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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.

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**GOVERNOR TONY EVERS'S RESPONSE BRIEF ON FOUR QUESTIONS**

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## INTRODUCTION

Petitioners have raised two meritorious constitutional challenges to Wisconsin's state legislative maps: their lack of territorial contiguity and their adoption's violation of separation of powers. This Court thus must invalidate the maps and provide a remedy. That task involves the most fundamental of constitutional mandates: for the government to maintain its legitimacy, it must derive its "just powers from the consent of the governed." Wis. Const. art. I, § 1. It should be elementary that elections are conducted according to lawful and responsive maps.

Certain Respondents and Intervenor-Respondents[1] argue that the Court should not rise to that task. For one, they attempt to avoid the issues altogether, rearguing that this Court should not have granted the petition for an original action. But as this Court has already concluded, it is of course proper for this Court to take jurisdiction over questions of Wisconsin's maps' lawfulness, which are of the utmost public importance. Beyond that, these Respondents argue that the proceedings should be governed by the rulings in *Johnson*, but those proceedings dealt with distinct legal issues—malapportionment and impasse—and further, were riddled with legal and procedural flaws. Ultimately, Respondents fail to rebut what is actually at issue: that the existing maps are unlawful and that this Court should expeditiously adopt new, lawful maps prior to the next state legislative election.

[1] This brief refers to the parties opposing the relief sought collectively as "Respondents." That term is intended to capture the individual "Johnson" Intervenor-Respondents, certain Senator Respondents, and Intervenor-Respondent the Wisconsin Legislature, which filed a joint brief with those Senator Respondents. The term "Respondents" in this brief does not include other Senators (Carpenter, Larson, Spreitzer, Hesselbein, and Smith), who support Petitioners.

## ARGUMENT

The following first responds to Respondents' arguments regarding this Court's four questions in its October 6 order. Second, this brief addresses various procedural arguments that Respondents raise in an attempt to derail this already-accepted original action.

### I. Response on questions presented by the Court's October 6 order.

#### A. Respondents fail to come to terms with the plain language of the Wisconsin Constitution, which requires "contiguous territory," not districts that are politically contiguous.

The current state legislative maps violate article IV, sections 4 and 5 of the Wisconsin Constitution, which require legislative districts to be composed of "contiguous territory." The meaning of "contiguous" is clear: it requires physical connection. Historical evidence supports this, including the original rationales behind the contiguity requirement: to prevent gerrymandering and create districts with uniform needs.

Wisconsin's maps should be revamped to make legislative districts contiguous, conforming with constitutional districting requirements and enhancing the democratic power of voters.

##### 1. Respondents advocate for an interpretation that is contrary to the Constitution's text.

Article IV does not permit legislative districts to have noncontiguous municipal islands. Dictionary definitions and early Wisconsin caselaw confirm this interpretation.

Respondents nonetheless argue that the contiguity clause only requires a district's towns and counties to be connected—not that each district must be a contiguous body of land. (Legislature's Br. 29–34.) The argument is neither grounded in precedent nor text.

There are three requirements for districts under article IV, section 4: "[1] to be "bounded by county, precinct, town, or ward lines, [2] to consist of contiguous territory *and* [3] be in as compact form as practicable." Wis. Const. art. IV, § 4. Because the clauses are joined by the word "and," districts must comply with all three. *See Bartholomew v. Wis. Patients Comp. Fund & Compcare Health Servs. Ins. Corp.*, 2006 WI 91, ¶ 79, 293 Wis. 2d 38, 717 N.W.2d 216.

The "bounded" clause provides that a district's outer borders must adhere to one of four enumerated governmental units, rather than to arbitrary boundaries. Districts must be bounded by either county, precinct, town, or ward lines.

The second clause discussing "contiguous territory" provides an additional independent requirement for a district's shape. The third clause, which requires compactness, also states an independent requirement.

At the time of the Constitution's enactment, "contiguous" meant "[t]ouching" and "territory" meant "[t]he extent or compass of land within the bounds or belonging to the jurisdiction of any state, city or other body." Noah Webster's American Dictionary of the English Language (1828). If the contiguity clause was intended to require only that governmental units be contiguous (*see* Legislature's Br. 29–30), that is what it would have said. Respondents may not substitute terms, or collapse requirements into one another, to change the meaning of the Constitution's plain text. *See State v. Fitzgerald*, 2019 WI 69, ¶ 30, 387 Wis. 2d 384, 929 N.W.2d 165.

