STATE OF WISCONSIN
IN SUPREME COURT

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 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, 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 STRECK,

Intervenor-Respondents.

GOVERNOR TONY EVERS INITIAL BRIEF ON FOUR QUESTIONS

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INTRODUCTION

The *Johnson* redistricting litigation led to state legislative maps that are constitutionally problematic in multiple ways. Two of those deficiencies are at issue in this proceeding—contiguity and encroachment on the separation of powers. This Court should remedy those deficiencies by declaring the existing maps unconstitutional and instituting new maps that return to the core purpose of redistricting: to promote democracy. The Court should seek to enhance the power of voters to determine the composition of the Legislature, while applying the constitutional and statutory criteria for redistricting.

First, the maps depart from the plain meaning and historical understanding of Wisconsin's constitutional text: the maps do not provide for districts of "contiguous territory," as required by article IV, sections 4 and 5. Rather, the maps have scores of instances of non-contiguity. While there may have been an era when the territorial contiguity requirement was not followed, the Constitution must be applied as written, and it is written (and was earlier consistently interpreted) to require physical connection. Adherence to that constitutional mandate is not optional.

Second, the maps were adopted under highly unusual circumstances that contravene the separation of powers. The *Johnson* majority imposed a "least change" mandate on the parties, which improperly colored everything that followed. The Legislature then proposed the precise maps that the Governor had vetoed in exercising his constitutional role in the legislative process. The *Johnson* majority adopted those vetoed maps without meaningful balancing of redistricting principles. These unique circumstances give rise to a separation of powers problem: the *Johnson* majority elevated the Legislature and subordinated the Governor's rightful joint role in redistricting. In all, the decision undermined the

Governor's exclusive authority to veto the redistricting bill and siphoned off what otherwise should be joint executive power.

Because of these deficiencies, this Court should declare Wisconsin's legislative maps unconstitutional and institute new maps. As a remedy, new maps should promote responsiveness to the vote and adhere to the constitutional and statutory mandates while avoiding the partisan bias that has infected the legislative maps to the detriment of Wisconsin's democracy.

STATEMENT OF THE ISSUES

The Court has directed that the briefing address four issues.

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

The Court should answer yes.

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

The Court should answer yes.

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)?

The Court should promote responsiveness to the vote, apply constitutional and statutory requirements, and avoid partisan bias.

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?

To gather factual material for a remedy, the Court should accept proposed maps and supporting briefs and reports from the parties, with an opportunity for responses. The Court should then expeditiously implement new maps in time for the next election.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Court has set oral argument for November 21, 2023, and the case likely calls for publication given its statewide importance.

STATEMENT OF THE CASE

After the 2020 census, the Legislature proposed new Assembly and Senate maps that were similar to the then-existing maps. The existing maps previously were found to be highly partisan and created, through a manipulation of boundaries, to "entrench the Republican Party in power." *Whitford v. Gill*, 218 F. Supp. 3d 837, 896 (W.D. Wis. 2016), *vacated and remanded on other grounds*, 138 S. Ct. 1916 (2018).

The Legislature's proposed maps perpetuated and likely worsened the existing partisan bias; they were vetoed by the Governor. As part of his veto message, the Governor explained that the maps were "clearly designed to benefit one political party over another and would preserve undemocratic

majorities."[1] This was contrary to democratic principles and the public's support for maps that "reduce one-party unfair advantages and that support the creation of a government where elected officials are responsive to their communities and have to work to win their votes." The veto message also recounted how the Princeton Gerrymandering Project's analysis gave the maps an overall "F" grade on criteria such as "partisan fairness, competitiveness, and geography features," as the bill featured "some of the most gerrymandered maps in the county."

Subsequently, the Court accepted jurisdiction over an original action based on malapportionment. *Johnson v. Wis. Elections Comm'n* ("*Johnson I*"), 2021 WI 87, ¶ 5, 399 Wis. 2d 623, 967 N.W. 2d 469. In the first phase of that case, a majority ruled that the Court would not consider the "partisan makeup" of any maps and that proposed remedial maps were required to adhere to a "least change" approach, "making the minimum changes necessary" to address population shifts. *Id.* ¶¶ 7–8.

Given those rulings, most of the parties, including the Governor, created new maps to submit to the Court. The sole exception was the Legislature, which did not newly formulate proposed maps but rather submitted the same Assembly and Senate maps that had been vetoed by the Governor. *See Johnson v. Wis. Elections Comm'n* ("*Johnson III*"), 2022 WI 19, ¶ 187, 401 Wis. 2d 198, 972 N.W.2d 559 (Karofsky, J., dissenting) ("Here, the Legislature, having failed to override the gubernatorial veto, submitted the very same proposal to us.").

The *Johnson* court ultimately adopted the vetoed maps by default because, in the majority's view, the vetoed maps

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[1] Governor's Veto Message, *State of Wis. S. Journal*, Nov. 18, 2021, at 617, https://docs.legis.wisconsin.gov/2021/related/veto_messages/sb621.pdf.

were "the only legally compliant maps" submitted to the Court. *Johnson III*, 401 Wis. 2d 198, ¶ 22. Those maps contain numerous instances where the Assembly and Senate districts are not physically contiguous. An alleged 55 Assembly districts and 21 Senate districts contain noncontiguous territory. (Pet. 42.)

On August 2, 2023, the present petitioners filed a petition for an original action, alleging that Wisconsin's Assembly and Senate maps are unlawful. That petition includes a count alleging a violation of the Wisconsin Constitution's contiguity requirement and a count alleging that the map-adoption process violated the separation of powers. (Pet. 42–43.) In an October 6, 2023, order, the Court granted leave to proceed on those two counts and instructed the parties and proposed intervenors to answer four questions. Governor Tony Evers moved to intervene on October 10, 2023, pursuant to this Court's schedule. The Court granted that motion on October 13, 2023.

Additional context is discussed in the argument below.

ARGUMENT

The Governor provides argument regarding the four questions posed by the Court as follows.

I. The Court should rule that the current maps are unconstitutional because they do not conform to the "contiguous territory" requirement.

The current state legislative maps violate article IV of the Wisconsin Constitution, which requires the legislature to be chosen by districts made up of "contiguous territory." Article IV, sections 4 and 5, state:

> The members of the assembly shall be chosen biennially, by single districts . . . to be bounded by county, precinct, town or ward lines, to consist of

> contiguous territory and be in as compact form as practicable.
>
> The senators shall be elected by single districts of convenient contiguous territory, at the same time and in the same manner as members of the assembly are required to be chosen; and no assembly district shall be divided in the formation of a senate district.

