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SUPREME COURT

IN THE SUPREME COURT OF WISCONSIN

No. _____

REBECCA CLARKE, RUBEN ANTHONY, TERRY DAWSON, DANA GLASSTEIN, ANN GROVES-LLOYD, CARL HUJET, JERRY IVERSON, TIA JOHNSON, ANGIE KIRST, SELIKA LAWTON, FABIAN MALDONADO, ANNEMARIE MCCLELLAN, JAMES MCNETT, BRITTANY MURIELLO, ELA JOOSTEN (PARI) SCHILS, NATHANIEL SLACK, MARY SMITH-JOHNSON, DENISE (DEE) SWEET, AND GABRIELLE YOUNG,

Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION; DON MILLIS, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, AND JOSEPH J. CZARNEZKI, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS COMMISSION; MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION; SENATOR ANDRÉ JACQUE, SENATOR TIM CARPENTER, SENATOR ROB HUTTON, SENATOR CHRIS LARSON, SENATOR DEVIN LEMAHIEU, SENATOR STEPHEN L. NASS, SENATOR JOHN JAGLER, SENATOR MARK SPREITZER, SENATOR HOWARD L. MARKLEIN, SENATOR RACHAEL CABRAL-GUEVARA, SENATOR VAN H. WANGGAARD, SENATOR JESSE L. JAMES, SENATOR ROMAINE ROBERT QUINN, SENATOR DIANNE H. HESSELBEIN, SENATOR CORY TOMCZYK, SENATOR JEFF SMITH, AND SENATOR CHRIS KAPENGA, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN SENATE,

Respondents.

PETITIONERS' MEMORANDUM OF LAW

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TABLE OF CONTENTS

INTRODUCTION 15

ARGUMENT 17

I. The Court should grant the petition because only this Court can resolve Petitioners' claims. 17

II. Wisconsin's legislative maps are extreme partisan gerrymanders and violate the Wisconsin Constitution. 21

A. Partisan gerrymandering claims are justiciable under the Wisconsin Constitution. 25

1. The Constitution's separation of powers principles do not preclude this Court from adjudicating partisan gerrymandering claims. 25

2. The Wisconsin Constitution guarantees a remedy for all wrongs. 34

3. The justiciability discussion in *Johnson I* is unpersuasive dicta. 36

B. Partisan gerrymandering violates the Wisconsin Constitution's guarantee of equal protection. 41

1. The text of Article I, Section 1 prohibits extreme partisan gerrymandering. 42

2. Principles in this Court's Article 1, Section 1 precedent apply to prohibit partisan gerrymandering. 43

3. History confirms that Article 1, Section 1 prohibits partisan gerrymandering. 46

4. Persuasive authority bolsters the application and manageability of Article 1, Section 1 as a prohibition against partisan gerrymandering. 47

5. The *Johnson I* Court's dicta regarding equal protection is unpersuasive. 51

C. Partisan gerrymandering violates Petitioners' free-speech and association rights. 52

1. The text of Article I, Section 3 prohibits partisan gerrymandering. 52

2. This Court's precedent confirms that Article I, Sections 3 and 4 prohibit partisan gerrymandering. 54

3. History confirms that Article I, Sections 3 and 4 prohibit partisan gerrymandering. 55

4. Persuasive authority from other courts supports the conclusion that Article I, Sections 3 and 4 prohibit partisan gerrymandering. 57

5. The *Johnson I* Court's dicta regarding free speech and association is unpersuasive. 58

D. Partisan gerrymandering violates the Wisconsin Constitution's Maintenance of Free Government provision. 61

III. The current legislative districts are unconstitutionally noncontiguous. 65

A. The contiguity provision requires that all parts of a district physically touch, with no detached pieces. 66

B. The current legislative districts are not contiguous. 72

IV. The current legislative maps violate separation of powers. 73

V. A "least change" remedial approach should not apply in this case. 76

VI. Any remedial plan must be neutral regardless of whether the Court adjudicates Petitioners' partisan gerrymandering claims. 79

VII. The Court should grant the writ *quo warranto* with respect to state senators whose terms currently end in 2027 and order special elections for those districts in November 2024. 82

CONCLUSION 84

TABLE OF AUTHORITIES

Cases

Adams v. DeWine,
195 N.E.3d 74 (Ohio 2022) 33

Aicher ex rel. LaBarge v. Wis. Patients Compensation Fund,
2000 WI 98, 237 Wis. 2d 99, 613 N.W.2d 849 ..... 35, 43

Allen v. State Human Rights Comm'n,
324 S.E.2d 99 (W. Va. 1984) 62

Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., Ltd.,
138 S. Ct. 1865 (2018) 68

Arizona State Legislature v. Ariz. Indep. Redistricting Comm'n,
576 U.S. 787 (2015) 27, 37

ASARCO Inc. v. Kadish,
490 U.S. 605 (1989) 37

Att'y Gen. v. Chi. & N.W. Ry.,
35 Wis. 425 (1874) 17

Attorney Gen. v. Cunningham,
81 Wis. 440, 51 N.W. 724 (Wis. 1892) 27

Avalos v. Davidson,
No. 01CV2897, 2002 WL 1895406 (D. Colo. Jan. 25, 2002) 81

Baker v. Carr,
369 U.S. 186 (1962) 26, 40

Balderas v. Texas,
No. 6:01CV158, 2001 WL 36403750 (E.D. Tex. 2001) 77, 81

Baldus v. Members of Wis. Gov't Accountability Bd.,
849 F. Supp. 2d 840 (E.D. Wis. 2012) 21, 31

Bartlett v. Evers,
2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685 19

Baumgart v. Wendelberger,
No. 01-C-0121, 2002 WL 34127471 (E.D. Wis. May 30, 2002) 80

Benisek v. Lamone,
348 F. Supp. 3d 493 (D. Md. 2018).....60

Black v. State,
113 Wis. 205, 89 N.W. 522 (1902).....43

Bonnett v. Vallier,
136 Wis. 193, 116 N.W. 885 (1908).....64

Carter v. Chapman,
270 A.3d 444 (Pa. 2022) 29, 33, 77

Chapman v. Meier,
420 U.S. 1 (1975)..... 39, 80

Chicago & N.W. Ry. Co. v. La Follette,
43 Wis. 2d 631, 169 N.W.2d 441 (1969).....62

Chicago & N.W.R. Co. v. Town of Oconto,
50 Wis. 189, 6 N.W. 607 (1880) 66

Collings v. Eli Lilly Co.,
116 Wis. 2d 166, 342 N.W.2d 37 (1984).....35

Common Cause v. Rucho,
318 F. Supp. 3d 777 (M.D.N.C. 2018) 60

Cousins v. City Council of City of Chi.,
503 F.2d 912 (7th Cir. 1974).....83

Dairyland Greyhound Park, Inc. v. Doyle,
2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408..... 66, 70, 71

Diaz v. Silver,
978 F. Supp. 96 (E.D. N.Y. 1997).....81

Easley v. Cromartie,
532 U.S. 234 (2001).....38

Elections Bd. v. Wisconsin Mfrs. & Com.,
227 Wis. 2d 650, 597 N.W.2d 721 (1999).....55

Essex v. Kobach,
874 F. Supp. 2d 1069 (D. Kan. 2012).....80

Estate of Makos by Makos v. Wis. Masons Health Care Fund,
211 Wis. 2d 41, 564 N.W.2d 662 (1997).....35

Friends of Black River Forest v. Kohler Co.,
2022 WI 52, 402 Wis. 2d 587, 977 N.W.2d 342.....37

Gabler v. Crime Victims Rights Bd.,
2017 WI 67, 376 Wis.2d 147, 897 N.W.2d 384.....74

Gaffney v. Cummings,
412 U.S. 735 (1973).....80, 82

Gard v. Wisconsin State Elections Bd.,
156 Wis. 2d 28, 456 N.W. 2d 809 (1990).....58

Gill v. Whitford,
138 S. Ct. 1916 (2018).....22, 31

Good v. Austin,
800 F. Supp. 557 (E.D & W.D. Mich. 1992).....81

Growe v. Emison,
507 U.S. 25 (1993).....27

Harkenrider v. Hochul,
197 N.E.3d 437 (N.Y. 2022).....30, 46

Harper v. Hall,
886 S.E.2d 393 (N.C. 2023).....48

Hastert v. State Bd. of Elections,
777 F. Supp. 634 (N.D. Ill. 1991).....81

Henning v. Vill. of Waterford,
78 Wis. 2d 181, 253 N.W.2d 893 (1977).....82

Hunt v. Cromartie,
526 U.S. 541 (1999).....38

In re Christoph,
205 Wis. 418, 237 N.W. 134 (1931).....62, 65

In re Paternity of Roberta Jo W.,
218 Wis. 2d 225, 578 N.W.2d 185 (1998).....34

Jacobs v. Major,
139 Wis. 2d 492, 407 N.W.2d 832 (1987).....*passim*

James v. Heinrich,
2021 WI 58, 397 Wis. 2d 517, 960 N.W.2d 350.....39

Jensen v. Wis. Elections Bd.,
2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537..... 17, 20, 27, 38

Johnson v. Wisconsin Elections Comm'n,
2021 WI 87, 399 Wis.2d 623, 967 N.W.2d 469.....*passim*

Johnson v. Wisconsin Elections Comm'n,
2022 WI 14, 400 Wis.2d 626, 971 N.W.2d 402..... 21, 27, 76, 77

Johnson v. Wisconsin Elections Comm'n,
2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559.....75

Kohn v. Darlington Community Schs.,
2005 WI 99, 283 Wis. 2d 1, 698 N.W.2d 794.....35

Koschkee v. Taylor,
2019 WI 76, 387 Wis. 2d 552, 929 N.W.2d 600.....19

Lawson v. Housing Auth. of City of Milwaukee,
270 Wis. 269, 70 N.W.2d 605 (1955).....55

League of United Latin Am. Citizens v. Perry,
548 U.S. 399 (2006).....84

League of Women Voters of Fla. v. Detzner,
172 So. 3d 363 (Fla. 2015).....30, 38

League of Women Voters of Mich. v. Benson,
373 F. Supp. 3d 867 (E.D. Mich. 2019).....60

League of Women Voters v. Commonwealth,
178 A.3d 737 (Pa. 2018)..... 29, 30, 33, 38

Linden v. Cascade Stone Co.,
2005 WI 113, 283 Wis. 2d 606, 699 N.W.2d 189.....30

LWV of Ohio v. Ohio Redistricting Comm'n,
192 N.E.3d 379 (Ohio 2022).....33, 48

LWV of Utah v. Utah Legislature,
No. 220901712 (Utah 3d Dist. Ct. Nov. 22, 2022) 33, 48

Madison Teachers, Inc. v. Walker,
2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337..... 28, 58, 60

Matter of 2021 Redistricting Cases,
528 P.3d 40 (Alaska 2023)..... 33, 48

Matter of Clark,
340 N.W.2d 189 (S.D. 1983)..... 62

McCauley v. Tropic of Cancer,
20 Wis. 2d 134, 121 N.W.2d 545 (1963)..... 60

Michigan v. Long,
463 U.S. 1032 (1983)..... 32

Mills v. Vilas Cnty. Bd. of Adjustments,
2003 WI App 66, 261 Wis. 2d 598, 660 N.W.2d 705 26

Nunnemacher v. State,
129 Wis. 190, 108 N.W. 627 (1906)..... 46

Ohio A. Philip Randolph Inst. v. Householder,
373 F. Supp. 3d 978 (W.D. Ohio 2019)..... 60

Petition of Heil,
230 Wis. 428, 284 N.W. 42 (1938)..... 17, 69

Prosser v. Elections Board,
793 F. Supp. 859 (W.D. Wis. 1992) 68, 69, 80

Republican Party of New Mexico v. Oliver,
No. S-1-SC-39481 (N.M. July 5, 2023)..... 28, 29, 48, 49

Rivera v. Schwab,
512 P.3d 168 (Kan. 2022) 48

Rucho v. Common Cause,
139 S. Ct. 2484 (2019)..... *passim*

Smiley v. Holm,
285 U.S. 355 (1932)..... 27

Rules of Court Case,
204 Wis. 501, 514, 236 N.W. 717 (1931).....74

Smith v. Beasley,
946 F. Supp. 1174 (D.S.C. 1996).....83

State *ex rel. Att'y Gen. v. Cunningham*,
81 Wis. 440, 497, 51 N.W. 724 (1892).....45

State ex rel. Binner v. Buer,
174 Wis. 120, 182 N.W. 855 (1921).....44

State ex rel. Ekern v. Dammann,
215 Wis. 394, 254 N.W. 759 (1934).....54

State ex rel. Frederick v. Zimmerman,
254 Wis. 600, 37 N.W.2d 473 (1949).....44

State ex rel. La Follette v. Kohler,
200 Wis. 518, 228 N.W. 895 (1930).....54

State ex rel. Lamb v. Cunningham,
83 Wis. 90, 53 N.W. 35 (1892).....18, 67

State ex rel. McGrael v. Phelps,
144 Wis. 1, 128 N.W. 1041 (1910).....55, 65

State ex rel. Milwaukee Med. Coll. v. Chittenden,
127 Wis. 468, 107 N.W. 500 (1906).....62, 64

State ex rel. Moreland v. Whitford,
54 Wis. 150, 11 N.W. 424 (1882).....30, 49

State ex rel. Neacy v. City of Milwaukee,
150 Wis. 616, 138 N.W. 76 (1912).....30, 50

State ex rel. Reynolds v. Zimmerman,
22 Wis. 2d 544, 126 N.W.2d 551 (1964).....27, 44, 58

State ex rel. Sonneborn v. Sylvester,
26 Wis. 2d 43, 132 N.W.2d 249 (1965).....27, 44

State ex rel. Thomson v. Zimmerman,
264 Wis. 644, 61 N.W.2d 300 (Wis. 1953).....67

State ex rel. Two Unnamed Petitioners v. Peterson,
2015 WI 85, 363 Wis. 2d 1, 866 N.W.2d 165..... 53, 57, 58

State ex rel. Wis. Senate v. Thompson,
144 Wis. 2d 429, 424 N.W.2d 385 (1988).....40

State ex rel. Zillmer v. Kreutzberg,
114 Wis. 530, 90 N.W. 1098 (1902).....47, 56

State v. Beno,
116 Wis. 2d 122, 341 N.W.2d 668 (1984).....53

State v. Chvala,
2004 WI App 53, 271 Wis. 2d 115, 678 N.W.2d 880 26

State v. Cole,
2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328.....61

State v. Doe,
78 Wis. 2d 161, 254 N.W.2d 210 (1977).....60

State v. Elam,
195 Wis. 2d 683, 538 N.W.2d 249 (1995).....77

State v. Forbush,
332 Wis. 2d 620, 796 N.W.2d 741 (2011).....63

State v. Knapp,
2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899.....44

State v. Redmon,
134 Wis. 89, 114 N.W. 137 (1907).....45

State v. Thompson,
2012 WI 90, 342 Wis. 2d 674, 818 N.W.2d 904.....40

State v. Van Brocklin,
194 Wis. 441, 217 N.W. 277 (Wis. 1927) 26

Stierle v. Rohmeyer,
218 Wis. 149, 260 N.W. 647 (1935).....63

Sweezy v. Wyman,
354 U.S. 234 (1957).....37

Szeliga v. Lamone,
No. C-02-CV-21-001816, 2022 WL 2132194 (Md. Cir. Ct. Mar. 25, 2022) 33, 48, 57