Respondents also offer historical dictionary entries that define "contiguous" to mean physical proximity or nearness. (Legislature's Br. 35–36.) Rather than help Respondents, these definitions reenforce that the principal definition of contiguous requires physical connection. To illustrate, nearly all the cited definitions begin with words like "touching," "adjoining," "actual contact," or "bordering." *See, e.g.*, *Contiguous*, The Imperial Dictionary of the English Language (1828) ("[t]ouching; meeting or joining at the surface or border; close together; neighboring; bordering or adjoining"). Only two of Respondents' quoted definitions refer to proximity without contact, and these are labeled as "loose," ancillary meanings. (Legislature's Br. 36 n.4.)

Late 1800's Wisconsin caselaw further supports the physically connected meaning of contiguity, and these authorities remain good law. Soon after the Constitution was ratified, *Chicago & Northwest Railroad Co. v. Town of Oconto* interpreted article IV's contiguity requirement to preclude legislative districts with detached areas. 50 Wis. 189, 6 N.W. 607, 609 (1880). Article IV contiguity was a clear basis for *Oconto's* holding, so *Oconto's* article IV discussion was not dicta, as some Respondents incorrectly suggest. (Johnson Br. 12–13.)

*State ex rel. Lamb v. Cunningham*'s statement that contiguity prohibits detached lands was not dicta, either. 83 Wis. 90, 53 N.W. 35, 57 (1892). *Lamb* reviewed the 1892 apportionment act for equality of representation and compliance with other constitutional requirements, including contiguity. The statements about contiguity thus were not dicta but were "germane to the . . . controversy at issue." *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 52 n.19, 324 Wis. 2d 325, 782 N.W.2d 682 (citation omitted).

*Town of Blooming Grove v. City of Madison*, 275 Wis. 342, 344, 81 N.W.2d 721 (1957), changes nothing. (Johnson Br. 12.) *Blooming Grove* simply held that there is no independent constitutional prohibition on towns' annexation of detached areas; it did not take into consideration *Oconto*'s holding interpreting article IV. *Blooming Grove* expressly stated that the effect that annexations might have on the composition of legislative districts was not before the court. 275 Wis. at 348–50.

Respondents also contend that the Court need not conform with the Constitution's contiguity requirement if it is balanced with other competing districting criteria. (Legislature's Br. 39–40 (citing *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 187 (2017).) However, the Constitution says nothing about balancing contiguity. Contiguity is a mandate. The "balancing" described in *Bethune-Hill* referred to balancing other districting "considerations," not constitutional requirements. 580 U.S. at 180. Further, while in some instances federal requirements may trump state criteria, *e.g.*, *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002), that is not the case with contiguity.

Respondents' view that the Constitution permits physically noncontiguous districts should be rejected as untethered from both the plain meaning of the text and past interpretation by the courts.

### 2. Political contiguity is not constitutionally required, and recent municipal legislation and practices have no bearing on constitutional interpretation.

Respondents contend that political contiguity satisfies the Wisconsin Constitution based on Wisconsin's recent history of municipal annexation and districting practices. Specifically, municipal island territories have been permitted

under municipal annexation laws. *See* 1925 Wis. Laws ch. 314. And from 1971 to 2011, municipal islands were statutorily treated as contiguous for districting purposes. *See* Wis. Stat. § 4.001 (2010). This argument fails for several reasons.

First, annexation laws and practices in the 1960's and 1970's are not the focus of constitutional interpretation—what matters is the context and understanding at the time of ratification. *Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 2023 WI 38, ¶ 22, 407 Wis. 2d 87, 990 N.W.2d 122.

Second, unlike legislative districts, the Constitution does not require municipalities to consist of contiguous territory. So just because island territories are considered "politically contiguous" to their towns for municipal law purposes does not mean they meet constitutional standards for legislative districts. (*See* Legislature's Br. 37.) It is easy to reconcile municipal islands with contiguous legislative districts. Both can, and should, simultaneously exist.

