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SUPREME COURT

No. 23AP1399-OA

In the Supreme Court of Wisconsin

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, INTERVENORS-RESPONDENTS.

OPENING MERITS BRIEF OF INTERVENORS-RESPONDENTS BILLIE JOHNSON, CHRIS GOEBEL, ED PERKINS, ERIC O'KEEFE, JOE SANFELIPPO, TERRY MOULTON, ROBERT JENSEN, RON ZAHN, RUTH ELMER, AND RUTH STRECK

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

RICHARD M. ESENBERG
LUKE N. BERG
NATHALIE E. BURMEISTER
330 E. Kilbourn Ave., Ste. 725
Milwaukee, WI 53202
Phone: (414) 727-9455
Facsimile: (414) 727-6385

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QUESTIONS PRESENTED

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

Answer: No.

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

Answer: No.

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)?

Answer: This Court should adopt a remedy no greater than necessary to fix any constitutional violations the Court identifies. There is a very simple fix to any contiguity problems that would also resolve the separation-of-powers claim.

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?

Answer: None, or very little, if the Court adopts the simple, obvious remedy. Otherwise, the fact-finding may be substantial.

INTRODUCTION

Petitioners in this case bring novel challenges to the maps this Court adopted in *Johnson v. WEC*. They could have raised these theories in that case, but instead they waited sixteen months, until two days after this Court's membership changed. Raising these claims now, especially under this accelerated schedule, violates many well-established principles of a fair and impartial tribunal—laches, due process, and stare decisis, to name a few. Even ignoring those problems for a moment, the claims Petitioners raise are meritless. For the last five decades, everyone—including this Court, the Legislature, the Governor, and every litigant in *Johnson*—has understood the Wisconsin Constitution's contiguity requirement to allow detached sections of the same political jurisdiction to be a part of the same legislative district, even if that creates geographical "islands." This connection of municipalities—sometimes referred to as "legal" or "municipal" contiguity—was necessary to comply, as much as possible, with the Constitution's requirement that redistricting not split municipalities. And Petitioners' separation-of-powers theory is nearly incomprehensible, given that it asks this Court to replace maps adopted by … this Court. If it was wrong to adopt maps advanced by the Legislature (because the Court cannot override a gubernatorial veto), then it would be equally improper to adopt maps advanced by the Governor because he (and this Court) lack legislative power. Neither argument works when the Court is adopting a remedial map to correct malapportioned districts.

But even if this Court were to find a contiguity or separation-of-powers violation, there is a very simple fix: put any "islands" into the districts that contain them. The vast majority of the islands—198 out of 211—contain less than 100 people, and 58 of them contain zero. Putting the islands into their surrounding districts, plus a few adjustments here and there, would entirely resolve any contiguity problem, while keeping

the population deviation under the number this Court found acceptable in *Johnson*. And doing this would also resolve the separation-of-powers problem, since the new map would no longer be the Legislature's map, but one without islands and some boundaries changed.

To do any more would put the Court in the position of making extralegal judgments about political matters. The Court has identified the issues. If it finds a constitutional infirmity, it ought to do no more than remedy it.

ARGUMENT

I. Question 1: The Existing State Legislative Maps Do Not Violate the Contiguity Requirements of Article IV, Sections 4 and 5 of the Wisconsin Constitution.

Petitioners argue that the existing maps are not contiguous as required under Wis. Const. art. IV, §§ 4 & 5. Petitioners' argument is that the Constitution allegedly requires literal contiguity rather than municipal contiguity (keeping municipalities together), even though no Court has ever adopted Petitioners' argument, and even though this State's maps for the last 50 years have been to the contrary.

The relevant provisions of the Wisconsin Constitution are as follows. Article IV, sec 4 provides: "The members of the assembly shall be chosen biennially, by single districts … such districts to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable." Article IV, sec 5 provides: "The senators shall be elected by single districts of convenient contiguous territory." Art. IV, sec. 5 further provides that "no assembly district shall be divided in the formation of a senate district." Thus, there are 99 assembly districts and 33 senate districts, and each senate district is made up of three complete assembly districts.

A. Case Law Supports the Use of Municipal Contiguity.

The only two cases that have ever squarely addressed the issue of literal contiguity versus municipal contiguity as it applies to apportionment under the Wisconsin Constitution are *Prosser v. Elections Bd.,* 793 F. Supp. 859 (W.D. Wis. 1992) (per curiam) and *Johnson v. Wis. Elections Comm'n,* 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 ("*Johnson I*").

In *Prosser*, the three-judge federal panel expressly held that the Wisconsin Constitution did *not* require literal contiguity, but rather that municipal contiguity was appropriate. *Id*. at 866. The decision in *Prosser* makes perfect sense, because under that approach, all of the residents of a municipality would be in the same legislative district, which, in turn, better complies with art. IV, § 4's requirement that districts be bounded by county, precinct, town, or ward lines.

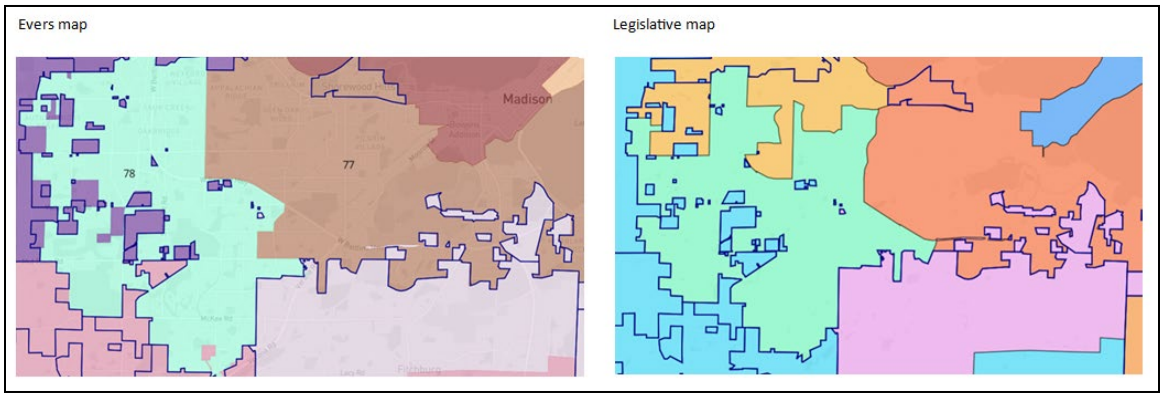
In the second case, *Johnson I*, this Court affirmed *Prosser* on this issue, stating:

> "Article IV, Section 4 of the Wisconsin Constitution further commands assembly districts be "contiguous," which generally means a district "cannot be made up of two or more pieces of detached territory." *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 148, 53 N.W. 35 (1892). If annexation by municipalities creates a municipal "island," however, the district containing detached portions of the municipality is legally contiguous even if the area around the island is part of a different district. *Prosser v. Elections Bd.*, 793 F. Supp. 859, 866 (W.D. Wis. 1992)."