Tetra Tech EC, Inc. v. Wis. Dep't of Revenue,
2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21 74

Thomas ex rel. Grambling v. Mallett,
2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523 35

Tomczak v. Bailey,
218 Wis. 2d 245, 578 N.W.2d 166 (1998) 34

Town of Wilson v. City of Sheboygan,
2020 WI 16, 390 Wis. 2d 266, 938 N.W.2d 493 ..... 18, 67

Vincent v. Voight,
2000 WI 93, 236 Wis. 2d 588, 614 N.W.2d 388 26

Weber v. City of Cedarburg,
129 Wis. 2d 57, 384 N.W.2d 333 (1986) 55

Whitford v. Gill,
218 F. Supp. 3d 837 (W.D. Wis. 2016) ..... *passim*

Wisconsin Just. Initiative, Inc. v. Wisconsin Elections Comm'n,
2023 WI 38, 407 Wis. 2d 87, 133, 990 N.W.2d 122 ..... 26, 36, 42, 66

Statutes and Constitutional Provisions

Kan. Const. Bill of Rights, § 11 58

Kan. Const. Bill of Rights, § 3 58

N.C. Const. art. I, § 12 58

N.C. Const. art. I, § 14 58

N.M. Const. art. II, § 18 49

W. Va. Const., art. III, § 20 62

Wis. Const. art. I, § 1 ..... *passim*

Wis. Const. art. I, § 3.....*passim*

Wis. Const. art. I, § 4.....*passim*

Wis. Const. art. I, § 9..... 25, 34, 35, 36

Wis. Const. art. I, § 22..... 61, 62, 63, 64

Wis. Const. art. IV, § 3.....27

Wis. Const. art. IV, § 4..... 18, 65

Wis. Const. art. IV, § 5.....65

Wis. Const. art. V, § 10.....74

Wis. Const. art. VII, § 2 26

Wis. Const. art. VII, § 3 26

Wis. Const. art. VII, § 8 26

Wis. Const. art. XIV, § 12.....70

Wis. Stat. § 4.001.....68

Wis. Stat. § 751.09.....20

Wis. Stat. § 784.04.....82

Wis. Stat. § 805.06.....20

Other Authorities

1847 Constitutional Convention (Delegate Richardson) 46

1847 Constitutional Convention (Delegate Rountree).....47

1848 American Dictionary 42, 53, 63

1971 Wisconsin Act 304, § 1..... 68, 69

2011 Wisconsin Act 43, § 2.....68

4 Annals of Cong. 934 (1794) (Madison) 41

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Journal of the Convention to Form a Constitution for the State of Wisconsin.....69, 70

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SCR 60.06(2)(a).....82

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INTRODUCTION

Wisconsin's current legislative districts are unconstitutional in multiple ways. They are extreme partisan gerrymanders that violate multiple provisions of the Wisconsin Constitution. The maps violate the Constitution's guarantee of equal protection because the Legislature, through these maps, has created superior and inferior classes of voters based on viewpoint, subordinating one class to the abusive fiat of the other. The maps also violate the constitutional guarantee of free speech because they retaliate against voters who express a political view by stripping them of political power. The maps also abridge the constitutional guarantee of free association by dividing Wisconsinites who otherwise associate together to build support for candidates of their choice. And the maps violate Wisconsin's guarantee of a "free government" because their aggressive gerrymander violates the requirement that the government adhere to moderation, temperance, and justice.

In addition to these infirmities, the maps violate two other clear constitutional prohibitions.

First, 55 assembly districts and 21 senate districts violate a straightforward and express constitutional requirement because they are noncontiguous, with detached pieces scattered in surrounding districts.

Second, the maps violate the Constitution's separation of powers limitation because this Court, in the *Johnson* litigation, imposed the *precise* maps the Governor vetoed—a veto that the legislature failed to override. By judicially

overriding that gubernatorial veto in the Legislature's stead, this Court transgressed separation-of-powers boundaries and impermissibly intruded upon core powers of the executive and legislative branches.

The continued use of the current legislative districts is unconstitutional and must be enjoined; the current maps must not be permitted to be used in another election. Regardless of whether the Court invalidates the current districts by resolving all three of Petitioners' claims or just those that require minimal or no factfinding (contiguity and separation of powers), this Court must not follow a "least change" approach in remedying these violations and must assure itself that it does not inadvertently impose another judicially sanctioned partisan gerrymander. As there is no legislatively enacted plan uninfected by widespread constitutional infirmities, a least change approach cannot apply here. The Court must order that new, constitutionally valid remedial plans be created, and the Court should direct those plans focus on the Wisconsin Constitution's redistricting criteria and traditional districting principles, without favoring or disfavoring any Wisconsin voters based on political viewpoints.

Finally, the Court should grant writs of *quo warranto* with respect to state senators who represent odd-numbered districts whose terms will not otherwise expire until 2027. Because they were elected from unconstitutionally configured districts, they lack legal entitlement to their office and the Court should order special elections in November 2024 for those districts to ensure a timely remedy for Wisconsin voters.

Wisconsinites have long endured unconstitutional legislative districts, which have eroded the very core of this State's democracy. It is time to end this injustice.

ARGUMENT

I. The Court should grant the petition because only this Court can resolve Petitioners' claims.

This Court exercises its original jurisdiction over cases regarding "the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." *Petition of Heil*, 230 Wis. 428, 436, 284 N.W. 42 (1938) (per curiam) (quoting *Att'y Gen. v. Chi. & N.W. Ry.*, 35 Wis. 425, 518 (1874)). Twice this Court has held that redistricting litigation is appropriately adjudicated through this Court's original jurisdiction. *See Johnson v. Wisconsin Election Commission*, 2021 WI 87, ¶20, 399 Wis.2d 623, 967 N.W.2d 469 ("*Johnson I*") ("[T]here is no question ... that this matter warrants this court's original jurisdiction; any reapportionment or redistricting case is, by definition *publici juris*, implicating the sovereign rights of the people of this state." (quoting *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam)). This redistricting case is especially suited for this Court's original jurisdiction for a number of reasons.

First, Petitioners' contiguity and separation of powers claims involve either indisputable factual predicates (contiguity) or legal issues (separation of powers) that only this Court can answer. With respect to Petitioners' contiguity claim, it is

indisputable that most of the current assembly and senate districts consist of physically noncontiguous territory. *See* Appendix to Petitioners' Memorandum.[1] The only question is whether the plain meaning of "contiguous territory" in the Wisconsin Constitution somehow includes its polar opposite. This Court resolved the question over a century ago, holding that Article IV, Section 4 "requires that each assembly district must consist of contiguous territory; that is to say it cannot be made up of two or more pieces of detached territory." *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 148, 53 N.W. 35, 57 (1892).

This Court recently confirmed that interpretation, *see, e.g.*, *Town of Wilson v. City of Sheboygan*, 2020 WI 16, ¶¶18-19, 390 Wis. 2d 266, 938 N.W.2d 493 (explaining that "contiguous" means having "*some significant degree of physical contact*" and that "[w]e have rejected the adoption of a broader definition of contiguous that includes territory near to, but not actually touching, a municipality" (emphasis in original)). Given this Court's two-sentence, unreasoned conclusion to the contrary in *Johnson I*, 2021 WI 87, ¶36, it must

[1] The Wisconsin Legislative Technology Services Bureau ("LTSB") has published images of each current assembly and senate district. *See* Wis. Leg. Tech. Servs. Bur., https://legis.wisconsin.gov/ltsb/gis/maps/. The LTSB also provides interactive maps that permit users to zoom to see greater details. *See* Wis. Leg. Tech. Servs. Bur., https://data-ltsb.opendata.arcgis.com/datasets/febd43c1d0594447854c02898a10928b_0/explore?location=44.522339%2C-87.723062%2C7.90 (interactive assembly map); https://data-ltsb.opendata.arcgis.com/datasets/f272cce2ff0443a789578e14291e76b9_0/explore?location=43.147419%2C-88.954928%2C10.10 (interactive senate map). The Court can take judicial notice of the maps. *See e.g.*, *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 504, 261 N.W.2d 434 (1978) (granting original action petition and taking judicial notice of "materials in the Wisconsin Legislative Reference Bureau") The noncontiguous districts are identified *infra* 21 & 22.

correct this departure from the ordinary, plain text, original meaning of the Constitution and the Court's binding precedent. This is a question of law.

The same is true with respect to Petitioners' separation of powers claim. That claim is also a legal question as to whether this Court, in exercising its remedial power to order a mandatory injunction that is district-for-district identical to a bill vetoed by the Governor, unconstitutionally usurped the exclusive, core powers of the Executive to veto legislation and of the Legislature to override that veto. Lower courts cannot answer this question because they cannot rule that an order of this Court has violated the Constitution's separation-of-powers limits. Moreover, this Court has recognized that cases raising separation-of-powers issues are appropriate for the exercise of this Court's original-action jurisdiction. *See, e.g.*, *Koschkee v. Taylor*, 2019 WI 76, 387 Wis. 2d 552, 929 N.W.2d 600; *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685.

Second, Petitioners' partisan gerrymandering claims raise legal questions that only this Court can answer. In dicta characterized by the dissent as a "gratuitous" "advisory opinion" representing a "sweeping overreach," *Johnson I*, 2021 WI at ¶¶102-103 (Dallet, J., dissenting), this Court in *Johnson I* ticked through various provisions of the Wisconsin Constitution's Declaration of Rights to conclude none prohibited partisan gerrymandering. It did so without any legal claim before it on the topic or developed briefing by the parties. *See id.* ¶¶53-63 (majority/lead op.). *Johnson I*'s advisory opinion on this topic is wrong for the reasons addressed infra only this Court can correct it. It makes no sense for

Petitioners to commence their partisan gerrymandering claims in the circuit court considering the *Johnson I* Court's "sweeping overreach" misconceiving the legal claims and their grounding in the Wisconsin Constitution. *Id.* ¶102 (Dallet, J., dissenting). Such an approach would waste judicial resources and frustrate a timely, effective remedy.

Although unlike Petitioners' contiguity and separation of powers claims, their partisan gerrymandering claims require resolution of contestable factual questions, this Court has a tool to adjudicate those issues after it determines the legal questions of justiciability and cognizability of Petitioners' claims: it can appoint a referee pursuant to Wis. Stat. §§ 751.09 and 805.06 to conduct an evidentiary hearing and report any findings of fact and conclusions of law for this Court to review. This approach would ensure that this Court remains one of review, not factfinding, while adhering to this Court's precedent that "any reapportionment or redistricting case is, by definition *publici juris*" and appropriate for original jurisdiction. *Jensen*, 2002 WI 13, ¶10 (per curiam).

Third, time is of the essence. The current maps are blatantly and intolerably unconstitutional—failing even the basic constitutional requirement of contiguity and violating fundamental separation of powers principles. They must not be used for any further elections. For a remedy to be imposed in time for the November 2024 election—with initial deadlines commencing in the spring—this Court must act expeditiously. Petitioners' request for expedited consideration is not exceptional. Petitioners seek adjudication on a timeline that is followed in every

decennial redistricting case and is no longer than the one this Court followed in *Johnson*. Nonetheless, the limited available time militates in favor of this Court exercising its original jurisdiction.

Fourth, only this Court can correct the flawed "least change" principle-turned-mirage that infected the *Johnson* proceedings. "Least change" never garnered support from a majority of Justices who (1) thought it should apply *and* (2) agreed on its meaning. *Compare, e.g.*, *Johnson v. Wisconsin Elections Comm'n*, 2022 WI 14, ¶33, 400 Wis. 2d 626, 971 N.W.2d 402 ("*Johnson II*") *with id.* ¶134 (Ziegler, C.J., dissenting), *with id.* ¶211 (Grassl Bradley, J., dissenting). This Court should follow Justice Walsh Bradley's advice: "If this process has shown us anything, it is that the court should depart from the 'least change' approach if and when redistricting arrives before it [again]." *Id.* ¶59.

II. Wisconsin's legislative maps are extreme partisan gerrymanders and violate the Wisconsin Constitution.

Wisconsin's legislative maps are extreme partisan gerrymanders that violate the Wisconsin Constitution. Petitioners will have no difficulty proving that the current legislative maps are extreme partisan gerrymanders. Courts have already found that the 2011 plans—which are over 80% (assembly) and 90% (senate) the same as the current plans—were the product of "a sharply partisan methodology that has cost the state in dollars, time, and civility." *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 844 (E.D. Wis. 2012). Drafts of those maps were labeled "Assertive" and "Aggressive" by the

mapdrawers to reflect the degree of Republican advantage they created. *Whitford v. Gill*, 218 F. Supp. 3d 837, 849 (W.D. Wis. 2016), *vacated on other grounds*, *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

Substantial statistical testing was conducted on the maps to guarantee a Republican majority. *Id.* at 893-94. "The map that emerged from the process reduced markedly the possibility that Democrats could regain control of the Assembly even with a majority of the statewide vote. . . . [I]f their statewide vote fell below 48%, the design of [the map] ensured that the Republicans would maintain a comfortable majority." *Id.* at 895; *id.* (noting that a primary concern was the "durability" of the Republican majority).

The 2011 plan had its intended effect. In 2012, Republicans won 48.6% of the statewide vote, which yielded a remarkable 60 assembly seats. *Id.* at 899. When Democrats received roughly the same vote share, they carried 36 assembly seats—"a 24 seat disparity." *Id.* at 901. From the 2012 through the 2020 elections, Republicans never fell below 60 seats—winning up to 64, or nearly two-thirds of the seats. In 2018, Republicans won 63 seats with just 44.8% of the vote. The gerrymander of the senate plan was exacerbated by the Legislature's careful grouping of assembly districts to form senate districts. For example, rather than join the Fox Valley cities of Oshkosh, Neenah, Menasha, and Appleton into a senate district (which would favor Democrats), those communities were split apart to favor rural Republican voters. Rather than combine Wausau with nearby Stevens Point—a configuration that would yield a swing senate district—Wausau

was included in a district that reached northwest to Hayward while Stevens Point was included in a district that traveled southwest to Sparta. To counteract the competitive, Democratic-lean of the driftless region, the Legislature stretched SD17 from the Illinois border all the way to Necedah. In this manner, the senate plan was doubly gerrymandered.

In 2021, the Legislature passed SB621, which *increased* the partisan skew of the maps in favor of Republicans. Discontent to simply balance population deviations, the Legislature reduced the number of assembly districts carried by President Biden from 37 to 35 by shifting suburban Milwaukee districts that had trended to the Democrats into more rural territory, restructuring districts in the northwestern corner of the state (that were already equally populated) to make them more Republican, and systematically making more Republican any district that had become more competitive over the decade. *None* of these changes were plausibly based upon a "least change" methodology or population balance. In some instances, the Legislature merely swapped population between equally populated districts to accomplish its partisan purposes, while purporting to be focused only on population balance.

