisdiction on this Court. Two particularly salient features of the Supreme Court's opinions define the scope of the mandate. *First*, the Supreme Court majority deliberately declined to address the merits of these associational harms because the record before it did not present an adequate basis on which to rule. *Second*, Justice Kagan's concurrence provides guidance on what the Court's opinion allows, including consideration of the right of association claims on remand. There is nothing unusual about a court receiving a case on remand and looking to concurring opinions to correctly discern the scope of the mandate. Together, those two features resolve the question posed by this Court of whether the right of association claims fall within the Supreme Court's mandate.

This Court may therefore adjudicate Plaintiffs' First Amendment right of association claims in this case. Plaintiffs have alleged and intend to prove at trial that they have suffered concrete and particularized injuries to their First Amendment associational rights. This Court has the power to remedy those injuries, and it should join the chorus of district courts that have held in favor of plaintiffs alleging similar injuries in partisan gerrymandering cases.

BACKGROUND AND PROCEDURAL HISTORY

Given the Court's familiarity with these proceedings, Plaintiffs confine their discussion of the relevant procedural history to post-remand proceedings. After the Supreme Court vacated this Court's earlier judgment and remanded for further proceedings, *Gill v. Whitford*, 138 S. Ct. 1916 (2018), this Court accepted the parties' proposal that the remanded case should start with an

amended complaint. Dkt. 199, at 1.[1] Simultaneously, this Court made clear that the remand did not authorize "starting a brand-new case." *Id.* Instead, this case would proceed within the scope of the mandate from the Supreme Court, which limits the issues the Court should consider under the familiar mandate rule. Among the "four main issues" this Court has identified for resolution on remand is "whether any of the plaintiffs have standing to sue." Dkt. 243, at 3.

In order to adequately allege and prove their standing, Plaintiffs amended their pleadings with leave of the Court. The amended complaint joins additional plaintiffs, identifying the specific Assembly district in which each plaintiff resides, and describing whether those districts have been "cracked" or "packed." Dkt. 201, ¶¶ 19, 22, 25, 28, 31, 34, 37, 40, 43, 46, 49, 52, 55, 58, 61, 64, 67, 70, 73, 76, 79, 82, 85, 88, 91, 94, 97, 100, 103. Plaintiffs also identified with particularity their claim for relief from unlawful burdens on their First Amendment right to association. In contrast with the pre-remand case, where "the harm asserted by plaintiffs [was] best understood as arising from a burden on those plaintiffs' own votes," *Whitford*, 138 S. Ct. at 1931, Plaintiffs now allege two conceptually distinct harms: (1) vote dilution, and (2) burdens on the First Amendment right of association. Dkt. 201, ¶ 17 ("In addition to having their votes unlawfully diluted, the plaintiffs have suffered a range of associational harms . . . ."); *id.* ¶¶ 18, 21, 24, 27, 30, 33, 36, 39, 42, 45, 48, 51, 54, 57, 60, 63, 66, 69, 72, 75, 78, 81, 84, 87, 90, 93, 96, 99, 102, 105-111 (alleging associational burden on each plaintiff); *id.* ¶¶ 173-178 (describing burden on right to association). All of these amendments were responsive to the specific issues addressed by the Supreme Court in *Whitford*.

After the Supreme Court remanded the case, the Wisconsin State Assembly intervened to defend the challenged districting plan. As part of its intervention, "[t]he Assembly has agreed to

[1] Docket entries are to Case No. 15-cv-00421-jdp.

abide by the parameters set forth in the court's preliminary pretrial conference order." Dkt. 223, at 4. These parameters include the "expeditious resolution of this case within the mandate of the Supreme Court."Dkt. 199, at 1-2. Nonetheless, the Assembly's understanding of the issues within the scope of the mandate has diverged from both the text of the Supreme Court's decision in *Whitford* and this Court's instructions. *See* Dkt. 229, at 4-6 (explaining why few of the Assembly's arguments even "plausibly fall within the scope of the Court's mandate").

To determine the precise scope of the mandate, this Court ordered pre-trial briefing "on the question [of] whether plaintiffs' claims under the First Amendment right of association fall within the scope of the Supreme Court's mandate in this case." Dkt. 248, at 2. In their opposition to the Assembly's motion to dismiss, Plaintiffs discussed why the First Amendment right of association claims fall within the mandate. Dkt. 229 at 11-12, 19-22. The arguments in Plaintiffs' opposition brief are expressly incorporated by reference in this brief, and additional arguments presented below further explain Plaintiffs' position. Plaintiffs respectfully contend that the mandate permits this Court to adjudicate Plaintiffs' First Amendment right of association claims to allow them to correct the jurisdictional defect—lack of standing—identified by the Supreme Court. But even if that were not true, the First Amendment right of association claims properly arise only for the first time on remand, particularly so for the 27 Plaintiffs joined as parties post-remand with this Court's leave. Because this theory of harm was not presented to the Supreme Court in *Whitford*, and therefore the Court explicitly declined to adjudicate it, the District Court may consider the First Amendment right of association claims in the first instance.