Third, the 1971 law that treated island annexations as contiguous for districting purposes was repealed in 2011. 2011 Wis. Act 43. It does not follow that, just because the law was passed and went unchallenged for many years, the law was constitutional. It also does not matter that municipal islands appear in recent districting maps. (Legislature's Br. 38.) Noncontiguous legislative districts were not constitutional then, and they are not constitutional now.

Finally, Respondents argue that political contiguity is sufficient because literal contiguity is unworkable in the context of Wisconsin's water boundaries. They point to legislative districts created in 1861 and 1876 composed of counties on either side of Green Bay and not connected by land. (Legislature's Br. 36–37.) They also suggest that if literal contiguity is followed, Wisconsin's islands in Lake Michigan and Lake Superior must be their own legislative districts. (Legislature's Br. 35.)

But courts in maritime states are in agreement that contiguous territory includes open water that extends to islands forming a state's seaward boundary. *Lamson v. Sec'y of Commonwealth*, 168 N.E.2d 480, 487 (1960) (For a maritime state, "the word 'territory' in the expression 'contiguous territory' . . . includes water spaces."); *Hickel v. Se. Conf.*, 846 P.2d 38, 45 (Alaska 1992) ("[A] contiguous district may contain some amount of open sea."). The historical presence of "rowboat" districts in Wisconsin does nothing to undermine that territorial contiguity applies as the rule.

### 3. *Johnson* is not precedential on contiguity and, even it were, it should not be followed.

Respondents contend that the Court is bound by the doctrine of stare decisis vis-à-vis *Johnson*. But *Johnson* has no bearing on the contiguity issue here for two reasons.

First, *Johnson* did not analyze the term "contiguous territory"; instead, it adopted the gloss from *Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992) (per curiam); *see Johnson v. Wis. Elections Comm'n* ("*Johnson I*"), 2021 WI 87, ¶ 36, 399 Wis. 2d 623, 967 N.W.2d 469. *Prosser* did not analyze Wisconsin caselaw regarding contiguity, including binding authority like *Oconto* and *Lamb*. Further, *Johnson* neither overturned *Lamb* nor reconciled *Prosser's* holding with Wisconsin's constitutional text. The brief statements in *Johnson* were not a reasoned holding and thus have no precedential value.

Second, even if *Johnson* were precedential, it should not be followed. Stare decisis is at its weakest when there is a constitutional infirmity at issue. *See State v. Lynch*, 2016 WI 66, ¶ 39 n.18, 371 Wis. 2d 1, 885 N.W.2d 89. Relatedly, this Court has discussed "the danger of rigidly adhering to the doctrine of stare decisis at the expense of fidelity to the constitution." *Black v. City of Milwaukee*, 2016 WI 47, ¶ 58,

369 Wis. 2d 272, 882 N.W.2d 333; *see also* Daniel R. Suhr, Kevin LeRoy, *The Past and the Present: Stare Decisis in Wisconsin Law*, 102 Marq. L. Rev. 839, 854 (2019) ("the court must exercise greater scrutiny of its precedents in constitutional cases").

Therefore, "stare decisis does not require us to retain constitutional interpretations that were objectively wrong when made." *Koschkee v. Taylor*, 2019 WI 76, ¶ 8 n.5, 387 Wis. 2d 552, 929 N.W.2d 600. As this Court explained, "an independent analysis of the issues presented herein better serves the interests of the public," *id.*, even where a "mere three years ago" the Court may have addressed the same issue. *Id.* ¶ 59 (A.W. Bradley, J., dissenting). That is, this Court has departed from precedent when "it is unsound in principle." *State v. Johnson*, 2023 WI 39, ¶ 47, 407 Wis. 2d 195, 990 N.W.2d 174.

There is no sound reason to cleave to *Johnson's* offhand adoption of *Prosser's* take on contiguity. If it applied to begin with, stare decisis should not be followed here.

#### 4. To remedy contiguity, the state legislative districts must be redrawn.

Fixing contiguity is not as simple as Respondents suggest. Rather, the territorial contiguity flaws require redrawing each map to fix the constitutional flaws while complying with other districting principles.

