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IN THE SUPREME COURT OF WISCONSIN
NO. 2023AP1399-OA

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 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 Election Commission; Meagan Wolfe, in her official capacity as the Administrator of the Wisconsin Elections Commission; Andre Jacque, Tim Carpenter, Rob Hutton, Chris Larson, Devin LeMahieu, Stephen L. Nass, John Jagler, Mark Spreitzer, Howard Marklein, Rachael Cabral-Guevara, Van H. Wanggaard, Jesse L. James, Romaine Robert Quinn, Dianne H. Hesselbein, Cory Tomczyk, Jeff Smith, and Chris Kapenga, in their official capacities as Members of the Wisconsin Senate,

Respondents.

ON PETITION TO THE SUPREME COURT OF WISCONSIN
TO TAKE JURISDICTION OF AN ORIGINAL ACTION

BRIEF OF SENATORS CARPENTER, LARSON, SPREITZER, HESSELBEIN AND SMITH IN SUPPORT OF PETITION FOR ORIGINAL ACTION

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INTRODUCTION

Respondents Senator Tim Carpenter, Senator Chris Larson, Senator Mark Spreitzer, Senator Dianne H. Hesselbein, and Senator Jeff Smith, sued in their official capacities as members of the Wisconsin Senate and collectively referred to as "the Democratic Senator Respondents," by and through their attorneys, Pines Bach LLP, submit this Response to the Petitioners' Petition to the Supreme Court of Wisconsin to Take Jurisdiction of an Original Action ("Petition").

At this juncture, the Democratic Senator Respondents do not dispute the five Issues Presented, (Petition at 3-4), and do not contest the well-pled factual allegations therein, (Petition at 7-37, ¶¶ 1-92).[1] Moreover, prompt resolution of these issues is of fundamental importance to the legitimate operation of democracy in the State of Wisconsin, and the Petitioners' claims satisfy this Court's criteria for exercising original jurisdiction. The Petition should be granted for the reasons stated in the Petition and supporting Memorandum of Law ("Mem. of Law"), and the additional reasons detailed below.

[1] The Democratic Senator Respondents offer the following clarification to Petition ¶ 54: The Legislature never attempted to override the Governor's veto of SB 621. Rather, on May 17, 2022, the legislative session ended. While an override was on the calendar, it was never brought up for a vote; no override vote was ever taken. When the session ended without even a vote on whether to override, as a technical matter the override "failed." All other bills that the Governor vetoed during the legislative session and that were not brought up for an override vote during the session also "failed" to be overridden on May 17, 2022. Following the Governor's veto of SB 621 on November 18, 2021, through to the end of the legislative session on May 17, 2022, the Legislature could have, but did not, pass other redistricting bills for the Governor's consideration.

ARGUMENT

I. The Petition meets this Court's high bar for an original action.

The Wisconsin Constitution authorizes this Court to "hear original actions and proceedings." Wis. Const. art. VII, § 3(2). It is left to the Court's "judgement and discretion" to decide whether to "grant an application to commence an original action in this court." *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938). The Court has long confined itself to granting only those applications "upon the ground that the questions presented are of such importance as under the circumstances to call for as speedy and authoritative determination by this court in the first instance." *Id.*; *see also State* ex rel. *La Follette v. Stitt*, 114 Wis. 2d 358, 362, 338 N.W.2d 684 (1983) ("We granted the petition to commence an original action because this matter is *publici juris* and requires a prompt and authoritative determination by this court in the first instance."); *Wis. Prof'l Police Ass'n, Inc. v. Lightbourn*, 2001 WI 59, ¶ 4, 243 Wis. 2d 512, 627 N.W.2d 807 ("The supreme court limits its exercise of original jurisdiction to exceptional cases in which a judgment by the court significantly affects the community at large.").

A. The issues raised in the Petition merit the exercise of original jurisdiction.

The Wisconsin Supreme court generally exercises its jurisdiction as a "court of first resort" over cases affecting "the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." *Heil,* 284 N.W. at 45 (quoting *Attorney Gen. v. Chicago & N.W. Ry.,* 35 Wis. 425, 518 (1874)). More specifically, the Supreme Court has repeatedly held that redistricting challenges are appropriate for the Court's exercise of its original jurisdiction. *Johnson v. Wisconsin Elections Commission,* 2021 WI 87, ¶ 20, 399