Johnson I, 2021 WI 87, ¶36.

Notably, in *Johnson*, *all seven justices on the Court approved maps based upon municipal contiguity*. Justices Hagedorn, A. Bradley, Dallet, and Karofsky did so when they approved the Governor's proposed legislative maps in *Johnson II*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402, and Chief Justice Ziegler, and Justices Roggensack and R. Bradley did so (with Justice Hagedorn again approving) when they approved the Legislature's proposed map in *Johnson III*, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559.

A portion of both the Governor's proposed map and the Legislature's proposed map are pictured side-by-side below, and the same islands appear in both:



Petitioners argue that both the *Prosser* court and this Court (including six of its current members) got it wrong based primarily on *Chicago & N.W.R. Co. v. Town of Oconto*, 50 Wis. 189, 6 N.W. 607 (1880) and *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35 (1892). They did not. Petitioners: (1) misunderstand those cases; and (2) ignore the entire history of this issue in the apportionment context in Wisconsin.

Intervenors will first address the two primary cases relied upon by Petitioners and then go through the history relevant to this issue. Petitioners first rely upon *Chicago & N.W.R. Co. v. Town of Oconto*, 50

Wis. 189, 192, 6 N.W. 607, 607 (1880). Pet. Mem. at 66. *Oconto* was *not* an apportionment case, it was an annexation case.[1] In that case, this Court held that towns, when created, must consist of contiguous territory, and in that context the Court said that contiguous meant literal contiguity. In the last paragraph of the *Oconto* decision, this Court said in dicta that it came to that conclusion, in part, because creating towns with non-contiguous territory could make apportionment of assembly districts more difficult. However, the decision in *Oconto* was later narrowed, and its dicta about apportionment was rendered moot in 1957 by this Court's decision in *Town of Blooming Grove v. City of Madison*, 275 Wis. 342, 81 N.W.2d 721 (1957).

This Court narrowed the holding in *Oconto* by deciding that the *Oconto* case dealt only with the *original* organization of a town, but did not decide whether, once a town has been validly organized, it is improper for cities and villages to later incorporate parts of the town such that one part of a town is completely separate from another part of the same town. *Id*. at 345. This Court in *Town of Blooming Grove* then went on to hold that such islands are permissible despite the requirement that towns must be made up of contiguous territory, endorsing the concept of municipal contiguity.

This Court's conclusion is noteworthy for two reasons. First, it noted that only eight years after the adoption of the constitution, the Legislature incorporated the City of Madison in the Laws of 1856, and that act divided the Town of Madison into five separate (meaning non-contiguous) portions. *Id*. at 346. Second, the Court noted that there was a legislative solution to deal with any problems caused for apportionment by municipal contiguity. *Id*. at 348. Wis. Stat. §4.04

[1] *Town of Wilson v. City of Sheboygan*, 2020 WI 16, 390 Wis. 2d 266, 938 N.W.2d 493, cited at p. 67 of Petitioners' Memorandum, is also an annexation case and not an apportionment case.

(1957-1958) provided that when parts of a town were annexed into a city or village, the annexed part became part of the assembly or senatorial district of the ward of the city or village into which it was annexed. That is, the statute adopted municipal contiguity for apportionment, and this Court approved of municipal contiguity for apportionment implicitly, if not expressly, by endorsing and relying upon the statute.

Petitioners next rely on *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35 (1892), for the proposition that this Court "squarely decided" the issue of literal versus municipal contiguity in that case. Pet. Mem. at 67. But that is an extreme exaggeration, because *Lamb* was not a dispute about literal contiguity and municipal contiguity. The issue here could not have been squarely decided in *Lamb* because the issue was not even argued in *Lamb*. Rather, *Lamb* was a "one person-one vote" case (long before that term was in usage) with the maps in dispute containing districts with wildly diverging numbers of residents.

The holdings of *Lamb* are that Wisconsin courts have jurisdiction with respect to apportionment disputes (not at issue here) and that the apportionment maps in dispute in that case did not provide for sufficiently equal representation (not at issue here). There was no dispute about whether contiguity could be municipal versus literal.

The passage from *Lamb* that Petitioners rely upon is dicta and says:

> "It is obvious … 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. … 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."

Lamb, 53 N.W. at 57.

But based upon the things that have happened since 1892, virtually none of that dicta is true. Town lines, ward lines, and county lines are no longer sacrosanct. Rather, the maintenance of municipal boundaries, while important, is no longer considered mandatory. Although minimizing municipal splits is an appropriate consideration, all of that must give way to the paramount importance of maintaining the one person, one vote, principle. *Wisconsin State AFL-CIO v. Elections Bd.,* 543 F. Supp. 630, 636 (E.D. Wis. 1982).

The only other apportionment case Petitioners cite is *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 61 N.W.2d 300 (1953), one of the cases arising from the 1950s redistricting. Like the other cases cited by Petitioners, *Thomson* was not a dispute about literal versus municipal contiguity. Instead, it was a case about the validity of a constitutional amendment that sought to make the geographic size of an assembly district a relevant factor in apportionment.

The passage that Petitioners rely on is not even part of the main decision in *Thomson*. Rather, there was a motion for rehearing, and a very short addition was added to the original decision about two months later denying the motion for rehearing. In that decision, this Court noted, as cited by Petitioners, that:

> "In support of the present motion plaintiff states that the Rosenberry Act established a few assembly districts, naming them, which are not created entirely of contiguous territory. In such cases ch. 550, Laws of 1953 is alleged to have

> repaired this error by joining isolated areas to the districts to which they are actually contiguous."

Thomson, 264 Wis. at 663–64. This Court did not rule on whether the plaintiff's statement was true or relevant or even explain what contiguous meant in that context. The Court simply denied the motion for rehearing, and that was the only holding in the short addendum.

As stated at the beginning of this section, the only two cases that have ever squarely addressed the issue of literal contiguity versus municipal contiguity with respect to apportionment are *Prosser* and "*Johnson I*," and both of those decisions *held* that municipal contiguity is constitutional for apportionment. That is the settled law of Wisconsin.