ARGUMENT

I. The Mandate Rule Governs the Scope of Proceedings Before this Court.

The mandate rule constrains the issues that a district court may consider in a case remanded from an appellate court. In its most basic formulation, "[t]he mandate rule requires a lower court to adhere to the commands of a higher court on remand." *United States v. Polland*, 56 F.3d 776, 777 (7th Cir. 1995); *see also, e.g.*, *United States v. White*, 406 F.3d 827, 831 (7th Cir. 2005) ("[T]he mandate rule require[s] the district court to adhere to the commands of this Court."). To ascertain these commands, a lower court must perform "a careful reading of the reviewing court's opinion." *Creek v. Village of Westhaven*, 144 F.3d 441, 445 (7th Cir. 1998). Following the mandate rule, this Court may not decide any issues in a manner "inconsistent with either the spirit or express terms" of the Supreme Court's decision. *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979). The Seventh Circuit characterizes remands as either general or limited. *United States v. Young*, 66 F.3d 830, 835 (7th Cir. 1995) (citing 28 U.S.C. § 2106). In a general remand, "consistency with that decision is the only limitation imposed" by the appellate court. *United States v. Simms*, 721 F.3d 850, 852 (7th Cir. 2013). And in a limited remand, the district court "may address only the issue or issues remanded, issues arising for the first time on remand, and issues that were timely raised but which remain undecided." *Kovacs v. United States*, 739 F.3d 1020, 1024 (7th Cir. 2014) (citing *United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001)). Regardless of how the Seventh Circuit would characterize this remand, Plaintiffs' First Amendment right of association claims fall within the bounds of the mandate.

The Supreme Court remanded this case with a clear purpose: "that the plaintiffs may have an opportunity to prove concrete and particularized injuries" necessary for this Court to exercise jurisdiction over Plaintiffs' case. 138 S. Ct. at 1934. Because the Supreme Court held "that the

harm asserted by the plaintiffs *is best understood* as arising from a burden on those plaintiffs' own votes," *id.* at 1931 (emphasis added), it held that on remand, Plaintiffs must discover and present at trial "evidence . . . that would tend to demonstrate a burden on their individual votes." *Id.* at 1934. On remand, Plaintiffs have alleged, taken discovery of, and will attempt to prove at trial precisely such injuries.

But Plaintiffs have also clarified on remand that they assert a second, conceptually distinct injury under the First Amendment right of association. Proof of associational harms would provide this Court with the power under Article III to adjudicate the merits of Plaintiffs' partisan gerrymandering claim and order appropriate remedies.[2] Thus, considering the associational harms alleged by Plaintiffs follows directly from the reason the Supreme Court remanded this case: to ensure that Plaintiffs have an opportunity to demonstrate that this Court has the power to hear Plaintiffs' case.

Moreover, this Court also "may consider and decide any matters left open by the mandate of [the Supreme Court]." *Quern*, 440 U.S. at 347 n.18 (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895)). "While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939); *see also, e.g.*, *Kovacs*, 739 F.3d at 1024 (noting that a district court may consider "issues arising for the first time on remand, and issues that were timely raised but which remain undecided"). Because "observations or commentary touching upon issues not formally before the reviewing court do not constitute binding determinations," a reviewing court's mandate does not

[2] As the Supreme Court reiterated in *Whitford*, standing and remedy should be considered together. "A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Whitford*, 138 S. Ct. at 1934 (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006)); *see id.* at 1940 (Kagan, J., concurring) ("And when the suit alleges that a gerrymander has imposed those [associational] burdens on a statewide basis, then its litigation should be statewide too—as to standing, liability, and remedy alike.").

foreclose the district court's consideration of those issues. *Moore v. Anderson*, 222 F.3d 280, 283 (7th Cir. 2000) (quoting *Creek*, 144 F.3d at 445). The *Whitford* majority's express decision to not address the First Amendment right of association claim means that this Court may consider it as a matter of first impression consistent with the mandate.