Wis. 2d 623, 967 N.W.2d 469 ("*Johnson I*"); *Jensen v. Wisconsin Elections Board,* 2002 WI 13, ¶ 17, 249 Wis. 2d 706, 639 N.W.2d 537 (2002) ("[T]here is no question" that "any reapportionment or redistricting case is, by definition, *publici juris,* impacting the sovereign rights of the people of this state" and therefore warrants the Court's exercise of original jurisdiction). Indeed, as early as 1892, this Court exercised original jurisdiction over claims of an unconstitutional gerrymander; claims akin to those asserted here. *See State* ex rel. *Att'y. Gen. v. Cunningham,* 81 Wis. 440, 51 N.W. 724 (1892). It did so finding such exercise was needed "to secure and protect…political rights and the liberties of the people." *Id.* at 449. The Court took redistricting disputes on as original actions repeatedly during the 20th century. *See, e.g., State* ex rel. *Bowman v. Dammann,* 209 Wis. 21, 243 N.W. 481 (1932); *State* ex rel. *Broughton v. Zimmerman,* 261 Wis. 398, 52 N.W.2d 903 (1952), *overruled on other grounds by State* ex rel. *Reynolds v. Zimmerman,* 22 Wis. 2d 544, 126 N.W.2d 551 (1964); *State* ex rel. *Sonneborn v. Sylvester,* 26 Wis. 2d 43, 132 N.W.2d 249 (1965).

Moreover, characterizing its action as granting a petition for original action, twelve years ago this Court took jurisdiction over a dispute because it determined that a court violated the separation of powers by interfering in the legislative process. *State* ex rel. *Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 7, 334 Wis. 2d 70, 798 N.W.2d 436 (2011). This case includes a similar claim of violation of separation of powers by the judicial branch.

State legislative redistricting is primarily a state prerogative. *Jensen,* 249 Wis. 2d at ¶ 5.

B. There are no adequate remedies available in the lower courts.

The Court is more likely to grant a petition for original action when the petition raises matters that are both *publici juris* and involve circumstances of "exigency," making any remedy in circuit court inadequate. *Heil,* 284 N.W. at 48-49. Original Supreme Court jurisdiction is appropriate when the "questions presented are of such importance as under the circumstances to call for as speedy and authoritative determination by this court in the first instance." *Id.* at 50.

As Petitioners note, "time is of the essence." (Petition at 20). If indeed the current state legislative districts are unconstitutional in one or more ways, there is insufficient time before the next scheduled elections to start this dispute in circuit court and have it eventually wind its way to final resolution before this Court. The parties, candidates, and voters all need, before the key deadlines leading to the August 13, 2024 primary elections, the certainty that comes with this Court deciding this case as an original action. Moreover, the present maps have been used in only one general state legislative election, held November 2022. Conducting more elections using unconstitutional maps would further complicate the elections process and add taxpayer expense by requiring more special elections, as are called for with respect to all state senators elected in November 2022 to the challenged districts and currently scheduled to hold office into January 2027.

C. Factfinding is not necessary, and if any factfinding is desired, it can be accomplished by referral to a circuit court or referee.

From the face of the Petition, resolution of at least two of the legal questions presented does not involve disputes of fact or any need for fact finding: the contiguity and separation of powers questions. It cannot be disputed that the state legislative districts imposed in *Johnson v. Wisconsin Elections Commission,* 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559 (*"Johnson III")* are the same maps as were proposed by the Legislature as SB 621, vetoed by the Governor, and which the Legislature did not even attempt to override. Instead, the Court did that by imposing the exact same maps reflected in SB 621. The legal question is whether in doing so, the Court exceeded its power and infringed on the powers of the Legislature, the Governor, or both.

Likewise, with respect to the contiguity claim, the current contours of the state legislative districts cannot be disputed, including the extensive lack of contiguity of many districts. The legal question is whether Article IV, Sections 4 and 5 of the Wisconsin Constitution allow for this.

If the Court finds a violation of separation of powers or Article IV, Sections 4 and 5, the maps are unconstitutional and must be replaced by the Court. Under such circumstances, it need not even take up the Petitioners' partisan gerrymandering claims.