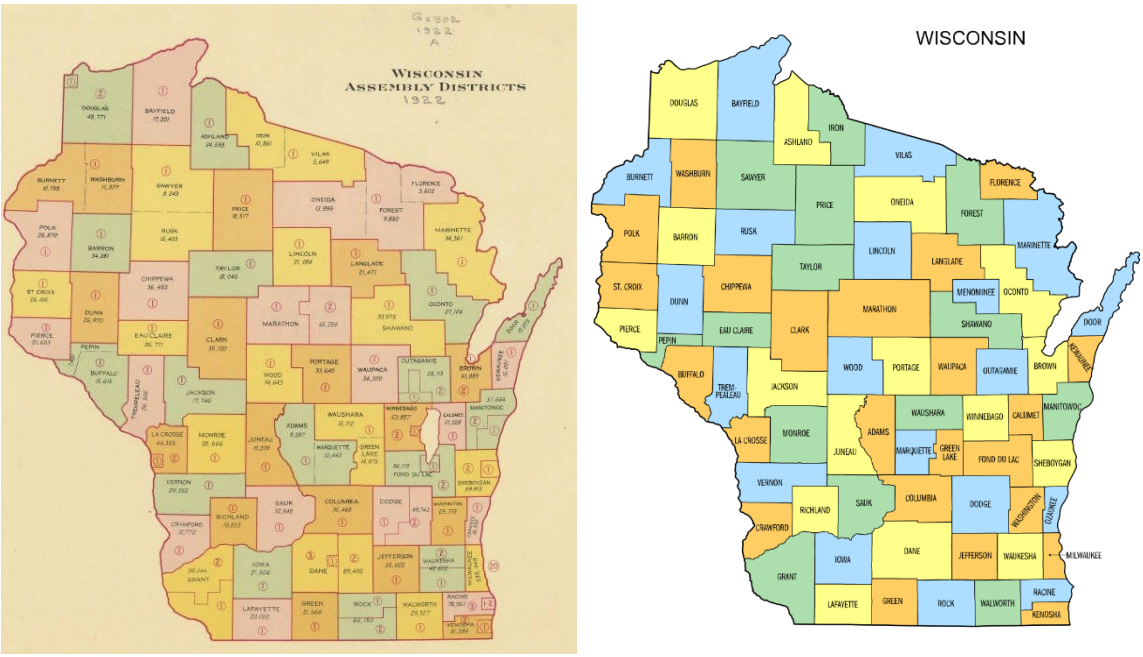
B. History Supports the Use of Municipal Contiguity.

In addition to municipal contiguity being the settled law of this state, history establishes that literal contiguity has never been determined to be necessary for apportionment, whereas municipal contiguity has been repeatedly used and approved.

As noted above, art. IV, §§ 4 and 5 say that assembly districts must consist of "contiguous territory" and senate districts must consist of "convenient contiguous territory." The word "contiguous" is not defined, and the meaning of "contiguous" in the apportionment context was not brought to judicial attention in the early days of statehood, because, at that time, the language in art. IV, sec. 4, requiring districts to be bounded by county, precinct, town or ward lines was considered inviolable. *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892). In light of that, the early apportionment maps were relatively simple, and all assembly maps were within county boundaries—many simply constituted one county. Parts of a municipality detached from its greater body existed, but islands were

unlikely to arise when districts were drawn by county and could be placed in the same district without the need to consider population equality.

As an example, here is the 1922 Assembly map and a Wisconsin County Map side-by-side:



County lines continued to be considered "inviolable" in Wisconsin into the 1960s, and the principle was actually incorporated into the court-ordered reapportionment plan adopted by this Court in 1964. *See State ex rel. Reynolds v. Zimmerman*, 23 Wis. 2d 606, 128 N.W.2d 16 (1964). But because of the State's growth pattern, an "intact-county" plan became impossible to achieve, because the resulting population deviation would have been unacceptable under the U.S. Constitution, as interpreted in *Reynolds v. Sims*, 377 U. S. 533 (1964). Therefore, the Wisconsin Attorney General concluded in 1969 that Wisconsin's constitutional requirement regarding respect for county lines was no longer enforceable given the population equality requirement of the

federal constitution. *See* 58 Op. Atty. Gen. 88 (1969)[2]; *Wisconsin State AFL-CIO*, 543 F. Supp. at 635.

By the end of the 1960s, Wisconsin had numerous municipal islands because Wisconsin law allowed such islands to exist under certain circumstances. For example, a 1925 statute allowed annexation of land "lying near" to a municipality, even if not touching. *See* 1925 Laws of Wisconsin chs. 314–15 (creating section 66.025).

The current statutes still permit annexation of land "lying near" to a municipality, even if not touching, *see* Wis. Stat. § 66.0223(1), and also allow a "town island" surrounded by a city or village, *see* Wis. Stat. § 66.0221(2). As a result of these statutes, Wisconsin has numerous so-called "islands" where part of one municipality is surrounded by a different municipality.

Once "intact-county" redistricting could no longer be followed, the numerous municipal islands that existed had to be dealt with based on the provisions of art. IV, sec. 4, which require that districts be bounded by town and ward lines and be contiguous (requirements that are inconsistent once municipal "islands" exist).

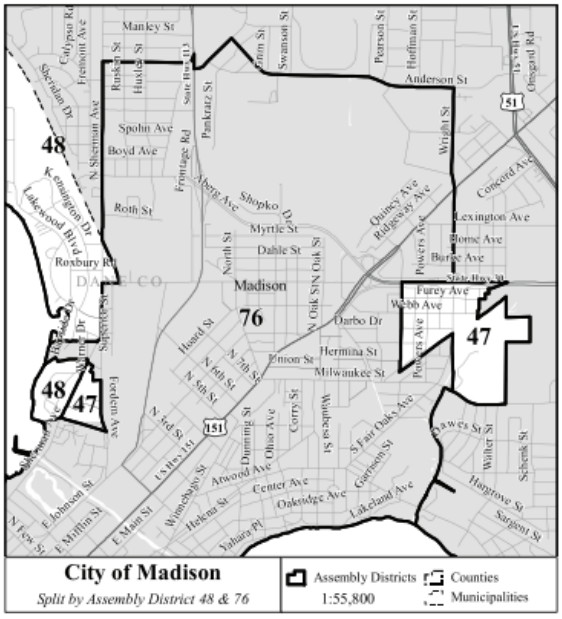
In 1971, the Legislature dealt with this problem in time for the 1970s round of redistricting by creating Wis. Stat. § 4.001(2), which stated that "in designing the districts, the following factors are considered as coequal in precedence: compactness, contiguity of area, and community of interest. *Island territory (territory belonging to a city, town or village but not contiguous to the main part thereof) is considered a contiguous part of its municipality*." (Emphasis added.)

[2] *Available at* https://www.doj.state.wi.us/sites/default/files/dls/ag-opinion-archive/1969/Volume%2058_1969.pdf

This statute, defining "contiguous" as municipal contiguity (i.e., keeping municipalities together), remained in place for 40 years, and no one ever challenged it as unconstitutional. The statute was amended in 1983, but only to move the relevant language from subsection 2 to subsection 3.