First, the Constitution requires dissolving municipal islands into surrounding districts so that they are contiguous, but that gives rise to another redistricting issue: municipal splits. While municipal splits may be permitted to a certain extent, districting principles require avoiding them when possible. Specifically, "maintenance of municipal boundaries [is] important" and "municipal splits should be used sparingly." *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 636 (E.D. Wis. 1982); *Baumgart*, 2002 WL 34127471, at

*3 (discussing avoiding municipal splits as a traditional districting criterion).

Currently, an alleged 55 assembly districts and 21 senate districts contain a total of 211 islands. (Pet'rs' Br. 42; Johnson Br. 8.) Respondents' proposed remedy—simply dissolving them—would create hundreds of municipal splits. And for the 198 municipal islands that are populated, residents would be represented by different legislators than the rest of their municipalities, reducing their power as voters to advocate for their municipal interests.

Second, Respondents concede that just dissolving islands would result in a total population deviation of 9.73%. (Johnson Br. 32.) That is far higher than other modern Wisconsin redistricting courts have accepted, which require a 2% deviation or lower. *See, e.g., Wis. State AFL-CIO*, 543 F. Supp. at 634 ("We believe that a constitutionally acceptable plan . . . should, if possible, be kept below 2%."). Further, court-ordered districting plans are held to higher equality standards than legislative maps; only a *de minimis* deviation is appropriate. *Chapman v. Meier*, 420 U.S. 1, 26–27 (1975). The 9.73% deviation proposed by Respondents is simply too high.

Dissolving municipal islands into surrounding districts is an inadequate remedy. Given the large number of municipal islands in Wisconsin, many districts would require complete reconfiguration, placing municipal islands internally within a district and avoiding an unjustifiably high population deviation. The contiguity violations require redistricting anew.

### B. Respondents do not rebut that *Johnson*'s adoption of vetoed maps violated the Wisconsin Constitution's separation of powers.

The *Johnson* Court's errors include and exceed accepting the Legislature's previously vetoed plan; it supercharged the Legislature's power at the expense of the Governor's and Court's own constitutional roles in the redistricting process. The Court first started down a misguided path when it adopted a "least-change" approach to redistricting that entrenched legislative power and abdicated the Court's proper role in impasse litigation. The culmination was the *Johnson* Court's adoption of the exact maps that the Governor vetoed—ignoring both the Governor's exclusive veto authority and the Constitution's exclusive method for veto override. Under these unique circumstances, the Court's decisions stretch the Wisconsin Constitution's separation of powers architecture beyond its permissible bounds.

Seeking to avoid the separation of powers issues, Respondents construct a strawman: that the Governor is trying to force the Legislature out of redistricting litigation. He is not.

#### 1. Judicial override of the Governor's constitutional veto authority intrudes on Wisconsin's separation of powers.

"[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). As for the power of the Governor, Wisconsin law is clear: his veto 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). Respondents do not identify any contrary Wisconsin authority because there is none.

There is no exception in the redistricting context. As this Court has emphasized, once the Governor has vetoed proposed maps, they "cannot become law unless both houses of the legislature vote to override that veto." *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 557, 126 N.W.2d 551 (1964). In other words, legislative veto override is the exclusive way for vetoed redistricting maps to "become law." *Id.*; Wis. Const. art. V, § 10. "Only a super majority of the legislature (two-thirds of the members present) may override the governor's veto of any bill." *Wis. Small Business United, Inc. v. Brennan,* 2020 WI 69, ¶ 50, 393 Wis. 2d 308, 946 N.W.2d 101 (Bradley, R., J., dissenting).

Respondents therefore cannot refute that the *Johnson* Court intruded on separation of powers principles when it made the Legislature's vetoed maps law despite the failure of the Legislature to override that veto. Lacking legal authority to defend the Court's adoption of the maps, Respondents offer three arguments. Each is unavailing.

First, Respondents construct an artificial distinction between judicial adoption of the Legislature's maps and legislative enactment of the same maps. (*See* Legislature's Br. 43–44.) According to the Legislature, because the *Johnson* Court did not "enact" remedial maps as legislation, it did not override the Governor's veto. This linguistic hairsplitting finds no support in the Constitution. As it makes clear, the sole question is whether the remedial maps have "become law," and the purpose of the Governor's veto power and the Legislature's override power is to control exactly that. Wis. Const. art. V, § 10. Whether a map "becomes law" through enactment or adoption, it is law all the same. Throughout the State, the Wisconsin Elections Commission and election clerks have implemented the remedial maps that "became law" as a result of *Johnson III*, just as they would have if the

maps had "become law" legislatively. Because the result of *Johnson III* was for the vetoed remedial maps to "become law," the adoption versus enactment argument turns on a distinction without a difference.