Even the facts underlying the legal claims of unconstitutional partisan gerrymandering, should the Court wish to reach those claims, can hardly be disputed. The makeup of the current state legislative districts must be uncontested, as is the fact that they were arrived upon by making as few changes as possible, applying a "least change" approach, to the

2011 maps (though, as discussed in Petitioners' Memorandum of Law, there was no majority opinion on what "least change" meant). (*See* Mem. of Law at 76-77.) Moreover, evidence presented to a three-judge federal district court demonstrated that those 2011 maps were designed "to secure the Republican Party's control of the state legislature for the decennial period." *Whitford v. Gill,* 218 F. Supp. 3d 837, 890 (W.D. Wis. 2016), *vacated and remanded,* 138 S. Ct. 1916 (2018). That court concluded that "the evidence establishe[d] that one of the purposes of [the 2011 state legislative districts] was to secure Republican control of the Assembly under any likely future electoral scenario," and thus "entrench the Republican Party in power." *Id.* at 896. *See also Baldus v. Members of the Wis. Gov't. Accountability Bd.,* 849 F. Supp. 2d 840, 844 (E.D. Wis. 2012). Thus, the partisanship of the 2011 maps is well-supported by evidence that could be reviewed by this Court, as is the intent for the 2021 maps to be as similar as possible to them. What remains to be determined is whether the resulting current maps violate one or more provisions of the Wisconsin Constitution due to the partisan gerrymandering. Thus, it is unlikely that further factual development will be necessary to reach a judgment on the legal merits of Petitioners' partisan gerrymandering claims.

Should the Court find one or more of the five constitutional violations alleged by the Petitioners, it will need to decide what remedies to order. While identification of the appropriate ***remedies*** may call for fact finding or factual development, when evaluating whether to grant a Petition for Original Action, the question that is now before the Court, the focus should not be and is not historically on the remedies portion of the dispute. Rather, it is on the ***legal issues*** arising from the facts and whether they "so importantly affect[ ] the rights and liberties of the people of this

state as to warrant" exercise of original jurisdiction. *Heil*, 284 N.W. 2d at 49; *see also id.* at 50. To forecast what may be necessary to identify the ultimate remedies, before a violation has been found, is "putting the cart before the horse."

Moreover, should factfinding or fact development be needed in the exercise of the Court's original jurisdiction, as may be expected in determining the appropriate remedies in a case like this, the Court has the power to make "factual determinations," *Wurtz v. Fleischman,* 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980), and "there are procedures for getting those facts." *Ozanne*, 2011 WI 43, ¶ 108 (Abrahamson, C.J., concurring in part and dissenting in part). Specifically, in original jurisdiction actions, the Court may "refer issues of fact or damages to a circuit court or referee for determination." Wis. Stat. § 751.09; *see also* Wis. Stat. § 805.06. It has done this in the past. *See Wisconsin Pro. Police Ass'n, Inc.,* 2001 WI 59, ¶ 6.

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

The Democratic Senator Respondents agree with the Petitioners that partisan gerrymandering claims are justiciable under the Wisconsin Constitution, for the reasons stated in the Petition and Memorandum of Law. (*See* Mem. of Law at 25-41.)

The Democratic Senator Respondents strongly believe that voters should pick their representatives, not the other way around. They are ready, willing, and able to serve their constituents from fairly drawn districts and participate in the Legislature's law-making function with other senators similarly chosen. They believe that the Wisconsin Legislature will better serve the People of the State of Wisconsin, and more

faithfully fulfill its Constitutional role as the branch most responsive to the needs of the citizens as a whole, if this Court recognizes that the Wisconsin Constitution places limits on extreme partisan gerrymanders, applies those limits, and strikes down the current maps.

III. The merits of the Petitioners' legal challenges should be resolved in their favor.

Although the merits of the Petitioners' challenges to the current state legislative districts are not yet before the Court, due to the extensive briefing of the merits presented by the Petitioners in their Petition and supporting materials and the short timeframe in which the issues presented must necessarily be decided, the Democratic Senator Respondents offer their perspective on the merits of the Petitioners' claims below.

A. The Democratic Senator Respondents do not contest Petitioners' partisan gerrymandering claims.

The Democratic Senator Respondents recognize the constitutional harms visited on voters like the Petitioners by the current state legislative districts, as detailed in their Petition and Memorandum of Law. (*See* Mem. of Law at 41-65.) They do not contest those claims. Because those claims have been so thoroughly and convincingly briefed by Petitioners, the Democratic Senator Respondents have nothing substantive to add to that briefing.

B. The current state legislative districts violate the contiguity requirements of Article IV, Sections 4 and 5 of the Wisconsin Constitution.

The Constitution's requirement for legislative district contiguity is simple, clear, and absolute. Assembly districts must "consist of contiguous territory and be in as compact form as practicable" and senate districts must be composed of whole assembly districts and also consist of "contiguous territory." Wis. Const. art. IV, §§ 4 and 5. Petitioners' Petition demonstrates that 21 of the 33 Senate districts violate this command, including several represented by Democratic Senator Respondents. (Petition ¶¶ 78-92.) The Democratic Senator Respondents agree that the current maps violate Article IV, Sections 4 and 5 of the Wisconsin Constitution for the reasons stated by Petitioners. (*See* Mem. of Law at 65-73.)