As explained above, in the 1990s, the impact of this statute was addressed in *Prosser,* 793 F. Supp. at 866, and the court in that case determined that the Wisconsin Constitution did not require literal contiguity—but rather held that municipal contiguity was appropriate. And municipal contiguity was used for the 1990s maps. *Id.*

Wis. Stat. § 4.001 was repealed by 2011 Wisconsin Act 43, but the maps approved after the 2010 census had multiple islands that were again based on municipal contiguity. For example, the map below shows an island from district 47 within district 76:



Obviously, as shown above, the maps approved by this Court after the 2020 census in both *Johnson II* and *Johnson III* had multiple islands.

The continued existence of these islands in legislative maps rebuts any suggestion that the Legislature, in repealing § 4.001, intended to prohibit them. Since the constitution was being interpreted to permit them, statutory permission was not required. It merely reflected long-standing practice.

Thus, for at least the last 50 years and since "intact-county" maps were no longer feasible, the settled law of Wisconsin has been that Wisconsin's constitutional requirement for contiguity means municipal contiguity and not literal contiguity—as Petitioners now allege. Pet. Mem. at 65–73. This Court invited anyone who wanted to participate in the *Johnson* case to do so, but no one intervened to argue that Petitioners' approach—which divides municipalities and undoes 50 years of Wisconsin history—was required.

C. The Contiguity Claim is Barred by Laches and Stare Decisis

1. Laches

There are three elements to a laches claim: "unreasonable delay, lack of knowledge a claim would be brought, and prejudice." *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶1, 393 Wis. 2d 308, 946 N.W.2d 101. Once each element is proven, "application of laches is left to the sound discretion of the court asked to apply this equitable bar." *Id.* ¶12.

This Court has emphasized that "[e]xtreme diligence and promptness are required on election-related matters." *Trump v. Biden*, 2020 WI 91, ¶11, 394 Wis. 2d 629, 951 N.W.2d 568 (citation omitted). While *Trump* involved election administration, laches also applies in redistricting cases and has sometimes barred redistricting claims entirely, because "voters have come to know their districts and candidates, and will be confused by change," and because Court-ordered

redistricting that falls too close in time to an election can result in "voter confusion, instability, dislocation, and financial and logistical burden on the state." *Fouts v. Harris,* 88 F.Supp.2d 1351, 1354–55 (S.D. Fla. 1999), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000), *applying White v. Daniel,* 909 F.2d 99, 104 (4th Cir.1990); *see also Knox v. Milwaukee Cty. Bd. of Elections Comm'rs*, 581 F. Supp. 399, 405, 408 (E.D. Wis. 1984) (applying laches and denying motion for a preliminary injunction in a Milwaukee County redistricting lawsuit).

All three elements have been met here, and the Court should apply laches to bar the contiguity claim.

First, there is an unreasonable delay here. "[U]nreasonable delay in laches is based not on what litigants know, but what they might have known with the exercise of reasonable diligence." *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶20, 389 Wis. 2d 516, 936 N.W.2d 587. Petitioners here unreasonably delayed with respect to both issues now before the Court.

While Petitioners here were not parties in the *Johnson* case, they easily could have been by simply asking. During the *Johnson* litigation, this Court permitted any and all parties to intervene in the case and granted intervention to all parties that sought it. *Johnson II,* 2022 WI 14, ¶2. Moreover, Petitioners in this case are represented by many of the same law firms that participated in *Johnson*; namely Law Forward, Inc.; Stafford Rosenbaum LLP; and the Campaign Legal Center. Petitioners waited to raise their arguments two years after *Johnson* was initiated, and sixteen months after the maps were adopted. Hundreds of thousands of voters went to the polls and elected their representatives since then. To bring these challenges now is plainly unreasonable.

With respect to the other intervenors—the Governor and Intervenors Wright, Krenz, Hamilton, Theriault, and Jha—all were

intervenors and participants in *Johnson*. There is nothing that prohibited them from raising in *Johnson* the argument raised in the instant case, but they did not do so.

Second, the respondents here, as well as all the parties that participated in *Johnson*, including the Legislature, Governor, and some of the intervenors, lacked knowledge this claim would be brought a year and half later. It is undisputed that these claims were not brought in *Johnson*, and nothing in the current record suggests that there was any evidence these claims would have been brought before this action was filed. This is sufficient to satisfy this element of the laches test. *See*, *Trump*, 394 Wis. 2d 629, ¶23; *Brennan*, 393 Wis. 2d 308, ¶18.

Third, there is prejudice here. Prejudice is a fact specific determination, but "is generally held to be anything that places the party in a less favorable position." *Wren*, 389 Wis. 2d 516, ¶32 (citation omitted). Petitioners could have brought these claims years ago, and the Court could have considered them when adopting the maps in *Johnson*. At the very least, they could have brought them before the November, 2022, elections. Instead, they did nothing for a year and half, and now hundreds of thousands of Wisconsinites have voted to elect their representatives and senators based upon the maps adopted by this Court in *Johnson*. Petitioners now seek to undo that election and invalidate the terms of office of various state senators. If these claims are heard and the requested relief is granted, it would invalidate millions of votes "cast in reliance on interpretations of Wisconsin's election laws that were well-known …" *Trump*, 394 Wis. 2d 629, ¶28. As a result, these claims are now prejudicial, and the third element of the laches test is met.

Having plainly established all three elements of laches here, this Court should exercise its equitable discretion and bar these claims as it

did very recently in *Brennan* and *Trump*. Equity weighs as strongly in favor of applying laches here as it did in either of those cases.[3]

2. Stare Decisis

This Court has "repeatedly recognized the importance of stare decisis to the rule of law." *State v. Johnson*, 2023 WI 39, ¶19, 407 Wis. 2d 195, 990 N.W.2d 174; *State v. Prado*, 2021 WI 64, ¶67, 397 Wis. 2d 719, 960 N.W.2d 869. Stare decisis ensures that "cases are grounded in the law, not in the will of individual members of the court." *State v. Roberson*, 2019 WI 102, ¶97, 389 Wis. 2d 190, 935 N.W.2d 813 (Dallet, J., dissenting). Overruling a case requires a "compelling 'special justification,'" *Prado*, 2021 WI 64, ¶68; *Johnson*, 2023 WI 39, ¶19, and a "change in the membership of the court" does not suffice, *Koschkee v. Taylor*, 2019 WI 76, ¶70, 387 Wis. 2d 552, 929 N.W.2d 600 (A.W. Bradley, J., dissenting) (quoting *Bartholomew v. Wisconsin Patients Comp. Fund & Compare Health Servs. Ins. Corp.*, 2006 WI 91, ¶32, 293 Wis. 2d 38, 717 N.W.2d 216); *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶95, 264 Wis. 2d 60, 665 N.W.2d 257.