Simultaneously, however, nothing in *Whitford*'s mandate vacating this Court's prior judgment requires reopening the litigation of issues already decided by this Court but not addressed by the Supreme Court's opinion. Matters "not within the scope of the remand" are "not available for consideration on remand." *United States v. Husband*, 312 F.3d 247, 251-52 (7th Cir. 2002). The Assembly "cannot use the accident of remand as an opportunity to reopen" those previously decided issues. *United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001). And even where a remand order does not limit the issues that may be considered, judicial economy favors limiting reconsideration of the issues already decided and not disturbed by the reviewing court. *United States v. Adams*, 746 F.3d 734, 743-44 (7th Cir. 2014) (describing "unnecessary confusion and wasted judicial resources" resulting from misperception that a general remand "*requires* a district court to start from scratch"); *see also Carmody v. Bd. of Trs. of the Univ. of Ill.*, 893 F.3d 397, 408 (7th Cir. 2018) (noting that, after remand, an "earlier final judgment became interlocutory," but there was no "compelling reason to revisit the earlier rulings after [the Circuit's] remand"), *cert. denied*, 139 S. Ct. 798 (2019). Assuming Plaintiffs have standing, which they have alleged, demonstrated through discovery, and intend to prove at trial, *see infra*, the Supreme Court's mandate permits the Court to readopt its previous factual findings and legal conclusions on the merits of the case.

II. The Supreme Court Remanded to Allow Plaintiffs to Prove Their Injuries, Including First Amendment Associational Injuries.

The Supreme Court held in *Whitford* that Plaintiffs had failed to prove their standing, and "[t]he District Court and this Court therefore lack[ed] the power to resolve their claims." 138 S. Ct. at 1923. Recognizing that "[t]his is not the usual case," however, the Supreme Court declined to remand with instructions to dismiss. *Id.* at 1933-34. Instead, the Court remanded precisely to provide Plaintiffs with the opportunity "to prove concrete and particularized injuries using evidence . . . that would tend to demonstrate a burden on their individual votes." *Id.* at 1934. The Court vacated this Court's judgment and "remand[ed] for further proceedings consistent with this opinion." *Id*. The Court's decision only concerned the burden Plaintiffs carry to demonstrate standing to challenge a partisan gerrymander, and its mandate reflects that limited holding; this Court must determine whether Plaintiffs have standing before reaching the merits of their claims. Because the mandate derives from the issues addressed by the Supreme Court's opinion, this Court may consider new theories that would demonstrate this Court's jurisdiction.

The First Amendment right of association claims directly relate to Plaintiffs' ability to prove standing to challenge Wisconsin's partisan gerrymander: "Because on this alternative theory, the valued association and the injury to it are statewide, so too is the relevant standing requirement." *Whitford*, 138 S. Ct. at 1939 (Kagan, J., concurring). And assuming Plaintiffs can demonstrate standing based on associational harms, they will have corrected the jurisdictional defect the Supreme Court identified. As a result, this Court (and the Supreme Court, on appeal) will have the power to adjudicate the merits of the partisan gerrymander at issue in this case and order appropriately tailored remedies.

A. The Supreme Court's *Whitford* Opinions Permit Adjudication of the First Amendment Right of Association Claims.

A close reading of all three opinions in *Whitford*, as well as past practice from other courts, confirms Plaintiffs' position. The majority opinion deliberately does not foreclose adjudication of the right of association claim on remand. And courts interpreting mandates from the Supreme Court routinely examine concurring opinions to ensure that they comply with the Court's holding. The Court should therefore conclude, as Justice Kagan wrote, that "nothing in the Court's opinion prevents the plaintiffs on remand from pursuing an associational claim." *Whitford*, 138 S. Ct. at 1939 (Kagan, J., concurring).

1. Nothing in the language of the majority opinion precludes this Court from considering theories of standing other than vote dilution on remand. *First*, the decretal language—"the case is remanded for further proceedings consistent with this opinion," 138 S. Ct. at 1934—does not foreclose other standing theories to the extent that they do not contradict the Court's holding. *See Young*, 66 F.3d at 836. As a "catch-all remand[]," a remand "for further proceedings consistent with this opinion" differs from a mandate where "some precise task [is] identified" for the trial court. Jon O. Newman, *Decretal Language: Last Words of an Appellate Opinion*, 70 Brook. L. Rev. 727, 731 (2005) (internal quotation marks omitted). In the latter case, where a reviewing court instructs a district court to only consider a particular issue or set of issues on remand, that district court must confine itself to only discussing those issues. 28 U.S.C. § 2106; *Adams*, 746 F.3d at 744 (noting that 28 U.S.C. § 2106 authorizes "limited remand, where the appellate court returns the case to the trial court but with instructions to make a ruling or other determination on a specific issue or issues and do nothing else" (quoting *Simms*, 721 F.3d at 852)). But that is simply not the case here.