Without repeating those arguments, the Democratic Senator Respondents add the observation that in the recent past, legislatures controlled by both Democrats and Republicans, as well as courts, have ignored the contiguity requirements of our Constitution. Perhaps they were under the erroneous impression that a statute like the one referenced in *Prosser v. Elections Board,* 793 F. Supp. 859 (W.D. Wis. 1992), and since repealed, could amend the Constitution. Or perhaps they believed that a "past practice" by previous legislatures and courts of enacting and imposing maps lacking contiguity meant that the Constitution does not mean what it says. Or maybe they thought that because in the past maps containing noncontiguous districts were not challenged as unconstitutional, the contiguity requirement guaranteed to the People of

Wisconsin in the Constitution had somehow been waived as to all redistricting going forward.

To be clear, there are two ways and two ways only to amend the Constitution. First, an amendment may be proposed in either house, passed by both houses of the legislature in each of two successive sessions, and then submitted to the people for approval and ratification. Second, a Constitutional Convention may be held. Wis. Const. art. XII, §§ 1 and 2. Although Article IV Sections 4 and 5 have been amended in the past, most recently in 1982, no amendment has been made modifying the plain, clear, and absolute requirement that both Assembly and Senate districts consist of "contiguous territory."

Indeed, as noted by the Petitioners, the Wisconsin Supreme Court affirmed only three years ago that the word "contiguous," used in a municipal annexation statute requiring contiguity, should be attributed its "common and approved usage unless a different definition has been designated by the statutes." *Town of Wilson v. City of Sheboygan*, 2020 WI 16, ¶ 17, 390 Wis. 2d 266, 938 N.W.2d 483); (*See* Mem. of Law at 67). After determining that the statutes do not define the word, it determined that the meaning of "contiguous" is to require at a minimum <u>some significant degree of physical contact</u>." *Town of Wilson*, 2020 WI 16, ¶¶ 17-19 (emphasis original). An interpretation of "contiguous" to "include[ ] territory near to, but not actually touching" was rejected. *Id.* at 19. That plain meaning applies to Article IV Sections 4 and 5 as well.

C. The current state legislative districts violate the separation-of-powers doctrine reflected in the Wisconsin Constitution.

1. The separation of powers standard.

The Wisconsin Constitution—which derives its authority from the consent of the People of Wisconsin—confers three types of governmental power: legislative, executive, and judicial. Wis. Const. art. IV, § 1; *id.* art. V, § 1; *id.* art. VII, § 2. Each power is vested in a coordinate branch of government, with "no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution, and no branch to exercise the power committed by the constitution to another." *State* ex rel. *Friedrich v. Cir. Ct. for Dane Cnty.*, 192 Wis. 2d 1, 13, 531 N.W.2d 32 (1995).

"A separation-of-powers analysis ordinarily begins by determining if the power in question is core or shared." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 35, 393 Wis. 2d 38, 946 N.W.2d 35 (Hagedorn, J.). Core powers are "exclusive…constitutional powers into which other branches may not intrude." *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999). Shared powers "lie at the intersections of these exclusive core constitutional powers." *SEIU*, 2020 WI 67, ¶ 35 (citing *Horn*, 226 Wis. 2d at 643). The branches may exercise power within these "borderlands," but may not "unduly burden or substantially interfere with another branch." *Id.* (citing *Horn,* 226 Wis. 2d at 644).

"Each branch of government must abide by the law." *Ozanne,* 2011 WI 43, ¶ 126 (Abrahamson, J., concurring in part and dissenting in part). "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously…Against this pernicious doctrine

this court should resolutely set its face." *Id.* (citing *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

2. The role of the branches in Constitutional reapportionment.

The decennial reapportionment of Wisconsin legislative districts is by law to be "accomplished by the joint efforts of the legislature and the governor in passing and signing into law a particular reapportionment bill" vis-à-vis the Presentment Clauses of the Wisconsin Constitution. *State* ex rel. *Reynolds v. Zimmerman*, 22 Wis. 2d 544, 558, 126 N.W.2d 551 (1964); Wis. Const., art. V, § 1-2. More specifically, an apportionment bill, like all bills, must be passed by the Legislature and presented to the Governor for approval and signature. Wis. Const., art. V, § 1(a)-(b). If the Governor vetoes the bill, the bill is returned to the house where the bill originated for reconsideration. *Id.*, § 2(a). If approved by two-thirds of members of both houses of the Legislature, the bill shall become law. *Id.* This is the *only* manner by which a law may be enacted under the Wisconsin Constitution. *Id.*, art. IV, § 17(2). This power to "make law" is a "legislative" power. *SEIU*, 2020 WI 67, ¶ 1.

