IN THE SUPREME COURT OF WISCONSIN

No. 2023AP1399

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,

GOVERNOR TONY EVERS, IN HIS OFFICIAL CAPACITY; NATHAN ATKINSON, STEPHEN JOSEPH WRIGHT, GARY KRENZ, SARAH J. HAMILTON, JEAN-LUC THIFFEAULT, SOMESH JHA, JOANNE KANE, AND LEAH DUDLEY,

Intervenors-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,

WISCONSIN LEGISLATURE; BILLIE JOHNSON, CHRIS GOEBEL, ED PERKINS, ERIC O'KEEFE, JOE SANFELLIPO, TERRY MOULTON, ROBERT JENSEN, RON ZAHN, RUTH ELMER, AND RUTH STRECK,

Intervenors-Respondents.

PETITIONERS' BRIEF

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ISSUES PRESENTED

1. Do the existing state legislative maps violate the contiguity requirements contained in Article IV, Sections 4 and 5 of the Wisconsin Constitution?

2. Did the adoption of the existing state legislative maps violate the Wisconsin Constitution's separation of powers?

3. If the Court rules that Wisconsin's existing state legislative maps violate the Wisconsin Constitution for either or both of these reasons and the Legislature and the Governor then fail to adopt state legislative maps that comply with the Wisconsin Constitution, what standards should guide the Court in imposing a remedy for the constitutional violation(s)?

4. What fact-finding, if any, will be required if the Court determines there is a constitutional violation based on the contiguity clauses and/or the separation-of-powers doctrine and the Court is required to craft a remedy for the violation? If fact-finding will be required, what process should be used to resolve questions of fact?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is warranted in this matter under the standards in Wis. Stat. § (Rule) 809.22. Pursuant to this Court's order, unless otherwise ordered, the Court will hear oral argument on Tuesday, November 21, beginning at 9:45 a.m.

Publication is proper under the standards in Wis. Stat. § (Rule) 809.23(1) because the issues raised here are of statewide import and will provide guidance relevant to future decennial redistricting and litigation.

INTRODUCTION

This Court asked all parties to address the four issues set forth above. Below, Petitioners address each issue in turn.

Section I describes the Wisconsin Constitution's plain-text requirement that legislative districts be "contiguous," meaning they cannot be composed of detached territories, and how Wisconsin's current legislative districts violate that requirement.

Section II describes how the current legislative maps violate the Wisconsin Constitution's separation-of-powers principle because they result from the judicial exercise of the legislative and executive branches' exclusive powers.

Section III explains the criteria the Court should employ in determining the appropriate remedy for these constitutional infirmities. Specifically, in determining an appropriate remedy, the Court should ensure that any remedial map reflects the Court's role as a nonpartisan institution, and traditional redistricting requirements and criteria.

Section IV identifies Petitioners' proposed process and schedule that the Court should use in selecting or developing remedial maps. The Court should conduct a remedial process expeditiously, and with limited fact-finding based on written submissions from the parties, and Section IV lays out a potential schedule for this process. Section IV also explains why the Court need not afford the legislative and executive branches another opportunity to enact maps.

ARGUMENT

I. The current legislative districts are unconstitutionally noncontiguous.

The current legislative districts violate the Wisconsin Constitution's contiguity requirement. The Constitution requires assembly districts to be "bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable," and senate districts to be composed of whole assembly districts and to consist of "contiguous territory." Wis. Const. art. IV, §§ 4, 5. The majority of current legislative districts—fifty-four[1] of the ninety-nine assembly districts and twenty-one of the thirty-three 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 Wisconsin Just. Initiative, Inc. v. Wisconsin Elections Comm'n*, 2023 WI 38, ¶¶93-117, 407 Wis. 2d 87, 990 N.W.2d 122 (Dallet, J., concurring) (role for analysis of original public meaning). The Court "therefore examine[s] 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

[1] The Petition mistakenly identified fifty-five noncontiguous districts. AD89 is contiguous because its discrete sections are connected by water.

the provision by the legislature, as manifested through the first legislative action following adoption." *Dairyland Greyhound Park*, 2006 WI 107, ¶19.

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

Text, history, and precedent confirm that the Wisconsin Constitution prohibits legislative districts composed of physically detached territories.

Text. The plain meaning of the phrase "contiguous territory," both today and at the founding, is that the entirety of the land in a district must be adjoining and physically touching, without detached parts. Dictionaries published around 1848 support this meaning. Webster's Dictionary defined "contiguity" as the "[a]ctual contact of bodies; touching," while "contiguous" was defined as "[t]ouching; meeting or joining at the surface or border," and "contiguously" as "in a manner of touch; without intervening space." Noah Webster, *An American Dictionary of the English Language* (1848), App. 005-008. It further used "contiguous" as a synonym for "adjoin," meaning to "be next to, or in contact." *Id.*, App. 007. By contrast, it defined "incontiguous" as "not adjoining, not touching, separate." *Id*., App. 008. Likewise, Samuel Johnson's authoritative dictionary defined "contiguous" as "Meeting so as to touch; bordering upon each other," and "contiguously" as "without any intervening spaces." Samuel Johnson, A Dictionary of the English Language 147 (Alexander Chalmers ed. 1837), App. 009-010. These meanings accord with how "contiguous" and "contiguity" are defined today: "Touching at a point or along a boundary; adjoining," *Contiguous*, Black's Law Dictionary (11th

ed. 2019), such as where "contiguity exist[s] between two adjoining tracts of land." *Contiguity,* Black's Law Dictionary (11th ed. 2019).

Early legal meanings of "contiguous" support this interpretation. Blackstone described towns that are "common because of vicinage" to be those that "lie contiguous to each other," using the term to mean a shared physical boundary. 1 William Blackstone, Commentaries, *33. In examining property on a parcel of land, Blackstone used "contiguous thereto" to mean two structures touching each other—and not detached structures, like barns and stables, although contained on the property of the same owner. 4 William Blackstone, Commentaries, *221, App. 013-015. Justice Thomas Cooley's foremost state constitutional law treatise likewise recited cases, including from this Court, recognizing that "contiguity" and "contiguous" meant adjoining or adjacent lands. *See* Thomas M. Cooley, *A Treatise on Constitutional Limitations*, 296, 688, 701 (5th ed. 1883) (citing, *inter alia*, *Chicago & N.W. Ry. Co. v. Town of Oconto*, 50 Wis. 189, 6 N.W. 607 (1880)), App. 016-019. James Madison employed the term "contiguous States" similarly in the Federalist Papers. Federalist 42 at 271 (Rossiter ed. 1961) (Madison), App. 020-022.

Other state supreme courts around the time of Wisconsin's founding interpreted the term "contiguous territory" to mean "land adjacent," "land adjoining," and "adjacent territory"—that is, land connected by physical contact without detached parts. *See, e.g.*, *City of Jeffersonville v. Weems*, 5 Ind. 548-50

(1854); *Hobbs v. Parker*, 31 Me. 143, 151 (1850); *Commonwealth v. Upton*, 72 Mass. 473, 475-76 (1856).