The maps' extreme partisan skew is not the product of the State's political geography or adherence to traditional districting principles. In large part, it is the product of the deliberate fragmentation of Democratic voters in Wisconsin's mid-sized cities, villages, and towns. In places like Superior, Bayfield, Menominee, River Falls, Eau Claire, Wausau, Green Bay, Appleton, Neenah, Menasha,

Sheboygan, Monroe, and Beloit—among others—districts are configured to prevent those cities' Democratic voters from electing their preferred candidates to additional assembly districts.

This Court—notwithstanding the Governor's veto—ordered the Legislature's plan in place to remedy the malapportioned 2011 districts. In 2022, the plans did precisely what Republicans hoped—increasing their majority to 64 assembly seats (two shy of a veto-proof two-thirds majority) and 22 senate seats (a veto-proof majority). Only five Republican victories were by less than 55% of the vote. On the same ballots, Democrats won three of the five statewide contests, with the winners of all five contests receiving between 48.3% and 51.2% of the vote. The two Republicans to win statewide garnered just 49.6% and 50.5% of the vote. An equally divided electorate yielded near two-third majorities for Republicans in both chambers.

A mountain of evidence demonstrates that the current legislative maps are extreme and durable partisan gerrymanders. Contrary to the Wisconsin Constitution's fundamental guarantee that the "government[ ] . . . deriv[es] [its] just powers from the consent of the governed," Wis. Const. art. I, § 1, the people choose their representatives in Wisconsin by the consent of the entrenched, legislative majority. As the discussion below illustrates, Petitioners' claims are justiciable and the current maps violate several provisions of the Wisconsin Constitution.

A. Partisan gerrymandering claims are justiciable under the Wisconsin Constitution.

Petitioners' partisan gerrymandering claims are justiciable because redistricting is not exclusively assigned to the Legislature, manageable standards govern the constitutional analysis, and the plain text of Article I, Section 9 of the Constitution guarantees a remedy for all wrongs. The *Johnson I* Court's consideration of these issues ignored numerous well-established principles of Wisconsin law, addressed issues not presented by the litigants or that were unnecessary to address the dispute before the Court and accordingly are nonbinding dicta, and the analysis is otherwise unpersuasive. This Court should hold that redistricting laws are subject to constitutional constraints enforced through judicial review, like any other piece of legislation. This Court's intervention is particularly urgent to correct the antidemocratic distortion that extreme partisan gerrymandering represents.

1. The Constitution's separation of powers principles do not preclude this Court from adjudicating partisan gerrymandering claims.

Wisconsin's relevant justiciability doctrine (sometimes referred as the political-question doctrine) is a product of the separation of powers principle implied in the Constitution. *State ex rel. Friedrich v. Cir. Ct. for Dane Cnty.*, 192 Wis. 2d 1, 14, 531 N.W.2d 32, 36 (1995). Within Wisconsin's constitutional tripartite system, the "judicial power is that power which adjudicates and protects the rights and interests of individual citizens, and to that end construes and applies

the laws." *State v. Van Brocklin*, 194 Wis. 441, 217 N.W. 277, 277 (Wis. 1927) (citations and quotations omitted). The judiciary has a broad jurisdictional mandate, including "*in all matters* civil and criminal." Wis. Const. art. VII, § 8 (emphasis added); *accord id.* §§ 2, 3.

But this Court may stay its normal judicial-review imperative only if, as relevant here, the subject of a dispute is (1) "exclusively committed by the constitution to another branch of government," *and* (2) categorically "not susceptible to judicial management or resolution." *Mills v. Vilas Cnty. Bd. of Adjustments*, 2003 WI App 66, ¶17, 261 Wis. 2d 598, 660 N.W.2d 705 (quoting *Vincent v. Voight*, 2000 WI 93, ¶192, 236 Wis. 2d 588, 614 N.W.2d 388 (Sykes, J., concurring in part, dissenting in part)); *accord Wisconsin Just. Initiative, Inc. v. Wisconsin Elections Comm'n*, 2023 WI 38, ¶68, 407 Wis. 2d 87, 990 N.W.2d 122, 144 (Grassl Bradley, J., concurring). Such circumstances indicating "nonjusticiability [are] rarely invoked." *Vincent*, 2000 WI 93, ¶194 (Sykes, J., concurring in part, dissenting in part). The exclusivity or manageability issues must be "prominent on the surface" of the dispute for the courts to decline review. *State v. Chvala*, 2004 WI App 53, ¶50, 271 Wis. 2d 115, 678 N.W.2d 880 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).[2] Neither concern is present here.

First, redistricting disputes—including claims of partisan gerrymandering—are justiciable because establishing district lines is not

[2] This Court affirmed the *Chvala* decision in a unanimous, per curium opinion. 2005 WI 30, ¶¶44-45, 279 Wis. 2d 216, 693 N.W.2d 747 (per curiam).

exclusively committed to the Legislature. Redistricting plans are produced as legislation. Like any other passed legislation, redistricting plans must be presented to the Governor for "joint action" and "concurrence" before becoming law. *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 554-59, 126 N.W.2d 551 (1964); *see also* Wis. Const. art. IV, §§ 3, 4; *id.* art. V, § 10.[3] And like any enacted laws, redistricting plans are subject to judicial review for adherence to Wisconsin law. *Zimmerman*, 22 Wis. 2d at 555.[4] While "[t]he responsibility to adopt new district boundaries is not [the Court's] in the first instance," this Court must review districts that "implicate[] the constitutional rights of voters." *Johnson II*, 2022 WI 14, ¶1.

This Court has historically been "unequivocal" in asserting its "institutional interest in vindicating the state constitutional rights of Wisconsin citizens in redistricting matters." *Jensen*, 2002 WI 13, ¶9. This is in part because "[i]f the remedy for these great public wrongs" of manipulated district lines "cannot be

[3] Accordingly, like most states, Wisconsin's "legislative authority" over apportionment "includes not just the two houses of the legislature" but also "a make-or-break role for the Governor" through the gubernatorial veto. *Arizona State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 806 (2015) (citing *Smiley v. Holm*, 285 U.S. 355, 365-66 (1932)). Only rarely do states exempt redistricting legislation from gubernatorial veto. *See, e.g.*, N.C. Const. art. II, § 22(5).

[4] In addition to *Reynolds v. Zimmerman*, the Court has repeatedly evaluated the constitutionality of redistricting plans without hesitating to strike down violative districts. *See, e.g.*, *Attorney Gen. v. Cunningham*, 81 Wis. 440, 480-84, 51 N.W. 724 (1892) (state legislative plans); *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 60, 132 N.W.2d 249 (1965) (rejecting similar "plenary-power argument" concerning county commission plans). State or federal court review of redistricting in Wisconsin is the norm, not the exception. *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶9, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam). Accordingly, "state courts have a significant role in redistricting" to fulfill their essential judicial duties, including, at times, to devise a remedial map. *Growe v. Emison*, 507 U.S. 25, 33 (1993).

found in this court, it exists nowhere." *Cunningham*, 81 Wis. at 483 *accord id*. at 499-505 (Pinney, J., concurring). Thus, this Court's redistricting precedent puts beyond doubt that the subject is not within the Legislature's exclusive control and therefore cannot qualify as a nonjusticiable political question.

Second, manageable standards govern Petitioners' redistricting claims. For Petitioners' speech and association claims, as further described *infra*, the well-established standards this Court applies in other contexts are applicable and equally manageable here. The Court need only ask: Did the Legislature discriminatorily retaliate against particular voters based upon how those voters associated and expressed their political views at the ballot box? The evidence will put beyond doubt that it did, and Respondents cannot explain how answering this question is somehow unmanageable or foreign to the work of courts. *See, e.g.*, *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶38, 358 Wis. 2d 1, 851 N.W.2d 337 (recognizing people's right to "associate and speak freely and petition openly," which is protected "from [government] retaliation for doing so" (citation omitted)).

Manageable standards also govern Petitioners' claims under Article I, Sections 1 and 22. Just last month, the New Mexico Supreme Court held that analogous partisan gerrymandering claims—there challenging a congressional plan—are justiciable as a violation of New Mexico's Equal Protection Clause. Order at 3-4, *Republican Party of New Mexico v. Oliver*, No. S-1-SC-39481 (N.M. July 5, 2023) (full opinion forthcoming). App. 137-142. The *Oliver* Court adopted

the standard articulated in Justice Kagan's dissent in *Rucho v. Common Cause*, examining "(1) intent; (2) effects; and (3) causation." *Id.* (citing 139 S. Ct. 2484, 2516 (2019) (Kagan, J., dissenting)). The same standard governs Petitioners' claims under Article I, Sections 1 and 22.

Under this standard, plaintiffs must demonstrate first that "state officials' predominant purpose" in adopting a plan "was to entrench their party in power by diluting the votes of citizens favoring its rival," and, second, that "the lines drawn in fact have the intended effect by substantially diluting their votes." *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting) (quotations, citations, and alterations omitted). The third step shifts the burden to defendants to "come up with a legitimate, non-partisan justification." *Id.* This standard is "the sort of thing courts work with every day." *Id.* at 2617. It is the same basic analysis that federal courts—including in Wisconsin—coalesced to adopt before *Rucho*'s contrary holding based on Article III's federal "case or controversy" requirement. *Id.* at 2513, 2516, 2518-22 (collecting cases); *Johnson I*, 399 Wis. 2d at 689-90 (Dallet, J., dissenting) (same); *Whitford*, 218 F. Supp. 3d at 884-927 (applying similar three-part standard). And state courts have now employed the same or similar analyses to enforce their state constitutional protections against partisan gerrymandering. *See, e.g.*, *Oliver*, *supra*, at 3-4; *League of Women Voters v. Commonwealth* (*LWVPA*), 178 A.3d 737, 801-21 (Pa. 2018) (adopting similar analysis under Free Elections Clause); *Carter v. Chapman*, 270 A.3d 444, 462, 470 (Pa. 2022) (further detailing *LWVPA*).

This standard evaluating partisan intent, effects, and causation aligns with this Court's equal-protection analysis and redistricting precedent.[5] Starting with predominant partisan intent, this Court has on numerous occasions indicated that partisan intent in devising districts is unlawful. In *Cunningham*, the Court's opinion and Justice Pinney's concurrence alike repeatedly decry partisan gerrymandering as unlawful and reinforce this Court's constitutional role to uphold the people's rights against such legislative action. 81 Wis. at 482-83; *id.* at 496-517 (Pinney, J., concurring). In *State ex rel. Moreland v. Whitford*, the Court described "gerrymander[ing]" as "the unsavory but expressive name for th[e] method of creating civil divisions of the state for improper reasons," including "[q]uestions of … politics," that "should not be considered in the formation and alteration of" districts. 54 Wis. 150, 158, 11 N.W. 424 (1882). And in *State ex rel. Neacy v. City of Milwaukee*, the Court indicated that the factual concession that partisan intent had not influenced a redistricting plan was key to its lawfulness. 150 Wis. 616, 618, 138 N.W. 76 (1912) (described in Court's factual summary). Several other state courts have manageably evaluated evidence of partisan intent to adjudicate partisan gerrymandering claims. *See, e.g.*, *LWVPA*, 178 A.3d at 768-81, 818-21; *Harkenrider v. Hochul*, 197 N.E.3d 437, 451-54 & n.14 (N.Y. 2022); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 388-93 (Fla. 2015).

[5] A predominance standard also accords with the analysis this Court uses in determining the prominent "purpose or thrust" of a contract was for goods or services, evaluating a range of objective and subjective considerations. *Linden v. Cascade Stone Co.*, 2005 WI 113, ¶¶18-20, 283 Wis. 2d 606, 699 N.W.2d 189 (citation and quotations omitted).

Such predominant partisan intent is evident in the legislative plans. They were designed by the Legislature under single-party control with clear incentive to continue themselves in power through gerrymandering to resist an electorate that often elects candidates from the opposing party in statewide elections. Likewise, the existing plans are recycled—and exacerbated—versions of the extreme partisan maps used last decade, which federal three-judge courts described as products of "a sharply partisan methodology," driven by a "partisan motivation that … clearly lay behind" the plans, and deemed any statements to the contrary "almost laughable." *Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 851 (E.D. Wis. 2012); *see also Whitford v. Gill*, 218 F. Supp. 3d at 898 (detailing direct and circumstantial evidence of partisan intent), *vacated and remanded on standing grounds*, 138 S. Ct. 1916 (2018). Governor Evers also vetoed the plans because of their predominant partisan intent, including the Legislature's disregard for the nonpartisan commission's proposed maps.[6] The evidence will only further confirm that predominant partisan intent motivated the creation of the challenged plans.

Next, the Court examines whether that predominant intent did in fact produce substantial discriminatory results. This is not a close call here. The

[6] *See* Governor Tony Evers, *Gov. Evers Vetoes GOP's "Gerrymandering 2.0" Maps*, YouTube (Nov. 18, 2021), https://youtu.be/GveF69dqSNc; Press Release, Office of the Governor, *Gov. Evers Vetoes GOP's "Gerrymandering 2.0" Maps* (Nov. 18, 2021), https://content.govdelivery.com/accounts/WIGOV/bulletins/2fcd160.

governing plans are *even more gerrymandered* versions of the 2011 plans that retain over 80% of those prior configurations. Those previous plans in fact "prove[d] even more resistant to increases in Democratic vote share, and more responsive to increases in Republican vote share, than was predicted." *Whitford*, 218 F. Supp. 3d at 902; *accord id.* at 886, 898-910 (further describing effects evidence). And since then, they have enabled Republicans to receive a minority of the statewide vote yet garner supermajority control of the Legislature.

But even for closer calls, the justiciability inquiry has never required a bright-line evidentiary rule to evaluate the standard's manageability. For example, employment-discrimination cases are not rendered nonjusticiable just because the U.S. Supreme Court has declined to pick a precise statistical threshold, applicable in all cases, for establishing that a challenged policy is unlawful. *Rucho*, 139 S. Ct. at 2522 (Kagan, J., dissenting) ("[T]he law is full of instances where a judge's decision rests on estimating rightly . . . some matter of degree.").[7] The standard instead seeks a range of *evidence* to weigh whether it is sufficient to meet the applicable standard, as developed over time and in the context of actual litigation.