By contrast, the judiciary has no legislative powers. "There is no liberty, if the power of judging be not separated from the legislative and executive powers." *Ozanne*, 2011 WI 43, ¶ 93 (Abrahamson, J., concurring in part and dissenting in part) (citing The Federalist No. 78 (Alexander Hamilton)). The judiciary "cannot legislate nor supervise the making of laws." *Johnson I*, 2021 WI 87 ¶ 70 (citing *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶35, 387 Wis. 2d 511, 929 N.W.2d 209). Nor can it "act as a 'super-legislature' by inserting [itself] into the actual lawmaking function." *Id.* ¶ 71. While the judiciary may exercise its powers to craft a

judicial remedy for a political impasse in the redistricting process, such conferral of power is not permission to "legislate." *Id.* Nor under any circumstance does it have "jurisdiction or right to interfere with the legislative process. That is something committed by the constitution entirely to the legislature itself." *Goodland v. Zimmerman*, 243 Wis. 459, 467, 10 N.W.2d 180 (1943).

3. The *Johnson III* court violated the separation of powers doctrine by imposing the maps that were vetoed by the Governor.

Under normal circumstances, "legislative districts of the state of Wisconsin cannot be apportioned without the joint action of the legislature and the governor." *Reynolds*, 22 Wis. 2d at 558–59. Both the Governor and the Legislature are "indispensable parts" of this process. *Id.* at 557. "When the legislature finally has adopted a bill by action of both houses **[the Governor] has the general power of veto**, and when [they have] vetoed a bill **it cannot become law unless both houses of the legislature vote to override that veto**." *Id.* (emphasis added). "Because the Governor is given such an important role by our constitution in the entire legislative process…the framers of the constitution intended to require [their] participation in all decisions relating to legislative reapportionment." *Id.*

a) The legislative process was incomplete when the Court ruled.

"[T]he legislative process is not complete unless and until an enactment has been published" following approval by the Governor or passage by the Legislature over his veto. *Goodland*, 243 Wis. at 466. "The judicial department has no jurisdiction or right to interfere with the legislative process.…If a court can intervene…the court determines what

shall be law.…If the court does that, it does not in terms legislate but it invades the constitutional power[s]" reserved for the political branches. *Id.* at 467-68. Only after "the legislative process has been completed," may the judiciary consider whether an enactment is constitutional under its conferred power of judicial review. *Id.* at 469.

Judicial interference before the legislative process has been completed violates the separation of powers doctrine. *Goodland*, 243 Wis. at 472 (vacating an injunction preventing the Secretary of State from publishing an enacted bill); *Ozanne*, 2011 WI 43, ¶ 9 (vacating an injunction enjoining publication and implementation of an enacted bill); *see also State v. Superior Ct. of Milwaukee Cnty.*, 105 Wis. 651, 81 N.W. 1046, 1055 (1900) (vacating contempt proceedings against the Milwaukee Common Council for enacting an ordinance in violation of an injunction preventing its passage). In the context of redistricting, the judiciary may not fill the shoes of one of the other political branches. *Johnson III*, 2022 WI 19, ¶ 187 ("By judicially enacting the very bill that failed the political process…[the Judiciary} has taken the unprecedented step of removing the process of lawmaking from its constitutional confines and overriding a governor's veto ourselves.") (Karofsky, J., dissenting).

Here, the Legislature passed 2021 SB 621—the Legislature's proposed reapportionment map—on November 12, 2021. (Petition ¶ 47.) Governor Evers vetoed SB 621 on November 18, 2021. (Petition ¶ 48.) On April 15, 2022, the *Johnson III* court ordered that the Legislature's map be implemented to resolve what it deemed to be a political impasse—the very map proposed in 2021 SB 621 and vetoed by the Governor. (Petition ¶ 53.) While a veto override vote could have been taken at any time during the 2021-2022 Legislative Session, neither the Assembly nor Senate held an

override vote of the Governor's veto of SB 621 before the legislative session ended on May 17, 2022. Likewise, the Legislature did not even attempt to send the Governor a different reapportionment bill during the six months remaining in the session. (*See fn.1, supra.*)

Once the Governor vetoed SB 621, the bill could only become law if approved by two-thirds vote of both houses. Wis. Const. art. V., § 2(a); Wis. Const. art. IV, § 17(2) ("No law shall be enacted except by bill."). The legislative process was not completed before the Court imposed SB 621 as law. Instead, the Legislature simply stopped acting after the veto: it did not return to the drawing board to offer a different map, nor did it seek to override the Governor's veto. Instead, it invited the Court into the process to judicially impose its preferred map before the legislative process was complete. As requested, the *Johnson III* court obliged. By inserting itself into the process to impose SB 621 as the law while the legislative process was still underway—perhaps stalled but certainly incomplete—the *Johnson III* court improperly determined "what shall be law" in violation of the separation of powers doctrine. *Goodland*, 243 Wis. at 467-68.

b) The Court usurped the Legislature's role and/or the Governor's role.