History. The framers' decision to require contiguous districts reflects a deliberate preference, not a meaningless technicality. The delegates to the Constitutional Convention were particularly concerned that legislators would be unable to effectively represent their constituents in districts containing far-flung territory. For example, when constitutionally establishing the state's original districts, the delegates approved an amendment by Delegate Featherstonhaugh to give Calumet and Manitowoc Counties one representative each, rather than combining them in a single district. *Journal of the Convention to Form a Constitution for the State of Wisconsin* at 363, 365-66, 390 (Madison, Tenney, Smith & Holt 1848), App. 023-030. Delegate Featherstonhaugh explained, "the two counties were entirely disconnected, so far as their settlements were concerned, and could not possibly act in concert." *Id.* at 363, App. 026. 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 delegates also presumably understood that, six years earlier, Congress used the identical term "contiguous territory" in the 1842 Apportionment Act to require that congressional elections be conducted using single-member "districts

composed of contiguous territory." Apportionment Act of 1842, ch. 47, App. 203, 5 Stat. 491 (1842). The Congressional Record indicates that members of Congress understood the new contiguous territory requirement to mean that all parts of the district's land must be physically touching, and some saw this mandate as a tool to better "give effect to the popular will" in congressional elections. *See, e.g.*, Cong. Globe, 27th Cong., 2nd Sess. App. 492-93 (1842) (statement of Sen. Huntington); *id.* at 471 (statement of Sen. Wright), *id.* at 340 (statement of Rep. Davis), *id.* at 793 (statement of Sen. Bates), App. 204-209. Against this backdrop, it made sense for Wisconsin's founders to align state legislative elections with congressional elections by providing for the same single-member district structure and giving the "contiguous territory" requirement the same meaning: fully confined, adjoining land that physically touched.

Accordingly, the state's first legislative districts were fixed in the original Constitution, and those districts were all physically contiguous. *See* Wis. Const. art. XIV, § 12 (1848). Moreover, the original 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 original districts had detached parts—and

indeed concern was expressed that even a contiguous district containing Calumet and Manitowoc 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).

Precedent. This Court has held that the contiguity requirement means what it says—all parts of a district must physically touch such that a district 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. Ry. Co.*, 50 Wis. at 192. This Court reasoned that permitting noncontiguous town attachments could restrict the Legislature's choices in redistricting because the Constitution requires 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 decided the meaning of Article IV's contiguity requirement, holding 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 (1892).

The *Lamb* Court emphasized that this was "absolutely binding." *Id.* The Court's interpretation of the contiguity requirement in *Lamb* has never been overruled.

The Court 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 having "*some significant degree of physical contact*" and "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).

This Court's contradictory statement in *Johnson I* that districts could be noncontiguous to accommodate municipal "islands" is nonbinding *dicta*. *Johnson v. Wisconsin Elections Comm'n*, 2021 WI 87, ¶36, 399 Wis. 2d 623, 967 N.W.2d 469 ("*Johnson I*"). The Court addressed the issue in just two sentences, conducted no analysis of the text or original meaning of "contiguous," and did not acknowledge *Lamb*. Instead, the Court simply cited a federal district court decision, *Prosser v. Elections Board*, 793 F. Supp. 866 (W.D. Wis. 1992), that concluded noncontiguous municipal islands were permissible. No party in *Johnson I* argued otherwise, and there was no discussion of whether *Prosser*'s interpretation conflicted with the Constitution or this Court's precedent. Accordingly, *Johnson I*'s statement does not bind this Court. *Wisconsin Just. Initiative*, 2023 WI 38, ¶142 (Hagedorn, J., concurring) ("[W]here 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)).

Prosser provides no reasoned support for permitting physical non-contiguity. In *Prosser*, the federal court resolved the 1992 impasse litigation over Wisconsin's redistricting by selecting a remedial map that contained noncontiguous districts (over a competing proposal with complete contiguity). 793 F. Supp. at 866. *Prosser* devoted scant space to analyzing the constitutional issue before concluding that the Legislature's failure to propose contiguous districts was not a "serious demerit." *Id.* The court reasoned that, by statute, towns could sometimes "annex noncontiguous areas" and that the Legislature's redistricting plan "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 a recent statute "treat[ing] islands as contiguous with the cities or villages to which they belong." *Id.* That statute—since repealed—was enacted as part of the standards guiding the 1971 legislative redistricting process and 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 reenacting Wis. Stat. § 4.001 (emphasis added)); 2011 Wisconsin Act 43, § 2 (repealing Wis. Stat. § 4.001(2)-(5)).[2]

[2] The Legislature also historically understood the *constitutional provision* requiring "contiguous territory"—as opposed to the *statutory* contiguity requirement in the annexation statute—to require that all parts of a district literally touch. In 1953, the Legislature passed a law "relating to correction of errors in the apportionment of assemblymen," 1953 Wis. Sess. Laws 512, to correct several noncontiguous aspects of certain assembly districts. *See State ex rel. Thomson v. Zimmerman*, 264

Prosser neither cited nor discussed this Court's contrary holding about the meaning of Article IV's "contiguous territory" requirement, notwithstanding this Court's admonition that *Lamb* is "absolutely binding." 83 Wis. at 148; *see also, e.g.*, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.,* 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." (quotations omitted)). Instead, *Prosser* cited a statute in which the Legislature decided it would draw districts that were "*not* contiguous." *See* 1971 Wis. Sess. Laws 1170 1 (emphasis added); *Prosser*, 793 F. Supp. at 866. This was an error. A statute enacted over 120 years after the founding, which is directly contrary to the Constitution's plain text and this Court's binding precedent, and which explicitly recognizes that detached parts of a district are "not contiguous" but purports to allow them anyway, cannot carry the day. The Legislature has no power to interpret Article IV's contiguity requirement to mean *not* contiguous, and *Prosser* lacked authority to disregard this Court's binding authority. Its analysis of the contiguity issue was plain error and cannot be followed here by this Court, whose binding holding *Prosser* ignored. Moreover, as a practical matter, it is unnecessary to create noncontiguous districts to minimize municipal splits—even among municipalities that have island territory. Keeping towns that

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 was intended to "repair[] this error by joining isolated areas to the districts to which they are actually contiguous").

contain municipal islands in the same districts as their neighboring municipalities prevents both creating noncontiguous districts and splitting municipalities.

Prosser is also contrary to holdings of numerous other state supreme courts. These courts recognize that contiguous should be given its "literal meaning[]." *See Kawamoto v. Okata*, 868 P.2d 1183, 1186 n.7 (Haw. 1994). The long-understood "ordinary and plain meaning of the words 'contiguous territory' is not territory nearby, in the neighborhood or locality of, but territory touching, adjoining, and connected, as distinguished from territory separated by other territory." *In re Sherill*, 81 N.E. 124, 131 (N.Y. 1907). Thus, in the redistricting context, "[c]ourts generally agree that contiguous territory is territory that touches, adjoins or is connected, as distinguished from territory that is separated by other territory." *Below v. Gardner,* 963 A.3d 785, 791 (N.H. 2002); *accord In re Senate Joint Resol. of Legislative Apportionment 1176*, 83 So. 3d 597, 628 (Fla. 2012); *In re Legislative Districting of State*, 805 A.2d 292, 318 (Md. 2002); *Arizona Minority Coal. for Fair Redistricting v. Arizona Indep. Redistricting Comm'n,* 121 P.3d 843, 869 (Ariz. Ct. App. 2005); *Preisler v. Kirkpatrick*, 528 S.W.2d 422, 424 n.4 (Mo. 1975).[3]

* * *

[3] Other state courts also hold that when parts of a district are separated by water, this does not disrupt the contiguity of the district. *See, e.g.*, *Lamson v. Sec'y of Commonwealth*, 168 N.E.2d 480, 487 (Mass. 1960) ("This being a maritime Commonwealth, the word 'territory' in the expression 'contiguous territory' in [the Constitution] includes water spaces."); *Parella v. Montalbano*, 899 A.2d 1226, 1255 (R.I. 2006) (accepting "shore-to-shore" contiguity). But accepting water contiguity does not mean accepting land noncontiguity: "Clearly, a district that contained two sections completely severed by another land mass would not meet [the constitutional mandate of contiguity]." *Wilkins v. West*, 571 S.E.2d 100, 109 (Va. 2002).