In interpreting the Wisconsin Constitution, the Court focuses "on the language of the adopted text and historical evidence including 'the practices at the time the constitution was adopted, debates over adoption of a given provision, and early legislative interpretation as evidenced by the first laws passed following the adoption.'" *State v. Halverson*, 2021 WI 7, ¶ 22, 395 Wis. 2d 385, 953 N.W.2d 847 (citation omitted).

The constitutional requirement here is clear: Wisconsin's legislative districts must be composed of contiguous territory—and this means that all parts of a district must be physically connected.

This Court should rule that the current maps fail to conform to the contiguous territory requirement for five reasons. First, early Wisconsin caselaw supports a reading of the Constitution that all districts must physically connect. Second, the plain meaning of the words "contiguous territory" likewise requires contact along a boundary or at a point. Third, historical evidence supports the same conclusion. Fourth, more recent Wisconsin precedent confirms that contiguity requires actual contact. Last, caselaw permitting legislative districts with detached islands to meet the contiguity requirement should be rejected.

A. Early Wisconsin Supreme Court precedent requires physically connected legislative districts.

This Court concluded long ago that legislative districts must be composed of adjoining lands with no detached areas. *Chi. & N.W.R. Co. v. Town of Oconto*, 50 Wis. 189, 6 N.W. 607

(1880); *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35 (1892). These authorities remain binding law.

In *Town of Oconto*, Oconto County sought to annex into the town of Oconto several detached and separate bodies of land. The court invalidated the annexation for two reasons. 6 N.W. at 607. First, the Court relied on the meaning of the word "town" in the municipal code, concluding that a town is "expressive of compactness, adjacency, and contiguity," is a "whole territory within certain limits," and is not "constituted of separate, detached, and remote bodies of territory." *Id.* at 609. Second, the Court reasoned that the Constitution could not be construed to authorize a county to change a town's boundaries to include "separate, detached, and non-contiguous territory." *Id.* The Court grounded its reasoning in the Constitution's redistricting provisions: allowing towns to become noncontiguous would restrict the Legislature's power under the Constitution to apportion districts "consisting of contiguous territory, and bounded by county, precinct, town, or ward lines." *Id.*

Lamb, decided several years later, fortified this rule. In *Lamb*, the Court enjoined implementation of 1892 redistricting legislation on grounds that districts lacked equality of representation, contiguity, and compactness. *Lamb*, 53 N.W. at 36. On the topic of contiguity, the Court stated that article IV "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." *Id.* at 57. The Court continued that this constitutional criterion is "absolutely binding upon the legislature, and that that body has no power, much less discretion, to dispense with" it. *Id.* at 57.

Despite some modern districting practices, *Oconto County* and *Lamb* together establish that the Wisconsin Constitution requires legislative districts to be formed of

unified, adjoining territories without separate or detached lands.

B. The plain meaning of "contiguous territory" requires contact at a point or along a boundary.

The language of Wisconsin's Constitution requires legislative districts to consist of "contiguous territory." Consistent with *Oconto County* and *Lamb*, that term has a clear meaning both historically and today: physical connection.

"Contiguity" historically has meant contact at a point or along a boundary. *See Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 117, 295 Wis. 2d 1, 81, 719 N.W.2d 408 (explaining that courts properly refer to the "obvious and ordinary" meaning at the time of adoption). In fact, the word "contiguous" dates back to the early 1600's—its roots are the Latin words *contingere* and *contig*, which mean "to touch." *Contiguous*, The American Heritage Dictionary (5th ed. 2016); *Contiguous*, Oxford English Dictionary (last modified Sept. 2023).

The 1828 dictionary definition of "contiguous" was "[t]ouching; meeting or joining at the surface or border; as two contiguous bodies or countries." *Contiguous*, Noah Webster's American Dictionary of the English Language (1828). Similarly, the 1919 edition of Pope's Legal Definitions, drawing on previous decades of legal sources, provides four definitions of "contiguous:" (1) "united or joined together;" (2) "in actual close contact, touching, adjacent, near;" (3) "in actual contact; touching; meeting or adjoining at the surface or border;" and (4) "in close contact and a distance of feet destroys the contiguity within the meaning of a fire insurance policy." *Contiguous*, Pope's Legal Definitions, 1st ed. (1919). Pope's Legal Definitions also defined "contiguous and compact territory" in the context of apportionment: "contiguous"

means that "counties or subdivisions of counties, when counties may be divided, when combined to form a district must not only touch each other, but must be closely united territorially." *Contiguous and Compact Territory*, Senatorial District, Pope's Legal Definitions, 1st ed. (1919).

That definition of "contiguous"—of physical contact—carries through to today. Black's Law Dictionary defines "contiguous" as: "Touching at a point or along a boundary," or "adjoining." *Contiguous*, Black's Law Dictionary (11th ed. 2019). The general dictionary definition is the same. Contiguous means "being in actual contact: touching along a boundary or at a point," or "touching or connected throughout in an unbroken sequence." *Contiguous*, Merriam Webster Collegiate Dictionary (11th ed. 2023); *see also Contiguous*, The American Heritage Dictionary (5th ed. 2016) ("contiguous" means "sharing an edge or boundary;" "connecting without a break"); *Contiguous*, Oxford English Dictionary (last modified Sept. 2023) ("contiguous" means "[t]ouching, in actual contact, next in space; meeting at a common boundary, bordering, adjoining"). The meaning is plain: areas must be physically connected.

In addition to the Wisconsin cases cited above, other caselaw and legal scholarship reflect the straightforward meaning of "contiguous territory." The Maryland Supreme Court, for example, recently interpreted its constitutional contiguity requirement to require that "there be no division between one part of a district's territory and the rest of the district; in other words, contiguous territory is territory touching, adjoining and connected, as distinguished from territory separated by other territory." *Matter of 2022 Legislative Districting of State*, 282 A.3d 147, 192–93 (Md. 2022). Similarly, the Florida Supreme Court concluded that "contiguous" means "being in actual contact: touching along a boundary or at a point. A district lacks contiguity 'when a part is isolated from the rest by the territory of another district.'"

In re Constitutionality of House Joint Resolution 25E, 863 So.2d 1176, 1179 (Fla. 2003) (citation omitted). Simply put, contiguous means that "no part of one district be completely separated from any other part of the same district." Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts, in Representation and Redistricting Issues 7*, 16 (Bernard Grofman et al. eds., 1982).

The meaning of the word contiguous has remained the same for centuries. Both current and historical sources confirm that by its plain meaning, contiguous means physical contact.

C. Historical evidence further supports the physical contact requirement.

Historical evidence, including the practices at the time the Wisconsin Constitution was adopted and debated, also demonstrate that the contiguity requirement means that legislative districts be physically connected.