Nowhere in the *Whitford* opinions did any Justice suggest that the *only* way Plaintiffs may demonstrate standing is through district-by-district vote dilution. Rather, to the extent that Plaintiffs assert vote dilution harms in their case, they must prove standing in accordance with the Supreme Court's holding. The Supreme Court did not remand for further proceedings only on the question of vote dilution; it remanded for further proceedings "consistent with" its holding on how Plaintiffs must demonstrate standing when they allege vote dilution harms.

Second, nothing in the rest of language of the majority opinion explicitly or implicitly deprives this Court of the power to consider the First Amendment right of association theory. The Supreme Court expressly said that the majority opinion "le[ft] for another day consideration of other possible theories of harm not presented here." 138 S. Ct. at 1931; *id.* at 1940 (Kagan, J., concurring) (underscoring that the Court "le[ft] for another day the theory of harm . . . that a partisan gerrymander interferes with the vital 'ability of citizens to band together' to further their political beliefs" (citation omitted)). Since the Supreme Court "did not tell [this Court] *not* to conduct" an analysis of Plaintiffs' First Amendment right of association claims, the Court may consider them. *Simms*, 721 F.3d at 852; *see also United States v. Obi*, 542 F.3d 148, 154 (6th Cir. 2008) ("Although the appellate decision focused exclusively on obstruction, the mandate did not instruct the district court to limit its review to that particular issue."). Of course, if Plaintiffs' First Amendment right of association theory conflicted in some way with the holding of the Supreme Court, this Court must reject it. But the mere fact that the Supreme Court determined the theory was inadequately developed on the prior record to discuss its merits should not preclude Plaintiffs from further developing the record sufficiently to support standing based on associational burdens.

The Supreme Court's decision to not instruct this Court to dismiss Plaintiffs' case underscores the propriety of assessing other jurisdictional bases. 138 S. Ct. at 1933-34. Where an

appellate court issues a mandate requiring immediate dismissal for lack of jurisdiction, a district court may not consider new jurisdictional theories before carrying out the mandate. *See Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414-15 (4th Cir. 2005). But because "this is not the usual case," the Supreme Court declined to order dismissal. *Whitford*, 138 S. Ct. at 1933-34. And on remand, Plaintiffs have amended their pleadings with leave from the Court. *See* Dkt. 201. Those amended pleadings, which have clarified the First Amendment harms asserted, now supply the basis for this Court's jurisdiction. *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007) ("[W]hen a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction."). Because Plaintiffs have adequately pleaded First Amendment right of association harms and intend to prove them at trial, this Court may consider them as a basis for its jurisdiction.

2. Even if the scope of the remand order were not clear from the majority opinion alone, no principle of law compels the Court to disregard Justice Kagan's concurrence. Quite the opposite: courts properly look to *all* of the Justices' opinions to interpret an ambiguous mandate. For example, after the Supreme Court decided the merits in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court "remanded for proceedings consistent with this opinion, including consideration of the question of severability." 505 U.S. 833, 901 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.). In addition to considering severability, the district court permitted plaintiffs to challenge the constitutionality of the portions of the law as applied, even where the Supreme Court had upheld the law on its face. After the court of appeals reversed the district court's judgment, plaintiffs petitioned Justice Souter for a stay.

To determine whether the district court erred, Justice Souter interpreted the scope of the Court's earlier mandate using all five opinions from the earlier case. He recognized that the joint

opinion controlled under the *Marks* rule, *Planned Parenthood of Se. Pa. v. Casey*, 510 U.S. 1309, 1310 n.2 (Souter, Circuit Justice 1994), but nonetheless looked to the concurrences and dissents as well. He observed, "[s]ignificantly, *none* of the five opinions took the position" that the district court should reopen proceedings on remand to determine the constitutionality of the Pennsylvania statute as applied. *Id.* at 1313 (emphasis added). As a result, the Court of Appeals had correctly construed the mandate to forbid the district court from reopening the question of the constitutionality of the Pennsylvania law in the same case.

Applying Justice Souter's methodology here yields two conclusions. *First*, because at least one opinion in *Whitford* took the position that the First Amendment right of association claims could be considered on remand, they are within the scope of the mandate. Justice Kagan's concurrence unambiguously permits Plaintiffs the choice of whether to pursue associational harm theories on remand. 138 S. Ct. at 1938-39 (Kagan, J., concurring). Following that direction, Plaintiffs have pleaded, taken discovery of, and intend to prove at trial these types of injuries. *See infra*. The Court should therefore consider them within the scope of the remand order. *Second*, this Court need not—and should not—reopen any other aspects of its prior decisions for duplicative litigation. Neither the majority opinion nor Justice Kagan's or Justice Thomas's concurrences suggested that this Court should reconsider any other aspects of the decision it rendered after hearing the evidence presented at the four-day trial in May 2016 and considering the arguments of counsel in post-trial briefing. *See* 138 S. Ct. at 1928-29 (declining to opine on justiciability of partisan gerrymandering claims); *id.* at 1934 ("We express no view on the merits of the plaintiffs' case."); *id.* at 1936-37 (Kagan, J., concurring) (discussing the evidence this Court might consider on remand regarding standing, but not suggesting this Court reopen its holding on the merits); *id.* at 1941 (Thomas, J., concurring in part and concurring in the judgment) (opining that he would