Second, Respondents misconstrue the separation of powers issues in this case. The Legislature incorrectly asserts that "Petitioners' view would have the perverse effect of excluding the Legislature from redistricting remedies." (Legislature's Br. 46.) But no one claims the *Johnson*'s remedial maps violated the separation of powers because of the party that submitted them. The constitutional defect arose because the Governor had already vetoed—without an override—the exact maps the *Johnson* Court adopted. The Governor's position is that the Legislature—along with any proper party—can submit proposed remedial maps, with the limitation that it intrudes on the Governor's constitutional authority for a court to adopt maps that the Governor has already vetoed.

Relatedly, Respondents mistakenly argue that "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." (Johnson Br. 26.) This again is unconnected to the Governor's position, which is not that both the Governor and Legislature are required to approve adopted remedial maps. Rather, the Court may not ignore separation of powers principles by unquestioningly adopting maps that the Governor has vetoed. This Court's general power to adopt remedial maps in redistricting litigation is not in dispute.

Third, the Legislature asserts without support that "[o]nly the Legislature has the constitutional authority to make redistricting policy." (Legislature Br. 46.) Not so. The Court explicitly rejected a nearly identical argument in *Reynolds*: It is "unreasonable" to suggest that "that the framers of the constitution intended to exclude from the

reapportionment process the one institution guaranteed to represent the majority of the voting inhabitants of the state, the Governor." *Reynolds*, 22 Wis. 2d at 556–57. Both the Governor and the Legislature "are indispensable parts of the legislative process," *id.* at 557, underscoring why this Court must reject the *Johnson* Court's failure to respect the Governor's exercise of his veto power and the Legislature's failure to override.

### 2. Respondents' submissions reaffirm that the *Johnson* Court's missteps combined to violate the separation of powers.

In redistricting litigation, this Court has "the power to adopt on [its] own initiative a reapportionment plan which conforms to the requirements of art. IV, Wis. Const." *Reynolds*, 22 Wis. 2d at 569. The *Johnson* Court not only failed to execute that power, it "abdicate[d its] power to draft and execute a final plan of apportionment," functionally transferring that power to the Legislature. *Id.* at 571. This is inconsistent with the Wisconsin Constitution's separation of powers principles.

Respondents never address the Court's "power to draft and execute" a new redistricting plan. *Id.* Instead, they cite back to *Johnson I*, suggesting the Court had to adopt a hands-off approach to remedial mapmaking. The few other cases on which they rely highlight the ways in which the Court failed to properly exercise its judicial power.

For example, the Legislature quotes *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 107 N.W. 500, 511–12 (1906), for the uncontroversial proposition that "courts have the sole authority to 'administer remedies for remedial rights,' to issue 'judicial determinations,' and to enforce those decisions." (Legislature's Br. 43 (brackets and ellipsis omitted).) But *Chittenden* goes much further,

describing the judiciary's role relative to the other branches and making clear that courts cannot shrink from their judicial power. "Due process of law does not mean merely according to the will of the Legislature." *Chittenden*, 107 N.W. at 512. Nor may courts' decisions be "idle" or a "shallow pretense." *Id.* Rather, the *Chittenden* Court explained that when courts have "a right or duty to decide, the decision must, certainly, be something more than an impotent declaration." *Id.*

The Respondents also quote *State ex rel. Memmel v. Mundy*'s statement that "[t]he extent of an equitable remedy is determined by and may not properly exceed the effect of the constitutional violation." (Johnson Br. 28 (quoting 75 Wis. 2d 276, 28–89, 249 N.W.2d 573 (1977)). The *Mundy* Court also stressed, however, that "a court of equity has authority to tailor a remedy for the particular facts," 75 Wis. 2d at 288, and the Court affirmed the constitutionality and scope of the remedy at issue, *see id.* at 291.