States enacted the first contiguity standards, requiring multi-county districts to be composed of adjoined counties, around 1790. Micah Altman, *Traditional Districting Principles: Judicial Myths vs. Reality*, 22 Social Sci. Hist. 159, 168–70 (1998) (the first contiguity requirements were enacted in New Hampshire in 1788). Within a quarter-century, states began adopting contiguity requirements into their constitutions, starting with New York in 1821. James A. Gardner, *Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 Rutgers L.J. 881, 918–19 (2006). In 1848, Wisconsin became the fifth state to do so. *Id.*

Meanwhile, on the federal level, Congress imposed its own contiguity requirement in 1842. The Apportionment Act passed that year stated that House members must be elected from single-member congressional districts "composed . . . of contiguous territory." *Wood v. Broom*, 287 U.S. 1, 5 (1932).

The requirement remained in place until 1929. *Id*. at 6–8 (citing Reapportionment Acts of 1842, 1872, 1882, 1891, 1901, and 1911).

The fundamental reasons for contiguity criteria were twofold.

First, contiguity was intended to ensure that legislative districts were composed of constituents with shared needs and interests. Andrew J. Clarkowski, *Shaw v. Reno and Formal Districting Criteria: A Short History of A Jurisprudence That Failed in Wisconsin*, 1995 Wis. L. Rev. 271, 292 (1995).

Second, contiguity was intended to prevent gerrymandering. As the Illinois Supreme Court stated in 1895, "'[t]he requirement of contiguousness was contained in the constitution of 1848 . . . to guard as far as practicable, under the system of representation adopted, against a legislative evil commonly known as the 'Gerrymander.'" *People ex rel. Woodyatt v. Thompson*, 40 N.E. 307, 315 (1895); *see also* Gardner, 37 Rutgers L.J. 894–95 (the contiguity requirement is the oldest, most common provision aimed at preventing gerrymandering).

Debates about apportionment at the Wisconsin constitutional convention also reflect the Framers' desires to create districts with common interests and prevent gerrymandering. For example, during one debate over the proper apportionment criteria, Mr. Featherstonhaugh expressed opposition to creating districts "separated by nature" and raised the flaws of joining areas with "no interest in common." *The Attainment of Statehood*, Ed. Milo M. Quaife, Publication of the State Historical Society of Wisconsin, p. 602–04 (1928).

The Framers' concerns about gerrymandering arose during a similar debate over whether counties should be divided across assembly districts. *Id.* at 622. Mr. Dunne

stated that he "did not think the principle of cutting up counties would work well . . . The moment they began to draw lines and district counties, they would see sectional differences start up on every side. This system of dividing counties would open a door for gerrymandering which ought to be kept closed." *Id.*

The history and debates support the conclusion that at the time contiguity criteria was enacted, the Wisconsin Framers intended to create physically connected legislative districts—meant, in part, to prevent gerrymandering. On the other hand, this history provides no evidence that the Wisconsin Constitution allows legislative districts to include detached, separate lands.

D. Recent Wisconsin Supreme Court precedent confirms that contiguity requires physically connected land.

The Court has more recently opined on contiguity in the context of municipal boundaries and incorporation, and those cases further support that contiguous means physically connected land.

In the most recent case to address a municipal contiguity challenge, the Court affirmed that "contiguous" means just that. *Town of Wilson v. City of Sheboygan*, 2020 WI 16, ¶ 18, 390 Wis. 2d 266, 938 N.W.2d 493. Concerning contiguity in the context of annexation authority, *Town of Wilson* explains that "one may discern a trend in Wisconsin's courts to require at minimum some significant degree of physical contact between the properties in question." *Id.* The Court went on to explain that it had "rejected the adoption of a broader definition of contiguous that includes territory near to, but not actually touching, a municipality." *Id.* at 19 (citing *Town of Delavan v. City of Delavan*, 176 Wis. 2d 516, 500 N.W.2d 268 (1993)).

Similarly, *Town of Waukechon, Shawano County v. City of Shawano*, 53 Wis. 2d 593, 597, 193 N.W.2d 661 (1972), determined that an annexed area that shared its entire 575-foot boundary with the city was contiguous. In comparison, in *Town of Delavan*, the Court determined that annexed property separated by 400 feet of water was not contiguous.[2] 176 Wis. 2d at 528.

Wisconsin municipal-annexation cases provide further support for the proposition that contiguous land must physically connect.[3]

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[2] Despite concluding in *Town of Delavan* that the annexed land was noncontiguous, the Court declined to void the annexation based on a *de minimis* principle because the "unique facts of this particular case render the trivial lack of contiguity insufficient to void the annexation." *Town of Delavan v. City of Delavan*, 176 Wis. 2d 516, 530, 500 N.W.2d 268 (1993).

The Court has departed from the plain meaning of "contiguous" in just one municipal annexation case. In *Town of Lyons v. City of Lake Geneva*, 56 Wis. 2d 331, 202 N.W.2d 228 (1972), the Court concluded that a parcel of land was contiguous to a town, even though a 23-foot-wide public road separated the properties. *Id.* at 336. The court stated that separation by a 23-foot public road was "close enough." *Id.* at 335. However, *Town of Lyons* stands as an exception. The Court noted that its holding was limited to the particular configuration of the land and the existence of the public road in that case. *Id.*

[3] Adopting the plain meaning of contiguous here would not affect municipal annexation or ward-districting practices. *Town of Oconto* held in a taxation challenge that towns must consist of contiguous territory, in part because towns with noncontiguous areas would result in violations of article IV's contiguity requirement for legislative districts. *Town of Oconto*, 50 Wis. 189. But the Wisconsin Legislature later passed municipal laws that permit towns to annex noncontiguous island territory, and to create voting wards with island territories. Wis. Stat. § 5.15(1)(b); 5.15(2)(f)3; 66.0217. There is no constitutional contiguity requirement for municipalities or municipal wards. Requiring physical contact for state legislative districts would only mean that municipal islands must be taken into account in the legislative redistricting process.

E. The contiguity reasoning in *Prosser*, relied on in *Johnson*, should not apply.

In the 1990s *Prosser* redistricting matter, the federal panel concluded that the Wisconsin Constitution does not require "literal contiguity" in its legislative districts. *Prosser v. Elections Bd.*, 793 F. Supp. 859, 866 (W.D. Wis. 1992). That conclusion is not grounded in the constitutional text and should not be followed here.