The typical evidence used to prove substantial effects in partisan gerrymandering cases is well-tested and used basically the same way across

[7] This brief cites federal case law as persuasive authority only, not to suggest federal law in any way dictates the outcome of this case. Adequate and independent state grounds under the Wisconsin Constitution control the outcome of this case, and the Court should specifically state as much in any decision it renders. *See, e.g.*, *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (holding that state court that "indicates clearly and expressly that [its decision is] based on bona fide separate, adequate, and independent grounds" will not be subject to review by U.S. Supreme Court).

numerous sister state courts that provide a roadmap for manageability.[8] These courts have relied on expert and factual testimony showing statistical evidence of partisan bias and asymmetry that reveals whether a map packs and/or cracks disfavored-party voters to advantage the other party. *See, e.g.*, *LWVPA*, 178 A.3d at 769-779; *Carter*, 270 A.3d at 470-71; *Adams*, 195 N.E.3d at 91-92; *LWV of Ohio*, 192 N.E.3d at 411; *Szeliga*, 2022 WL 2132194, at *29-40. They have also examined record evidence of public input and the mapmakers' disregard for established communities of interest. *See, e.g.*, *Matter of 2021 Redistricting Cases*, 528 P.3d at 95-97. And courts similarly examine departures from neutral traditional redistricting criteria to examine substantial partisan effects and intent. *See, e.g.*, *Adams*, 195 N.E.3d at 86-92; *LWVPA*, 178 A.3d at 769-79; *Szeliga*, 2022 WL 2132194, at *31-34, 41; *LWV of Ohio*, 192 N.E.3d at 410-14; *Matter of 2021 Redistricting Cases*, 528 P.3d at 97-101. The evidence here will demonstrate that the plans are extreme outliers on about every measure and accordingly effectuate substantial discriminatory partisan effects.[9]

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[8] *See Matter of 2021 Redistricting Cases*, 528 P.3d 40 (Alaska 2023); *LWV of Ohio v. Ohio Redistricting Comm'n*, 192 N.E.3d 379 (Ohio 2022); *Adams v. DeWine*, 195 N.E.3d 74, 85-93 (Ohio 2022); *LWVPA*, 178 A.3d at 769-779; *Carter*, 270 A.3d at 470; *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194 (Md. Cir. Ct. Mar. 25, 2022); *accord* Order at 10-20, *LWV of Utah v. Utah Legislature*, No. 220901712 (Utah 3d Dist. Ct. Nov. 22, 2022) (evaluating manageability at motion to dismiss stage).

[9] Gerrymandering become more extreme because of developments in technology, which enable mapmakers to harness granular voter data (often showing the increasing durability and firmness of voters' political preferences) and rapidly advancing mapping machinery (such as using supercomputer processing and artificial intelligence) to efficiently manipulate the electoral process. But the same technologies and data used to gerrymander also make it possible to reliably evaluate the partisan bias of such plans. *See, e.g.*, *Rucho*, 139 S. Ct. at 2517 (Kagan, J.,

Finally, courts can examine the State's justification under this burden-shifting approach. In addition to evaluating similar evidence for discerning intent and effects, the Court can look to whether alternative redistricting plans can be devised that satisfy any applicable nonpartisan traditional redistricting criteria but are far less biased. This type of inquiry is manageable and what courts do all the time in examining a range of anti-discrimination contexts.

2. The Wisconsin Constitution guarantees a remedy for all wrongs.

Petitioners' partisan gerrymandering claims are likewise justiciable because the plain text of the Constitution guarantees that they are. Article I, Section 9 provides that "[e]very person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character . . ." Wis. Const. art. I, § 9. "This court has long held that the 'certain remedy' clause of this provision, while not guaranteeing to litigants the exact remedy they desire, entitles Wisconsin residents to their day in court." *Tomczak v. Bailey*, 218 Wis. 2d 245, 277, 578 N.W.2d 166 (1998) (internal quotation marks omitted). While "Article I, § 9 does not confer legal rights," it does "guarantee[ ] access to the courts to enforce *existing* rights." *In re Paternity of Roberta Jo W.*, 218 Wis. 2d 225, 238, 578 N.W.2d 185 (1998) (emphasis in original); *see also Aicher ex rel. LaBarge v. Wis. Patients Compensation Fund*, 2000 WI 98, ¶47, 237 Wis. 2d 99,

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dissenting). Thus, such evidence by the day can more reliably and manageably demonstrate the presence of substantial partisan effects.

613 N.W.2d 849 ("[Article I, Section 9] guarantees a suitor a day in [ ] court."). This Court has emphasized that Article I, Section 9's protections are "not [ ] frail." *Thomas ex rel. Grambling v. Mallett*, 2005 WI 129, ¶113, 285 Wis. 2d 236, 701 N.W.2d 523.

This Court's Article I, Section 9 jurisprudence has focused on situations in which litigants contended that the Legislature restricted access to the courts in ways that stymied the ability to pursue common law claims. *See, e.g.*, *Kohn v. Darlington Community Schs.*, 2005 WI 99, ¶¶36-43, 283 Wis. 2d 1, 698 N.W.2d 794 (holding that statute of repose for negligence actions did not violate Article I, Section 9); *Aicher*, 2000 WI 98, ¶54 (holding that statute of repose for medical malpractice claims did not violate Article I, Section 9). But the plain text of the provision also guarantees a judicial forum to vindicate the rights guaranteed in the Constitution itself, such as Petitioners' equal protection, free speech and association, and maintenance of free government claims. In doing so, Article I, Section 9 provides a "constitutional guarantee of judicial independence." *Estate of Makos by Makos v. Wis. Masons Health Care Fund*, 211 Wis. 2d 41, 82, 564 N.W.2d 662 (1997) (A.W. Bradley, J., dissenting). This guarantee is critical here, where the very nature of partisan gerrymandering—the insulation of the Legislature from the will of the people—renders the Judiciary the only available forum to vindicate Petitioners' constitutional rights. *See Thomas*, 2005 WI 129, ¶128) ("When an adequate remedy or forum does not exist to resolve disputes or provide due process, the courts, under the Wisconsin Constitution, can fashion an

adequate remedy." (quoting *Collings v. Eli Lilly Co.,* 116 Wis. 2d 166, 182, 342 N.W.2d 37 (1984)).

Article I, Section 9 by its plain text ensures that the rights guaranteed to Wisconsinites in the Constitution are enforceable in court. And it puts Wisconsin in contrast with the federal court system that has a range of doctrines that limit their Article III power, whereas Wisconsin guarantees access to the State's courts to enable people to address their injuries.

3. The justiciability discussion in *Johnson I* is unpersuasive dicta.

In *Johnson I*, the Court discussed partisan gerrymandering claims in the abstract—even though no such claims were presented, briefed, or argued. *Johnson I*, 2021 WI 87, ¶5; *see also id.* ¶¶102-03 (Dallet, J. dissenting) (noting that the lead opinion's discussion of such claims was "gratuitous" and "an advisory opinion" as no "excessive partisan gerrymandering claim [is] before us"). Such dicta is non-binding. *Wis. Just. Initiative*, 2023 WI 38, ¶142 (Hagedorn, J., concurring) (explaining that "where our opinions addressed tangential matters not central to the question presented, we labeled such statements dictum and recognized that this court is not bound by its own dicta" (citation, quotations, and alteration omitted)). The *Johnson I* dicta on justiciability is also unpersuasive for numerous reasons.

First, it entirely ignores the applicable separation of powers principles and precedent described above. *Johnson I* opinion cites *not a single case* from this Court that discusses the applicable justiciability analysis. 2021 WI 87, ¶¶39-58. It

similarly fails to address Article I, Section 9's guarantee that Wisconsin courts must provide a remedy for all wrongs. *See id.* The opinion instead relies entirely on the U.S. Supreme Court's decision in *Rucho*, plurality opinions from prior cases that recognized partisan gerrymandering is unlawful, and a handful of law review articles (only one of which even mentions Wisconsin). *See id.*

Importantly, *Johnson I* dicta gets *Rucho* wrong. Far from foreclosing this Court's review, the federal courts have expressly rerouted partisan gerrymandering cases to state courts to be litigated under state constitutions. Although the *Rucho* majority acknowledged that "[partisan] gerrymandering is 'incompatible with democratic principles,'" it ruled that *federal* Article III "case or controversy" constraints made the issue "beyond the reach of the federal courts." 139 S. Ct. at 2506-07 (quoting *Arizona Indep. Redistricing Comm'n*, 576 U.S. at 791) (emphasis added). But that decision interpreting Article III does not control the analysis here "[b]ecause our state constitution lacks the jurisdiction-limiting language of its federal counterpart." *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶17, 402 Wis. 2d 587, 977 N.W.2d 342. Federal justiciability doctrines do not apply "even when [state courts] address issues of federal law"—much less when this Court addresses Wisconsin's Constitution. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989); *Sweezy v. Wyman*, 354 U.S. 234, 255 (1957) (same for separation of powers doctrines).

Accordingly, the *Rucho* Court highlighted that the unavailability of federal review "does not condone excessive partisan gerrymandering" or "condemn

complaints about districting to echo into a void" because "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." 139 S. Ct. at 2507.

Second, *Johnson I* fails to address sister states' partisan gerrymandering cases, such as the then-existing decisions in Pennsylvania and Florida. *See LWVPA*, 178 A.3d at 769-779; *Detzner*, 172 So. 3d at 363. And developments since *Johnson I*—including decisions in New Mexico, Alaska, Maryland, Ohio, Utah, and New York that apply manageable standards to partisan gerrymandering claims—further undermine the opinion's unpersuasive conclusions. *See supra* n.5 (collecting cases). That so many state courts have managed to adjudicate partisan gerrymandering claims is strong evidence that the task is judicially manageable.

Third, serious flaws in *Johnson I's* reasoning undermine its persuasive value. To start, the Court erroneously focuses on a lack of party-registration data to claim that "measuring a state's partisan divide is difficult." 2021 WI 87, ¶42. This ignores that it is data from *actual election results*, not party registration figures, that the Legislature uses to engage in gerrymandering. *See Easley v. Cromartie*, 532 U.S. 234, 244 (2001) (rejecting analysis relying on registration figures instead of election results); *Hunt v. Cromartie*, 526 U.S. 541, 550-51 (1999) (similar). Measuring voters' partisan voting patterns certainly has not proven difficult for the Legislature, which twice in the past twelve years adopted severely partisan gerrymandered legislative plans. Courts would similarly not

struggle to measure the scope of the Legislature's gerrymandering by using similar tools to evaluate and remedy the violations.[10]

Johnson I further erred by reasoning that partisan gerrymandering is inevitable when the jurisdiction uses single-member districts. 2021 WI 87, ¶47. The exact opposite is true—single-member districts give political minorities *more say* in the electoral process compared to positions elected statewide. *See Chapman v. Meier*, 420 U.S. 1, 20 (1975); Eliza Sweren-Becker, *The Meaning, History, and Importance of the Elections Clause*, 96 Wash. L. Rev. 997, 1031-33 (2021). Regardless, it is not the electoral system that harms Petitioners, but the Legislature's manipulation of that system to discriminate and retaliate against them.

Johnson I likewise wrongly contends that remedying partisan gerrymandering would "obliterat[e]" many traditional redistricting criteria mandated by federal law and Article IV of the Wisconsin Constitution." 2021 WI 87. This is so, the opinion reasons, because "drawing contiguous and compact single-member districts of approximately equal population often leads to grouping large numbers of Democrats in few districts and dispersing rural Republicans

[10] Even though some voters may change their mind in future elections and realign with other political views, that does not undermine the applicability of protections against gerrymandering that discriminates and retaliates against voters based on their expressed political views. *Cf. Johnson I*, 2021 WI 87, ¶¶43-46. Constitutional protections have never been limited to only immutable traits. While a Wisconsinite's religious affiliation may change in the future, for instance, that does not discount the heightened scrutiny applied to prevent unconstitutional treatment against that individual based on their prior expression of their views. *See James v. Heinrich*, 2021 WI 58, ¶48, 397 Wis. 2d 517, 960 N.W.2d 350.

among several." *Id.* But, as this case will show, this is simply not true, and its falsity underscores the error in *Johnson I* purporting to decide constitutional issues and reach factual conclusions in the absence of any briefing, evidence, or argument by the parties. *See, e.g., State v. Thompson*, 2012 WI 90, ¶9, 342 Wis. 2d 674, 818 N.W.2d 904 ("[I]t is better practice not to decide issues that have not been fully briefed.").

Finally, *Johnson I* is wrong to suggest that because resolving partisan gerrymandering claims would mean limiting the Legislature and creating constitutional districts that shift political outcomes, this Court is barred from intervening. *See* 2021 WI 87, ¶40. "[I]t is peculiarly the province of the judiciary to interpret the constitution and say what the law is," including the "court's duty to resolve disputes" regardless of whether it limits a "coordinate branch[] of government." *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 436-37, 424 N.W.2d 385 (1988) (citation omitted). And it is the "responsibility of the judiciary to act, notwithstanding the fact that the case involves political considerations or that final judgment may have practical political consequences." *Id.* Accordingly, "the mere fact that the suit seeks protection of a political right does not mean it presents a political question" because such "an objection is little more than a play upon words." *Baker*, 369 U.S. at 209 (citations and quotations omitted).

Johnson I ignores that judicial review in this area is not only permissible, but critical. Extreme partisan gerrymandering affronts the basic premise of American government: that democratic "power is in the people over the

Government, and not in the Government over the people." 4 Annals of Cong. 934 (1794) (Madison). "Because gerrymanders benefit those who control the political branches," they "enable[] politicians to entrench themselves in power against the people's will," such that they are rarely susceptible to political solutions. *Whitford*, 138 S. Ct. at 1935 (Kagan, J., concurring). Rather, it is often "only the courts [who] can do anything to remedy the problem." *Id*. Indeed, "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about" and the denial of a meaningful vote "seems the quintessential stoppage." John Hart Ely, *Democracy and Distrust* 116-36 (1980). This Court cannot shirk its duty to uphold voters' constitutional rights simply because the cases touches upon political matters.

B. Partisan gerrymandering violates the Wisconsin Constitution's guarantee of equal protection.

Extreme partisan gerrymandering violates the Wisconsin Constitution's equal-protection guarantee. Article I, Section 1 provides that the people are "equally free and independent" and have "certain inherent rights." Wis. Const. art. I, § 1. "[G]overnments are instituted" to "secure these rights" and must "deriv[e] their just powers from the consent of the governed." *Id.* Text, precedent, history, and persuasive authority all establish that partisan gerrymandering violates these equal-protection guarantees.

1. The text of Article I, Section 1 prohibits extreme partisan gerrymandering.

The original public meaning of the text of the Wisconsin Constitution favors applying Article I, Section 1's promises of equal protection to prohibit partisan gerrymandering. *Wisconsin Just. Initiative,* 2023 WI 38, ¶21 ("We must similarly focus on the constitutional text, reading it reasonably, in context, and with a view of the provision's place within the constitutional structure."); *cf. id.* at ¶¶93–117 (Dallet, J., concurring) (describing role for analysis of original public meaning). At the time of Wisconsin's founding, "equal" was understood to mean, for example, "[h]aving the same value;" "[b]eing in just proportion;" "[i]mpartial, neutral, and not biased;" "[j]ust, equitable, giving the same or similar rights or advantages;" "having competent power, ability, or means;" and "not inferior or superior to another." App. 145 (1848 American Dictionary). "Free" was defined, in relevant part, as "not being under a necessity or restraint;" "not in a state of vassalage or dependence;" "open to all, without restriction;" and "instituted by a free people; not arbitrary or despotic, as government." *Id.*

Far from comporting with these meanings of "equally free," partisan gerrymandering enables a majority of the Legislature to create superior and inferior classes of voters based on viewpoint, sacrificing the rights of the latter to entrench benefits for the former. It subordinates the inferior voters' electoral power to a state of vassalage. In Wisconsin, it means one political party—even when losing the statewide vote—will win a majority or even a two-thirds super-

majority. Gerrymandering distorts the political process so that a legislative majority can derive its power not by obtaining "the consent of the governed" but instead by skewing district lines to escape democratic accountability and popular sovereignty. The text of Article I, Section 1 and its original meaning are incompatible with permitting a legislative majority to skew the electoral process in this manner.