*Chittenden* and *Mundy*, particularly when read along with the Court's cases addressing judicial authority to redistrict, confirm the vitality of judicial power and the Court's responsibility to exercise that power in reapportionment litigation. Those cases lead to one inescapable conclusion about *Johnson*'s string of missteps: the decision ran afoul of the separation of powers by abdicating the Court's constitutional obligation to exercise the judicial power, culminating in the adoption of vetoed maps.

First, by adopting a "least change" approach to select new maps, the *Johnson* Court subordinated its own "power to draft and execute a final plan of apportionment." *Reynolds*, 22 Wis. 2d at 571.

Second, *Johnson* ignored that the maps it relied on as a "template," *Johnson I*, 399 Wis. 2d 623, ¶ 23, were created using a "sharply partisan methodology," *Baldus v. Members of the Wisconsin Government Accountability Board*, 849 F. Supp. 2d 840, 858 (E.D. Wis. 2012). Consequently, the

*Johnson* Court not only enmeshed itself in further partisan entrenchment, it also failed to "tailor a remedy" to the underlying "particular facts." *Mundy*, 75 Wis. 2d at 288.

Third, the *Johnson* Court adopted the Legislature's proposed map by default, merely because it was the last remaining choice. *See Johnson v. Wis. Elections Comm'n,* 2022 WI 19, ¶ 154, 401 Wis. 2d. 198, 972 N.W.2d 559 (Hagedorn J., concurring) ("*Johnson III*"). The Court did not account for the Governor's veto of that identical plan, and it refused to conduct additional fact-finding despite an explicit invitation from the U.S. Supreme Court to do so. *See Johnson III*, 401 Wis. 2d. 198, ¶¶ 182–185 (Karofsky, J., dissenting). This effectively overrode the Governor's veto, improperly bending the Court's remedy to the "will of the Legislature." *Chittenden*, 107 N.W. at 512

Taken together, the *Johnson* Court's actions not only "abdicate[d its] power to draft and execute a final plan of apportionment which conforms to the requirements of art. IV, Wis. Const," *Reynolds*, 22 Wis. 2d at 571, it improperly elevated the power of the Legislature by deferring to the Legislature's proposed maps and ignoring the Governor's traditional role as a check on Legislative power.

### C. Adopting maps responsive to the vote, together with constitutional, statutory, and traditional redistricting principles, should guide the Court in imposing any remedy.

#### 1. The Court should ensure that remedial maps are responsive to the vote.

When this Court turns to a remedy here, the task is an exercise in "balancing." *Baumgart,* 2002 WL 34127471, at *2. As the Court has observed, "this court" acts as an "institution of state government" when adopting maps. *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 17, 249 Wis. 2d 706, 639 N.W.2d 537.

Acting as that institution comes with responsibilities: not only is the Court required to balance multiple criteria, but the Court also must guard against being a party to partisanship—something antithetical to a court's function. *See Prosser*, 793 F. Supp. At 867; *Wis. State AFL-CIO*, 543 F. Supp. At 638. It follows that redistricting courts properly analyze potential maps to discern if they are "responsive to changes" in voters' preferences to "ensure that all voters have 'an equal opportunity to translate their votes into representation.'" *Carter v. Chapman*, 270 A.3d 444, 470 (Pa. 2022) (citation omitted).

Respondents suggest that analyzing proposed remedial maps for responsiveness and bias somehow offends due process because, they say, there is no discernable standard. (Johnson Br. 35–36.) Their contention is baseless.

First, the Court is not tasked with determining how much partisanship is too much such that a partisan gerrymandering claim may lie. There is no gerrymandering claim proceeding in this case. Rather, the purpose of considering responsiveness and partisanship is to avoid creating unfair maps when crafting a *remedy*. Keeping the Court-as-mapmaker out of partisanship does not require tricky line drawing.

Second, courts across the country have analyzed maps based on responsiveness and partisanship. *See*, *e.g.*, *Carter*, 270 A.3d at 470; *Wattson v. Simon*, 970 N.W.2d 42, 52 (Minn. 2022); *Maestas v. Hall*, 274 P.3d 66, 76–77, 79 (N.M. 2012). Respondents' bald assertion that there is no discernible standard ignores the reality of those cases and the fact that there are multiple well-established standards for measuring responsiveness and partisanship. (*See* Governor's Opening Br. 29–30 (compiling metrics).)