The *Prosser* litigation arose after the Legislature and Governor failed to enact maps based on the 1990 census. Legislators challenged the existing districts as malapportioned and in violation of the Voting Rights Act. *Id.* at 862–63, 865. Numerous parties submitted proposed plans to the court, and the court formulated its own plan based on its two favored proposals. One was submitted by the Legislature and contained non-contiguous districts. *Id.* at 865.

The *Prosser* panel adopted that physically non-contiguous approach. In justifying it, the court explained that Wisconsin towns were statutorily allowed to annex noncontiguous areas, that the distance between the towns and islands in the plan were slight, and that it was the general practice of the Legislature to treat island-annexations as contiguous to their municipalities. *Id.* at 866. The panel concluded that the map's lack of literal contiguity was no "serious demerit." *Id.*

Later, in *Johnson I* and without analysis, this Court adopted *Prosser*'s statement that if a municipality annexes an area and creates an island, the island is treated as legally contiguous. *Johnson I*, 399 Wis. 2d 623, ¶ 36. This Court should reject *Prosser*'s approach to contiguity, tersely adopted in *Johnson*, for three reasons.

First, *Johnson I*'s adoption of *Prosser* was dicta because it was not essential to the determination of the issues actually

addressed in *Johnson I. State v. Sartin*, 200 Wis. 2d 47, 60, 546 N.W.2d 449 (1996). Even if it was not dicta, the two-sentence statement was devoid of any analysis, and so it need not be followed as precedent by the Court. *See Tavern League of Wis., Inc. v. Palm*, 2021 WI 33, ¶ 41, 396 Wis. 2d 455, 957 N.W.2d 261.

Second, *Prosser*'s contiguity analysis is untethered from the binding Wisconsin law discussed above. The case fails to mention, let alone grapple with, *Lamb*, which held that the Wisconsin Constitution imposes a binding contiguity requirement that a district "cannot be made up of two or more pieces of detached territory." *Lamb*, 53 N.W. at 57. And *Prosser* offers no explanation for why contiguity, a clear requirement in the plain language of the Wisconsin Constitution, may be disregarded.

Third, the Wisconsin statute that treated island annexations as contiguous in legislative districts was repealed in 2011. *See* Wis. Stat. 4.001; 2011 Wis. Act 29 (repealing Wis. Stat. § 4.001(2)–(5)). Thus, there is no ongoing basis for relying on that statute. And, even if the statute were current, it would not matter. The legislature may not enact laws that conflict with the Constitution. *See League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶ 36, 387 Wis. 2d 511, 929 N.W.2d 209. *Prosser*'s analysis of contiguity was incorrect, *Johnson* wrongly relied on it, and the Court should not follow it here.

* * * *

In sum, the Wisconsin Constitution's plain language should be given effect. As the Wisconsin cases demonstrate, "contiguous territory" means what it says: that districts must consist of territory that physically touches. Because the

current maps do not, in scores of instances, the maps should be invalidated, and new maps should be drawn.[4]

II. In these unusual circumstances, the Court should rule that the *Johnson* Court's adoption of the very maps the Governor vetoed violated the separation of powers.

The adoption of the Legislature's maps in *Johnson* took place under highly unusual circumstances. The maps adopted were the very maps that the Governor had vetoed as part of the legislative process and under his exclusive constitutional authority. The Legislature did not override that veto. Then, after this Court ruled that "least change" maps should govern, the Legislature chose to submit its vetoed maps instead of crafting new ones. In turn, the Court ultimately adopted those vetoed legislative maps without meaningful balancing of the redistricting principles.

That was error: in redistricting, courts stand in when there is an impasse and have significant discretion in crafting a remedy. Indeed, under the separation of powers, the Court should have acted in that capacity instead of enacting the exact remedy vetoed by the Governor. Under these unusual circumstances, the Court should rule that separation of powers principles prevent this end-run around the Governor's power to exercise his constitutional veto authority.

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[4] Any remedy should invalidate the maps in full, as the current maps are created based on an incorrect premise of non-literal contiguity. Further, remedying the non-contiguity problem will result in a ripple effect of shifting populations in various areas of the maps.

A. Wisconsin's separation of powers doctrine prohibits any branch from exercising or otherwise intruding into the core powers of another branch; the Governor's constitutional veto authority is an especially robust core power.

Wisconsin's separation of powers doctrine is designed to prevent branches from encroaching on powers constitutionally entrusted to a different branch. One highly protected governmental power is the Governor's veto authority. Not only is that power solely vested in the Governor, but the Wisconsin Constitution's veto power is designed to be especially robust.

The Wisconsin Constitution vests power in three separate governmental branches. Wis. Const. art. IV, § 1, art. V, § 1, art. VII, § 2. "[N]o branch [is] subordinate to the other, no branch [may] arrogate to itself control over the other except as is provided by the constitution, and no branch [may] exercise the power committed by the constitution to another." *State v. Holmes*, 106 Wis. 2d 31, 42, 315 N.W.2d 703 (1982).

This separation of powers is not simply formal. It serves two vital purposes: It protects against encroachment by one branch on powers our Constitution commits to the others and it also protects the People and their individual liberties. *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶¶ 4–5, 376 Wis. 147, 897 N.W.2d 384. That includes guarding against the risk that "judicial power . . . could impinge on liberty through 'arbitrary control,' if fused with the legislature." *Id.* ¶ 5 (*quoting* Montesquieu, *Spirit of the Laws* at 152).

Where the Wisconsin Constitution vests a particular power exclusively in one branch of government, that "core power" cannot be exercised or intruded upon by any other branch of government under any circumstances. A core power is identified by looking to the Constitution: "A core power is a

power vested by the constitution that distinguishes that branch from the other two." *Serv. Emps. Int'l Union, Loc. 1 v. Vos ("SEIU")*, 2020 WI 67, ¶ 104 n.15, 393 Wis. 2d 38, 946 N.W.2d 35. That is, "the constitution itself constitutes the source" of the core power. *Id.* ¶ 104. In turn, "[c]ore zones of authority" "are to be 'jealously guarded.'" *Gabler*, 376 Wis. 2d 147, ¶¶ 30–31 (citation omitted). "Any exercise of authority by another branch" in an area of core power "is unconstitutional." *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 48, 382 Wis. 2d 496, 914 N.W.2d 21 (citation omitted).

The Governor's veto authority, which dates to Wisconsin's original 1848 constitution, is unequivocally a "core" executive power. The power to exercise the veto is exclusively vested in the Governor and is found in the Constitution's article on executive power, article V. Article V, section 10, provides that "[e]very bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor." It provides only one way around a vetoed bill: "If the governor rejects the bill, the governor shall return the bill," where if "two-thirds of the [Legislature's] members present agree to pass the bill notwithstanding the objections of the governor," it results in a veto override. Wis. Const. art. V, § 10. No other branch of government or governmental officer can veto legislation, and the Legislature has the exclusive power to override a veto only in the prescribed way.