With its April 15, 2022 ruling, the *Johnson III* court served as a Super-Legislature to override the Governor's veto and judicially impose SB 621. Rather than carrying out its own powers, under the guise of the redistricting litigation, the Legislature requested the Court assume and subvert legislative powers expressly conferred to the political branches. *Friedrich*, 192 Wis. 2d at 13 ("[N]o branch [may] exercise the power committed by the constitution to another."). In doing so, it violated the separation of powers doctrine by impermissibly acting as only the

Legislature can act: by overriding the Governor's veto. *See* Wis. Const. art. V., § 10(2)(a). Or, viewed another way, it acted only as the Governor can, by "signing into law" SB 621 after the Legislature passed it in both houses and presented it to the Court. *See* Wis. Const. art. V, § 10(1)(b).

In the redistricting process, the roles of the Governor and the Legislature are expressly defined by the Wisconsin Constitution. *Reynolds*, 22 Wis. 2d at 577; Wis. Const. art V., § 10(1)-(2). The Wisconsin Constitution "provides only one avenue to override…a veto, no judicial override textually exists." *Johnson III*, 2022 WI 19, ¶ 187 (Karofsky, J., dissenting). Simply put, the *Johnson III* court had no authority under the Constitution to act as a Super-Legislature to override the Governor's veto or act in the Governor's place to make SB 621 law.

Indeed, the other branches cannot nullify the Governor's veto in the redistricting process. In *State* ex rel. *Reynolds v. Zimmerman*, 22 Wis. 2d at 550, the Governor had rejected the maps proposed by the Legislature, and the veto was not overridden. Following the Governor's veto and override failure, the Legislature passed a joint resolution purporting to reapportion the Wisconsin legislative districts. *Id.* The resolution was "nearly identical" to the map vetoed by the Governor. *Id.* The Wisconsin Supreme Court held that resolution to be invalid, as it had circumvented the joint action of the Legislature and Governor required for legislative reapportionment. *Id.* at 559. Critically, the *Zimmerman* court noted that the framers of the Constitution intended to have the Governor's "participation in all decisions related to legislative apportionment" and that the Governor is the only elected official "involved in the legislative process that represents the people as a whole." *Id.* at 557-559.

The *Johnson III* court's actions are akin to the joint resolution proposed in *Zimmerman*. Just like the joint proposal, judicial enactment of SB 621 nullified the Governor's decision to veto the Legislature's proposed map and cut out of the reapportionment process the only voice that "represents the people as a whole." *Id.* In imposing the map reflected in SB 621, the *Johnson III* court "judicially [overrode] the Governor's veto, thus nullifying the will of Wisconsin voters who elected that governor into office." *Johnson III*, 2022 WI 19, ¶ 187 (Karofsky, J., dissenting). This Court should grant the Petitioner's original action to examine, and rectify, this violation of the separation of powers doctrine.

IV. The Court should remedy any finding of unconstitutionality of the current legislative districts by ordering remedial maps that comport with traditional districting principles and achieve partisan fairness.

Should the Court find the current state legislative districts to violate any provision of the Wisconsin Constitution, it should order new ones. In evaluating or creating new maps, this Court should adhere faithfully to its duties under the United States and Wisconsin Constitutions and the Voting Rights Act, and it should consider other factors consistent with those duties and appropriate to a court in pursuit of the best possible plan for safeguarding the representational rights of Wisconsin's citizens, as detailed further below.

A. State law and related traditional principles require that districts must be apportioned equally by number, contiguous, and compact.

Mandatory redistricting considerations are provided by the Wisconsin Constitution. It requires that assembly districts be apportioned "according to the number of inhabitants." Wis. Const. art. IV, § 3. While "perfect exactness" is not required, "there should be as close an approximation to exactness as possible." *State* ex rel. *Attorney General v. Cunningham,* 81 Wis. 440, 484, 51 N.W. 724 (1892) (emphasis in original).