As noted above, this Court, just eighteen months ago, decided that the maps now challenged as non-contiguous met the contiguity requirement. Nothing has changed other than the membership of this Court. Overruling that part of *Johnson* so close in time, solely because the membership of the Court has changed, would "throw[ ] the doctrine of stare decisis out the window." *Koschkee*, 2019 WI 76, ¶62 (A.W. Bradley J., dissenting).

[3] Moreover, if any of the parties to the *Johnson* litigation attempt to re-litigate any of the issues decided in that case, it would also raise issue– and claim– preclusion problems.

II. Question 2: The Adoption of the Existing State Legislative Maps Did Not Violate Separation of Powers, Whereas Replacement of Those Maps by This Court Here Would.

Article IV, Section 3 of the Wisconsin Constitution calls upon the Legislature to craft and pass new maps apportioned on a population basis once every ten years, and the Governor's approval is required to adopt maps without court involvement. Wis. Const. art. IV, § 3; *Zimmerman*, 22 Wis. 2d at 557–58. Existing state legislative and federal congressional districts are presumptively unconstitutional after the federal decennial census is released due to population shifts that violate the "one person, one vote" principle. Wis. Const. art. IV, § 3; *Reynolds*, 377 U.S. at 568.

If the Legislature and Governor reach an impasse regarding the new maps, the Court must get involved because the existing maps—automatically considered unconstitutional after each census is published—cannot stand. There is no other choice. If, as Petitioners allege, a Court-selected map can violate separation of powers, then so would a new map selected by this Court in *this very case*.

"Wisconsin's constitution contains no express separation of powers provision." *J.F. Ahern Co. v. Wisconsin State Bldg. Comm'n*, 114 Wis. 2d 69, 102, 336 N.W.2d 679 (Ct. App. 1983). While "[t]he Wisconsin constitution creates three separate co-ordinate branches of government … [it] does not define legislative, executive, or judicial power and [ ] it is neither possible nor practicable to 'classify accurately all the various governmental powers and to say that this power belongs exclusively to one department and that power belongs exclusively to another.'" *State v Holmes*, 106 Wis. 2d 31, 42–43, 315 N.W.2d 703 (1982) (citation omitted).

This is because "[t]here are 'great borderlands of power'—'twilight zone(s)'—'vast stretches of ambiguous territory'—in which it is difficult to determine where the functions of one branch end and those of another

begin." *Id*. (citations omitted). Therefore, the separation of powers doctrine "does not demand a strict, complete, absolute, scientific division of functions between the three branches of government," *id*., but instead "should be viewed as a general principle to be applied to maintain the balance between the three branches of government, preserve their respective independence and integrity, and prevent concentration of unchecked power in the hands of any one branch." *Layton Sch. of Art & Design v. Wis. Emp. Rels. Comm'n*, 82 Wis. 2d 324, 348, 262 N.W.2d 218 (1978).

This Court has also explained that "[w]hen delineating the Wisconsin Constitution's lines of demarcation separating governmental powers … the constitutional powers of each branch of government fall into two categories: exclusive powers and shared powers. Each branch has exclusive core constitutional powers into which other branches may not intrude." *Gabler v. Crime Victim Rights Bd*., 2017 WI 67, ¶30, 376 Wis. 2d 147, 897 N.W.2d 384 (citation omitted). "Exclusive powers" have had "sparing demarcation," *State ex rel Friedrich v. Cir. Ct. for Dane Cnty*., 192 Wis. 2d 1, 14, 531 N.W.2d 32 (1995), while "shared powers lie at the intersections of [ ] exclusive core constitutional powers" and "are not exclusive to any one branch." *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999) (citation omitted).

Redistricting is an example of shared powers, as "[b]oth the Governor and the legislature are indispensable parts of the legislative process." *Zimmerman*, 22 Wis. 2d at 557. There is a role for the courts only if the Governor and Legislature cannot agree. *See Jensen v. Wisconsin Elections Bd*., 2002 WI 13, ¶7, 249 Wis. 2d 706, 639 N.W.2d 537 (remarking that after *Baker v. Carr* and *Reynolds v. Sims*, 1972 was the only year in which Wisconsin redistricting matters were resolved without court involvement).

The authority of the judicial branch to intervene in the event of an impasse between the executive and legislative branches has been consistently recognized in Wisconsin redistricting cases. Since the 1960s, Wisconsin's legislative and executive branches have successfully instituted new redistricting plans only *twice*—once in 1972 and again in 2011. The Court's involvement in *Johnson* was the result of yet another failure by the Legislature and Governor to exercise their shared power to agree on, and implement, new maps after the 2020 decennial census. All parties agreed that the census rendered the current maps unconstitutional, "necessitating [the Court's] involvement." *Johnson I*, 2021 WI 87, ¶19. And, critically, the remedy imposed by any court sustains its effect only "until such time as the legislature and governor have enacted a valid apportionment plan." *Id.* (citation omitted). Such cooperation may be engaged—and new maps developed—between those branches at any time.

That the *Johnson* Court ultimately adopted the congressional maps proposed by Governor Evers and the state legislative maps proposed by the Legislature is not an unconstitutional intrusion on separation of powers in either case. The Governor and this Court lack legislative power, but adopting a remedial map in an apportionment case neither usurps that power (the political branches were unable to exercise it) or constitutes an exercise of it (the Court is merely ensuring that the legislative maps comply with the law). Similarly, while this Court may not "override" a gubernatorial veto, concluding that a map submitted by the Legislature is the only proposal compliant with the law neither usurps that power (adopting a remedial map pursuant to legal standards does not "override" the veto) nor constitutes the exercise of legislative power. Rather, once the Governor and the Legislature could not agree and litigation was started, the Governor and the Legislature were simply two of the parties in the litigation and had the same right as the other parties to submit proposed maps for the Court's consideration.

The maps they proposed to this Court were subject to the Court's review against neutral legal standards, the same as maps submitted by the other parties. As this Court remarked in *Johnson*, the Legislature's maps are in place because they were the only "legally compliant" maps the Court received in view of the Supreme Court's direction on the Voting Rights Act. *See Johnson III,* 2022 WI 19, ¶72 ("No other maps comply with all legal requirements") (main op); *Id*., ¶155 ("[I]n light of the Supreme Court's clarified instructions, the Legislature's state senate and state assembly maps are the only legally compliant maps we received.") (Hagedorn, J., concurring).