Third, Respondents develop no argument that the basic due process elements would be implicated: a protected property or liberty right and a lack of procedures before deprivation of them. *See State v. Keister*, 2019 WI 26, ¶ 10, 385 Wis. 2d 739, 924 N.W.2d 203 (To prove a procedural due process violation, a party must show "a deprivation by state action of a constitutionally protected interest in 'life, liberty or property' without due process of law." (citation omitted)). Respondents have no cognizable interest in a particular map—meaning the first step is absent—and they are receiving process now, where they are free to present their arguments—meaning the second step is absent. Their baseless assertion of a due process problem should be rejected.

### 2. There is no basis for applying a "least change" approach.

The Legislature argues that the "least change" approach from *Johnson* must be applied here as a matter of precedent, but that misapprehends this action. (Legislature's Br. 54–57.) Unlike *Johnson*, this case does not concern maps enacted through the political process; rather, it concerns court-selected maps. Thus, even if "least change" made sense in *Johnson* (which it did not), there is no basis for applying "least change" to these distinct circumstances.

Further, as discussed in the Governor's first brief, *Johnson*'s reliance on "least change" was fundamentally flawed. Even if *Johnson* were potentially precedential, this Court should not follow it. *See Lynch*, 371 Wis. 2d 1, ¶ 39 n.18 (explaining that stare decisis may not apply when the "the precedential case was 'badly reasoned'" (citation omitted)). Using "least change" is problematic in at least four ways. (*See* Governor's Br. 30–34.)

First, since the *Johnson* litigation, the U.S. Supreme Court and other courts across the country have rejected "adherence to a previously used districting plan" when the

original map was flawed. *See*, *e.g.*, *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").

Second, the Wisconsin Constitution requires "apportion[ing] and district[ing] anew the members of the senate and assembly." Wis. Const. art. IV, § 3. And, when redistricting, this Court must ensure that any map it enacts "conforms to the requirements of art. IV, Wis. Const." *Reynolds*, 22 Wis. 2d at 569. A "least change" approach, which treats "the existing maps 'as a template'" for replacement maps, *Johnson I*, 399 Wis. 2d 623, ¶ 72, is antithetical to the Court's constitutional obligation to redistrict.

Third, using "least change" is harmful to democratic principles. Because "least change" results in remedial maps that adhere closely to existing maps, where the original maps already entrench one political party—as was the case before the *Johnson* litigation, *see Whitford v. Gill*, 218 F. Supp. 3d 837, 896 (W.D. Wis. 2016), *vacated and remanded on other grounds*, 138 S. Ct. 1916 (2018)—least change perpetuates that entrenchment. Partisan entrenchment is irreconcilable with redistricting's goal of "achieving . . . fair and effective representation for all citizens." *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973) (citation omitted).

Fourth, because "least change" tends to benefit already-advantaged political parties, it removes an in-power party's incentive to cooperate with the minority party during the legislative process. Thus, "least change" not only instills partisan bias, but it also encourages redistricting failure and impasse.

The Respondents do little to advocate for using "least change" beyond restating the *Johnson* Court's conclusions. (*See* Legislature's Br. 54–55; Johnson Br. 34.) As discussed above, stare decisis is weakest when a constitutional issue is at stake and the prior decision is badly reasoned. The many

shortcomings of using "least change" strongly counsel against using it again here.

Last, to the extent the Respondents offer any additional support for "least change," the only cases they cite are *federal*. (Legislature's Br. 56–57.) These federal cases are not instructive, as they involve "principles of federalism and comity" that do not arise in this case. *Growe v. Emison*, 507 U.S. 25, 32 (1993). Federalism and comity concerns might counsel in favor of *federal court* deference to existing legislative maps, which at an earlier time conceivably reflected at least some state policymakers' preferences. But when a *state court* redistricts, its actions do not implicate principles of federalism or comity. Instead, because "institutions of state government are primary in matters of redistricting, . . . *federalism requires deference to state high courts* for their resolution." *Jensen,* 249 Wis. 2d 706, ¶ 22 (emphasis added). The Legislature's reliance on federal authority is misplaced.

### D. The Court should consider proposed maps and supporting factual submissions from the parties and should adopt new maps expeditiously.