The cases reflect that the veto power is critical to the separation of powers and is properly vested in the Governor only, especially when it comes to redistricting. In the *Reynolds* redistricting matter, the Court described the Governor's role in redistricting as "indispensable," specifically highlighting "the general power of veto." *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 557, 126 N.W.2d 551 (1964). And as the Court explained, when the Governor exercises his veto authority in redistricting, that means "a bill cannot become law unless both houses of the legislature vote to override that

veto." *Id.* That "constitutional allocation[ ] of power" has to be respected. *Id.* at 558. Indeed, respecting the veto power is especially important in redistricting, where the Governor "is the only person involved in the legislative process that represents the people as a whole." *Id.* at 558.

Not only is the veto a core constitutional power of the Governor, but Wisconsin's constitutional commitment to it has been confirmed and extended over the state's history. When originally ratified in the Constitution, the power was limited to vetoing legislation in whole. Wis. Const. art. V, § 10 (1848). However, the Legislature over time began sending omnibus legislation to the Governor (something that is not allowed in many other states) forcing an all or nothing approach to multiple budget and policy items. John S. Wietzer, *The Wisconsin Partial Veto: Where Are We and How Did We Get Here? The Definition of "Part" and the Test of Severability*, 76 Marq. L. Rev. 625, 630 (1993).

Based on concerns that the omnibus practice nullified the veto power in many circumstances, the people of Wisconsin ratified a constitutional amendment that empowered the Governor with additional veto authority, a partial veto, meant "to correct the imbalance between the legislature and the governor." *Id.* at 631. "This uniquely broad and expansive power. . . is broader than the item veto authority granted governors in other states." *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 450, 424 N.W.2d 385 (1988); *see also* Frederick B. Wade, *The Origin and Evolution of Partial Veto Power*, Wis. Law., March 2008, at 12 (discussing that it is "the most extensive" veto power that has been "given to any state executive").

More generally, the importance of an executive's veto authority has long been recognized. In Federalist 73, Alexander Hamilton explained that the veto acts as a "salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or

of any impulse unfriendly to the public good, which may happen to influence a majority of that body." It guards against the enactment of bad laws that are "unfriendly to the public good" through "haste, inadvertence, or design." *Id.* The political science literature shows that Hamilton's assessment of its importance has been borne out. The executive veto is a critical part of any system of separation of powers ensuring that the legislature and the executive engage in a bargaining process over legislation that redounds to the benefit of the people. *See* Charles Cameron, *Veto Bargaining* 158 (Cambridge University Press 2000); Thad Kousser and Justin Phillips, *The Power of Governors: Winning on Budget and Losing on Policy*, 37 (Cambridge University Press 2012).

Overall, the Wisconsin Constitution vests robust veto authority solely in the Governor: a bill must, "before it becomes law," be presented to the Governor, and only the Governor may issue his approval or rejection. That veto or approval decision is exclusively the Governor's right to exercise and thus is "core." *See SEIU*, 393 Wis. 2d 38, ¶ 104 & n.15. The Legislature's role in the process is exclusively before or after the Governor's veto decision: to pass a bill in the first place and to potentially override a veto through the prescribed process.

And the judiciary has no role whatsoever. The courts have no role to play in the veto process. There is no veto-related authority vested in the judiciary under the Constitution's judiciary provisions in article VII. Indeed, the Court has long recognized that "the veto power found in nearly all constitutions and charters whereby the chief executive is given a participation in the legislative power . . . confers a discretion of the most absolute and unquestionable character, as free from restraint as the very vote of the [legislature]. *It is beyond control by courts*, whether by mandamus or otherwise." *Rudolph v. Hutchinson*, 134 Wis.

283, 114 N.W. 453, 454 (1908) (emphasis added). Like the other branches, the courts' powers are limited to their own sphere: the courts may not exercise authority constitutionally entrusted to another branch. *Tetra Tech EC, Inc.*, 382 Wis. 2d 496, ¶ 48.

Thus, "the judicial power cannot legislate nor supervise the making of laws." *League of Women Voters of Wis.*, 387 Wis. 2d 511, ¶ 35 (citation omitted). In other words, the veto authority is not shared. It is exclusively the executive's power.

B. Under the unusual circumstances here, adoption of the very map vetoed by the Governor encroached upon his core power to veto legislation.

Johnson III's adoption of the previously vetoed districts was the culmination of a process that failed repeatedly to properly consider separation of power concerns. The Court committed a fatal error when it adopted maps that had previously been vetoed—thereby overriding both the will of the public in electing the Governor and the Governor's core veto authority—and it did so as part of a constellation of missteps beginning in *Johnson I*. Most acutely, this Court abdicated its own constitutional power and duty to fairly and faithfully act under the circumstances.

In the seminal case involving the three branches' powers and responsibilities in redistricting, the Court held that where there is a legislative impasse, courts "do not abdicate [their] power to draft and execute a final plan of apportionment which conforms to the requirements of art. IV, Wis. Const., should the other arms of our state government be unable to resolve their differences and adopt a valid plan." *Reynolds*, 22 Wis. 2d at 571. Indeed, as the U.S. Supreme Court has emphasized, "state courts have a significant role in redistricting." *Growe v. Emison*, 507 U.S. 25, 33 (1993). 'The power of the judiciary of a State to require valid

reapportionment or to formulate a valid redistricting plan has not only been recognized by [the United States Supreme] Court but appropriate action by the States in such cases has been specifically encouraged." *Id.*; *Scott v. Germano*, 381 U.S. 407, 409 (1965) (same). The Court has therefore made clear: although redistricting "is not a comfortable place for any court, state or federal. . . . *Growe* [w]as the United States Supreme Court's effort to put the state supreme courts back into the equation." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 10, 249 Wis. 2d 706, 639 N.W.2d 537.

In the typical course of redistricting, "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 559. Thus, "[w]hen the legislature finally has adopted a [redistricting] bill by action of both houses[,] [the Governor] has the general power of veto, and when he has vetoed a bill it cannot become law unless both houses of the legislature vote to override that veto." *Id.* at 557. Where, as here, the political branches fail to exercise their constitutional imperative to redistrict because the legislature fails to override the Governor's veto, "this [C]ourt has the power to adopt on [its] own initiative a reapportionment plan which conforms to the requirements of art. IV, Wis. Const." *Id.* at 569. Courts that are called to redistrict possess authority comparable to that of the political branches. *See Jensen,* 249 Wis. 2d 706, ¶ 10.