If the Court accepts Petitioners' argument that adoption of the Legislature's map in *Johnson* violates separation of powers because doing so somehow circumvented the Governor, Pet. Mem. at 73–76, then it necessarily follows that any map selected by this Court that has not been approved by both the Legislature and the Governor would violate the separation of powers doctrine in the same way. That would mean that this Court *also* violated separation of powers when it first selected the Governor's map in *Johnson II*. And it would suggest that the current Congressional maps—which are not challenged in this case—are yet another separation-of-powers problem, given that they were proposed by the Governor (but never adopted by the Legislature).

It would also mean that the Legislature and Governor cannot submit maps in this case either—or any redistricting case—because, if this Court adopted a map submitted by either, it would, again, be a map never approved by the other branch. Excluding the main two branches who are assigned the primary job of redistricting in the Constitution from participating in litigation over the maps would seem to be an even

greater separation-of-powers problem, since this Court would be taking that role upon itself without any input from the coordinate branches.[4]

Perhaps Petitioners' theory is that *only* the exact map the Legislature previously adopted and the Governor vetoed is prohibited from being submitted in redistricting litigation. But that theory is not only incoherent and unsupportable, it would be beyond trivial to remedy by making minor changes to the map. As explained below, the simple remedy for the contiguity problem would also resolve the separation-of-powers claim, understood this way.

Maybe Petitioners will argue that anything "close enough" to the previous map violates separation-of-powers. Again, both Petitioners, and this Court, would have to provide a coherent theory and legal support for such a bizarre claim. But it would also lead to whole host of impossible questions to answer. How close would be too close, for example? Would one change to the map suffice? Two? Ten? How about 211, if this Court flipped all of the islands to their containing districts, as suggested below. And if that is not sufficient, why not?

Worse yet, such a theory would effectively put a thumb on the scale against one, and only one, litigant in the case (the Legislature)—who also happens to be the primary body tasked with redistricting in the Wisconsin Constitution. Not only would this raise its own separation-of-powers problem, it would also raise due process concerns, since the Court would be disadvantaging some litigants and not others. There is no legal principle that makes it verboten to adopt the Legislature's plan (because it was vetoed) but not verboten to adopt the Governor's plan (which was

[4] Indeed, if Petitioners' theory is correct, this Court could not adopt any map because none of them were approved by the Legislature and signed into law by the Governor (or became law after a legislative override of a gubernatorial veto.)

never adopted by the Legislature, in which all legislative power is vested.)

To summarize, the Legislature and the Governor were participating as litigating parties in *Johnson*, and the Court reviewed their submitted maps and applied neutral, legally-required standards to ensure that the maps they ultimately accepted complied with the law. This is routine in redistricting litigation. Petitioners' separation-of-powers claim is meritless, and this Court should reject it.

Petitioners' separation of powers argument also should be rejected under the doctrines of laches and stare decisis, for the same reasons as set forth in Section I.C above.

III. Question 3: This Court Should Make Only Those Changes Necessary to Cure Whatever Violation This Court Finds and Rely on Traditional Redistricting Criteria Alone.

A. This Court Should Make Only Those Changes That Are Necessary to Remedy Any Violation.

As an initial matter, any remedy in this case should go no further than necessary to resolve any violation this Court identifies. A well-established principle of "the appropriate reach of the judicial power" is that remedies must be "appropriately tailored to any constitutional violation." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶47, 393 Wis. 2d 38, 946 N.W.2d 35; *State ex rel. Memmel v. Mundy*, 75 Wis. 2d 276, 288–89, 249 N.W.2d 573 (1977) ("The extent of an equitable remedy is determined by and may not properly exceed the effect of the constitutional violation." (quoting *Austin Indep. Sch. Dist. v. United States*, 429 U.S. 990, 995 (1976) (Powell, J., concurring)). "To go further, and enjoin other acts which, if done, do not affect the rights in litigation in any way, is simply an exercise of arbitrary power, which cannot be defended for a moment." *Linden Land Co. v. Milwaukee Elec. Ry. &*

Lighting Co., 107 Wis. 493, 83 N.W. 851, 856 (1900). Both the United States Supreme Court and this Court have applied this principle in redistricting cases. *E.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) ("[A] plaintiff's remedy must be limited to the inadequacy that produced [his] injury in fact.") (citation omitted); *see also Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015) (racial gerrymandering claims, and any remedies, apply "district-by-district," and "do[ ] not apply to a State considered as an undifferentiated 'whole.'"); *Johnson I*, 2021 WI 87, ¶83 (Hagedorn, J., concurring) ("[T]he court's function is to formulate a remedy—one tailored toward fixing the legal deficiencies.").

This is particularly so in redistricting—a process that is dominated by political judgments. This Court cannot make those judgements. It may only ascertain and apply the law. Even a valid claim cannot be a Trojan horse in which is hidden an entire redistricting process that goes beyond the legal infirmity to be remedied.

1. Contiguity Claim

If this Court concludes that the existing maps violate the contiguity requirements of Wisconsin's constitution, it should make only those changes that are necessary to remedy the contiguity violation. There is, in fact, a very simple remedy if this Court decides that contiguity does not allow for any "islands" whatsoever, even if those islands preserve municipal boundaries: the "islands" can simply be absorbed into the districts surrounding them, with minimal, and often *no* other changes to surrounding districts.

By Intervenors' count,[5] there are a total of 52[6] assembly districts[7] with "islands," and a total of 211 islands. However, of those 211 "islands," 58 of them—over a quarter—have zero residents in them. Thus, they can be placed into the district they are contained in and no one will be affected.[8] And, of the 52 assembly districts with islands, 10 of them have *only* islands with zero residents.[9] Take assembly district 66 in Racine County, for example. It contains two small "islands," surrounded by District 62; those islands consist entirely of Johnson Park Golf Course and Caledonia Dog Park. No one lives in those "islands." It was connected to Assembly District 66 to preserve municipal boundaries; but if this Court concludes that this is nevertheless a "contiguity" problem, it can

[5] This is based on publicly accessible information available online through the LTSB, and is judicially noticeable. https://legis.wisconsin.gov/LTSB/gis/maps/. And, while Proposed-Intervenors have attempted to be as accurate as possible with this information, this has been done on an expedited basis due to this Court's extremely abbreviated briefing schedule.

[6] Petitioners claim that there are 55, but Intervenors have been unable to find any islands in assembly districts 76, 89, and 98. *See* Petition 36 n.1.

[7] Because senate districts are simply the combination of three assembly districts, the remedy proposed would resolve contiguity issues in senate districts as well.