The Constitution also requires that assembly districts be single-member districts and "be bounded by county, precinct, town or ward lines, [to] consist of contiguous territory and be in as compact form as practicable." Wis. Const. art. IV, § 4. Further, senate districts must consist "of convenient contiguous territory" and be comprised of whole assembly districts. Wis. Const. art. IV, § 5. Senate districts may also be served only by a single senator. *Id.*

"The term 'compact' has not been defined in Wisconsin, but other states with similar constitutional requirements have defined 'compact' as meaning closely united in territory." *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 634 (E.D. Wis. 1982) (*citing People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N.E. 307 (1895)). In assessing compactness, the U.S. Supreme Court has used an "eyeball" test focused on the regularity of the district's shape. *Bush v. Vera*, 517 U.S. 952, 960 (1996).

As discussed further, *supra,* the Constitution requires that legislative districts be comprised of "contiguous territory." Wis. Const. art. IV, § 4. "Contiguous" means that a district "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 (1892). Although this principle has been ignored in the past, the Constitution demands it. Thus, each part of a district must be connected to every other part, and it must be possible to travel to all parts of a district without crossing district lines.

These provisions reflect that Wisconsin has enshrined certain traditional redistricting principles as paramount: one person one vote, geographic compactness, and contiguity.

B. Maps should also follow other traditional redistricting principles including preserving the unity of political subdivisions and communities of interest.

There are certain "traditional" redistricting principles that are not constitutionally required and are subservient to the above requirements. *Shaw v. Reno*, 509 U.S. 630, 647 (1993). Nonetheless, some of these factors, when applied, can justify some deviation from requirements of perfect population equality or some map shaping that might otherwise qualify as impermissible gerrymandering. *Id.*; *Evenwel v. Abbot*, 578 U.S. 54, 59-60 (2016).

One such principle is the preservation of the unity of political subdivisions. This may be viewed as related to the Wisconsin constitutional requirement that districts "be bounded by county, precinct, town or ward lines" (though not itself mandated by that provision, given that, for example, districts bounded by ward lines can plainly cross many other municipal boundaries). Wis. Const. art. IV, § 4. Although sometimes viewed as an "important" factor, it nonetheless has been recognized as secondary in light of the one person, one vote principle. *AFL-CIO*, 543 F. Supp. at 635-636.

A "closely related" principle "is the objective of preserving identifiable communities of interest in redistricting." *Id.* at 636; *see also Evenwel*, 578 U.S. at 59. "One important aspect of this concern is avoiding any dilution in the voting strength of racial and ethnic minorities." *AFL-CIO*, 543 F. Supp. at 636.

Finally, the Court in its work should account for the factor of partisan influence over Wisconsin's extant districting scheme. The importance of this factor is based not merely in tradition and considerations of court legitimacy, but in constitutional imperatives which elevate it above other factors that the Democratic Senator Respondents anticipate other parties may promote. Even if this Court does not reach the question of whether partisan gerrymandering violates the Wisconsin Constitution, because the ***Court*** will be defining the state legislative districts, not the political branches, it must endeavor to create fair maps. Instead of deferentially reviewing an enacted map to determine "whether it struck a reasonable balance among the considerations enumerated above," because there is no enacted map,[2] the Court must itself take responsibility for selecting the "best possible" plan. *Prosser v. Elections Bd.*, 793 F. Supp. 859, 865, 866-867 (W.D. Wis. 1992).

That is not to say that the Court should be blind to the partisan make up of districts. The partisan makeup of districts is not only a valid factor for the Court to consider; it is one that the Court ***must*** consider to avoid imposing a partisan map of its own. In other words, it must be aware of the partisan makeup of current and possible future districts, and steer clear

[2] To the contrary, the current district maps were vetoed by the Governor and were not overridden by the Legislature. Instead, acting in violation of separation of powers, they were judicially overridden by the *Johnson III* court, as detailed *supra.*

of them, in order to make the best possible selection it can in the service of the constitutional and other legal rights of all of Wisconsin's citizens: Democrats, Republicans, and those of all other political persuasions. *See e.g., Prosser,* 793 F. Supp. at 865, 870 (rejecting redistricting plans proposed by the parties because they bore "the marks of their partisan origins" and creating one itself that preserved the strengths of those plans while avoiding their weaknesses).