Reinterpreting "contiguous territory" to mean anything other than physically touching land without detached parts would be inconsistent with this Court's task to derive constitutional meaning from "the plain meaning of the words in the context used." *Wisconsin Just. Initiative*, 2023 WI 38, ¶22. Districts that contain non-adjoining, detached land are not "contiguous territory" by any stretch of that definition, as established in consistent original and contemporary meaning, this Court's precedent, the framers' original design, the early Wisconsin Legislature's initial interpretations, and the common understandings of courts across the country. "Contiguous territory" means what it says and the Court should not reinvent the term to also mean detached territory.

B. The current legislative districts are not contiguous.

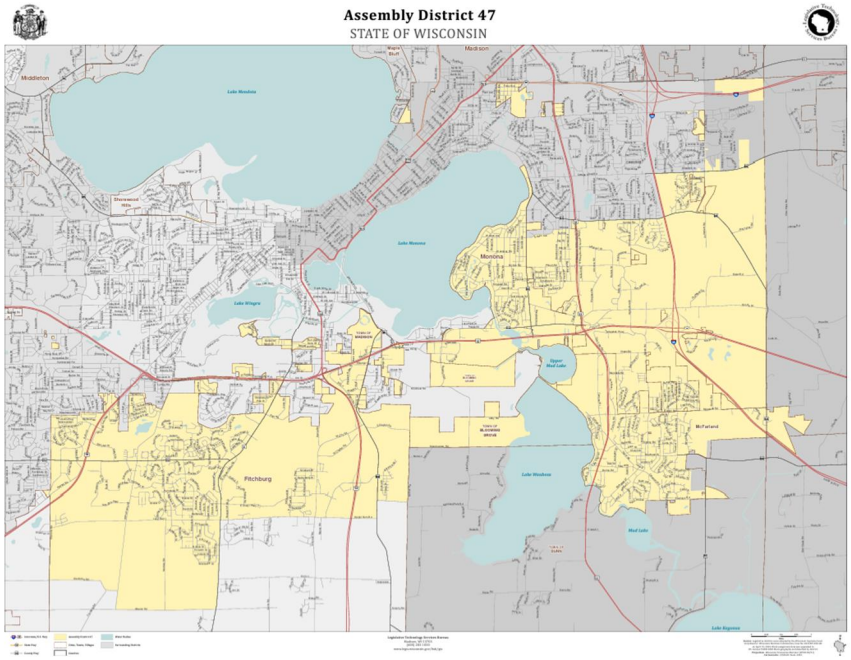
The current legislative districts are not contiguous. Fifty-four assembly districts,[4] consisting of between two and forty disconnected pieces of territory, and twenty-one senate districts,[5] consisting of between two and thirty-four disconnected pieces of territory, are noncontiguous.[6] Consider, for example, the Madison-area

[4] 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, 91, 93-95, and 97-99. *See supra* note 1.

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

[6] The Wisconsin Legislative Technology Services Bureau ("LTSB") has published images of each current assembly and senate district. *See* Wis. Legis. Tech. Servs. Bureau., https://legis.wisconsin.gov/ltsb/gis/maps/. The LTSB also provides interactive maps that permit users to zoom to see greater details. *See, e.g.*. Wis. Legis. Tech. Servs. Bureau., https://data-ltsb.opendata.arcgis.com/datasets/febd43c1d0594447854c02898a10928b_0/explore?location=44.522339%2C-87.723062%2C7.90. The Court may 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, 441 (1978) (granting original action petition and taking judicial notice of "materials in the Wisconsin Legislative Reference Bureau").

assembly districts. Petitioners set forth a number of images of these districts in their Petition and accompanying memorandum, but AD47 provides a stark illustration:



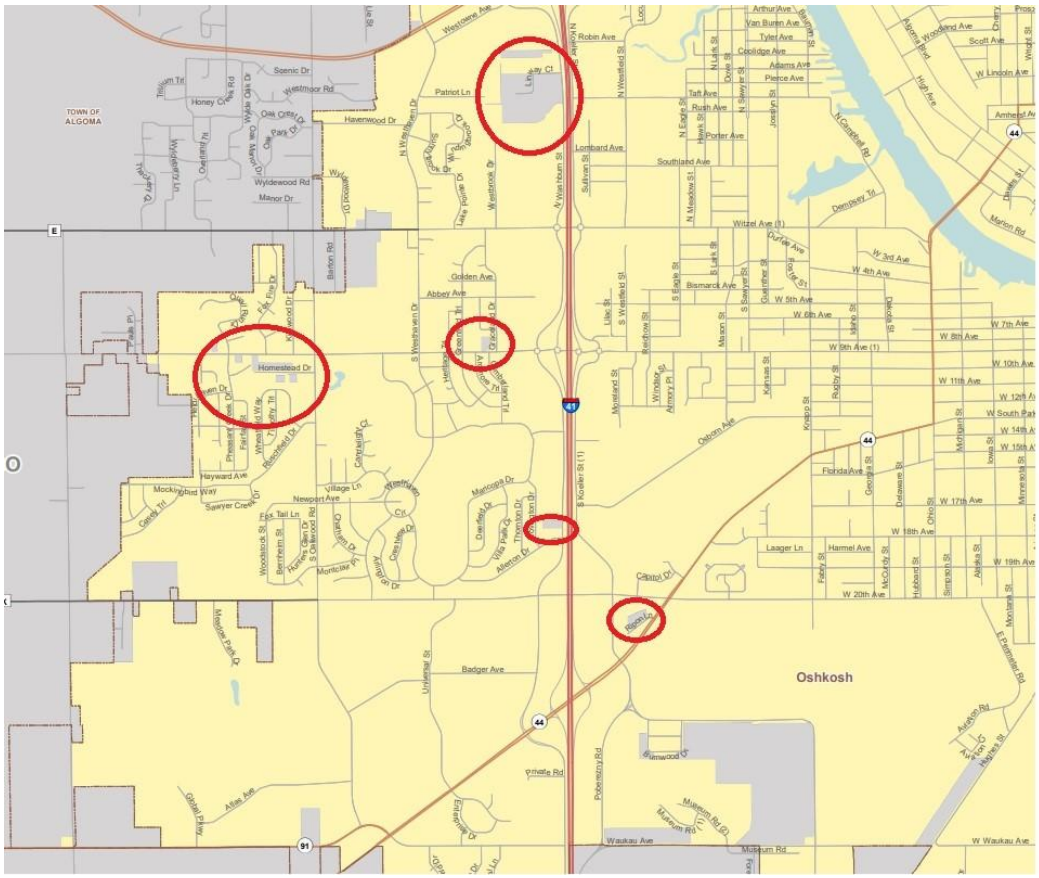
This Madison-area district has disconnected pieces scattered across Dane County. Several disconnected pieces were part of the Town of Madison, but in October 2022 the Town of Madison ceased to exist, with its territory now distributed to the Cities of Madison and Fitchburg.[7] As a result, not only is AD47 noncontiguous, but 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.[8] As it is, some

[7] *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.

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

residents in stranded portions of AD47 must cross two other assembly districts before reaching another part of their district.

The noncontiguity is not solely the result of municipal islands. For example, most of the City of Oshkosh is in AD54, but in the middle of AD54 are pieces of AD53 that are likewise just parts of the City of Oshkosh, as opposed to some island territory of a neighboring municipality. These are shown below circled in red[9]:



Noncontiguity pervades both the assembly and senate maps—with noncontiguous districts present across almost the entire State. *See supra* nn. 4, 5.

[9] *See* Wis. Legis. Tech. Serv's Bureau, *Assembly District 54*, Wis. State Leg. https://legis.wisconsin.gov/ltsb/gis/maps/. The fact that these island segments are not bounded by a different municipality is reflected by the absence of a dotted line around them to indicate the presence of a municipal boundary.

