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,

Governor Tony Evers, in his official capacity; Nathan Atkinson, Stephen Joseph Wright, Gary Krenz, Sarah J. Hamilton, Jean-Luc Theffeault, 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 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,

Wisconsin Legislature; Billie Johnson, Chris Goebel, Ed Perkins, Eric O'Keefe, Joe Sanfelippo, Terry Moulton, Robert Jensen, Ron Zahn, Ruth Elmer and Ruth Steck,
Intervenors-Respondents.

IN AN ORIGINAL ACTION TO THE SUPREME COURT OF WISCONSIN

OPENING BRIEF OF SENATORS CARPENTER, LARSON, SPREITZER, HESSELBEIN AND SMITH

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STATEMENT OF THE ISSUES

In the Court's October 6, 2023 Order, it directed the parties to file briefs addressing only the following questions:

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

The Court has ordered oral argument in this matter for Tuesday, November 21, 2023. The Court's decision in this matter should be published as it is a matter *publici juris*.

PROCEDURAL STATUS OF THE CASE

On August 2, 2023, Petitioners brought a Petition seeking leave to commence an original action under Wis. Stat. § (Rule) 809.70 ("Petition"). They allege that the state legislative districts adopted by the Court in *Johnson v. Wisconsin Elections Commission,* 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559 ("*Johnson III*") are unconstitutional on five separate grounds. On the same day Petitioners also filed a memorandum in support of their Petition, an appendix, and a motion for a scheduling order. On August 14, 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," filed a response to the motion for scheduling order.

On August 15, the Court ordered all Respondents to file responses to the Petition. All Respondents did so on August 22. The Democratic Senator Respondents supported the Petition. The remaining Senator Respondents opposed it. The Wisconsin Elections Commission, its members, and its administrator took no position on the merits of the Petition. Also on August 22, the Wisconsin Legislature sought permission to intervene as a Respondent and also sought leave to file an amicus brief. The same day, Professor Charles Fried sought leave to file an amicus brief. No response or opposition to these motions was filed.

On October 6, 2023, the Court granted the Petition for leave to commence an original action solely as to two issues: (1) whether the existing state legislative maps violate the contiguity requirements contained in Article IV, Sections 4 and 5 of the Wisconsin Constitution, and (2) whether the adoption of the existing state legislative maps violated the

Wisconsin Constitution's separation of powers. In that same order, the Court also granted the Wisconsin Legislature's motion to intervene and the motions for leave to file amicus briefs, and those briefs were accepted for filing. The Court also directed that any other party wishing to intervene file a motion to do so by October 10, and ordered that any responses to such motions be filed by October 12. On October 10, Governor Tony Evers moved to intervene in his official capacity as an intervenor-petitioner. So did a group of voters: Nathan Atkinson, Stephen Joseph Wright, Gary Krenz, Sarah J. Hamilton, Jean-Luc Thiffeault, Somesh Jha, Joanne Kane, and Leah Dudley. Another group of voters also moved to intervene as intervenor-respondents: Billie Johnson, Chris Goebel, Ed Perkins, Erin O'Keefe, Joe Sanfelippo, Terry Moulton, Robert Jensen, Ron Zahn, Ruth Elmer and Ruth Streck. Responses to those motions were filed on October 12. On October 13 the Court granted the motions to intervene.

Finally, the Court's October 6 order directed all parties to file briefs on the four questions set out in the Statement of the Issues above. Those briefs are due by noon on October 16, 2023. This is that brief on behalf of the Democratic Senator Respondents.

STATEMENT OF FACTS

The facts relevant to the legal issues presented for review are largely (if not entirely) undisputed. On November 12, 2021, the Legislature passed 2021 SB 621 to reapportion Wisconsin's legislative districts following receipt of the 2020 Census data. (Petition ¶47) On November 18, 2021, Governor Evers vetoed that legislation. (Petition ¶48) The Legislature never attempted to override the Governor's veto of SB 621. (Brief of Senators Carpenter, Larson, Spreitzer, Hesselbein and Smith in Support of Petition for Original Action, hereinafter "Petition Response," p. 9 n.1) In an original action to this Court, *Johnson v. Wisconsin Elections Commission*, No. 2021AP1450-OA, on April 15, 2022, the Court imposed the maps passed by the Legislature in 2021 SB 621 and vetoed by the Governor. (Petition ¶53 and *Johnson III, supra*) On May 17, 2022, the legislative session ended. (Petition Response, p. 9 n.1) 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. (*Id.*)

The current state legislative maps include 55 assembly districts that have disconnected pieces of territory and 21 senate districts that have disconnected pieces of territory. (Petition ¶¶91 n.1; 91 n.2; *see also* Petition ¶¶84-90)

Should the current maps be found unconstitutional, on information and belief, the relevant facts necessary to craft a remedial map are largely undisputed. That data includes county, precinct, town, ward and other municipal boundaries; population distribution as of the 2020 Census; the locations of communities of interest including different racial and ethnic

minority communities, and data about voter voting histories by geographic area including candidate party affiliations.