If the Court were to instead seek to maintain "blindness" as to partisanship of existing and proposed maps, it would simply be complicit in the perpetuation of the partisan effects that are inherent in them. Partisanship is at the heart of our democratic system, built into the very fabric of our civic life, and both an inevitable feature of virtually any map proposed by a political body and a key component of the map's impact on the representational interests of Wisconsin's citizens. It has long been recognized that when a court is ***itself*** charged with selection of redistricting maps, partisan features are among the important factors it should consider. Unlike court-chosen plans, "[a]n enacted plan would have the virtue of political legitimacy." *Prosser*, 793 F. Supp. at 866. Thus,

> [j]udges should not select a plan that seeks partisan advantage—that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda—even if they would not be entitled to invalidate an enacted plan that did so.

Id.

Justice Dallet echoed these sentiments, explaining, "[i]t is one thing for the current legislature to entrench a past legislature's partisan choices for another decade. It is another thing entirely for this court to do the same." *Johnson I,* 2021 WI 87, ¶ 93 (Dallet, J., dissenting). Rather, in

remedying any constitutional violation infecting the current maps, the 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).

As Justice Prosser observed, "In turbulent times, courts are expected to act with fairness and objectivity." *Ozanne,* 2011 WI 43, ¶ 18 (Prosser, J., concurring). The *Johnson III* court abdicated that responsibility by imposing extreme partisan maps that were not chosen, but rather were explicitly rejected, through the political process. This Court should not make the same mistake. Instead, it must act fairly, that is, to choose remedial maps that comport to traditional districting principles and allow Wisconsin voters to translate their voting strength into representation. A fair state legislative district map will allow a political party whose candidates earn the most votes statewide to also win a majority of seats in the legislature. A closely divided statewide electorate would give rise to a closely divided legislature.

The Democratic Senator Respondents agree with Petitioners that the Court should reject any remedy methodology that could be described as a "least change" approach. A "least change" approach, whether that means changing the existing unconstitutional maps as little as possible to meet the traditional redistricting criteria described above, or whether it means "core retention," would merely further calcify the politically gerrymandered maps existing now. Where core retention is urged as a principle, courts should "examine the underlying justification for the original lines or original district," as it may impermissibly "be used to insulate the original basis for the district boundaries." *Bethune-Hill v.*

Virginia State Bd. of Elections, 141 F. Supp. 3d 505, 544-45 (E.D. Va. 2015), *aff'd in part, vacated in part on other grounds*, 137 S. Ct. 788, 197 L. Ed. 2d 85 (2017). Such untoward insulation is precisely what this Court must guard against. Neither the core retention principle nor the "least change" concept is required by any federal or state law, and their consideration as factors of any value has not been endorsed by any Wisconsin court, including any majority of the Wisconsin Supreme Court. (*See* Mem. of Law at 76-77.)

C. Federal law requires district maps that reflect equal population and provide minority protection.

Finally, remedial maps chosen by the Court must also adhere to two federal requirements: equal population and minority protection.

Like the Wisconsin Constitution, the U.S. Constitution requires equality of population among districts. "[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964);[3] *see also Gray v. Sanders*, 372 U.S. 368, 381 (1963) (holding that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.")

Federal redistricting law also calls for minority protection. This tenet has two basic sources of law. The first is the Equal Protection Clause of the Fourteenth Amendment, which was enacted with the central purpose of

[3] With regard to state legislative redistricting, "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Reynolds,* 377 U.S. at 579.

"preventi[ng] official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). Specifically, it prohibits the state from separating citizens into different electoral districts on the basis of race without sufficient justification. *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 187 (2017). If race is the predominant motivating factor in how a district's boundaries are drawn, the state must satisfy strict scrutiny by proving that it has imposed the map in a narrowly tailored manner to achieve a compelling interest. *Miller v. Johnson*, 515 U.S. 900, 920 (1995). Unconstitutional racial gerrymanders include, *inter alia*, the act of either placing a disproportionately large population of a minority group in a single district, known as "packing," or of thinning out the minority group's members among a number of districts, known as "cracking." *Shaw*, 509 U.S. at 670–71(White, J., dissenting (citing precedents)).

The other federal source of minority protection is Section 2 of the Voting Rights Act of 1965 ("VRA"), which prohibits states from imposing any voting requirement or condition "in a manner which results in a denial or abridgement" of the right to vote based on race. 52 U.S.C. § 10301(a). This section "prohibits any practice or procedure that, 'interacting with social and historical conditions,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) (*quoting Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)). Thus, any remedy imposed in this case must satisfy the requirements of the Equal Protection Clause of the United States Constitution and the VRA.

CONCLUSION

The Court should GRANT the Petition for Original Action and issue an Order governing further proceedings consistent with the Democratic Senator Respondents' August 14, 2023 Response to the Petitioners' Motion for Scheduling Order.

Respectfully submitted this 22nd day of August 2023.

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