have remanded with instructions to dismiss the case for lack of jurisdiction, but not suggesting this Court reconsider its merits analysis). Given that none of the Justices even hinted that the Court should reconsider other issues that it had already resolved, the rest of this Court's factual findings and legal conclusions fall outside the Supreme Court's mandate.

Seventh Circuit case law counsels an analogous approach. When the Supreme Court's decision contains an ambiguous mandate in need of interpretation, the Seventh Circuit carefully "review[s] the various opinions written by the Justices" to determine what proposition garnered support from a majority of the Justices. *Calvert Fire Ins. Co. v. Will*, 586 F.2d 12, 13 (7th Cir. 1978) (per curiam); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 (1983) (noting that *Calvert* correctly interpreted the Supreme Court's mandate). In *Calvert*, the panel confronted a fractured Supreme Court decision without a majority opinion. But rather than interpreting the mandate using only the plurality opinion, the Circuit concluded that the controlling concurrence *and* the dissent *together* defined the scope of the mandate. Because the Circuit determined that four dissenting Justices would also favor the position taken in Justice Blackmun's controlling concurrence, the two opinions jointly created a mandate backed by a majority of the Court. *Calvert*, 586 F.2d at 14. Both opinions were necessary to determine what the mandate required from the lower courts on remand.

So too, here: Writing for a majority of those seven justices who joined Part III of the *Whitford* majority opinion, Justice Kagan noted that "nothing in the Court's opinion prevents the plaintiffs on remand from pursuing an associational claim." 138 S. Ct. at 1939 (Kagan, J., concurring); *see also id.* at 1934 (Kagan, J. concurring) ("[O]n remand [Plaintiffs] may well develop the associational theory . . . ."). Justice Kagan emphasized that whether to pursue a right of association claim is a choice left to Plaintiffs, not one dictated by the Court's mandate. *Id.* at

1938 (Kagan, J., concurring) (noting that Plaintiffs may "choose" to pursue the claim "on remand"). These four concurring Justices voted for vacatur and remand not because they believed Plaintiffs could not advance First Amendment right of association claims, but rather because they had not sufficiently done so on the record then before the Court. *See id.* at 1939 (Kagan, J. concurring) ("[T]he plaintiffs tried this case as though it were about vote dilution alone."). These Justices left no ambiguity about how they interpreted the scope of the Court's mandate. And because they provided the necessary votes for Part III of the opinion to enjoy support from a majority of the Justices, their interpretation of the mandate deserves controlling weight.

As a final, more recent example, the Second Circuit recently used two concurring Justices' opinions to determine how to proceed after the Supreme Court vacated its prior opinion and remanded the case. *See Expressions Hair Design v. Schneiderman* (*"Expressions I"*), 137 S. Ct. 1144, 1152 (2017) (vacating the opinion and "remand[ing] for further proceedings consistent with this opinion"). Although the majority opinion did not mention certifying the interpretation of the state law to the New York Court of Appeals—let alone require it—the Second Circuit chose to certify the question on remand. *Expressions Hair Design v. Schneiderman* ("*Expressions II"*), 877 F.3d 99, 107 (2d Cir. 2017). The Court of Appeals specifically referenced Justice Breyer's and Justice Sotomayor's concurring opinions when deciding that the Supreme Court's mandate encompassed the option of certification, despite the majority opinion's silence on the issue. *See id.* (citing *Expressions I*, 137 S. Ct. at 1153 (Breyer, J., concurring); *Expressions I*, 137 S. Ct. at 1159 (Sotomayor, J., concurring)). In particular, Justice Sotomayor's concurrence used language similar to Justice Kagan's in this case: "The Court's opinion does not foreclose the Second Circuit from choosing that route [certification] on remand." *Expressions I*, 137 S. Ct. at 1159 (Sotomayor, J., concurring); *cf. Whitford*, 138 S. Ct. at 1939 (Kagan, J., concurring) ("[N]othing in the Court's

opinion prevents the plaintiffs on remand from pursuing an associational claim . . . ."). Relying on a Justice's concurrence to interpret the majority opinion's mandate breaks no new ground.