[8] Thus, it is hard to see how Petitioners—or anyone—would have standing to challenge these islands. Moreover, Petitioners do not explain how they have standing to challenge non-contiguity in districts other than those in which they reside. As the Supreme Court has emphasized in the context of racial gerrymandering claims, the "harms" that come from a racially gerrymandered district "are personal" and limited to "voter[s] who live[ ] in the *district* attacked." *Alabama Legislative Black Caucus*, 575 U.S. at 263 (emphasis in original). Voters who "live[ ] elsewhere in the State" "lack[ ] standing to pursue a racial gerrymandering claim" against another district. *Id*. Petitioners do not explain how they could possibly be harmed by a non-contiguous district elsewhere in the State.

[9] Assembly districts 6, 37, 39, 44, 59, 66, 72, 81, 91, and 95.

be resolved by putting that "island" into District 62, without changing the population of either district.

Another 76 of the 211 islands (beyond the 58 with zero people described above) have less than ten residents within them. Put in terms of assembly districts, another 12 of the 52 districts with islands (beyond the 10 just listed) have *only* islands with less than ten people in them.[10] For these districts, flipping the islands to the containing districts would have negligible impacts on the population of either district. Of these 12, assembly district 94 has the most people in islands, a total of 13 people in two islands, .02% of its current population.

Yet another 64 of the 208 islands (beyond the 133 described above (58 with zero + 76 with less than ten)), have fewer than 100 residents within them. Put in terms of assembly districts, another 23 of the 52 districts with islands (beyond the 22 just listed (10+12)) have *only* islands with less than 100 people in them.[11] Again, for these districts, flipping the islands to the containing districts would have negligible impacts on the population of that district or nearby districts. Of these 23 districts, assembly district 80 has the most people in islands, a total of 418 people in 34 islands, still only .7% of the district's current population.

In other words, 45 of the 52 assembly districts with islands have only islands with less than 100 people, and could all be fixed, easily, with less than .7% impact on the population of those districts, by putting the island into the containing district.

[10] Assembly districts 3, 24, 25, 28, 32, 33, 41, 52, 60, 88, 93, and 94.

[11] Assembly districts 2, 5, 15, 26, 27, 30, 38, 40, 42, 43, 45, 46, 53, 58, 61, 63, 67, 70, 79, 80, 86, 97, and 99.

Only seven assembly districts[12] have islands with more than 100 people in them, and for four of these, the total population of all "islands" in the district is less than 400 people, again, less than .6% of the population in each of these districts.

If this Court were to put the residents of islands into the districts in which the island is contained, for the 48 districts described above—all but three—the map would have a total population deviation of only 2.96% (and, as described below, that number can be brought down further with a few minor additional changes).

Only three districts have islands containing more than 1,000 people, and only one, in Madison, has over 1,500—district 47 has 3,742 people in islands. While incorporating the islands from these three districts into the containing districts will increase population deviation, it would still be within the range determined by federal courts to be acceptable. In fact, by our analysis, if this Court did nothing more than the simple remedy of putting every island into its containing district, and making no other changes whatsoever, the total population deviation among all assembly districts would be 9.73%—still under the 10% deviation permitted by United States Supreme Court precedent. *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *Johnson I*, 2021 WI 87, ¶¶25–26.

Even if this Court were to reject that approach on the grounds that 9.73% is too high, minimal additional changes would be required. As noted above, most of that population deviation comes from just a few pairs of districts—and most heavily, by far, Madison. Thus, Intervenors would suggest putting every island into its containing district and then making changes to the 10 or 11 districts that have the highest population deviation, which could be done by moving just a few wards. By shuffling just a few wards in four different sets of neighboring districts—districts

[12] Assembly Districts 29, 31, 47, 48, 54, 68, and 88

47–48 and 76–78 in Madison, districts 68 and 91 in Eau Claire, districts 53 and 54 in Oshkosh, and districts 31 and 45 in Beloit—Intervenors were able to get the maximum population deviation for assembly districts down to 1.57%, less than the 1.88% in Governor Evers' map that this Court deemed acceptable in *Johnson II*. 2022 WI 14, ¶ 36. In fact, that approach would move somewhere between 16,000 to 17,000 people or about .29% of the State's population.

In addition, this simple solution minimizes senate disenfranchisement[13] because very few voters—no more than 17,000—will be shifted *at all*, much less from even to odd or odd to even senate districts. As Justice Dallet noted in *Johnson*, "true neutrality" requires "senate disenfranchisement" to be kept minimal. *Johnson I*, 2021 WI 87, ¶94 (Dallet, J., dissenting). Other case law echoes this point, acknowledging that redistricting necessarily results in some senate disenfranchisement but "it is not something to be encouraged." *Prosser*, 793 F. Supp. at 866; *see also Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *3–4, *7 (E.D. Wis. 2002) (unpublished) (considering levels of senate disenfranchisement when assessing proposed redistricting plans and adopting the plan with the lowest level).

Intervenors' suggested remedy can be explained in more detail later, but all that is to say, there is a simple remedy to the contiguity problem, and there is no need for, and no basis for, the Court to go beyond this simple approach.

2. Separation of Powers Claim

If this Court concludes that the existing map violates separation of powers, the Court would need to be very clear about its theory of what

[13] "Senate disenfranchisement" refers to a delay in the ability of a voter to vote for a Senator because that voter has been moved to a different senate district. *Johnson I*, 2021 WI 87, ¶94, n.5, (Dallet, J., dissenting).

it is exactly that makes the separate of powers violation—and what would fix it—to provide guidance going forward. And, again, this Court should make only those changes that are necessary to resolve the constitutional violation. The simplest solution would be to use the same remedy described above with respect to contiguity—flipping the islands into their containing districts. This would remedy the separation-of-powers problem because the map would no longer be the map proposed by the Legislature and vetoed by the Governor, but instead a different map.

B. If This Court Instead Starts from Scratch, It Should Apply Traditional Redistricting Criteria

If the Court believes that it must make more changes than necessary to resolve the actual constitutional violation (which is a hard circumstance to imagine), then it should apply the traditional redistricting criteria that are discussed at length in *Johnson* and that this Court is familiar with: population equality, compliance with the VRA and equal protection, contiguity, preserving political subdivision boundaries, compactness, preserving communities of interest, and minimizing "senate disenfranchisement." *Johnson I*, 2021 WI 87, ¶¶24–38 (discussing these requirements); *Id.* ¶94 (Dallet, J., dissenting) (same). Going that route, however, would create yet another irregularity in this case. Why would the Court rewrite the maps more than necessary to cure an identified constitutional violation? No lawful answer comes to mind. This Court should also apply the "least changes" approach it adopted in *Johnson*, since that is settled law on the appropriate method to fix constitutional violations in apportionment maps. *Johnson I*, 2021 WI 87, ¶¶64–79.