And Wisconsin stands alone when it comes to noncontiguous districts. Putting aside instances where water separates parts of a district, only three other states include *any* districts that are noncontiguous. Massachusetts includes a single house district with one noncontiguous portion.[10] The Pennsylvania Senate and House combined include six districts with a handful of detached portions.[11] The Tennessee House and Senate each include a single district with a single noncontiguous portion.[12] And that's it. Across all forty-nine other states' house and senate legislative maps, forty-six have *no* noncontiguous districts, and three have a combined total of *nine* noncontiguous districts among them.[13] This stands in stark contrast to Wisconsin, where there are *seventy-five* noncontiguous districts across the assembly and senate maps, many with disconnected pieces reaching into double digits and one (AD80)

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[10] *2021-2031 Districts*, 193rd Gen. Ct. Commonwealth Mass., https://malegislature.gov/Redistricting/NewDistricts/House (select "Download House District Maps" to review NORFOLK 14).

[11] *State House District Plans*, Penn. Redistricting, https://www.redistricting.state.pa.us/maps/ (expand "2021 Final" and select "Final Map" to review House Districts 41, 94, 96, 97, and 131, and Senate District 36).

[12] *Senate District 5*, Tenn. Comptroller of the Treasury, https://comptroller.tn.gov/content/dam/cot/pa/documents/district-maps/tn-senate-districts/StateSenate5.pdf; *Senate District 5*, Tenn. Comptroller of the Treasury, https://comptroller.tn.gov/content/dam/cot/pa/documents/district-maps/tn-house-districts/HouseDistrict52.pdf.

[13] It appears that the noncontiguous districts in Massachusetts and Tennessee have not been directly challenged on this basis, and precedent from courts in those states would reject those noncontiguous districts as violating state redistricting provisions that require contiguity. *See, e.g.*, *Mader v. Crowell*, 498 F. Supp. 226, 229 (M.D. Tenn. 1980) ("Contiguity is absent, then, only when a portion of a district is separated from the remainder of the district by the intervention of the territory of another district."); *Town of Brookline v. Sec'y of Com.*, 417 Mass. 406, 421, 631 N.E.2d 968, 977 n.13 (1994) ("Article 101 [of the Amendments to the constitution of the Commonwealth] contains an unconditional contiguity requirement"). For Pennsylvania, the holding in *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711 (Pa. 2012), conflicts with prior state precedent that held contiguity is satisfied only where "no part of the district is wholly physically separate from any other part." *Com. ex rel. Specter v. Levin*, 293 A.2d 15, 23 (Pa. 1972). Moreover, the small amount of noncontiguity permitted in *Holt* was deemed necessary to avoid further political subdivision splits, a concern not present in Wisconsin.

with as many as forty. Wisconsin's noncontiguous districts are an extreme national outlier.

This has real representational consequences. Legislators are less likely—as the framers recognized—to interact with constituents residing in disconnected pieces of their district.

Redistricting maps that adhere to contiguity and political subdivision boundaries requirements can—and must—be drawn. *Dairyland Greyhound Park*, 2006 WI 107, ¶24 (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.

II. The current legislative maps violate the Wisconsin Constitution's separation-of-powers principles.

Wisconsin's Constitution establishes a "tripartite separation of independent governmental power [that] remains the bedrock of the structure by which we secure liberty." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶3, 376 Wis. 2d 147, 897 N.W.2d 384. When the judicial branch imposes the precise map proposed by the Legislature but vetoed by the Governor, it upsets the balance of this bedrock structure, improperly seizing for itself powers the Constitution assigns to other branches.

Wisconsin's separation-of-powers principles are modeled after those of the United States Constitution. *See id.,* ¶¶3, 11. The framers of the U.S. Constitution

recognized that "the concentration of governmental power presented an extraordinary threat to individual liberty: 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, ...may justly be pronounced the very definition of tyranny.'" *Id.* ¶4 (quoting The Federalist No. 47, at 298 (James Madison) (Clinton Rossiter ed., 1961)). James Madison admonished that "neither the legislature nor the executive nor the judiciary 'ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.'" *Id.* (quoting The Federalist No. 48, at 305 (James Madison) (Clinton Rossiter ed., 1961)).

In *Johnson III*, by adopting the precise maps the Legislature passed and subsequently the Governor vetoed, this Court did what Madison warned against: it exerted overruling influence over the other branches in the administration of their respective powers. *Johnson v. Wisconsin Elections Comm'n*, 2021 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559 ("*Johnson III*"). The Governor exercised his exclusive constitutional authority to veto the maps the Legislature passed as SB 621. The Legislature alone had the power to override that veto. Wis. Const. art. V, § 10(2); *see also Wisconsin Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶50, 393 Wis. 2d 308, 946 N.W.2d 101 (Grassl Bradley, J., dissenting) ("Only a super majority of the legislature (two-thirds of the members present) may override the governor's veto of any bill."). The Legislature failed to do so. By adopting the Legislature's maps anyway, this Court impermissibly exercised the exclusive legislative power to override a veto.

Wisconsin's Constitution grants only the Governor the power to approve or veto legislation. Article V, Section 10 states unambiguously that the Governor must "approve or veto bills": "Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor. ... If the governor rejects the bill, the governor shall return the bill, together with the objections in writing, to the house in which the bill originated." Wis. Const. art. V, § 10. That house may then, "agree to pass the bill notwithstanding the objections of the governor." *Id.* At such time, the bill is sent to the other house, "by which it shall likewise be reconsidered, and if approved by two-thirds of the members present it shall become law." *Id.*

The 2020 redistricting process initially proceeded accordingly: "On November 11, 2021, the legislature passed redistricting plans. One week later, the governor vetoed the legislation. The legislature [] failed to override his veto." *Johnson I* at ¶17. Indeed, the Legislature never attempted to override. Br. of Sen. Carpenter *et al*. filed Aug. 22, 2023, p. 9 n.1. The constitutional consequence is plain: the bill does not become law. *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 557, 126 N.W.2d 551 (1964) ("[W]hen [the Governor] has vetoed a bill it cannot become law unless both houses of the legislature vote to override that veto."). Yet, because of the Court's decision, it became law nonetheless. This Court, despite its lack of constitutional authority to override vetoes, adopted the Legislature's maps. In so doing, the Court crossed the boundaries enshrined in Wisconsin's Constitution and usurped the roles of the coordinate branches.

Although *Johnson III* majority did not acknowledge this grave separation-of-powers issue. In dissent, Justice Karofsky clearly explained the violation. "By now implementing [the Legislature's maps]," Justice Karofsky wrote, "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." *Johnson III*, 2022 WI 19, ¶187 (Karofsky, J., dissenting). The Constitution's plain text is indisputable: the veto power belongs to the Governor alone, and the override power belongs to the Legislature alone, not to this Court.

In parallel circumstances, the Supreme Court of New Mexico concluded that it could not order the adoption of vetoed legislation. In *State ex rel. American Federation of State, County & Municipal Employees v. Johnson*, 994 P.2d 727 (N.M. 1999), the petitioners asked the court to "issue a writ commanding the Governor of the State of New Mexico to abide by the decision of the New Mexico Legislature extending the term of the State Agreement pursuant to the Public Employee Bargaining Act." *Id.* at 727. The court held this "would require [it] to exceed its constitutional powers ... either by judicially overriding the Governor's veto of three appropriation bills, or by usurping the Legislature's role in enacting new legislation." *Id.* at 727-28. The court analyzed Article IV, Section 22 of the New Mexico Constitution, which provides that "'[e]very bill passed by the [L]egislature shall, before it becomes a law, be presented to the [G]overnor for approval.'" *Id.* at 728 (alterations in original) (quoting N.M Const. art. IV, § 22). In New Mexico, as in Wisconsin, "[w]hen the Governor vetoes a bill presented to him, it 'shall not

become a law unless thereafter approved by two-thirds of the members present and voting in each house.'" *Id.* (quoting N.M Const. art. IV, § 22). Accordingly, "the three appropriation bills passed by the Legislature could not become law … after the Governor's vetoes without approval by a two-thirds majority of the Legislature." *Id.* The court "cannot override the Governor's vetoes, nor can the Court usurp the role of the Legislature in enacting new legislation." *Id.* In *Johnson III*, this Court did what the New Mexico Supreme Court properly refused to do: it overrode a gubernatorial veto without constitutional authority.