Johnson I, *II*, and *III* therefore hinged on a crucial misapprehension: that the Court's mandate to remedy an impasse was severely curtailed and that any balancing of key redistricting and constitutional principles was improperly "political." *See Johnson I*, 2021 WI 87, ¶ 71 ("Courts 'lack the authority to make the political decisions that the Legislature and the Governor can make through their enactment of redistricting legislation.'"). The Court so constrained its exercise of power that the effect was to supercharge the

Legislature and its previously vetoed plan. In the process, it failed to account for the Governor's exercise of his core constitutional veto power and reduced the judiciary's role to that of an observer or box ticker instead of holders of a profound, substantive responsibility. *See infra* part III (summarizing standards and principles courts apply when selecting or drawing a map).

When it treated "the existing maps 'as a template'" for new maps under the auspices of a "least change" redistricting approach, *Johnson I*, 2021 WI 87, ¶ 72, the Court failed to discharge the "power of the judiciary," *Growe*, 507 U.S. at 33, and abandoned its "institutional interest in vindicating the state constitutional rights of Wisconsin citizens in redistricting matters." *Jensen*, 249 Wis. 2d 706, ¶ 9.

That failure was enormously consequential. In intentionally elevating the "existing maps," *Johnson I*, 2021 WI 87, ¶ 72, the Court did not independently scrutinize whether those existing maps satisfied the constitutional contiguity requirement. They did not, and so the current maps do not. *See supra* part I. Further, as discussed below, *see infra* part III.B, utilizing "least change" was also a legal misstep that conflicted with article IV, section 3 of the Wisconsin Constitution and the long-accepted, common-sense principle that courts should not favor existing maps as a starting point if they are "politically biased from the start." *Prosser,* 793 F. Supp. at 871.

While this court adopted the Legislative maps as the last maps standing after remand, the situation the court found itself in was a result of its own design: It demanded maps that complied with the wrong standard. So it was left with maps that were deficient. Although the U.S. Supreme Court reversed and remanded after *Johnson II*, it also allowed that this Court was "free to take additional evidence if it prefer[red]." *Wisconsin Legislature,* 595 U.S. at 405. But in *Johnson III*, the Court declined that invitation based on the

desire to resolve the litigation immediately. *See id.* ¶¶ 139, 143 (Grassl Bradley, J., concurring). In so doing, the Court elevated expediency over a proper exercise of the judicial power and due consideration of separation of powers.

Finally, the Court intruded on the Governor's core veto power, described above in *Reynolds*, when it effectively exercised the legislature's veto override power. By "implementing that failed bill, this [C]ourt judicially overr[o]de[] the Governor's veto, thus nullifying the will of the Wisconsin voters who elected that governor into office." *Johnson III*, 2022 WI 19, ¶ 187 (Karofksy, J., dissenting). The Wisconsin Constitution "provides only one avenue to override such a veto; no judicial override textually exists." *Id.* "Nor, historically, has this [C]ourt ever exercised such a supreme power." *Id.*

The Court's adoption of vetoed plans was a particularly acute example of the Court's misapprehension of the balance of redistricting power between the political branches and the judiciary. Instead of exercising its proper, co-equal role in redistricting, the Court took an unlawful shortcut: it installed the Legislature's vetoed maps, thereby overriding the Governor's veto. For these reasons, the Court should conclude, under the unique circumstances of *Johnson*, that adoption of the state legislative maps violated the separation of powers.

III. Remedial maps must be responsive to the vote, implement constitutional and statutory standards, and must not perpetuate existing maps' political bias.

A. The Court should adopt maps that promote responsiveness to the vote, while applying constitutional and statutory requirements.

1. This Court's lodestar should be adopting maps that promote democracy in Wisconsin.

In any remedial maps, this Court should seek to enhance the democratic power of voters and to conform with constitutional and statutory principles for redistricting. The entire point of redistricting is to serve democracy: it should empower voters, not the opposite. Any maps imposed by the Court should follow that lodestar. Proposed maps should be evaluated for responsiveness to the vote—whether shifts in the statewide vote translate to changes in composition of the Legislature—and, as a corollary, for political bias.

After all, the maps govern the essential exercise of democracy, enshrined in our Constitution's directive that the government derives its "just powers from the consent of the governed." Wis. Const. art. I, § 1. That is the aim of redistricting: "achieving . . . fair and effective representation for all citizens." *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973) (quoting *Reynolds*, 377 U.S. at 565–66).

In balancing the various requirements and factors at play, the Court should not lose sight of the ultimate purpose of redistricting and the key role it plays in our democracy.

2. The Court should apply the constitutional and statutory mandates to new maps, while always keeping the purpose of redistricting in focus.

As a general matter, factors governing the creation of legislative districts come from federal law (both the United States Constitution and federal statutes), Wisconsin law (both constitutional and statutory), and may include other fundamental map-drawing principles. Applying these factors "requires the balancing of several disparate goals." *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *2 (E.D. Wis. May 30, 2002).

First, as a matter of federal law, this Court should strive to make apportionment as equal as practicable.[5] *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 633 (E.D. Wis. 1982) (applying *Reynolds v. Sims*, 377 U.S. 533 (1964)). In addition, Section 2 of the federal Voting Rights Act "prohibits States from imposing any 'standard, practice, or procedure in a manner which results in a denial or abridgement of the right of any citizen to vote on account of race or color.'" *Allen v. Milligan*, 599 U.S. 1, 25 (2023) (quoting 52 U.S.C. § 10301(a)). However, there is no VRA claim in the present litigation.

[5] Some deviations from a strict population standard may be allowed to account for redistricting criteria. *Baumgart*, 2002 WL 34127471, at *3.

Second, under the Wisconsin Constitution, Assembly "districts [are] to 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.[6] "Compact" means "closely united in territory," but some allowances may be made for natural or political subdivision boundaries. *Wis. State AFL-CIO*, 543 F. Supp. at 633. Also under state law, "no assembly district shall be divided in the formation of a senate district." Wis. Const. art. IV, § 5. And, by statute, "[t]he state is divided into 33 senate districts, each composed of 3 assembly districts." Wis. Stat. § 4.001.