2. Principles in this Court's Article 1, Section 1 precedent apply to prohibit partisan gerrymandering.

This Court's precedent squarely supports applying the equal-protection rights enshrined in Article I, Section 1 to prohibit partisan gerrymandering.

This Court has long held that Article I, Section 1 forbids any law that provides some Wisconsinites "greater privileges before the law than others." *Black v. State*, 113 Wis. 205, 219, 89 N.W. 522, 527 (1902). All people "must [have] equality before the law" and be free from "unjust discriminations." *Id.* Accordingly, government must not "treat[] members of a similarly situated class differently," and such disparate treatment is subject to "strict scrutiny analysis" when the government action "impinges on a 'fundamental right'"—such as the right to vote. *Aicher*, 2000 WI 98, ¶56, 237 Wis. 2d 99, 613 N.W.2d 849.

Article I, Section 1 ensures that voting rights must "be free and equal" because "no right is more jealously guarded and protected by the departments of government under our constitutions, federal and state, than is the right of suffrage." *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d

473 (1949). The provision requires "perfect equality with reference to all things pertaining to the exercise of the right of suffrage," such that Wisconsinites have the right to vote "with the same effectiveness [as] any other elector" and opportunities that "are the same as those enjoyed by other citizens similarly situated." *State ex rel. Binner v. Buer*, 174 Wis. 120, 127, 182 N.W. 855, 857-58 (1921). Applying the provision to a malapportioned map, this Court reinforced that for "[t]he right to vote … to mean anything in a representative government" it must "mean[] the right to secure equal representation." *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 55, 132 N.W.2d 249 (1965). As such, Article I, Section 1 requires redistricting to produce "equality of representation" for all Wisconsinites. *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 556, 126 N.W.2d 551 (1964). Partisan gerrymandering affronts these mandates by skewing district lines to give Republicans—whose political views are favored by the Legislature—a greater opportunity to elect their preferred candidates.[11]

This Court has also long recognized that Article I, Section 1's popular-

[11] The Court should decline to interpret Article I, Section 1's equal-protection guarantee in lockstep with the federal Fourteenth Amendment in this context because "greater protection of citizens' liberties" to be treated equally in the political process "ought to be afforded." *State v. Knapp*, 2005 WI 127, ¶59, 285 Wis. 2d 86, 700 N.W.2d 899 (describing state constitutional rights exceeding federal constitutional floor). Article I, Section 1 derives from "paraphrasing the United States Declaration of Independence (not the federal constitution)." *Jacobs v. Major*, 139 Wis. 2d 492, 535, 407 N.W.2d 832 (1987) (Abrahamson, J., concurring in part, dissenting in part); *Sonneborn*, 26 Wis. 2d at 49 (stating that the provision "is framed in language of a Declaration of Rights and reminiscent of the Declaration of Independence"). Article I, Section 1 should be interpreted in accord with the breadth of its text, historical origin, and purpose, each of which departs from the Fourteenth Amendment. *See, e.g.*, Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 174-78 (2018) (describing imperative to construe state constitutional rights to avoid limiting, lockstep interpretations).

sovereignty principles—mandating the government exercise "just powers" that are "deriv[ed] … from the consent of the governed"—require accountability to the people. In the Court's words: "Too much dignity cannot well be given to that declaration. That it was intended to cover a broad field not practicable to circumscribe by any specific limitation or limitations, cannot well be doubted." *State v. Redmon*, 134 Wis. 89, 101, 114 N.W. 137 (1907). The provision establishes "[a] broad general restriction o[n] legislative power." *Id.*; *accord Jacobs*, 139 Wis. 2d at 507 (collecting cases). This restriction requires upholding that "the only source of political power is in the people" and the "accumulated will of the people, is sovereign." *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 497, 51 N.W. 724 (1892) (Pinney, J., concurring). Key to this mandate is that voters "may exercise *[their] part* of sovereignty in common with [their] fellow-citizens" and "have their proper voice and influence and just representation in the representative branch of the government as members and as possessors of the sovereignty vested in the people." *Id.* at 498 (emphasis in original). "[T]his court … has an undoubted right to protect and enforce" these equality and sovereignty rights "as against unconstitutional and illegal attack from all sources whatever." *Id.* at 499. Partisan gerrymandering in Wisconsin has violated these popular-sovereignty guarantees by enabling legislators to insulate themselves from the electorate by using their power to skew district lines. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859 (2021).

3. History confirms that Article 1, Section 1 prohibits partisan gerrymandering.

The historical origin, context, and discussion of Article I, Section 1 bolster its application to prevent partisan gerrymandering. Wisconsin's Constitution arose from a desire to create "protection[s] of persons from state action," including limitations on the excesses of a self-interested Legislature. *Jacobs*, 132 Wis. 2d at 143. Key among those protections is Article I, Section 1, which derives its meaning and principles from the federal Declaration of Independence and the Lockean social compact philosophies that animated the American Revolution. *See Nunnemacher v. State*, 129 Wis. 190, 199-201, 108 N.W. 627, 629 (1906).

Wisconsin's constitutional convention show that our Framers enshrined these rights in the state charter. They rejected proposals to remove Article I, Section 1 on the claimed basis that the principles it embodied would instead be "a proper subject for legislation." 1847 Constitutional Convention at 108 (Delegate Richardson). Instead, the delegates sought to adopt a Declaration of Rights that "declared the principle[s]" of Wisconsinites' fundamental freedoms to be enduring and broadly applied so "as to secure equal justice to all, without marring the constitution with all the details of ordinary legislation." *Id.* at 104 (Delegate Lovell). Concerning redistricting, the delegates believed that, in keeping with Wisconsin's popular-sovereignty guarantees, single-member districts should be devised to ensure that elections would be "purely democratic" to "br[ing] the representative immediately home to his constituents." *Id.* at 219 (Delegate O.

Cole). The delegates were focused on having a single-member districting system that would not "open a door for gerrymandering which ought to be kept closed." *Cunningham*, 81 Wis. at 512 (Pinney, J., concurring) (detailing statements). They therefore rejected a redistricting proposal that was undermined by "political considerations" where a proponent "wanted to divide" an area "so as to secure two democratic districts at all hazards." 1847 Constitutional Convention at 568 (Delegate Rountree). And they enacted broad constitutional provisions—such as Article I, Section 1—that could be adapted to prevent future inequalities.

In sum, the rights secured in Article I, Section 1 draw on historical principles and experience to protect the people's right to be equally free and to ensure that "the consent of the governed" would remain the touchstone of Wisconsin's representative government. As the Framers recognized, gerrymandering is the antithesis of these guarantees, and "[i]t would be inconceivable that the people of Wisconsin … should by general grant of legislative power have intended to confer upon that government authority to wholly subvert those primary rights" by giving legislators free rein to gerrymander themselves into office in perpetuity. *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 532-33, 90 N.W. 1098 (1902).

4. Persuasive authority bolsters the application and manageability of Article 1, Section 1 as a prohibition against partisan gerrymandering.

Courts in several other states have restrained partisan gerrymandering by applying constitutional provisions like Article I, Section 1. For example, earlier

this year, the Alaska Supreme Court ruled that gerrymandered legislative districts violated that state constitution's equal protection clause, which, like Wisconsin's, has distinct text and purpose that "requires a more demanding review than its federal analog" to guarantee voters' equal opportunity in the political process. *Matter of 2021 Redistricting Cases*, 528 P.3d at 57 (Alaska 2023). Persuasive trial court decisions in Maryland and Utah reached similar conclusions, applying state constitutional equal-protection mandates as limits on the vote dilution inherent in partisan gerrymandering. *Szeliga* 2022 WL 2132194, at *14-18, 45-46; Ruling and Order at 38-44, *LWV Utah*, No. 220901712; *see also LWV Ohio*, 2022-Ohio-65, ¶¶148-57 (Brunner, J., concurring) (discussing jurisdiction over state equal-protection claim).[12]

Last month, the New Mexico Supreme Court held partisan gerrymandering claims—there challenging a congressional plan—are justiciable as a violation of the state's Equal Protection Clause. Order at 3-4, *Republican Party of New Mexico v. Oliver*, No. S-1-SC-39481 (N.M. July 5, 2023) (full opinion forthcoming). The Court did so even though New Mexico's equal-protection guarantee (unlike

[12] Contrary decisions in Kansas and North Carolina are inapposite. The Kansas Supreme Court's decision in *Rivera v. Schwab* recognized that "[e]qual protection is at the heart of both partisan and racial gerrymandering or vote dilution claims," but the Court concluded the Kansas equal protection right (unlike Wisconsin's) is only coextensive with (not broader than) the U.S. Constitution. 512 P.3d 168, 178 (Kan. 2022). The *Harper III* decision is distinguishable for the same reason. *See Harper v. Hall*, 886 S.E.2d 393, 409 & n.6, 439-40 (N.C. 2023). Likewise, the Court came to the unpersuasive, atextual, and ahistorical conclusion that vote dilution occurs only in malapportioned districts. *Id*. at 458-60 (Earls, J., dissenting).

Wisconsin's) is textually indistinguishable from the federal Fourteenth Amendment. *Id.* (citing N.M. Const. art. II, § 18).

The *Oliver* Court adopted the standard articulated in Justice Kagan's *Rucho* dissent, examining "(1) intent; (2) effects; and (3) causation." *Id.* (citing *Rucho v. Common Cause*, 139 S. Ct. at 2516 (Kagan, J., dissenting)). Under that standard, plaintiffs must demonstrate first that "state officials' predominant purpose in drawing a district's lines was to entrench their party in power by diluting the votes of citizens favoring its rival," and, second, that "the lines drawn in fact have the intended effect by substantially diluting their votes." *Id.* (quotations, citations, and alterations omitted). The third step shifts the burden to defendants to "come up with a legitimate, non-partisan justification." *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting). This standard is "the sort of thing courts work with every day." *Id.* at 2517; *see id.* at 2516 (noting that "courts across the country . . . have largely converged on a standard for adjudicating partisan gerrymandering claims").

Evaluating partisan intent, effects, and causation aligns with this Court's equal protection analysis and redistricting precedent. This Court has on numerous occasions indicated that partisan intent in drawing districts is unlawful. In *Cunningham*, the Court's opinion and Justice Pinney's concurrence repeatedly decry partisan gerrymandering as unlawful and reinforce this Court's constitutional role to uphold the people's rights against such legislative action. 81 Wis. at 482-83; *id.* at 496-517 (Pinney, J., concurring). In *State ex rel. Moreland v. Whitford*, the Court described "gerrymander[ing]" as "the unsavory but expressive

name for th[e] method of creating civil divisions of the state for improper reasons," including "[q]uestions of … politics," that "should not be considered in the formation and alteration of" districts. 54 Wis. At 158. And in *State ex rel. Neacy v. City of Milwaukee*, the Court indicated that the factual concession that partisan intent had not influenced a redistricting plan was key to its lawfulness, 150 Wis. At 618 (described in Court's factual summary).

Here, there is little room for dispute that the Legislature acted with discriminatory partisan intent. Courts have concluded that the 2011 plan that constitutes over 80% of the current assembly map and 90% of the current senate map was intended as a partisan gerrymander—and was even labeled by the mapdrawers as an "aggressive" one. The Legislature's alterations to those plans in creating the current maps is inexplicable as anything other than an effort to retake every inch of ground Democratic voters made up over the past decade. Across the state the Legislature—with no basis in the need for population adjustments—systematically increased the Republican performance of any district approaching competitive status, while converting several districts from Democratic to Republican majorities. In a near-tied statewide 2022 election in which Democrats won three of five statewide contests, the Republicans increased their assembly majority to 64 seats and won a two-thirds majority in the state Senate.

The maps violate the equal-protection and popular-sovereignty mandates of Article I, Section 1. They are unconstitutional.

5. The *Johnson I* Court's dicta regarding equal protection is unpersuasive.

The *Johnson I* dicta is unpersuasive on the merits. The three-paragraph discussion barely mentions the constitutional text and fails to explain how one branch of government devising districts to amplify the influence of some voters at the expense of others is consistent with the mandates that Wisconsinites are "equally free" and that government must "deriv[e] [its] just powers from the consent of the governed." Wis. Const. art. I, § 1; *cf.* 2021 WI 87, ¶¶53-55. It also ignores Article I, Section 1's history and precedent, relying instead on a U.S. Supreme Court plurality opinion and a law review article with no bearing on Wisconsin's Constitution. 2021 WI 87, ¶¶53-55. The *Johnson I* Court compounds its errors by cherry-picking statements from *Cunningham*—which established the opposite principles. *Cunningham* described "*equal* representation in the legislature" as "the highest and most sacred right[]," 81 Wis. at 483 (emphasis in original); reinforced the people's "rights … to have full effect given to the political power of each elector," *id.* at 501 (Pinney, J., concurring); and emphasized the judiciary's urgent role to "preserve the government against … the struggles of partisan strife and factional fury which might otherwise overthrow it," including "the pernicious methods of gerrymandering then recognized as an evil to be greatly deplored," *id.* at 500, 513 (Pinney, J., concurring).

C. Partisan gerrymandering violates Petitioners' free-speech and association rights.

The current legislative maps violate Petitioners' free-speech and association rights by retaliating against them based on their expression of political views and by abridging their right to associate for the advancement of their political beliefs.

1. The text of Article I, Section 3 prohibits partisan gerrymandering.

The text of Article I, Sections 3 and 4 prohibits partisan gerrymandering. Wisconsin's Constitution guarantees that "every person may freely speak, write and publish his sentiments on all subjects" and that "no laws shall be passed to restrain or abridge the liberty of speech or of the press." Wis. Const. art. I, § 3. It also guarantees that "[t]he right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged." *Id.* at § 4. Together, these clauses define Wisconsinites' free-speech and association rights and "without any doubt, [] clearly prohibit[] the state from acting to restrain or abridge the liberty of speech." *Jacobs*, 139 Wis. 2d at 504.

The plain meanings of Article I, Sections 3 and 4 establishes that those provisions bar extreme partisan gerrymandering. In *Jacobs*, this Court held that "art. I, §3 has plain, unambiguous meaning that free speech is protected constitutionally against state interference." 139 Wis. 2d at 504; *see also id*. at 534 (Abrahamson, J. concurring in part) ("the first clause confirms the centrality of freedom of expression in our constitutional scheme" and "the second clause

identifies the government as the gravest threat to free speech at the time the provision was drafted"). Similarly, Article I, Section 4 states that the right to assemble, consult for the common good, and petition "shall never be abridged." These broad provisions expressly protect against state action retaliating against and abridging Wisconsinites' ability to communicate political viewpoints and hold their government accountable. *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶¶46-47, 363 Wis. 2d 1, 866 N.W.2d 165 ("the broadest protection [is afforded] to [ ] political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people'" (citation omitted)). Partisan gerrymandering does the opposite.

At the time of the Wisconsin Constitution's ratification in 1848, speech and voting were understood to be intertwined. "Speech" meant "expressing ideas" or "expressing thoughts" and "vote" meant "to express or signify the mind, will, or preference." An American Dictionary of the English Language (1848). The expressive nature of voting was known to the Framers and those who ratified the Wisconsin Constitution. *State v. Beno*, 116 Wis. 2d 122, 137, 341 N.W.2d 668 (1984) ("the court may reasonably presume" that "the constitutional debates and … practices in existence in 1848" were "also known to the framers of the 1848 constitution"). It was well understood that "the right of political expression and association, including through the vote" was "the device through which the people could express their voice—and have it heeded— regarding the issues of the day and the performance of their government." *Id*. at 18; *see also id*. at 16-20.