INTRODUCTION

The Democratic Senator Respondents, by and through their attorneys, Pines Bach LLP, submit this Opening Brief on the merits of the issues accepted for consideration in this original action. As detailed below, the existing state legislative maps are unconstitutional on two separate and distinct grounds: **First,** they fail to comply with the Wisconsin Constitution's contiguity requirements because they include geographic islands within numerous senate and assembly districts. **Second,** in choosing to impose the very maps proposed by the Legislature in 2021 SB 621 and vetoed by the Governor, the *Johnson III* Court violated the Wisconsin Constitution's separation of powers.

Upon finding the existing maps to be unconstitutional, this Court must order appropriate remedies, including remedial maps. In doing so, it should comply with all state and Federal legal requirements, follow traditional redistricting practices, and endeavor to create fair maps. Rather than remaining blind to the partisan effects of any given set of maps, it must be aware of partisan makeup of districts and avoid imposing a partisan map—even if it could not invalidate such a map enacted through the legislative process. As the only non-partisan branch of state government, acting with fairness and objectivity is essential to preserving the legitimacy of the Court and democracy itself.

With these considerations in mind, imposing a remedial map is a legal, rather than factual, undertaking. Consequently, this Court need not conduct any fact-finding. However, should the Court find it necessary, the

Court may refer fact-finding to a referee or circuit court, consistent with prior practice and legal authority.

ARGUMENT

I. The existing state legislative maps 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, 5. An early interpretation of Article IV, sec. 4 confirms that in *addition to* each town and ward being contained in the same assembly district, such districts must be geographically connected:

> [Art. IV, sec. 4], as amended, provides that "the members of the assembly shall be chosen biennially, by single districts * * * by the qualified electors of the several districts; such districts to be bounded by county, * * * town, or ward lines, to consist of contiguous territory, and be in as compact form as practicable." It is obvious from this, that the number of districts must be the same as the number of members; that the qualified electors of each district have power to elect one member, and no more; that neither a town nor a ward can be divided in the formation of an assembly district; so that each town, and the whole of it, must be in some one assembly district, and each ward, and the whole of it, must be in some one assembly district. It was determined in the former case, and is now conceded, that no county line is to be broken in the formation of any assembly district. **This section also requires that each assembly district must consist of contiguous territory; that is to say, it cannot be made up of two or more pieces of detached territory.**

State ex rel. *Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35, 56–57 (1892) (emphasis added).

The 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, Secs. 4 and 5 of the Wisconsin Constitution for the reasons stated by Petitioners. (*See* Petitioners' Memorandum of Law supporting their Petition, hereinafter "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, governors from both parties, 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, governors 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 some 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 abrogated as to all redistricting going forward.

This Court rejected that idea over 130 years ago: "[T]he constitution requires the legislature to apportion the state into senate and assembly districts" according to constitutional imperatives. *Lamb,* 53 N.W. at 59. **"Such constitutional requirements are plain and unambiguous, and hence are not to be regarded as abrogated by any number of legislative violations of them."** *Id.* (emphasis added)

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, 2. Although Article IV Secs. 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." In light of the Court's longstanding—over 130 years--interpretation that districts with "detached territory" violate Article IV Section 4 of the Constitution, *Lamb,* 53 N.W. at 56–57, the fact that subsequent amendments to secs. 4 and 5 of article IV did not modify that holding means that the Legislature acquiesced to that interpretation. "[L]egislative silence following judicial interpretation of a statute demonstrates legislative acquiescence in that interpretation." *Wenke v. Gehl Co.,* 2004 WI 103, ¶31, 274 Wis. 2d 220, 682 N.W.2d 405. This doctrine is premised on the presumptions that the legislature acts with knowledge of a court's binding interpretation of a statute and recognizes that, if it does not explicitly change the law, the court's binding interpretation will remain unchanged. *State* ex rel. *Campbell v. Township of Delavan*, 210 Wis. 2d 239, 256, 565 N.W.2d 209 (Ct. App. 1997).