Third, this Court should apply other map-drawing principles in ways that comply with the requirements cited above and that promote responsiveness to democracy. For example, other principles may include avoiding split municipalities and maintaining traditional communities of interest. *Baumgart*, 2002 WL 34127471, at *3. In addition, the degree of Senate "disenfranchisement" may be considered, but it should not be an overriding factor here. This factor, which refers to two-year vote delays when votes are shifted from odd-year to even-year senate election districts, is sometimes "unavoidabl[e]." *Prosser*, 793 F. Supp. at 864. That temporary disenfranchisement is not seen as unconstitutional "so long as no particular group is uniquely burdened," *Baldus v. Members of the Wisconsin Government Accountability Board*, 849 F. Supp. 2d 840, 852 (E.D. Wis. 2012), and it may be inevitable in service of other principles. Here, for example, there may be a degree of temporary Senate

[6] Regarding the county-lines requirement, the courts have explained that it no longer strictly applies given the federal constitutional mandates: "While maintaining the integrity of county lines may be a desirable objective, we believe its general incompatibility with population equality makes it only a consideration of secondary importance." *Wis. State AFL-CIO*, 543 F. Supp. at 635.

disenfranchisement when instituting maps that remedy the constitutional errors, but that disenfranchisement may be avoided if the Court orders elections in both even and odd districts, as requested by Petitioners.

Regarding incumbency, the Court need not consider it. That is consistent with what some panels have done: "At no time in the drafting of this plan did we consider where any incumbent legislator resides." *Wis. State AFL-CIO*, 543 F. Supp. at 638. Another panel considered the pairing of incumbents but only to the extent it appeared based on a partisan intent or resulted in a partisan advantage. *See Baumgart*, 2002 WL 34127471, at *4.

Last, and importantly, this Court should consider responsiveness to the vote and partisan fairness metrics. Regarding responsiveness, the Court should consider how proposed maps actually reflect the exercise of democracy—where changes to the voting population translate into differences in elections. That responsiveness is what democracy is meant to accomplish on a basic level.

A corollary is guarding against partisan bias. As courts in Wisconsin have already established, "[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." *Prosser*, 793 F. Supp. at 867. The Court ought not adopt a plan that "would inure to the political benefit of any one person or party." *Wis. State AFL-CIO*, 543 F. Supp. at 638. The United States Supreme Court has put it even more bluntly: "partisan gerrymanders … are incompatible with democratic principles." *Arizona State Legislature v. Ariz. Independent Redistricting Comm'n*, 576 U.S. 787, 791 (2015). As a result, although this case does not involve claims of partisan gerrymandering, any remedial maps must not intentionally or unintentionally endorse a practice that is "incompatible with democratic principles."

It follows that this Court can and should evaluate potential maps for responsiveness and partisan bias. This is exactly what the *Prosser* court did. The panel explained that the court's plan promoted "balance" and was "the least partisan" compared to plans proposed by the parties. *Prosser*, 793 F. Supp. at 871.

Consistent with that, courts have repeatedly rejected maps with obvious partisan bias and relied on partisan fairness metrics in crafting or adopting remedial districting plans. The Minnesota Supreme Court, for example, ruled that new plans must be drawn "without the purpose of protecting, promoting, or defeating any incumbent, candidate, or political party." *Wattson v. Simon*, 970 N.W.2d 42, 52 (Minn. 2022). Similarly, when the Pennsylvania Supreme Court engaged in impasse redistricting, the court concluded it was "appropriate to evaluate proposed plans through the use of partisan fairness metrics to ensure that all voters have 'an equal opportunity to translate their votes into representation.'" *Carter v. Chapman*, 270 A.3d 444, 470 (Pa.), *cert. denied sub nom.* Costello v. Carter, 143 S. Ct. 102 (2022); *see also Maestas v. Hall*, 274 P.3d 66, 76-77, 79 (N.M. 2012) (remanding to a lower court maps that had not been evaluated for partisan bias).

With the aid of the parties' submissions and analysis, the Court can identify maps' responsiveness to the vote and can also avoid partisan bias by using well-established, rigorous, and neutral metrics of responsiveness and partisan fairness, such as the efficiency gap, mean-median difference, partisan symmetry, and the declination metric. *See also* Nick Stephanopoulos and Eric McGhee, *The Measure of a Metric*, 70 Stan. L. Rev. 1503 (2018) (efficiency gap); Michael McDonald and Robin E. Best, *Unfair partisan gerrymanders in politics and law: A diagnostic applied to six cases*, 15 Election L.J. 312 (2015) (mean-median difference); Bernard Grofman and Gary King, *The future of partisan*

symmetry as a judicial test for partisan gerrymandering after LULAC v. Perry, 6 Election L.J. 2 (2007) (partisan symmetry); Gregory S. Warrington, *Quantifying gerrymandering using the vote distribution*, 17 Election L.J. 39 (2019) (declination). Recent developments in computation allow scholars to generate map-based simulations that produce thousands of sample maps controlled for specific criteria, which can then be used to evaluate the fairness—or bias—of a proposed map. Moon Duchin, *Gerrymandering metrics: How to measure? What's the baseline?*, 71 Bulletin for the American Academy of Arts and Sciences 54 (2018).

Used together, these metrics provide a comprehensive measure of a map's responsiveness to the vote and partisan fairness and allow the Court to "check the work" of map drawers. Simply put, "[t]he degree of partisan fairness is measurable," *Carter*, 270 A.3d at 473 (Donohue, J., concurring), and the Court should take advantage of the tools available to measure maps' responsiveness to the vote and mitigate against the Court's improper entanglement in entrenched partisan bias in any remedial districting plan.

B. The Court should not apply a "least change" approach in evaluating remedial maps under the circumstances here.

A corollary to the principle that maps should reflect the will of the voters is that a "least change" approach to map-drawing is untenable if existing maps themselves are unresponsive and biased. That was the case in *Johnson*, and it is the case here.

1. The "least change" approach improperly minimizes the judiciary's role in redistricting.

A "least change" approach for Wisconsin's maps is unworkable under basic redistricting and constitutional principles. The *Johnson I* Court's use of "least change" departed from past practice and ensured that the Court did not perform the function required of it under the Wisconsin Constitution.

The *Johnson* I Court appeared to think that balancing redistricting principles and promoting democracy through politically unbiased maps was not the proper role for courts. That is incorrect. Courts have power to remedy an unconstitutional map. *Jensen*, 249 Wis. 2d 706, ¶ 17 (explaining that legislative and judicial institutions play primary roles in reapportionment and redistricting). And nothing requires that courts elevate a "least change" approach over maps' responsiveness to the vote or other traditional and judicially administrable criteria. *See*, *e.g.*, *Carter*, 270 A.3d at 464 (selecting a least-change plan not by virtue of its least-change approach, but because it produced the most sound and responsive map in that particular case).