The current legislative districts, by targeting Democratic-supporting voters, "retaliate against Petitioners based on their viewpoint and exercise of free speech[.]" Pet. at 3, 5, 24-29. The gerrymander rewards voters holding favored views and punishes voters holding disfavored views, ensuring that election results do not correspond with the people's expressed will.

2. This Court's precedent confirms that Article I, Sections 3 and 4 prohibit partisan gerrymandering.

Principles in this Court's precedent confirm that Article I, Sections 3 and 4 prohibit partisan gerrymandering. These rights are "the very essence of democracy." *State ex rel. La Follette v. Kohler*, 200 Wis. 518, 569, 228 N.W. 895 (1930) (stating that "if [a regulation of elections] destroys free speech, it is to that extent void"). Courts recognize the protected expressive interest in voting. *See State ex rel. Ekern v. Dammann*, 215 Wis. 394, 400, 254 N.W. 759 (1934) ("[T]he right of the voters so to express themselves is a constitutional right that may be regulated but not destroyed by the legislature").[13] Article I, Sections 3 and 4 of the Wisconsin Constitution guarantee the "right to speak freely [that] is essential to nourish democracy." *Jacobs*, 139 Wis. 2d 492 at 531 (Abrahamson, J., concurring in part). These clauses "identif[y] the government as the gravest threat to free speech at the time [these] provision[s] were drafted." *Id*. at 534 (Abrahamson, J., concurring in part).

[13] *See* J. Gerald Hebert & Armand Derfner, *Voting Is Speech*, 34 Yale L. & Pol'y Rev. 471, 485-91 (2016) (collecting other cases).

Wisconsinites have a constitutionally protected right to associate, including the right "to band together for the purpose[] of advocating political ideas or beliefs" on the same terms as other voters. *Elections Bd. v. Wisconsin Mfrs. & Com*., 227 Wis. 2d 650, 664, 597 N.W.2d 721 (1999); *Lawson v. Housing Auth. of City of Milwaukee*, 270 Wis. 269, 274, 70 N.W.2d 605 (1955). The right to associate with political parties is a basic constitutional right. *See Weber v. City of Cedarburg*, 129 Wis. 2d 57, 68, 384 N.W.2d 333 (1986) (noting that the right to vote is a "constitutional basis" for the freedom of association); *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 2, 128 N.W. 1041 (1910) (syllabus pt. 9) ("Every legislative interference with freedom of voters to form political organizations and act under their respective party names is [] an interference with the right to vote.").

The current maps abridge Petitioners' rights by dividing voters who would otherwise associate together to build support for legislative candidates. Moreover, they abridge the Petitioners' rights by artificially depressing their ability to recruit volunteers, secure contributions, and advocate together for their views. Pet. at 3, 5, 8, 39.[14]

3. History confirms that Article I, Sections 3 and 4 prohibit partisan gerrymandering.

History confirms that Wisconsin's free-speech and association guarantees prevent government action, like partisan gerrymandering, that limits

[14] *See also* Nicholas O. Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties*, 45 Legis. Stud. Q. 609 (2020) (empirically demonstrating the harmful effects of partisan gerrymandering on targeted political parties).

Wisconsinites' ability to express their political will. First, these guarantees are in the Declaration of Rights, commonly understood in 1848 and now as a statement of "privileges and liberties considered most basic and important" and "a limitation and restraint on governmental action." *Jacobs v. Major*, 132 Wis. 2d 82, 127–28, 390 N.W.2d 86 (Ct. App. 1986) (Gartzke, J., concurring), *aff'd in part, modified in part and rev'd in part*, 139 Wis. 2d at 492; Thomas Cooley, *A Treatise on the Constitutional Limitations* 176 (1868) (a declaration of rights in a state constitution "is inserted in the constitution for the express purpose of operating as a restriction upon legislative power."). "By the preamble, preservation of liberty is given precedence over the establishment of government." *State ex rel. Zillmer*, 114 Wis. at 532.

The debates over the free-speech and association provisions also support the application of those rights to partisan gerrymandering.[15] The original provision in the 1846 constitution, which stated: "The legislature shall make no law abridging the freedom of speech, or the right of the people peaceably to assemble, and petition for redress of grievances," was rejected as "too indefinite." *Jacobs*, 132 Wis. 2d at 142 (Gartzke, J., concurring). Several substitutes were proposed, and the first sentence of the alternative provision selected was incorporated into the version of Article I, Section 3 adopted in 1848. *Id.* (Gartzke, J., concurring). The selected proposal "made the free speech provision more definite by expanding

[15] The 1846 debates illuminate the meaning of art. I, § 3, because the adopted constitution and the rejected 1846 constitution contain a similar provision. *See Jacobs*, 132 Wis. 2d at 140.

it," specifically "by including an affirmative statement that every person may freely speak, write and publish his sentiments on all subjects," by "prohibiting a restraint as well as an abridgment," and by "embracing liberty of the press as well as liberty of speech." *Id*. (Gartzke, J., concurring). The association provision, once combined with speech, was turned into its own, more detailed provision in the adopted 1848 constitution. Wis. Const. art. I, § 4. These changes show that the Framers *deliberately designed these guarantees expansively* to protect against state interference with expression and association, including participation in the political process.[16]

4. Persuasive authority from other courts supports the conclusion that Article I, Sections 3 and 4 prohibit partisan gerrymandering.

Other state courts have recognized that partisan gerrymandering implicates speech and association protections. In Maryland, a state court applied strict scrutiny to bar a congressional gerrymander "that dilute[d] the influence of certain voters based upon their prior political expression—*i.e*. their partisan affiliation and their voting history" which "imposes a burden on a right or benefit, here a fundamental right [of voting.]" *Szeliga*, 2022 WL 2132194, at *19.[17]

[16] This reading of the Constitution's free-speech provisions is consistent with recent decisions by this Court. For example, the Wisconsin Constitution does not expressly mention "issue advocacy" in relation to campaign finance, but this Court held those rights were protected in *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85. If advertising for a political candidate or campaign is protected speech, certainly voting for one is, too.

[17] Courts in Kansas and North Carolina have found the opposite, but those opinions are distinguishable. Wisconsin's language differs in important ways from that in both states. For example, Wisconsin's Constitution includes a clause not found in the Kansas Constitution ("no

This Court should do the same. Under the Wisconsin Constitution, the freedoms of expression, association, and voting are fundamental rights. *State ex rel. Two Unnamed Petitioners*, 2015 WI 85, ¶47 ("Political speech is [] a fundamental right and is afforded the highest level of protection."); *Madison Teachers, Inc.*, 2014 WI 99, ¶37 ("the right to associate with organizations that engage in constitutionally protected speech [] is fundamental in nature"); *Zimmerman*, 254 Wis. at 613. Partisan gerrymandering violates these fundamental rights by burdening Wisconsinites with disfavored viewpoints Accordingly, heightened scrutiny applies. *See, e.g.*, *Gard v. Wisconsin State Elections Bd.*, 156 Wis. 2d 28, 44, 456 N.W. 2d 809 (1990) (applying strict scrutiny to "regulations burden[ing] … rights "of free speech and association"); *Szeliga*, 2022 WL 2132194, at *19.

5. The *Johnson I* Court's dicta regarding free speech and association is unpersuasive.

The Court's prior decision in *Johnson* is no barrier to evaluating and deciding Petitioners' free speech and association claims here as no partisan gerrymandering claims (free speech or otherwise) were before the Court. *Johnson I*, 2021 WI 87, ¶5; *see also id.* at ¶¶102-03 (Dallet, J. dissenting). Further, despite setting out the standard for proper judicial interpretation of the Wisconsin

laws shall be passed to restrain or abridge the liberty of speech"), and North Carolina mentions only restraints. *Compare* Wis. Const. art. I, §§ 3, 4, *with* N.C. Const. art. I, §§ 12, 14; Kan. Const. Bill of Rights, §§ 3, 11. The *Rivera* court summarily dismissed the free-speech claim because it ruled that "the sole mechanism relied on for judicial enforcement" against partisan gerrymandering "is the constitutional guarantee of equal protection." 512 P.3d at 179. Not so here.

Constitution, *id.* at ¶¶21-22, the *Johnson I* court included no analysis of Article I, Sections 3 and 4. That opinion made no mention of the debates around these provisions, historical evidence, sister state decisions, or the plain meaning of the provisions. *See* 2021 WI 87, ¶¶59-61.

The only arguments the *Johnson I* Court responds to are ones that no party made. In its brief discussion of Article I, Sections 3 and 4, the opinion says those provisions cannot apply because "even after the most severe partisan gerrymanders," citizens can still run for office, vote, campaign for candidates, and express their views. *Id*. at ¶60. But Petitioners need not establish they are wholly prevented from speaking or associating; the plain language of the Constitution guards against state action that "abridge[s]" or "restrain[s]" those rights, not just actions that prohibit the exercise of those rights. Wis. Const. art. I, §§ 3, 4.

Moreover, Petitioners are not advocating for a guaranteed "receptive audience" or a "favorable outcome." *Johnson I*, 2021 WI 87, ¶61. Rather, they seek an open political forum in which the government does not use gerrymandering to restrain, retaliate against, and arbitrarily disadvantage minority viewpoints. It is the Legislature, not Petitioners, that has predetermined political success through the surgical assignment of voters to districts based on past voting behavior. Pet. at 21-32. This Court's role in hearing Petitioners' claims is only to decide whether a particular map violates the Wisconsin Constitution's freedom of speech and association guarantees.

Rucho is not binding here. *Rucho* held that federal courts lack Article III jurisdiction to decide the merits questions, not that the First Amendment permits partisan gerrymandering. *Rucho*, 139 S. Ct. at 2507 (the Court does "not condone excessive partisan gerrymandering"). Indeed, before they were barred from hearing the claims, federal courts found that partisan gerrymandering violated federal free speech and association guarantees. *Whitford*, 218 F. Supp. 3d 837; *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018); *Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018); *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978 (W.D. Ohio 2019).

More importantly, the *Rucho* majority explicitly pointed to state constitutions as a solution for partisan gerrymandering. *Rucho*, 139 S. Ct. at 2507-08. Wisconsin's Constitution is not bound by the minimums of the federal constitution when it comes to free speech and association. *State v. Doe,* 78 Wis. 2d 161, 172, 254 N.W.2d 210 (1977) (holding that this Court "will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded"); *McCauley v. Tropic of Cancer*, 20 Wis. 2d 134, 139, 121 N.W.2d 545 (1963).[18]

[18] In *Madison Teachers., Inc. v. Walker*, 2014 WI 99, ¶23, n.9, the Court assumed, for purposes of argument, that Article I, Sections 3 and 4 were "coextensive" with the First Amendment. However, the Court left the door open, noting that Plaintiffs "fail[ed] to present a developed argument to support their suggestion that Article I, Sections 3 and 4 of the Wisconsin

The text of Wisconsin's Constitution differs from that of the First Amendment—it is significantly broader, protecting "every person['s]" right to "freely speak, write, and publish his sentiments on all subjects" against restraints *or* abridgments, and to the right to "consult for the common good." Wis. Const. art. I, §§ 3, 4. The Framers included this language (and made it different than the First Amendment) to protect individual political rights and restrain tyrannical legislative power. *State v. Cole*, 2003 WI 112, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328 (this Court interprets the Wisconsin Constitution "to give effect to the intent of the framers and of the people who adopted it").

D. Partisan gerrymandering violates the Wisconsin Constitution's Maintenance of Free Government provision.

The gerrymandered redistricting plans violate Article I, Section 22 of the Wisconsin Constitution, which provides that "[t]he blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." Legislative plans drawn for the express purpose of being an "aggressive" partisan gerrymander and that convert an equally divided electorate into a two-thirds legislative majority for one set of Wisconsin voters reflects none of the requirements enshrined in Section 22.

Constitution should confer more expansive protection than its federal counterpart under the particular facts in this case." *Id.*

This Court has held that Wisconsin's free government provision creates "an 'implied inhibition' against governmental action with which any legislative scheme must be in compliance." *Jacobs*, 139 Wis. 2d at 509 (quoting *State ex rel. Milwaukee Med. Coll. v. Chittenden*, 127 Wis. 468, 521, 107 N.W. 500 (1906)). That "implied inhibition" operates with "quite as much efficiency as would [an] express limitation[]." *Id*. (quotation marks and citation omitted). Section 22's "far-reaching purpose" helps demonstrate that a legislative action that "plainly violates some fundamental principles of justice" cannot stand even if no constitutional provision expressly forbids it. *Chittenden*, 127 Wis. at 517.

Taking Section 22 seriously, this Court has held that it protects rights that are foundational to a free and democratic society, such as equal treatment under the law. *See Chicago & N.W. Ry. Co. v. La Follette*, 43 Wis. 2d 631, 636, 169 N.W.2d 441 (1969) (noting that Section 22 and other provisions guarantee "[d]ue process and equal protection of the laws"); *see also In re Christoph*, 205 Wis. 418, 420, 237 N.W. 134 (1931) (invalidating a law under Article I, Sections 1 and 22 because it was "based on a classification which [was] arbitrary and unreasonable").[19] The provision reaches beyond equal-protection principles, forbidding grossly unreasonable legislative action and sometimes providing

[19] Other states have interpreted Section 22 corollaries to protect a similar set of rights. *See, e.g.*, *Allen v. State Human Rights Comm'n*, 324 S.E.2d 99, 109 (W. Va. 1984) (concluding that "[e]qual opportunity in this State is a fundamental principle which has its foundation in" Article III, Section §20 of the West Virginia Constitution); *Matter of Clark*, 340 N.W.2d 189, 191 (S.D. 1983) (relying on "fundamental principles" provision in equal-protection case).

greater protection than the federal constitution. *See State v. Forbush*, 332 Wis. 2d 620, 658-59, 796 N.W.2d 741 (2011) (Abrahamson, C.J., concurring) (citing Section 22 when pointing out that this Court has held that it would "not be bound by the minimums which are imposed by the Supreme Court of the United States" quotation marks and citation omitted)); *Stierle v. Rohmeyer*, 218 Wis. 149, 167, 260 N.W. 647 (1935) (invalidating provision and explaining that "when things so monstrous as this are contemplated as within the language of the statutory provisions under consideration, it behooves us to heed the admonitions of section 22, art. 1, of our state Constitution").

Section 22 was also understood this way at the time of the founding. In 1848, "justice" meant "application of equity," (App. 148) "moderation" meant "keeping a due mean between extremes," (App. 149) "temperance" meant "restrained or moderate indulgence," (App. 151) "frugality" meant "a prudent and sparing use or appropriation of anything," (App. 147) and "virtue" meant "abstaining from vice." (App. 148) An American Dictionary of the English Language (1848). The plain meaning of this provision thus limits extreme and inequitable governmental action.