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 (internal citation omitted); (*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 some significant degree of physical contact." *Town of Wilson*, 2020 WI 16, ¶¶17-19 (emphasis original). This Court rejected an interpretation of "contiguous" to "include[ ] territory near to, but not actually touching." *Id.* ¶19. That plain meaning applies to Article IV Sections 4 and 5 as well.

II. The adoption of the existing state legislative maps violated the Wisconsin Constitution's separation-of-powers doctrine.

A. 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).

As the branch empowered to declare what the law is, the Court must be even more zealous in policing judicial incursions across the boundaries of powers of the other branches. 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 "Each branch of government must abide by the law." *Id.* at ¶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)).

B. The role of the branches in Constitutional reapportionment.

The decennial reapportionment of Wisconsin legislative districts is 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, ¶94 (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 v. Wisconsin Elections Commission ("Johnson I")*, 2021 WI 87 ¶70, 399 Wis. 2d 623, 967 N.W.2d 469 (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).

C. 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.*

1. 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 judicial powers. *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 v. Wisconsin Elections*

Commission ("Johnson III"), 2022 WI 19, ¶187, 401 Wis. 2d 198, 972 N.W.2d 559 ("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. (Petition Response, p. 9 n.1) Likewise, the Legislature did not even attempt to send the Governor a different reapportionment bill during the six months remaining in the session. (*Id.*)

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. The Legislature could have voted to override the Governor's veto or returned to the drawing board to offer a different map. It did not. Instead, the Legislature invited the Court into the legislative process to judicially impose SB 621 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.

2. 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.

III. If the existing state legislative maps are found unconstitutional and the legislature and governor then fail to adopt legal maps, the Court should order remedial maps that apply traditional districting principles to 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. If the Court initially refers the issue to the Legislature and Governor,[1] the Democratic Senator Respondents recommend that a strict deadline be set. Legal maps must be in place by mid-March 2024, just five months from now. If the legislature and governor fail to adopt legal maps, or if the Court chooses to move forward with identifying legal maps without such a referral, the Court should either appoint an expert to create proposed maps for the parties to provide feedback on or allow the parties to propose and critique one another's maps for the Court's consideration consistent with the below standards. 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.

[1] This Court has ordered such a remedial process in the past. *Reynolds*, 22 Wis.2d at 572. In *Reynolds,* the Court directed the Governor and Legislature to attempt to adopt new maps after an initial impasse. Here, though, there is no impasse between the Governor and Legislature. The sole question is whether the judicial remedy in *Johnson III* was lawful.

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).

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." *Lamb*, 53 N.W. at 57. 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 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:

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

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 867. 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.) Consequently, in crafting a remedy, the mapmaker—whether it be the parties or the Court— is not bound by the current maps or any predecessors as a starting point.

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

[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.

Fourteenth Amendment, which was enacted with the central purpose of "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.

IV. Any fact-finding needed in crafting remedial maps can be accomplished by referral to a circuit court or referee.

Should the Court find the current maps unconstitutional, it will need to craft a remedy: primarily a remedial map. As noted in the Statement of Facts above, it is believed that the facts and data that go into crafting legislative districts are largely undisputed. Disputes may exist as to the legal relevance of that information, and how it should be applied in crafting a remedial map, but those disputes are questions of law, not fact. Consequently, this Court may craft and impose a remedial map without any fact-finding.

If factfinding or fact development is needed in the exercise of the Court's original jurisdiction, however, 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 Prof'l Police Ass'n, Inc. v Lightbourn,* 2001 WI 59, ¶6, 243 Wis. 2d 512, 627 N.W.2d 807.

CONCLUSION

For the reasons stated in this brief, the Court should hold that the existing legislative maps are unconstitutional and order a process and schedule for the remedies phase. That process and schedule should include (1) a deadline for selection of remedial state legislative maps; (2) a method for submission of proposed maps and selection; (3) referral of any issues of fact relevant to crafting a remedy to be resolved on an expedited

basis to a circuit court or referee pursuant to Wis. Stat. § 751.09. The Court should also order such other relief as is just and proper.

Respectfully submitted this 16th day of October 2023.

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CERTIFICATION

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 6,760 words.

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