Indeed, since *Johnson I* was decided, courts including the U.S. Supreme Court have repeatedly concluded that "adherence to a previously used districting plan" is improper when the original map was deficient. *See Allen v. Milligan,* 599 U.S. 1, 22 (2023) (rejecting state's use of a "core retention metric" for selecting new redistricting plan where new plan "resembled an old racially discriminatory plan"); *GRACE, Inc. v. City of Miami*, --- F.Supp.3d ----, No. 1:22-CV-24066-KMM, 2023 WL 4853635, at *8 (S.D. Fla. July 30, 2023) (rejecting decision to "rely on redistricting considerations that have the potential to carry forward the effects of the constitutional violation"); *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 811 (M.D. La.), *cert. granted before judgment*, 142 S. Ct. 2892,

213 L. Ed. 2d 1107 (2022), and *cert. dismissed as improvidently granted*, 143 S. Ct. 2654 (2023) ("prioritizing core retention risks freezing in the inequities of the previous map").

2. Using a "least change" approach is contrary to the plain language of the Wisconsin Constitution requiring apportionment "anew."

The plain text of the Wisconsin Constitution requires "apportion[ing] and district[ing] *anew* the members of the senate and assembly." Wis. Const. art. IV, § 3 (emphasis added). That language is original to the Wisconsin Constitution. *See* Wis. Const. art. IV, § 3 (1848). At the time of the charter's enactment, apportioning "anew" meant doing so "over again" or "in a new form." Noah Webster's American Dictionary of the English Language (1828).[7]

The Court in *Johnson I* only perfunctorily addressed article IV, section 3, determining that "the provision means the legislature must implement a redistricting plan each cycle and the language cannot reasonably be read to require the court to make maps at all, let alone from scratch." 2021 WI 87, ¶ 79. But in exercising its "remedial powers" over the districting process, the Court acknowledged that it was apportioning legislative districts and that it was bound by *other* constitutional provisions contained in article IV, such as compactness and contiguity. *See id.* ¶¶ 34–37; *see also* 83–84 (Hagedorn, J., concurring). Therefore, the Court also should have abided by the Constitution's direction that maps be created "anew," *i.e.*, "in a new form."

[7] Noah Webster's American Dictionary of the English Language (1828), https://webstersdictionary1828.com/Dictionary/anew (last visited Oct. 16, 2023).

3. Mechanical application of "least change" results in flawed maps, entrenching partisan bias and incentivizing future impasse.

"Least change" also is incompatible with the Wisconsin Constitution, this Court's role in redistricting, and democracy principles for two additional reasons.

First, a least change mandate only serves to entrench the characteristics of prior maps. *Johnson III*, 2022 WI 19, ¶ 159 (Karofsky, J., dissenting). Recognizing this fact, Wisconsin courts have previously refused to knowingly adopt politically skewed maps. For example, in *Baumgart*, a proposed map was rejected because, among other things, it "pack[ed] Democrats into as few districts as possible or divide[d] them among strong Republican districts"; and included "questionable splits on the county level in districts with Democrat incumbents, and appear[ed] to have been designed to ensure Republican control of the Senate." *Baumgart*, 2002 WL 34127471, at *4. The court also rejected Madison voting plans designed to gain partisan advantage for Democrats. *Id.*

Here, there is no meaningful dispute that the 2011 maps used as the status quo in *Johnson I* were highly partisan.[8] In 2012, a federal court determined that these maps were chosen using a "sharply partisan methodology." *Baldus*, 849 F. Supp. 2d at 858. Later, another federal panel concluded that the 2011 maps were designed in part to "entrench the Republican Party in power," and to do so "under any likely future electoral scenario for the remainder of the decade." *Whitford*, 218 F. Supp. 3d at 896 (vacated on other

[8] *See*, *e.g.*, Dan Shafer, Aug. 2, 2023, https://twitter.com/DanRShafer/status/1686828774405324800 (recounting statements by the Assembly Speaker indicating that "partisanship" was considered when drafting Wisconsin's 2011 maps).

grounds). This "large partisan effect" could not be explained by "Wisconsin's natural political geography." *Id.* at 926. The U.S. Supreme Court likewise observed that there was strong evidence that one political party's share of legislative seats far outpaced its share of the electorate: "[i]n 2012, Republicans won 60 Assembly seats with 48.6% of the two-party statewide vote for Assembly candidates. In 2014, Republicans won 63 Assembly seats with 52% of the statewide vote." *Whitford*, 138 S. Ct. at 1923. This Court must not use an approach that will perpetuate partisan advantage by using existing maps that are "politically biased from the start." *Prosser*, 793 F. Supp. at 871.[9]

Second, judicial redistricting decisions via a "least change" approach propagates an undemocratic cycle of impasse. When maps undoubtedly favor one political party, that party "has every incentive to ensure an impasse" and advocate for a least change rubric. *Johnson I*, 2021 WI 87, ¶ 93 (Dallet, J., dissenting). In turn, this is likely to produce further impasse: "Given that continuity tends to favor existing officeholders, legislators who expect a court to retain district cores (and perhaps even directly protect incumbents) may have little incentive to fulfill their redistricting duties. . . ." Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. Rev. 985, 1057 (2022).

This does not mean that courts must entirely scrap old maps. Rather, this Court should adopt an approach that produces maps to remedy constitutional defect while promoting democracy through responsive, unbiased maps and applying redistricting standards. By redistricting "anew,"

[9] While some panels have referred to working off of existing maps when those maps were not shown to be politically biased, *see Baumgart*, 2002 WL 34127471, at *7; *Prosser*, 793 F. Supp. at 871, that is not the case here.

courts can avoid the calcified districting problems that the "least change" approach guarantees.

IV. This Court should require factual submissions and analyses to select maps that promote responsiveness to the vote and conform to the constitutional and statutory requirements.

If this Court concludes the challenged maps are unconstitutional, as it should, the submission of factual material will be necessary. The parties should be given the option of submitting proposed maps and supporting expert reports and briefs detailing how those maps conform to map-drawing requirements such as compactness and contiguity and also analyzing the maps in terms of responsiveness to the vote and partisan bias. Then, all parties, whether they submitted proposed maps or not, should be given the opportunity to submit responsive briefs and reports addressing other parties' proposed maps under the criteria.

The Court should then select maps from the proposals or make alterations to a proposal. To ensure that proper maps are in place as soon as possible, the Court should direct that these steps be accomplished expeditiously to rectify constitutional infirmities prior to the next elections. Should the Court declare the current maps unconstitutional and adopt new maps, this should include ordering elections in the odd-numbered Senate districts that would otherwise not have elections in 2024 so that all Wisconsinites have the opportunity to elect their representatives under constitutional maps.

CONCLUSION

The Court should declare the current state legislative maps unconstitutional both because they fail the constitutional mandate for contiguity and because the *Johnson* Court's imposition of vetoed plans violates the state constitution's separation of powers.

Dated this 16th day of October 2023.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 9738 words.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

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