And the argument for following Justice Kagan's direction here is even stronger than for the Second Circuit following Justice Sotomayor's guidance in *Expressions II*. The concurring Justices in *Expressions I* declined to join the majority opinion. By contrast, the four Justices who signed Justice Kagan's concurrence in *Whitford* comprise the majority of Justices joining Part III of the Court's majority opinion. *See Whitford*, 138 S. Ct. at 1941 (Thomas, J., concurring in part and concurring in the judgment) (declining to join the remand order, along with Justice Gorsuch). Because "it follows logically," *Calvert*, 586 F.2d at 14, that the four concurring Justices would not join two irreconcilable opinions, the Court should construe the majority opinion consistently with Justice Kagan's interpretation.

To be sure, the majority opinion stated that the Supreme Court's "reasoning . . . with respect to the disposition of this case is set forth in this opinion and none other." *Whitford*, 138 S. Ct. at 1931. But that statement is not a command to disregard Justice Kagan's concurrence. Plaintiffs freely acknowledge that the only binding determinations of the Court were made in the majority opinion. It is precisely *because* the Supreme Court left this question open that this Court may properly address it on remand. If the Court had made a binding determination or issued a specific directive about the First Amendment right of association claim, or about Plaintiffs' use of right of association theories to prove standing, then the question would *not* be within the scope of the remand. But where, as here, the mandate contains some ambiguity, this Court should consult all of the Justices' opinions to determine how best to proceed. Because Justice Kagan's opinion plainly supports considering violations of the First Amendment right of association, the mandate includes those claims.

3. As described in Plaintiffs' memorandum of law in opposition to the Assembly's motion to dismiss, consideration of the First Amendment theory coheres with practice in analogous redistricting cases. Dkt. 229 at 33-35. In the case most similar to this one, the partisan gerrymandering challenge to North Carolina's congressional plan, the Supreme Court vacated the district court's judgment in June 2018 for "further consideration in light of" *Whitford*. *Rucho v. Common Cause*, 138 S. Ct. 2679, 2679 (2018). On remand, the district court did precisely what Plaintiffs advocate in this case. It separately analyzed the litigants residing in each district to determine if they had standing to allege partisan vote dilution. *See Common Cause v. Rucho* ("*Common Cause II*"), 318 F. Supp. 3d 777, 821-27 (M.D.N.C. 2018). It *also* considered the associational theory of partisan gerrymandering discussed in Justice Kagan's *Whitford* concurrence. *See id.* at 828-31, 926-27. But that is all the district court did; in every other area, *Common Cause II* simply restated the district court's rulings from its prior opinion. *See id.* at 814 (noting that *Whitford* "does not call into question [these] earlier conclusions"); *see also Hays v. Louisiana*, 936 F. Supp. 360, 365 (W.D. La. 1996) (reinstating the prior record after vacatur and remand for lack of standing in a redistricting case). Reconsideration in light of the Supreme Court's disposition in *Whitford* necessarily includes the right of association issues raised by Justice Kagan's concurrence.

B. In the Alternative, this Court May Properly Consider Plaintiffs' Theory Because It Arises for the First Time on Remand.

In the alternative, even if the mandate rule would not otherwise permit it, this Court nonetheless could consider the First Amendment right of association claims as an issue arising for the first time on remand. This Court did not address standing based on a First Amendment right of association claim in its initial opinion in this case. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 927-930 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018). On appeal, the Supreme Court understood

that *only* claims of vote dilution had been squarely presented on the record before it. *Whitford*, 138 S. Ct. at 1930-31 ("Here, the plaintiffs' partisan gerrymandering claims turn on allegations that their votes have been diluted."); *id.* at 1939-40 (Kagan, J., concurring) ("The Court's opinion is about a suit challenging a partisan gerrymander on a particular ground—that it dilutes the votes of individual citizens."). The Court concluded that the evidence presented by Plaintiffs in the first trial failed to prove standing because "on this record, it appears that not a single plaintiff sought to prove that he or she lives in a cracked or packed district." *Id.* at 1932 (majority opinion); *id.* at 1935 (Kagan, J., concurring) (proving standing on this theory of the case "entails showing, as the Court holds, that [a voter] lives in a district that has been either packed or cracked"). In light of the "fundamental problem with the plaintiffs' case as presented on this record," *id.* at 1933 (majority opinion), the Court *only* held that Plaintiffs should have a chance to prove standing on remand.