Petitioners do not suggest that Wisconsin's Constitution prohibits all power-sharing by the coordinate branches. However, certain powers—particularly those clearly granted to a specific branch—cannot be exercised by another branch. As this Court has noted, "the separation of powers doctrine envisions a 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 powers." *Id.* (internal quotation marks omitted).

Exclusive, or "[c]ore" powers, are "not for sharing." *Id.* ¶47. "As to these areas of authority, ... *any* exercise of authority by another branch of government is unconstitutional." *Gabler*, 2017 WI 67, ¶31 (internal quotation marks omitted). The veto power and the veto override are both core powers. A branch's core powers are

those the Constitution expressly vests in it. As this Court has held, "the 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." *In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 514, 236 N.W. 717, 722 (1931). Because the veto override is exclusively granted to the Legislature, this Court is barred from exercising that power. And because the power to veto legislation—and have that veto stand absent an effective override—is vested exclusively in the Governor, this Court is similarly barred from infringing on this core power.

III. Upon determining that the existing legislative maps violate the Wisconsin Constitution, this Court should ensure that any remedial maps reflect its nonpartisan role and incorporate traditional redistricting requirements and criteria.

Once this Court holds that the existing maps are unconstitutional, it must impose a proper remedy by mid-March 2024. That remedy cannot be a partisan gerrymander in intent or in effect. Consistent with its role as a nonpartisan institution, this Court should follow constitutional mandates, rely on traditional redistricting criteria, and ensure that any remedial map it imposes will not advantage any political party. Considerations of race may not predominate except to the extent necessary to comply with a compelling government interest; the Court may not protect incumbents; and it should not consider core-retention or a "least change" approach that has no basis in text or history.

Under relevant state and federal law, in evaluating or creating new state legislative districts, the Court ***must*** consider (1) population equality, (2) compactness, (3) contiguity, (4) preservation of the unity of political subdivisions, (5) partisan neutrality, and (6) compliance with the federal Equal Protection Clause and Voting Rights Act. Persuasive authority also instructs that the Court ***may***—and should here—consider so-called "traditional redistricting criteria," including preservation of communities of interest.

A. Factors the Court must consider.

1. Population equality

The U.S. and Wisconsin Constitutions require members of the Wisconsin Legislature to be elected on the basis of equal representation. U.S. Const. amend. XIV, § 1; Wis. Const. art. IV, § 3; *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). Accordingly, this Court must ensure population equality among districts, permitting only minor deviations "to accommodate traditional districting objectives." *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016) (citations omitted); *Zimmerman*, 22 Wis. 2d at 556; *Johnson I*, 2021 WI 87, ¶¶33, 38; *see Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 860 (E.D. Wis. 2001). Court-ordered maps in particular "must ordinarily achieve the goal of population equality with little more than de minimis variation." *Connor v. Finch*, 431 U.S. 407, 414 (1977) (citation omitted).

2. Compactness

This Court ***must*** consider compactness for assembly districts and ***may*** consider compactness for senate districts. Compactness is "the principle that

districts should be reasonably geographically compact, meaning that the distance between all parts of a district is minimized." 2020 Wis. Legislative Reference Bureau, *Redistricting in Wisconsin 2020: The LRB Guidebook,* 1 Wisconsin Elections Project, no. 2, 2020, , at 14. The Wisconsin Constitution requires assembly districts to "be in as compact form as practicable." Wis. Const. art. IV, § 4. Two accepted metrics for measuring compactness are the Reock and Polsby-Popper measures.[14] There is no legal requirement to consider compactness for senate districts, although it is considered a way to "in fact secure[] … equality of representation, in so far as it is practically attainable," *Lamb*, 83 Wis. at 153 (1892), and this Court has employed the "requirement of compactness [to] compel[] adoption" of certain district configurations over others. *State ex rel. Reynolds v. Zimmerman*, 23 Wis. 2d 606, 606-07, 128 N.W.2d 16 (1964).

3. Contiguity

The Wisconsin Constitution requires that assembly and senate districts consist of "contiguous territory," Wis. Const. art. IV, §§ 4-5, meaning that no district may be divided into discrete pieces having detached parts. *See* Section I, *supra*.

4. Preserving political subdivisions

This Court ***must*** consider preserving political subdivisions in assembly districts and ***may*** consider doing so in senate districts. The Constitution requires that

[14] *See, e.g.*, *What Are Measures of Compactness?*, Caliper, https://www.caliper.com/glossary/what-are-measures-of-compactness.htm (last visited October 9, 2023). See also *Baumgart v. Wendelberger*, No. 01-C-0121 & No. 02-C-0377, 2002 WL 34127471, at *7 (E.D. Wis. May 30, 2002) amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002) (using the "smallest circle" [Reock] and "perimeter to area" [Polsby Popper] measures of compactness).

assembly districts "be bounded by county, precinct, town or ward lines." Wis. Const. art. IV, § 4. Nonetheless, this is not an inflexible requirement, and at times, "splitting [] municipal boundaries is necessary to adhere to the one person, one vote, principle." *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 636 (E.D. Wis. 1982); *see also Zimmerman*, 22 Wis. 2d at 564. In addition, the constitutional mandate that "no assembly district shall be divided in the formation of a senate district," Wis. Const. art. IV, § 5, means this Court must not adopt maps that bisect any assembly district into multiple senate districts.

5. Partisan neutrality.

This Court must consider the partisan effects of proposed remedial maps to ensure it does not impose a partisan gerrymander—intentionally or inadvertently. The *Johnson I* Court's contrary conclusion is incorrect and should be overruled. But even if it remained good law, *Johnson I*'s reasoning is inapplicable here.

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 a misguided judicial neutrality principle, 2021 WI 87, ¶76—is wrong. To be truly "consistent with judicial neutrality," the Court must not enact a remedy that would reinstalls "a plan that seeks partisan advantage." *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶12, 249 Wis. 2d 706, 639 N.W.2d 537 (quoting *Prosser*, 793 F. Supp. at 867). As Justice Dallet explained, "[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). In adopting remedial maps, 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,* ¶109. (citation omitted). Implementing maps as a judicial remedy that are nearly indisputable partisan gerrymanders is unlawful; such maps have the same anti-democratic effects and lack of adherence to binding and traditional districting principles as if those maps were imposed by the Court in the first instance.[15]

As the U.S. Supreme Court has explained, a "politically mindless approach" to designing a map can cause "grossly gerrymandered results" "whether intended or not." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). For this reason, previous courts adjudicating 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*, 2002 WL 34127471, at *4 (rejecting proposed plans because of their partisan skew). As Justice Dallet summarized in *Johnson I*:

> The last three courts to tackle redistricting in Wisconsin all considered partisan effects alongside other generally accepted neutral factors when evaluating and choosing remedial maps. ... Those courts considered the partisan effects of their

[15] *See, e.g.*, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 844 (E.D. Wis. 2012) (describing that the underlying maps were the product of "a sharply partisan methodology that has cost the state in dollars, time, and civility"); *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)stry (similar).