The *Johnson I* decision grapples with none of this well-established precedent, nor the plain meaning of Section 22, history, or sister state decisions. Rather, in the sole, fleeting paragraph where it mentions Section 22, the Court merely asserts that "whatever operative effect Section 22 may have, it cannot constitute an open invitation" to "rewrite duly enacted law by imposing our

subjective policy preferences." *Johnson I*, 2021 WI 87, ¶62.[20] But that summary and advisory dismissal is contrary to Wisconsin's well-established jurisprudence. This Court has held that Article I, Section 22 is used when lawmakers "lose sight of the fact that there are [constitutional] restraints ... [and] it becomes necessary for the courts in the performance of their constitutional duty to call that to mind." *Bonnett v. Vallier*, 136 Wis. 193, 201, 116 N.W. 885 (1908). Article I, Section 22 provides bedrock principles for this Court to use in evaluating constitutional claims. *Chittenden*, 127 Wis. at 520. In *Chittenden*, this Court "decisively" rejected the idea that "general declared purposes of the Constitution," such as Section 22, are "mere embellishments" and instead held that they are "among the most valuable restraints upon legislative authority" and "should be given all the force which they were intended to have."

Not even the Legislature could plausibly argue that the current maps resulted from "firm adherence" to moderation, temperance, or justice—the mapmakers themselves labeled precursors to the challenged plans "assertive" and "aggressive" to describe the degree of unearned partisan advantage they sought. Pet. at 22, ¶56; *Whitford v. Gill*, 218 F. Supp. 3d at 922.

Moreover, the Legislature *exacerbated* the partisan gerrymander in the current map by reducing the number of Democratic districts and making a number

[20] In addition, the *Rucho* decision has no bearing or persuasive value when it comes to this Court considering claims under Wisconsin Constitution, Article I, Section 22, as there is no federal equivalent to this provision.

of Republican districts safer. Pet. at 22, ¶60-70. The maps violate fundamental notions of equality by dividing Wisconsin voters solely based on their political beliefs. *See Christoph*, 237 N.W. at 420 (law violated Section 22 because it was "based on a classification which [was] arbitrary and unreasonable").

All voters, not just those belonging to a favored political party, should have the opportunity to translate their votes into political power. *See Phelps,* 144 Wis. at 15 (right to vote is guaranteed "by the fundamentally declared purpose of government," which constitutes an "inhibition[] of legislative interference" with that right). Wisconsin's legislative maps deny its citizens that opportunity, preventing truly free government violating Section 22.

III. The current legislative districts are unconstitutionally noncontiguous.

The current legislative districts violate the Constitution's contiguity requirement. The Constitution provides that assembly districts shall be "bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable" and that senate districts must be composed of whole assembly districts and must consist of "contiguous territory." Wis. Const. art. IV, §§ 4 and 5. The majority of the current legislative districts—55 of the 99 assembly districts and 21 of the 33 senate districts—violate these constitutional commands.

"The constitution means what its framers and the people approving of it intended it to mean, and that intent is to be determined in the light of the circumstances in which they were placed at the time." *Dairyland Greyhound Park,*

Inc. v. Doyle, 2006 WI 107, ¶19, 295 Wis. 2d 1, 719 N.W.2d 408; *see also Wis. Just. Initiative*, 2023 WI 38, ¶¶93-117 (Dallet, J., concurring) (describing role for analysis of original public meaning). "We therefore examine three primary sources in determining the meaning of a constitutional provision: the plain meaning, the constitutional debates and practices of the time, and the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption." *Dairyland Greyhound Park*, 2006 WI 107, ¶19.

A. The contiguity provision requires that all parts of a district physically touch, with no detached pieces.

This Court has held that the contiguity requirement means precisely what it says—that all parts of a district must physically touch such that a district may not have detached pieces. This Court first addressed contiguity when it invalidated an effort by the town of Oconto to attach "lands separated and detached, and not contiguous to the main body of lands in said town." *Chicago & N.W.R. Co. v. Town of Oconto*, 50 Wis. 189, 192, 6 N.W. 607, 607 (1880). This Court reasoned that permitting noncontiguous town attachments could restrict the choices of the Legislature in redistricting because the Constitution required legislative districts to be contiguous.

> To so construe the constitution as to authorize the board of supervisors of a county to organize or change the boundaries of a town so that it would be composed of separate, detached, and non-contiguous territory, would most unquestionably restrict the sovereign power of the legislature in the organization of assembly districts "consisting of contiguous territory, and bounded by county, precinct, town, or ward lines." Article 4, § 4, Const.

Id. at 196.

The Court subsequently squarely decided the meaning of Article IV's contiguity requirement. The Court held that "each assembly district must consist of contiguous territory; that is to say it cannot be made up of two or more pieces of detached territory." *Lamb*, 83 Wis. at 148. The *Lamb* Court emphasized that this requirement was "absolutely binding." *Id.*

The Legislature has likewise previously understood the Constitution to require actual contiguity. In 1953, the Legislature passed a law "relating to correction of errors in the apportionment of assemblymen," Ch. 550, Laws of 1953, to correct several noncontiguous aspects of certain assembly districts, *see State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 663-64, 61 N.W.2d 300 (1953) (per curiam) (noting that "a few assembly districts" from the 1951 apportionment were "not created entirely of contiguous territory" and the 1953 law "repaired this error by joining isolated areas to the districts in which they are actually contiguous").

The Court has recently reaffirmed this plain meaning of "contiguous" in a statutory context. In *Town of Wilson v. City of Sheboygan*, the Court held that "contiguous" means have "*some significant degree of physical contact*" and that "[w]e have rejected the adoption of a broader definition of contiguous that includes territory near to, but not actually touching, a municipality." 2020 WI 16 ¶¶18-19, 390 Wis. 2d 266, 938 N.W.2d 493 (emphasis in original).

Precedent establishing the definition of the "contiguity" requirement went unheeded in the 1992 impasse litigation over Wisconsin's redistricting. In *Prosser*

v. Elections Board, the federal court selected a remedial plan from the Legislature that contained noncontiguous districts (over a competing proposal with complete contiguity). 793 F. Supp. 859, 866 (W.D. Wis. 1992). Addressing the issue, the court concluded the failure of the Legislature to propose contiguous districts was not a "serious demerit." *Id.* This was so, the *Prosser* court reasoned, because by statute towns could sometimes "annex noncontiguous areas" and that the redistricting plan proposed by the Legislature "treat[ed] these 'islands,' as the noncontiguous annexed areas are called, as if they were contiguous." *Id.* The court noted that this view was consistent with past practice of the Legislature to "treat islands as contiguous with the cities or villages to which they belong." *Id.*

The statute cited in *Prosser* regarding the past practice of the Legislature has since been repealed. Enacted as part of the standards guiding the 1971 legislative redistricting process, the statute provided that "[i]sland territory (territory belonging to a city, town or village but *not contiguous* to the main part thereof) is considered a contiguous part of its municipality." 1971 Wisconsin Act 304, § 1 (repealing and recreating Wis. Stat. § 4.001 (emphasis added)); 2011 Wisconsin Act 43, § 2 (repealing Wis. Stat. § 4.001(2)-(5)).

The *Prosser* court never cited nor discussed this Court's contrary holding about the meaning of Article IV's contiguity requirement, notwithstanding the fact that this Court's interpretation was binding. *See, e.g.*, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., Ltd.*, 138 S. Ct. 1865, 1868 (2018) ("If the relevant state law is established by a decision of the State's highest court, that decision is

binding on the federal courts." (internal quotation marks omitted)). Instead, the *Prosser* court cited to the *Legislature's* interpretation of the contiguity requirement, adopted by statute, in which the Legislature decided it would draw districts that were "*not* contiguous." 1971 Wisconsin Act 304, § 1 (emphasis added). This was an error. *Lamb* was—and is—binding precedent that the *Prosser* court should have followed, and the Legislature has no power to interpret Article IV's contiguity requirement to actually mean *not* contiguous.

In *Johnson I*, this Court compounded the error by relying upon *Prosser*'s discussion of noncontiguous municipal islands. 2021 WI 87, ¶36. In just two sentences and with no analysis of the text or original meaning of "contiguous," the *Johnson I* Court cited *Prosser* as authority for the proposition that districts could be noncontiguous to accommodate municipal islands. *Id.* No party in *Johnson I* argued otherwise, and there was no question of whether *Prosser*'s interpretation conflicted with the plain text of the Constitution or this Court's precedent.

The Framers' decision to require contiguous districts was not a meaningless technicality. The delegates to the Constitutional Convention were particularly concerned about how the formation of districts would affect the ability of legislators to represent their constituents. For example, the delegates approved an amendment by Delegate Featherstonhaugh to give Calumet and Manitowoc Counties one representative each, rather than combining them into a single district. *Journal of the Convention to Form a Constitution for the State of Wisconsin* at 363, 365, 390. In making his motion, Delegate Featherstonhaugh explained that

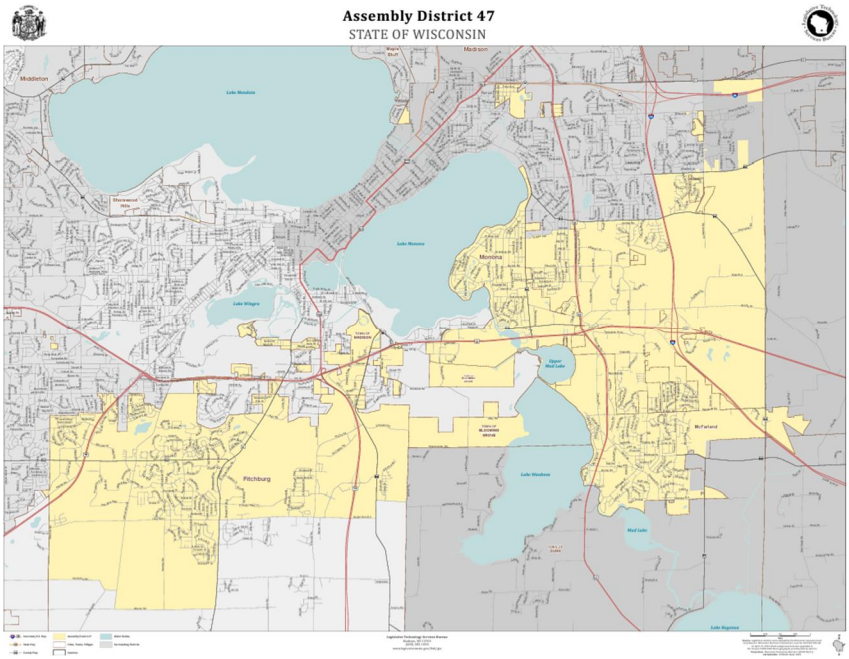
"the two counties were entirely disconnected, so far as their settlements were concerned, and could not possibly act in concert." *Id.* at 363. Delegate Chase spoke in support, noting that "the two counties, so far as facilities for acting together were concerned, were as entirely disconnected as Calumet and Racine." *Id.* Delegate Chase further explained that the counties "were contiguous it was true, but the settled portions of the two counties were separated by a wide strip of timbered country which cut off their intercourse and separated their interests." *Id.*

The State's original legislative districts were fixed in the Constitution, and those districts were all physically contiguous. *See* Wis. Const. art. XIV, § 12 (1848). Moreover, the Constitution specified that when towns were split or new towns created, the districts must remain physically contiguous. *See id.* ("The towns of Newark, Rock, Avon, Spring Valley and Center, in the county of Rock, shall constitute an assembly district: Provided, that if the legislature shall divide the town of Center, they may attach such part of it to the district lying next north"); *id.* ("The foregoing districts are subject, however, so far to be altered that when any new town shall be organized, it may be added to either of the adjoining assembly districts."). That none of those districts had detached parts—and indeed concern was expressed that even contiguous districts might not have sufficient intra-district transportation connectivity—is strong evidence that the Framers meant for Article IV's contiguity requirement to be accorded its plain meaning. *See Dairyland Greyhound Park*, 2006 WI 107, ¶19 (constitutional provision should be interpreted in light of Framers' understanding).

As Petitioners will demonstrate at the remedy phase of this litigation, redistricting plans that are *both* contiguous *and* bounded by these jurisdictional units can—and must—be drawn. *Id.* at ¶24 (explaining that the Constitution must be interpreted such that "no part is to be construed so that the general purpose [is] thwarted, but the whole is to be made to conform to reason and good discretion"). The Court must ensure that Wisconsin's legislative districts satisfy all of Article IV's requirements.

B. The current legislative districts are not contiguous.

The current legislative districts are not contiguous. A remarkable 55 assembly districts,[21] consisting of between 2 and 40 disconnected pieces of territory, and 21 senate districts,[22] consisting of between 2 and 34 disconnected pieces of territory, are noncontiguous. Consider AD47, shown below:



This Madison-area district has a host of disconnected pieces scattered across Dane County. Several disconnected pieces were part of the Town of Madison, but in October 2022 the Town of Madison ceased to exist, with its territory now

[21] The following assembly districts in the current map are noncontiguous: 2, 3, 5, 6, 15, 24-33, 37-48, 52-54, 58-61, 63, 66-68, 70, 72, 76, 79-81, 83, 86, 88, 89, 91, 93-95, and 97-99. *See supra* n.1.

[22] The following senate districts in the current map are noncontiguous: 1, 2, 5, 8, 9, 11, 13-16, 20-24, 27-31, and 33. *See supra* n.1.

distributed to the Cities of Madison and Fitchburg.[23] As a result, not only is AD47 noncontiguous, but the City of Madison now has floating segments of assembly districts amongst other districts within its borders. The same thing will occur when the Town of Blooming Grove is absorbed into the City of Madison in 2027.[24] Some residents in stranded portions of AD47 must cross two other assembly districts before reaching another part of their district.

Noncontiguity pervades both the assembly and senate maps—with noncontiguous districts across the entire state. *See supra* n. 21, 22. And this violation of the Constitution's most basic redistricting requirement has representational consequences. Legislators are less likely—as the journal from the Constitutional Convention suggests—to interact with constituents residing in disconnected pieces of their district.

The legislative districts fail this fundamental constitutional requirement—contrary to this Court's longstanding binding precedent and the plain meaning of the constitutional text—and must be enjoined on this basis alone.

IV. The current legislative maps violate separation of powers.

The current legislative maps violate the Wisconsin Constitution's separation of powers principle. "The separation of powers doctrine envisions a

[23] *See* Town of Madison Attachment, City of Fitchburg, https://www.fitchburgwi.gov/2691/Town-of-Madison-Attachment; Town of Madison Attachment, City of Madison, https://www.cityofmadison.com/news/town-of-madison-attachment-final-public-meeting-scheduled.

[24] *See* Town of Blooming Grove Attachment, City of Madison, https://www.cityofmadison.com/city-hall/town-of-blooming-grove/background.

system of separate branches sharing many powers while jealously guarding certain others, a system of separateness but interdependence, autonomy but reciprocity." *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶46, 382 Wis. 2d 496, 914 N.W.2d 21 (lead op.) (internal quotation marks omitted). "'The constitutional powers of each branch of government fall into two categories: exclusive powers and shared power,' and '[t]hese [g]reat borderlands of power' are not exclusive to any one branch." *Id.* (lead op.) (quoting *Friedrich*, 192 Wis. at 14 (brackets in original)).