The majority opinion expressly declined to decide the First Amendment right of association claims presented by Plaintiffs. The Court held that "the harm asserted by the plaintiffs is best understood as arising from a burden on those plaintiffs' own votes." *Whitford*, 138 S. Ct. at 1931. Given that understanding of Plaintiffs' claims, "other possible theories of harm," including the First Amendment right of association claims, were "not presented" to the Court and were therefore outside the scope of the Court's disposition. *Id.*; *see also id.* at 1934 (Kagan, J., concurring) ("The Court rightly does not address that alternative argument . . . ."). As a result, the Court expressed no opinion as to the validity of possible First Amendment right of association claims, including those that Plaintiffs now present. To the extent it addressed the right of association theory at all, the Court determined that it did not have jurisdiction to consider it. *Id.* at 1931 (majority opinion) ("[T]he opinion of this Court rests on the understanding that we lack jurisdiction to decide this

case, much less . . . others."). As a result, no court has ruled on the validity of Plaintiffs' First Amendment right of association claims.

Because neither this Court nor the Supreme Court have already decided the issue, Plaintiffs may present it on remand. The mandate rule "does not extend to issues an appellate court did not address," and therefore does not foreclose on remand consideration of those issues in the first instance. *Moore*, 222 F.3d at 284 (quoting *Luckey v. Miller*, 929 F.2d 618, 621 (11th Cir. 1991)); *see Quern*, 440 U.S. at 347 n.18. Simply put, because the right of association was not "a real part of the case" before the remand, *Whitford*, 138 S. Ct. at 1934 (Kagan, J., concurring), the mandate rule does not forbid this Court from addressing it now that Plaintiffs have amended their pleadings to allege infringements of that right. And most importantly, because those claims are "based on a legal theory put forward by a Justice of [the Supreme] Court and uncontradicted by the majority in any of [its] cases," they deserve consideration by this Court in the first instance. *See Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015).

The category of issues arising for the first time on remand is a narrow exception not intended to swallow the mandate rule. The Assembly may not invoke it to argue for reconsideration of issues where Defendants have already had an opportunity to present arguments to this Court and lost.[3] "[A]s a rule courts should be loathe" to reconsider their prior rulings "in the absence of extraordinary circumstances." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). The Assembly simply has not identified *any* change of circumstances or law that would warrant reconsideration, let alone extraordinary ones. The Court should not entertain dilatory

[3] Although the Assembly intervened after the remand, it agreed to step into the shoes of the original Defendants and stay within the mandate of the Supreme Court, as the law requires it must do. *See supra* Background; *see generally* 7C Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 1920 (3d ed. 2007) (noting that an "intervenor is treated as if the intervenor were an original party . . . [and] 'cannot unring the bell'" of prior proceedings (quoting *Hartley Pen Co. v. Lindy Pen Co.*, 16 F.R.D. 141, 153 (S.D. Cal. 1954)).

attempts to bend the mandate rule or law of the case doctrines to reopen already decided issues. Only issues arising for the *first* time on remand can be properly considered within the strictures of the mandate rule.

III. Plaintiffs Have Alleged and Intend to Prove at Trial Their Associational Injuries.

Plaintiffs have alleged, taken discovery of, and intend to prove at trial, associational injuries that support their standing and entitlement to relief. Plaintiffs' amended complaint "emphasize[s] their membership in that [Democratic] party." *Whitford*, 138 S. Ct. at 1939 (Kagan, J., concurring); *see* Dkt. 201, ¶¶ 105, 107-111 (identifying certain Plaintiffs as members of the Wisconsin Democratic Party); *see also id.* ¶¶ 18, 21, 24, 27, 30, 33, 36, 39, 42, 45, 48, 51, 54, 57, 60, 63, 66, 69, 72, 75, 78, 81, 84, 87, 90, 93, 96, 99, 102 (describing Plaintiffs as "supporter[s] of Democratic candidates and policies"). Plaintiffs have also alleged and taken discovery relating to "tangible associational burdens—ways the gerrymander had debilitated their party or weakened its ability to carry out its core functions and purposes." *Whitford*, 138 S. Ct. at 1939 (Kagan, J., concurring). Wisconsin's partisan gerrymander "deters [supporters of the Democratic Party] from, and hinders them in, turning out the vote, registering voters, volunteering for campaigns, donating money to candidates, running for office, appealing to independents, and advocating and implementing their preferred policies." Dkt. 201, ¶ 176. As a result, the gerrymander has hindered each Plaintiff's "ability to affiliate with like-minded Democrats and to pursue Democratic associational goals." *Id.* ¶¶ 18, 21, 24, 27, 30, 33, 36, 39, 42, 45, 48, 51, 54, 57, 60, 63, 66, 69, 72, 75, 78, 81, 84, 87, 90, 93, 96, 99, 102, 105-111. Plaintiffs will prove these allegations at trial.