> decisions not to enact their subjective view of what is politically fair but because courts, unlike legislatures, should not behave like political entities.

2021 WI 87, ¶111. *Prosser* emphasized the duty of courts when they "are not reviewing an enacted plan" but are instead "comparing submitted plans with a view to picking the one (or devising [their] own) most consistent with judicial neutrality." 793 F. Supp. at 867. At bottom, "[j]udges should not select a plan that seeks partisan advantage," and must not enact a plan that ensures that "one party can do better than it would do under a plan drawn up by persons having no political agenda." *Id*. Ultimately, the court crafted its own map, highlighting that doing so seemed "least partisan." 793 F. Supp. at 871.

This approach is consistent with this Court's decisions indicating that districting for partisan purposes is unlawful. *See, e.g.*, *Lamb*, 81 Wis. at 480-84 (lead); *id.* at 496-515 (Pinney, J., concurring); *State v. Whitford*, 54 Wis. 150, 158, 11 N.W. 424 (1882) (describing "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).

Other state supreme courts have taken the same approach of rejecting plans that implemented partisan gerrymanders. *See, e.g.*, *Carter v. Chapman*, 270 A.3d 444, 464 (Pa. 2022); *Maestas v. Hall*, 274 P. 3d 66, 76-77 (N.M. 2012); *Burling v. Chandler*, 804 A.2d 471, 483 (N.H. 2002). So have federal courts. *See, e.g.*, *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1090-91 (D. Kan. 2012) (rejecting proposed maps

that "appear to be motivated in part by political considerations that do not merit consideration by the Court"); *Avalos v. Davidson*, No. 01CV2897, 2002 WL 1895406, at *8 (D. Colo. Jan. 25, 2002); *Balderas v. Texas*, No. 6:01CV158, 2001 WL 36403750, at *3 (E.D. Tex. 2001) (per curiam), *summarily aff'd*, 536 U.S. 919 (2002); *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*. There, the Court's decision not to consider the partisan implications of remedial maps was tied directly to its decision to impose a remedy with least changes from the 2011 enacted maps. 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. Here, there is no lawfully enacted map due any deference. Instead, the Court must start from a clean slate in imposing a remedial map. The current map *failed* the legislative process and was vetoed by the Governor. Moreover, its constitutional infirmities—with over half its districts unconstitutionally noncontiguous—are far too widespread permit it to serve as the starting point of a remedial map. And the defunct 2011 maps are both stale in time and riddled with unconstitutionally noncontiguous districts. Because the Court has no legislatively enacted plan to base a remedial plan on, the *Johnson I*'s reasoning with respect to considering partisan effects does not apply. In this context, the only way for the Court to ensure that it does not inadvertently

impose a judicial gerrymander is to reject a "politically mindless approach," *Gaffney*, 412 U.S. at 753, and assure itself that its remedial map treats Wisconsin voters of all political viewpoints equally, *see also* SCR 60.06(2)(a) ("Wisconsin adheres to the concept of a nonpartisan judiciary.").

Additionally, it bears noting that the residences of incumbents have either been ignored by federal courts drawing Wisconsin redistricting maps, or used only to ensure the avoidance of a partisan gerrymander in the resulting maps. In the 1980s and 2000s, federal courts expressly rejected the use of incumbent addresses as they drew the assembly and senate maps. *See Wisconsin State AFL-CIO*, 543 F. Supp. at 638 ("At no time in the drafting of this plan did we consider where any incumbent legislator resides"); *Baumgart*, 2002 WL 34127471 at *3 (noting that "avoiding unnecessary pairing of incumbents" is not one of the traditional redistricting criteria in Wisconsin). In *Prosser*, the court considered the addresses of incumbents only to ensure "the political balance of the state." *Prosser*, 793 F. Supp. at 871. The locations of incumbents are relevant for this purpose because the presence of an incumbent in a district is a factor that affects the district's electoral performance.

6. Compliance with the Equal Protection Clause and the federal Voting Rights Act.

Any remedial map must also adhere to the federal Equal Protection Clause and the Voting Rights Act. *See Wisconsin Leg. v. Wisconsin Elections Comm'n*, 595 U.S. 398, 401 (2022). The federal Equal Protection Clause requires the application of strict scrutiny when "race was the predominant factor motivating" a district's

formation. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Section 2 of the VRA prohibits district configurations that dilute the electoral influence of voters of a particular race or ethnicity if certain conditions are met. *See* 52 U.S.C. § 10301; *Thornburg v. Gingles*, 478 U.S. 30, 47-51 (1986). The Court may consider such arguments if they arise, but no party in this litigation alleges that any existing district violates the federal Equal Protection Clause or Section 2 of the VRA.

B. The Court should also consider preserving communities of interest.

This Court should also consider preserving communities of interest, as Wisconsin federal courts previously have done. *See Prosser*, 793 F. Supp. at 863 ("To be an effective representative, a legislator must represent a district that has a reasonable homogeneity of needs and interests."); *Baumgart v. Wendelberger*, 2002 WL 34127471, *7 (respecting "traditional communities of interest"); *see also Johnson I*, 2021 WI 87, ¶94 (Dallet, J., dissenting) ("[N]eutral factors include other 'traditional redistricting criteria' such as compactness, preserving communities of interest, and minimizing 'senate disenfranchisement.'"). The U.S. Supreme Court considers preserving communities of interest to be a traditional districting principle, *see, e.g.*, *Evenwel*, 578 U.S. at 59, as does the LRB, *see* LRB Handbook at 17.

C. Factors that the Court may not or should not consider.

There are four additional criteria that the Court may not, or should not, consider: (1) the excessive and unjustified use of race, (2) "core retention," (3)

senate disenfranchisement, and (4) whether the remedial plan constitutes a "least change."

1. Excessive and unjustified use of race.

Because the Court *must* comply with the federal Equal Protection Clause, the Court may *not* excessively and unjustifiably consider race when selecting or designing maps. As noted above, race cannot predominate as the factor motivating any district's creation in the absence of a compelling reason, such as compliance with the VRA. *See Wisconsin Leg.*, 595 U.S. at 401 (citing *Cooper v. Harris*, 581 U.S. 285 (2017)).

2. Core retention.

"Core retention" is the practice of "retaining previous [district] occupants in new legislative districts." *Baumgart*, 2002 WL 34127471, at *3 (citing *Karcher v. Daggett*, 462 U.S. 725, 740 (1983)). While core retention may be a valid consideration where permitted by state law and consistent with a state's historic practices, it may be used only through "case-by-case attention" to whether the criterion actually produces a neutral, "nondiscriminatory" result. *Karcher*, 462 U.S. at 740-41. Here, core retention should not weigh heavily in this Court's evaluation or creation of maps.

Importantly, core retention is frequently *not* included in lists of traditional districting criteria. *See, e.g.*, *Evenwel*, 578 U.S. at 59. The LRB guide excludes core retention from its list of traditional redistricting criteria. Wisconsin also lacks the history of adherence to core retention that could, in some circumstances, justify its

use in other jurisdictions. *Cf. Abrams v. Johnson*, 521 U.S. 74, 99-100 (1997); *Abate v. Mundt*, 403 U.S. 182, 186 (1971). The Court need look no further than the "striking numbers" of voters shifted among districts during the last redistricting cycle to know that core retention is not a redistricting requirement in the state. *Baldus*, 849 F. Supp. 2d at 849.

Underscoring the conclusion that core retention is not a valid criterion in Wisconsin, this Court held long ago that:

> The requirement that such apportionment shall be made at the first session of the legislature after the taking of such census very clearly indicates that the census so taken is to be the basis of such apportionment; otherwise the apportionment might as well be made the year prior to the taking of such census as the first session of the legislature thereafter.