Finally, to make the process as fair and apolitical as possible, this Court should consider anonymizing map proposals so that this Court considers them without knowing who submitted them. The parties could,

for example, submit maps to the LTSB, or some other independent third party that the Court selects, who could then calculate scores for each proposal based on the traditional redistricting factors and then submit the anonymized proposals to the Court to select among them.

C. This Court Should Not Consider the Partisan Results of Any Maps.

Petitioners will undoubtedly ask this Court to consider the partisan "fairness" of a map based on some assessment of how it is predicted to perform politically. This Court already denied the petition with respect to its partisan gerrymandering claims, and it should likewise reject any backdoor attempt to sneak those considerations into the remedial phase of this litigation. This Court has already held—recently—that the predicted partisan makeup of districts is not an appropriate consideration for this Court in redistricting litigation given that it raises a "purely political question," is "untethered to legal rights," and lacks "any judicially manageable standards." *Johnson I*, 2021 WI 87, ¶¶39–63.

Considering the partisan effects of a map would require this Court to overrule *Johnson* and would be wholly inconsistent with the principle of *stare decisis*, as explained in detail above. *Supra* Part I.D.3.

Choosing a new map in any way based on its partisan effects would also violate Intervenors' due process rights. "A fair trial in a fair tribunal is a basic requirement of due process," *In re Murchison*, 349 U.S. 133, 136 (1955), and a state court can violate due process either "through the denial of a fundamentally fair judicial procedure or through the application of a rule of decision that itself violates due process." *See Reed v. Goertz*, 598 U.S. 230, 255 (2023) (Thomas, J., dissenting); *Rogers v. Tennessee*, 532 U.S. 451, 462, 467 (2001) (the due process clause requires "fundamental fairness" and protects against "unfair and arbitrary

judicial action"); *cf. Moore v. Harper*, 143 S. Ct. 2065, 2090 (2023) (recognizing that "state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4.").

Both the United States Supreme Court and this Court have held that there are no "judicially discernible and manageable" standards to judge the partisan "fairness" of a map. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *Johnson I*, 2021 WI 87, ¶¶39–63. In *Rucho*, the Supreme Court rejected all of the various proposals to measure partisan effects as "indeterminate and arbitrary." 139 S. Ct. at 2502–06. At bottom, all such methods depend on "prognostications as to the outcome of future elections, … invit[ing] 'findings' on matters as to which neither judges nor anyone else can have any confidence." *Id.* at 2503 (citation omitted). And engaging in such analysis necessarily entangles courts in "the extraordinary step of reallocating power and influence between political parties." *Id* at 2502. Thus, if this Court were to select a new map based in part on some prediction about its partisan effects, the result would be arbitrary, fundamentally unfair, and violate Intervenors' due process rights to a fair tribunal.

In their dissent in *Johnson I*, Justices Dallet, Bradley, and Karofsky emphasized how "vital" it is for "this court to remain neutral and nonpartisan" when wading into "the political thicket of redistricting." *Johnson I*, 2021 WI 87, ¶88 (Dallet, J., dissenting). And they recognized that "redistricting is an 'inherently political and legislative—not judicial—task,' even when judges do it." *Id.* How much more so if this Court were now to openly consider the partisan effects of any replacement maps proposed in this case. This Court should not consider "partisan choices over neutral redistricting criteria," but instead rely solely on "traditional redistricting criteria." *Id.* ¶¶88, 94.

IV. Question 4: If This Court Adopts the Simple and Obvious Remedy, Little, if Any, Fact-Finding Would Be Required; If It Rejects That Remedy, the Fact-Finding Could Be Substantial.

If this Court adopts the simple remedy proposed above, then this would remedy both the contiguity and separation-of-powers claims and very little, if any, fact-finding would be necessary. The Court should allow the parties to submit a more fulsome analysis about how to attach islands to their containing districts and what adjustments could be made to reduce the population deviations after absorbing the islands into their containing districts. And, of course, each side should have the opportunity to respond. But other than that, little more is needed.

If, on the other hand, this Court rejects the simple remedy for some reason, then substantial fact-finding may be required, depending on what this Court's reasons are for rejecting the simple remedy. It is impossible to comment without knowing what this Court's reasons might be for rejecting what appears to be a straightforward way to remedy any contiguity or separation-of-powers problem.

V. General Objections

A. Justice Protasiewicz's Participation in This Case Violates Intervenors' Due Process Rights.

Justice Protasiewicz's participation in this case also violates Intervenors' due process rights under *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) and related cases, for the reasons explained in detail in the Wisconsin Legislature's motion to recuse. Intervenors fully join that motion and objection, but will not file anything further in this Court on that issue given that Justice Protasiewicz has already decided not to recuse herself from this case.

B. This Court's Abbreviated Briefing Schedule, Without Justification, Is Deeply Unfair Given That Petitioners Waited for a Year and a Half to Bring Their Claims.

Petitioners waited for a year and half—sixteen months—after this Court issued its final decision in *Johnson III* adopting the current maps. Yet when this Court granted this case, it gave the parties only ten days, and only five full business days, to file their merits briefs. Neither Petitioners, nor this Court, have explained why this case requires such an expedited schedule that prevents a fulsome briefing of the issues. Unlike in *Johnson*, there is no well-recognized, one-person-one-vote problem with the current map, with an impending election upcoming. Petitioners' contiguity and separation-of-powers claims are novel and bizarre, and could be resolved in the ordinary course. Moreover, as explained below, Petitioners could have brought them in *Johnson*, or, at the very least, any time during the past sixteen months. They have had all that time to prepare their arguments and theories. Giving the other side only 5 business days to respond is deeply unfair, and does not reflect "a fair trial in a fair tribunal," which, as noted above, is a "basic requirement of due process," *In re Murchison*, 349 U.S. at 136.

CONCLUSION

This Court should reject Petitioner's claims, or, at very least, adopt the most limited remedy possible that resolves any constitutional problem the Court identifies.

Dated: October 16, 2023.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

Electronically signed by Luke N. Berg
Richard M. Esenberg (WI Bar No. 1005622)

Luke N. Berg (WI Bar No. 1095644)
Nathalie E. Burmeister (WI Bar No. 1126820)
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
Telephone: (414) 727-9455
Facsimile: (414) 727-6385
Rick@will-law.org
Luke@will-law.org
Nathalie@will-law.org

Attorneys for Intervenors-Respondents Billie Johnson, Chris Goebel, Ed Perkins, Eric O'Keefe, Joe Sanfelippo, Terry Moulton, Robert Jensen, Ron Zahn, Ruth Elmer, and Ruth Streck

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 9,052 words.

Dated: October 16, 2023.

Electronically Signed by Luke N. Berg

LUKE N. BERG