Following the Supreme Court's longstanding precedents, these harms are judicially cognizable and support standing to challenge Act 43 on a plan-wide basis. *Whitford*, 138 S. Ct. at 1938-39 (Kagan, J., concurring) (citing *Vieth v. Jubelirer*, 541 U.S. 267, 314, 315 (2004)

(Kennedy, J., concurring); *Anderson v. Celebrezze*, 460 U.S. 780, 791-92 & n.12 (1983); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000)). By proving the existence of these associational harms, Plaintiffs will have demonstrated that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable court decision). *Id.* at 1929 (majority opinion) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). Because these injuries satisfy the standing requirement of Article III, Plaintiffs will have corrected the jurisdictional defect identified by the Supreme Court in *Whitford*. *See* 138 S. Ct. at 1933 (identifying "the fundamental problem with the plaintiffs' case as presented on this record": the lack of proven harm to "individual legal rights"). This Court can and should vindicate Plaintiffs' First Amendment right of association.

Finally, the other district courts considering analogous First Amendment claims in light of *Whitford* have uniformly found that plaintiffs' associational injuries support plan-wide standing. Each of these opinions has cited Justice Kagan's concurrence in *Whitford* in its analysis of the injuries necessary to prove plan-wide standing based on associational injuries, and each has found that the Court has jurisdiction when plaintiffs have suffered injuries analogous to those pleaded here. *See Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1073-76 (S.D. Ohio 2019); *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867, 935-37 (E.D. Mich. 2019); *Benisek v. Lamone*, 348 F. Supp. 3d 493, 521-23 (D. Md. 2018); *Common Cause II*, 318 F. Supp. 3d at 828-31. These courts' analyses are carefully considered, and the Assembly can offer no persuasive reasons for why this Court should carve a new and different path. The injuries Plaintiffs will prove at trial fully support the power of this Court to remedy Plaintiffs' First Amendment right of association claims described in their amended complaint.

IV. This Court Should Not Address Issues Outside the Mandate of the Supreme Court.

As Plaintiffs explained in their opposition to the Assembly's motion to dismiss, Dkt. 229, the Assembly has attempted to raise a host of issues outside the scope of the Supreme Court's mandate. Because the mandate does not encompass them, these issues do not merit consideration by this Court. *See supra* Part I. The Assembly has not cited—because it cannot cite—any language in any of the three *Whitford* opinions indicating that the Supreme Court instructed this Court to reconsider its prior rulings on these subjects. And even if the mandate rule permitted consideration of these arguments, both the law of the case and judicial economy counsel against entertaining duplicative and dilatory arguments. *See, e.g.*, *Pearson v. Edgar*, 153 F.3d 397, 405 (7th Cir. 1998) (holding that earlier vacated judgment "still establishe[d] the law of the case" on issues not disturbed by the Supreme Court's decision); *see also Adams*, 746 F.3d at 743-44 (noting the "waste of judicial resources" when a district court "start[s] from scratch" after remand). Therefore, this Court should disregard the extraneous issues raised by the Assembly after the Supreme Court's decision in *Whitford*, including:

- Whether partisan gerrymandering claims are justiciable;
- Whether the efficiency gap replicates the majoritarian principle rejected in *Vieth* or requires jurisdictions to adopt proportional representation;
- The extent to which voters' decisions are affected by factors other than partisanship;
- Whether Plaintiffs belong to an "identifiable group";
- Whether challenges to partisan gerrymandering require a cause of action identical to other redistricting causes of action;
- Whether the justification prong proposed by Plaintiffs is unduly stringent;
- Whether the imputations performed by Plaintiffs' expert, Professor Simon Jackson, accurately measure different parties' level of support in uncontested races;
- Whether hypothetical examples that produce allegedly unintuitive efficiency gap measurements undermine the reliance on the efficiency gap;
- The extent to which Wisconsin's political geography accounts for Act 43's enormous pro-Republican skew;
- The extent to which Plaintiffs' proposed test includes a "mechanism" comprehensible to the Assembly; and
- The extent to which Plaintiffs' proposed test applies to nonpartisan races.

Nothing in the mandate compels this Court to consider or reconsider these issues. Indeed, the Assembly itself has belatedly acknowledged that on remand: "This is a case about the individual harms Plaintiffs have allegedly suffered." Dkt. 296 at 6. Any request from the Assembly to go beyond the scope of those individual harms is flatly inconsistent with this Court's desire for "expeditious resolution" of Plaintiffs' claims. Dkt. 199, at 1-2. Instead, this Court should focus on those issues "within the mandate of the Supreme Court," *id.* at 2, including Plaintiffs' First Amendment right of association claims.

CONCLUSION

For the foregoing reasons, this Court should hold that Plaintiffs' First Amendment right of association claims fall within the mandate of the Supreme Court.

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