Lamb, 83 Wis. at 149. The entire purpose of redistricting "anew" in Wisconsin is to reflect the *changed* composition of the State in the intervening time, not to retain the outdated composition. *Id*. Ignoring the present reality in Wisconsin in favor of preserving in amber the "vestige[s] of the dead past" for yet another decade is directly contrary to the object of redistricting. *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 722 n.8 (1964).

Likewise, given that the maps enacted in the last decade were extreme partisan gerrymanders, *see Whitford v. Gill*, 218 F. Supp. 3d at 910, and that the existing maps perpetuate those infirmities, considering core retention would only replicate and further entrench the skewed nature of Wisconsin's maps. *See* Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. Rev. 985, 1005 (2022). Here, the Court simply cannot "appl[y] th[e] factor in a manner free from any taint of arbitrariness

or discrimination." *Brown v. Thomson*, 462 U.S. 835, 843 (1983) (citation omitted). It instead should follow the path of numerous courts that have refused to legitimate "core retention" being used as a cloak for partisan favoritism. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1333-34 (N.D. Ga.) (three-judge court), *aff'd,* 542 U.S. 947 (2004); *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 678 (M.D. Pa. 2002).

Accordingly, and consistent with *Lamb*, this Court should consider Wisconsin as it is now, not as it was more than a decade ago.

3. Senate disenfranchisement.

The Court should not give substantial weight to senate disenfranchisement, i.e., the extent to which voters in certain districts will need to skip a senate election because their senate districts change. *See, e.g.*, *Baldus*, 849 F. Supp. 2d at 852. Although this typically would be a valid consideration, *see Johnson I*, 2021 WI 87, ¶94 (Dallet, J., dissenting), maintaining the odd-numbered senate boundaries to minimize disenfranchisement here would require the Court to act contrary to its neutral role and lock in an existing partisan gerrymander for those districts. The Court can instead address the issue of senate disenfranchisement by ordering special elections for the odd-numbered senate districts to occur in November 2024.

4. Least-change.

Finally, the Court should not apply a "least-change" approach to remedying the legal violations that render the current legislative maps unconstitutional.

First, the least-change approach applied in *Johnson* is not precedent because a majority of this Court never agreed that the approach (1) *should* apply and (2)

what it meant, if it did apply. *Only* Justice Hagedorn concluded both that a least-change approach should govern the selection of a remedy and that least change means "core retention." *See Johnson I*, 2021 WI 87, ¶¶82-84 & n.4 (Hagedorn, J., concurring); *Johnson v. Wisconsin Elections Comm'n*, 2022 WI 14, ¶26, ¶¶58-63, 400 Wis. 2d 626, 971 N.W.2d 402 ("*Johnson II*"). Justices Walsh Bradley, Dallet, and Karofsky disagreed that "least change" is an appropriate remedial approach but concluded that "core retention" should define the concept if it were to be applied. *See Johnson II*, 2022 WI 14, ¶¶58-63 (Walsh Bradley, J., concurring). Three other Justices dissented from this approach. *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 approach is thus not binding precedent. *See State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995) ("[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 that the standard is 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 this advice, and that of several other courts, in holding that courts are not bound by a "least change" approach. *See Chapman*, 270 A.3d at 464; *see also Balderas*, 2001 WL 36403750, at *2-3.

Second, the basis for applying a least-change approach in *Johnson* does not apply here. Unlike the situation the Court confronted in *Johnson*, the maps challenged here were not "passed by the legislature and signed by the Governor," so following a least-change approach is not necessary to avoid usurping "the lawmaking power constitutionally conferred on the legislature." *Johnson I*, 2021 WI 87, ¶8. Indeed, there is no legal basis for this Court to defer to maps that *failed* the political process and reflect the *rejected* public policy of a past regime, and doing so would shirk this Court's constitutional role and duties. *See Johnson III*, 2022 WI 19, ¶187 (Karofksy, J., dissenting); *see also supra* Section II. In impasse litigation where the previous maps were completely or overwhelmingly the result of the legislative process, there is some arguable rationale for applying a least-change approach because the challenged districts represent the last expression of the will of the people through duly enacted legislation. But that rationale does not hold for judicially imposed maps. Applying the least-change approach here would perpetuate maps that are not only unconstitutional but that were imposed by this Court, not by the legislative process preferred by the Wisconsin Constitution.

Third, the maps challenged here suffer from such extensive legal infirmities that a least-change approach is impossible. Most of the assembly districts and nearly two-thirds of the senate districts are noncontiguous, and eliminating the

noncontiguities is no simple (or isolated) fix, as it requires rebalancing populations (and applying other redistricting criteria) in districts state-wide. Moreover, each district is the result of a judicial override of a gubernatorial veto in violation of Wisconsin's separation-of-powers principles. The current maps are unsalvageable.

Fourth, the defunct 2011 maps (to which the current maps supposedly made "least changes") are not a legally appropriate starting point for remedial maps. Not only were they intentionally and severely gerrymandered, and not only were they unconstitutionally malapportioned by the time of *Johnson*, but they suffer the same constitutional defects as the existing maps. The 2011 maps are riddled with noncontiguous districts: forty-two of the 2011 assembly districts and eighteen of the 2011 senate districts were noncontiguous,[16] rendering them unacceptable as a base from which to make "least changes." Moreover, the 2011 maps 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). The constitutional infirmities of the current districts, as well as the 2011 districts, leave no salvageable policy choices to which this Court could defer.

Although the Court should prioritize constitutional requirements and traditional districting principles in imposing a remedy and should not apply a "least changes" standard, that does not mean that the existing plan cannot serve as one

[16] 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* note 1.

input in devising a remedial plan. For example, a number of assembly districts are contiguous and are configured in a way that would not cause the Court to be imposing a plan skewed in favor of a particular political party. Those districts might remain substantially the same in a proper remedial plan. That is particularly so for border districts that are less likely to be affected by changes in other districts. For example, some assembly districts in north-central and northeastern Wisconsin will not likely require many changes. Likewise, none of the assembly districts in the City of Milwaukee, which borders Lake Michigan, are noncontiguous and their current configurations would not cause the Court to be imposing a plan skewed in favor of a particular political party. Moreover, several of these districts have already been upheld by this Court, in litigation that reached the U.S. Supreme Court, as complying with federal law—both the VRA and the Equal Protection Clause. There is no need to revisit those districts and require renewed consideration of federal law issues in remedying the violations Petitioners allege in this case.

IV. The Court may conduct a remedial map-drawing process expeditiously and with limited fact-finding based solely on written submissions from the parties and intervenors.

A. Proposed Remedial Process

Petitioners respectfully submit that the process of developing, reviewing, and adopting lawful remedial plans can and should be conducted expeditiously based solely on written submission from the parties, including intervenors. The only necessary fact-finding will relate to compliance with the Wisconsin Constitution and the remedial standards adopted by the Court, which—as explained above—

should include traditional redistricting principles as well as avoiding districts that unfairly advantage one political party over another.[17] State and federal courts regularly undertake such fact-finding—and select or develop redistricting plans—based solely on written submissions, typically with the assistance of a court-appointed referee or special master who brings map-drawing experience and expertise. To ensure that remedial maps are in place by March 19, 2024,[18] Petitioners accordingly propose the following remedial process:

1. The Court should promptly appoint a referee, pursuant to Wis. Stat. §§ (Rule) 751.09 and 805.06, to assist the Court in reviewing potential remedial plans. State and federal courts typically appoint a referee or special master with significant map-drawing experience to assist in the process of reviewing, selecting, or sometimes developing redistricting plans. *See, e.g.*, Order, *League of Women Voters of Pa. v. Commonwealth*, No. 159 MM 2017 (Pa. S.Ct. Jan. 26, 2018) (appointing Nathaniel Persily); Order, *Common Cause v. Lewis*, No. 18 CVS 014001 (N.C. Super. Ct. Sept. 13, 2019) (appointing Nathaniel Persily); Order, *Bethune-Hill v. Virginia State Board of Elections*, No. 14-cv-00852 (E.D. Va. Oct. 18, 2018) (appointing Dr. Bernard Grofman). Petitioners recommend that the Court

[17] Petitioners do not anticipate that fact-finding will be needed to assess whether a remedial plan complies with federal law, other than compliance with population equality, a requirement that is also subsumed within the Wisconsin Constitution's equal protection requirement. No party is currently alleging any violation of the federal Constitution or a federal statute, including the VRA. If any party raises a federal-law issue that it believes requires fact-finding, the Court can assess that issue as it arises.