When exercising shared power, the branches "may [not] unduly burden or substantially interfere with another branch." *Id.* (internal quotation marks omitted) (bracket in original). Critically, "[c]ore powers ... are not for sharing." *Id.* at ¶47 (lead op.). "As to these areas of authority … *any* exercise of authority by another branch of government is unconstitutional." *Id.* at ¶48 (lead op.) (quoting *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶31, 376 Wis.2d 147, 897 N.W.2d 384).

The Constitution grants the Governor—not the Judiciary—the power to approve or reject by veto, legislation. Wis. Const. art. V, § 10. Likewise, the Constitution grants the Legislature—not the Judiciary— exclusive power to override gubernatorial vetoes. *Id.* Among each branch's core powers are those vested in them expressly by the Constitution. "[T]he coordinate branches of the government ... should not abdicate or permit others to infringe upon such powers as are exclusively committed to them by the constitution." *Gabler*, 2017 WI 67, ¶31 (quoting *Rules of Court Case*, 204 Wis. 501, 514, 236 N.W. 717 (1931)).

By imposing the *precise* legislative maps the Governor vetoed—a veto the Legislature failed to override—this Court violated separation of powers in two ways. First, the Court usurped the exclusive gubernatorial power to approve (or reject) a law passed by the Legislature. Second, the Court exercised the exclusive legislative power to override the Governor's veto. The current legislative maps unconstitutionally transgress the Constitution's separation of powers and must be enjoined. *See Johnson v. Wisconsin Elections Comm'n*, 2022 WI 19, ¶187, 401 Wis. 2d 198, 972 N.W.2d 559 ("*Johnson III*") (Karofsky, J., dissenting) ("By now implementing that failed bill, this court judicially overrides the Governor's veto . . . . But our constitution provides only one avenue to override such a veto; no judicial override textually exists.").

Issuing a mandatory injunction to impose a remedial plan in redistricting litigation is a judicial function. *See Johnson I*, 2021 WI 87, ¶¶66-68. But the *Johnson III* Court transgressed constitutional limitations by imposing the *precise* bill the Governor vetoed with its mandatory injunction. Doing so "unduly burden[ed]" and "substantially interfere[d] with" the powers of the Governor and the Legislature. *Tetra Tech*, 2018 WI 75, ¶46 (lead op.) (quoting *Friedrich*, 192 Wis. 2d at 14). And it turned this Court into the very thing the *Johnson I* Court warned against: a "'super-legislature'" in which this Court "supervise[d] the making of laws." 2021 WI 87, ¶¶70-71 (internal quotation marks omitted).

The Court violated the outer limits of the judicial power and unconstitutionally assumed executive and legislative power when it imposed

redistricting maps that had been blocked by the Governor in a veto the Legislature failed to override. The current legislative maps are unconstitutional on that basis and must be enjoined from further use.

V. A "least change" remedial approach should not apply in this case.

A "least change" approach to remedying the legal violations that infect the current legislative plans should not apply in this case for a number of reasons.

First, the least change approach applied in the *Johnson* litigation has no precedential effect because a majority of this Court never agreed that the approach (1) *should* apply and (2) what it meant, if it did apply. Justice Hagedorn was the only Justice who concluded that a least change approach should govern the selection of a remedy and that least change meant "core retention." *See Johnson I*, 2021 WI 87, ¶¶82-84 & n.4 (Hagedorn, J., concurring) (declining to join aspects of lead opinion defining least changes and concluding instead that equitable considerations could inform proper remedy); *Johnson II*, 2022 WI 14, ¶26 (applying "core retention" to measure least change). Justices Walsh Bradley, Dallet, and Karofsky disagreed that "least changes" was the appropriate remedial metric but concluded that "core retention" should define the concept if it were to be applied. *See id.*, ¶¶58-63 (Walsh Bradley, J., concurring). Three other Justices dissented from this approach focused on core retention as a way of understanding least changes. *See id.*, ¶134 (Ziegler, C.J., dissenting) (concluding that "least change" also means "county and municipal[] division and population deviation"); *id.*, ¶¶211, 220 (Grassl Bradley, J., dissenting) (explaining that "core retention—

exists nowhere in the . . . Wisconsin Constitution or any statutory law" and its adherence reflects a "dangerous doctrine, effectively overruling the Wisconsin Constitution" (internal quotation marks and citation omitted)).

The least change concept introduced in the *Johnson* litigation is thus not binding precedent. *See State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995) ("A general principle of appellate practice is that a majority of the participating judges must have agreed on a particular point for it to be considered the opinion of the court."). Moreover, the *Johnson* litigation showed the standard was unworkable. As Justice Walsh Bradley explained, "[i]f [the *Johnson* litigation] has shown us anything, it is that the court should depart from the 'least change' approach if and when redistricting arrives before it" again. *Johnson II*, 2022 WI 14, ¶59 (Walsh Bradley, J., concurring).

The Court should heed Justice Walsh Bradley's advice here, and follow the approach of several other courts. *See also Carter v. Chapman*, 270 A.3d 444, 464 (Pa. 2022) (rejecting contention that "least change" approach was a "prerequisite" for a remedial plan and instead focusing on whether plan had "contiguous and compact districts," "satisfie[d] the requisite traditional core criteria," and was "reflective of and responsive to the partisan preferences of the Commonwealth's voters"); *see also Balderas v. Texas*, No. 6:01CV158, 2001 WL 36403750, at *2-3 (E.D. Tex. 2001) (per curiam), *summarily aff'd*, 536 U.S. 919 (2002) (rejecting contention that remedial plan should defer to "traces of the unconstitutional plan

being replaced" and should instead follow "neutral districting factors" and the Court should ensure its plan does not create partisan asymmetry).

Second, even if the Court does not categorically reject the least changes concept, that approach nevertheless has no application here. Unlike in the *Johnson* litigation, the operative legislative maps under challenge in this case were not "passed by the legislature and signed by the Governor," *Johnson I*, 2021 WI 87, ¶8, and are thus due no deference by this Court. The current maps were *vetoed* by the Governor. This court should not defer to maps that *failed* the political process and reflect *rejected* public policy. *See Johnson III*, 2022 WI 19, ¶187 (Karofksy, J., dissenting).

Third, the extensive legal infirmities of the current maps make a least change approach impossible. In addition to being an extreme partisan gerrymander in violation of the Wisconsin Constitution, the majority of the assembly districts and nearly two-thirds of the senate districts are noncontiguous. These widespread constitutional infirmities make the current plan unsalvageable as a starting point.

Fourth, the defunct 2011 maps are not an appropriate starting point for a remedial plan. Not only are they unconstitutionally malapportioned, but they suffer from same defects as the existing plans. The 2011 maps have long been recognized as extreme partisan gerrymanders. *See Johnson I*, 2021 WI 87, ¶92 (Dallet, J., dissenting) (characterizing 2011 plans as being generated from a "sharply partisan methodology"); *Whitford*, 218 F. Supp. 3d at 922. Like the current maps, the 2011 maps are riddled with noncontiguous districts: 42 of the

2011 assembly districts and 18 of the 2011 senate districts were noncontiguous.[25] The 2011 plans were created "by a legislature no longer in power and a governor whom the voters have since rejected," *Johnson I*, 2021 WI 87, ¶92 (Dallet, J., dissenting), and the extent of their constitutional infirmity leaves no salvageable policy choices to which this Court could defer.

Even if the Court declines to hold that the least changes approach is inapplicable as a general matter, that approach has no application in this case.

VI. Any remedial plan must be neutral regardless of whether the Court adjudicates Petitioners' partisan gerrymandering claims.

Even if the Court only reaches Petitioners' claims that require minimal or no fact-finding (*i.e.*, contiguity and separation of powers), the Court must ensure the remedial maps it imposes do not favor or disfavor voters based upon their partisan affiliation. The *Johnson I* Court's contrary conclusion is wrong and should be overruled. But even if it remained good law, the *Johnson I* Court's reasoning is inapplicable under the circumstances of this case.

First, the *Johnson I* Court's conclusion that it must ignore a remedial map's disfavored treatment of certain Wisconsin voters based on their political viewpoints—under the guise of judicial neutrality, 2021 WI 87, ¶76—is dangerously wrong. As Justice Dallet explained, "[i]t is one thing for the current

[25] The following 2011 assembly districts are noncontiguous: AD2, 3, 5, 6, 15, 23, 25-27, 32-34, 37-40, 42, 43, 47, 48, 52-54, 58-61, 64, 67-70, 77, 79-81, 86, 93-95, 98, & 99. The following 2011 senate districts are noncontiguous: SD1, 2, 5, 8, 9, 11, 13-16, 20-24, 26, 27, & 33. *See supra* n.1.

legislature to entrench a past legislature's partisan choices for another decade. It is another thing entirely for this court to do the same." *Id.*, ¶93 (Dallet, J., dissenting). In adopting a remedial plan—whatever the underlying constitutional infirmity—this Court "must act consistent with [its] role as a non-partisan institution and avoid choosing maps designed to benefit one political party over all others. The people rightly expect courts to redistrict in neutral ways." *Id.* (citation omitted).

Justice Dallet's dissent accords with how other courts have approached this question. As the U.S. Supreme Court has explained, a "politically mindless approach" to reviewing a redistricting plan can cause "grossly gerrymandered results" "whether intended or not." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Courts that have previously adjudicated Wisconsin redistricting disputes have assured themselves that their judicial remedies are politically neutral. *See Prosser*, 793 F. Supp. at 867, 870-71 (explaining that "[j]udges should not select a plan that seeks partisan advantage" and selecting plan that was "least partisan"); *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *4 (E.D. Wis. May 30, 2002) (rejecting proposed plans because of their partisan skew).

Courts in other states have taken the same approach. *See Essex v. Kobach*, 874 F. Supp. 2d 1069, 1090-91 (D. Kan. 2012) (rejecting proposed maps that "appear to be motivated in party by political considerations that do not merit consideration by the Court"); *see also, e.g.*, *Chapman*, 270 A.3d at 464 (Pennsylvania Supreme Court ensuring map lacks partisan skew); *Avalos v.*

Davidson, No. 01CV2897, 2002 WL 1895406, at *8 (D. Colo. Jan. 25, 2002); *Balderas v. Texas*, 2001 WL 36403750, at *3; *Diaz v. Silver*, 978 F. Supp. 96, 102-04 (E.D. N.Y. 1997); *Good v. Austin*, 800 F. Supp. 557, 566 (E.D & W.D. Mich. 1992); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 659 (N.D. Ill. 1991).

Second, this case is distinguishable from *Johnson I*. In that case, the Court's decision not to consider the partisan implications of its remedial plan was tied directly to its decision to impose a remedy with least changes from the 2011 enacted plans. 2021 WI 87, ¶¶74-76. Because the Court was using the existing legislatively enacted maps as a starting point, the *Johnson I* Court reasoned that "[e]ndeavoring to rebalance the allocation of districts between the two major parties would be a decidedly nonjudicial exercise of partisanship by the court." *Id.*, ¶76.

But there are no available maps adopted by the Legislature and approved by the Governor that retain sufficiently constitutional features to permit application of a least changes approach here. *See Balderas*, 2001 WL 36403750, at *2-3 (rejecting contention that remedial plan should defer to "traces of the unconstitutional plan being replaced" and ensuring that remedial plan was not a partisan gerrymander). Even if it were appropriate for the Court to disregard partisan effects when drawing a least changes map based upon a prior enacted plan—and, to be sure, it is not—such a rule makes no sense where, as here, the Court must start from scratch with a plan that simply follows the constitutional

requirements and traditional districting principles. In this context, the only way for the Court to ensure it is not creating a judicial gerrymander is to reject a "politically mindless approach," *Gaffney*, 412 U.S. at 753, and assure itself that its remedial plan treats Wisconsin voters of all political viewpoints equally, *see also* SCR 60.06(2)(a) ("Wisconsin adheres to the concept of a nonpartisan judiciary.").

VII. The Court should grant the writ *quo warranto* with respect to state senators whose terms currently end in 2027 and order special elections for those districts in November 2024.

The Court should grant a writ *quo warranto* with respect to those state senators currently representing odd-numbered senate districts whose terms would not otherwise expire until 2027 and order special elections with respect to those senate districts in November 2024.[26] A writ *quo warranto* is available to challenge the authority of a public official to hold office. *See Henning v. Vill. of Waterford*, 78 Wis. 2d 181, 185, 253 N.W.2d 893 (1977).

The legislators elected in November 2022 took office in unconstitutionally configured districts. That constitutional infirmity has persisted for over a decade now, and Wisconsinites have suffered under this unconstitutional system for long enough. Legislators have no right to complete a term of office that was unconstitutionally obtained. Because senators elected from odd-numbered districts would not otherwise be up for election until November 2026, the Court should

[26] Petitioners requested, and the Attorney General declined, to bring this action for a writ *quo warranto*, thus authorizing Petitioners to do so. *See* Wis. Stat. § 784.04(2). App. 205-206. All affected senators are named Respondents in the Petition. Pet. 15-19, ¶¶ 30-46.

grant a writ *quo warranto* and order special elections in November 2024. Other courts have ordered special elections as part of the remedy for unlawfully configured districts. *See, e.g.*, *Cousins v. City Council of City of Chi.*, 503 F.2d 912, 914 (7th Cir. 1974) (special elections ordered following finding of racial gerrymandering); *Smith v. Beasley*, 946 F. Supp. 1174, 1212 (D.S.C. 1996) (truncating terms of legislators elected from unlawful districts and ordering special elections).

Here, the constitutional violations are severe, longstanding, and widespread. Moreover, holding special elections at the regular November 2024 general election for half the senate seats will not disrupt any governmental processes. Those elections will occur anyway without substantially added expense or difficulty by requiring special senate elections for odd-numbered senate districts. And doing so will avoid the "[s]enate disenfranchisement" issue that arises from redrawing senate boundaries. *See Johnson I*, 2021 WI 87, ¶94 n.5 (Dallet, J., dissenting). No voters will be delayed in voting for senate candidates, and no voters will suffer under unconstitutionally elected senators for an additional two years.

To be sure, courts adjudicating Wisconsin redistricting litigation have not generally ordered special elections for senators. But those cases have all been decided on malapportionment grounds. In those cases, the districts were not unconstitutional at the time of the senators' *election*, but became unconstitutional only once the new Census data was subsequently released. *See League of United*

Latin Am. Citizens v. Perry, 548 U.S. 399, 421 (2006) (explaining that "States operate under the legal fiction that their plans are constitutionally apportioned throughout the decade"). By contrast, the senate districts challenged in this case were unconstitutional partisan gerrymanders, unconstitutionally noncontiguous, and unconstitutionally configured in violation of the Constitution's separation of powers limitations from the moment they were imposed and at the time of the legislators' elections.

The Court should grant the writ *quo warranto* and order special elections for senators elected from odd-numbered districts at the November 2024 election to fully and finally remedy these unconstitutional legislative plans.

CONCLUSION

For the foregoing reasons, the Court should: grant the Petition for Original Action and the relief sought therein and in the accompanying Motion; enjoin the current legislative apportionment plans; and grant the requested writ *quo warranto* and order all legislative districts be elected at the November 2024 election.

Dated this 2nd day of August, 2023.

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