[18] This deadline is based upon the statutory deadline by which the Wisconsin Elections Commission must send notice of the primary and general elections to county clerks. Wis. Stat. § 10.06(1)(f).

give the parties an opportunity to submit recommendations for possible referee candidates with appropriate experience and expertise.

2. Within 3 days of the Court's order setting a remedial process and criteria, the Legislative Technology Services Bureau shall produce to all parties shapefiles containing county, ward, and municipal boundaries, as well as geocoded addresses for all incumbent representatives.

3. Within 14 days of the Court's order setting a remedial process and criteria, and not later than January 23, 2024, all parties and intervenors may submit proposed remedial plans along with briefing, which may attach expert analysis, addressing whether their proposed remedial plans comply with federal law, the Wisconsin Constitution, and the applicable redistricting and remedial criteria adopted by the Court. Each party or intervenor group may submit up to two sets of remedial plans. Any party or intervenor that submits a proposed remedial plan shall supply the Court and all other parties with a high-resolution image of the proposed plan, census block equivalency files in .csv format, and ESRI shapefiles that permit the Court and the other parties to assess how the proposed plan complies with the relevant redistricting principles and remedial standards. A party that chooses to submit an expert report analyzing proposed plans must supply the Court and all other parties, at the time of submission, with a copy of the backup data for that report, including source code, source data, input parameters, and output data for the analyses conducted by that expert for that report.

The parties, including intervenors, shall promptly respond to the best of their ability to any reasonable request by the referee for supporting data or information relating to their proposed plans. All such requests and responses shall be made by email, with all counsel copied. The referee may, but is not required to, request briefs on such matters as they would find helpful.

4. Within 14 days after the submission of proposed remedial plans, and not later than February 6, 2024, any party may submit response briefs, which may attach expert analysis, addressing whether another party's proposed remedial plan complies with federal law, the Wisconsin Constitution, and the applicable redistricting and remedial criteria adopted by the Court. A party that chooses to submit an expert analysis of proposed plans must supply the Court and all other parties, at the time of submission, with a copy of the backup data for that report, including source code, source data, input parameters, and output data for any analysis conducted by that expert.

5. Within 14 days after the parties' and intervenors' submissions described above, and no later than February 20, 2024, the referee shall issue a report assessing the parties' proposed remedial plans submitted to the Court. The report shall address whether such plan(s) comply with the Wisconsin Constitution, the applicable redistricting criteria adopted by the Court, and federal-law considerations, if any. The report may also suggest alterations to one or more of the parties' proposed remedial plans.

6. Within 7 days of issuance of the referee's report, and no later than February 27, 2024, the parties and intervenors may submit briefing, which may attach expert analysis, concerning the referee's report. The Court should issue its decision adopting final remedial plans as expeditiously as possible thereafter and, in any event, no later than March 19, 2024.

B. The Court need not afford the political branches another opportunity to enact new maps.

Although courts sometimes afford the political branches a first opportunity to enact a remedial plan when a prior plan is found unlawful, this Court need not do so here. The maps challenged in this case were not enacted pursuant to the legislative process required by Wisconsin law, and neither the Legislature nor the Governor have a legal right entitling them to the first attempt at replacing them. Rather, the existing maps are remedial plans adopted by this Court in *Johnson*, and it is thus this Court's responsibility in the first instance to cure defects in the maps. Indeed, after the U.S. Supreme Court vacated this Court's decision in *Johnson II*, this Court did not provide the Legislature an additional chance to pass legislation adopting new maps before choosing from among remedial maps the parties had proposed. *See Johnson III*, 2022 WI 19, ¶72. The Legislature and the Governor have intervened and both will have the ability to propose plans for the Court's consideration. The Court need not and should not delay the remedial process to give the Legislature and Governor an additional redistricting opportunity not afforded to the other parties.

If the Court concludes otherwise, however, the Legislature should be afforded 14 days from the date of the Court's decision to pass remedial plans. The Governor should be afforded 5 days to sign the plans or to veto them, and the Legislature shall be afforded 2 days to override any veto, such that any legislatively-enacted remedial plan must be submitted to the Court no later than 21 days from the date of the Court's liability decision. *See, e.g.*, *League of Women Voters of Pa. v. Commonwealth*, No. 159 MM 2017, slip op. at 2 (Pa. S. Ct. Jan. 22, 2018) (giving the legislature 18 days to enact a remedial congressional plan and the governor 6 days to sign it); *Common Cause v. Lewis*, 2019 WL 4569584, at *134 (N.C. Super. Ct., Sept. 3, 2019); (giving the legislature "two weeks" to enact remedial state legislative plans). The Court should order the Legislature to conduct the entirety of such a remedial process in full public view. At a minimum, that would require all map-drawing to occur at public hearings, with any relevant computer screen visible to legislators and public observers alike, including the referee. *See id.* (ordering the legislature to conduct the entire remedial map-drawing process in "full public view").

If a remedial plan is enacted through the legislative process within the deadline of 21 days from the date of this Court's liability decision, the Legislature shall immediately submit such plan to the Court. This submission should include both an image of the enacted remedial plans as well as census block equivalency files in .csv format and ESRI shapefiles. The Court should then set a schedule for the parties to file briefs, including expert analyses, analyzing the constitutionality

of the enacted plans, which the Court should then evaluate with the assistance of the special master.

Even if the Court gives the political branches the opportunity to enact remedial plans, it should commence the remedial process described above in Section IV. A in tandem to avoid delay in the event the political branches fail to enact a plan or that plan is unconstitutional. The Court should order the parties to submit proposed plans and supporting briefs (as described in Section IV.A.3, *supra*) within 21 days of this Court's liability decision (i.e., the deadline for the Legislature to submit an enacted plan to this Court), and then set periods for the parties to comment on each other's proposed plans and any enacted remedial plan, as well as to comment on a special master report, as described in Section IV.A.4-6, *supra*. *See, e.g.*, *League of Women Voters of Pa.*, slip op. at 3 (stating that "all parties and intervenors may submit to the Court proposed remedial districting plans on or before February 15, 2018," the same deadline for the Governor to approve a remedial plan enacted by the General Assembly).

CONCLUSION

Petitioners respectfully request that this Honorable Court enter a decision and order (1) finding that the existing state legislative maps violate the contiguity requirement of Article IV, sections 4 and 5 of the Wisconsin Constitution; (2) finding that the existing state legislative maps violate the Wisconsin Constitution's separation-of-powers principles; (3) enjoining the use of the existing legislative maps; (4) issuing a writ *quo warranto* declaring the election of senators in

November 2022 from unconstitutionally configured districts to be unlawful and ordering special elections in November 2024 for all odd-numbered state senate districts; (5) establishing neutral criteria with which the Court will evaluate and impose any remedial maps, and (6) establishing a scheduling order to permit the parties to engage in the process described in Section IV, *supra*.

Respectfully submitted this 16th day of October, 2023.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 10,952 words.

Dated this 16th day of October, 2023.

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