The parties and this Court are fully equipped to efficiently litigate a remedy in this case. The remedy phase requires only that the parties be given an opportunity to propose remedial maps, together with any supporting expert reports and briefs they wish to submit. In turn, the parties are equipped to expeditiously respond to those proposals. That is all that need occur for this Court to properly fulfill its role as remedial mapmaker and either adopt appropriate maps or fashion appropriate districts.

Respondents attempt to complicate this for no good reason. The Legislature, for instance, asserts it should get another shot at passing legislation, but its time to do so has long since passed—the process was attempted and failed prior to *Johnson I*, 399 Wis. 2d 623, ¶ 2.[2] The Legislature provides no good reason why it should be allowed to delay these proceedings to belatedly attempt it again, and it offers no indication that, if given the opportunity, it would in fact attempt to work with the Governor to enact fair maps. The Legislature's proposal should be a nonstarter.

The Legislature also proposes that it is too late to change the maps prior to the 2024 election, but it again does not back up its assertion. The neutral expert on what deadlines actually matter—the Wisconsin Elections Commission—has stated that maps should be in place by March 15, 2024, to avoid any administrative problems.[3] (Commission Br. 3.) There should be no difficultly in adhering to that date. The parties are no strangers to redistricting mechanics, and submission of proposed maps and corresponding papers can be made to the Court quickly after it rules on the merits. Alternatively, Petitioners have proposed an efficient use of a special master or referee that, if adopted as proposed, would lead to maps being in place by the March 15 deadline. (*See* Pet'rs' Br. 53 (providing for final deadlines no later than February 27, 2024).)

There is no basis for concluding that maps cannot be in place for the 2024 election. This Court can and should direct an efficient submission of proposals after its merits ruling.

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[2] In any event, the Legislature is free to pass new maps going forward.

[3] Although March 15 was supplied as the administratively desirable date, it may be that a somewhat later date would still suffice for purposes of holding the election.

## II. Other issues briefed by the Respondents outside of the Court's October 6 order.[4]

Respondents raise a variety of procedural arguments. Those arguments, at most, go to whether the Court should have accepted this original action to begin with. That ship has sailed, and for good reason: of course this Court properly exercises its original jurisdiction when faced with unconstitutional state legislative maps. Further, if this Court considers the procedural arguments in more detail, they all fail for multiple reasons.

### A. The Court has broad authority to accept original actions and tailor appropriate relief, and it is properly exercising that authority here.

Running through Respondents' procedural arguments is the theme that the Court, in accepting this original action, has done something procedurally irregular. That contention misapprehends this Court's original jurisdiction and gives short shrift to its broad powers and discretion.

As a leading treatise summarizes, "[i]t appears that the supreme court has broad power to grant any appropriate relief in an original action"; it further describes the "freedom of the supreme court to handle original jurisdiction matters as it deems appropriate." Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* 25-4 (9th ed.). It has long been the case that the Court properly exercises its original jurisdiction where a petition raises "a matter publici juris" in that it has unique "public importance" and statewide effect. *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 47–48 (1938).

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[4] The Legislature has filed a motion to dismiss raising these same arguments. The response here applies equally to the arguments raised in that motion to dismiss, and the Governor does not intend to separately respond to the motion unless this Court so directs.

This is a quintessential matter that "affect[s] the people at large." *Id.* at 48. This Court has stated as much: "There is no question but that this matter warrants this court's original jurisdiction; any reapportionment or redistricting case is, by definition, publici juris, implicating the sovereign rights of the people of this state." *Jensen*, 249 Wis. 2d 706, ¶ 17.

Thus, there is nothing irregular about exercising original jurisdiction to review the claims in this publicly important redistricting case.[5] That also is consistent with the fact that this Court has a duty to resolve pressing questions of constitutional importance. The "state high court has the final say—and thus final authority—over the interpretation of its own state's laws." Bryan A. Garner et al., *The Law of Judicial Precedent* 255 (2016); *see also Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶ 3, 394 Wis. 2d 33, 36, 949 N.W.2d 423, 425 (on "question of state law… this [C]ourt has the final word.").

In addition, the Court's superintending authority over "all courts" necessarily means it has authority to revisit its own rulings in *Johnson I-III* (assuming, for argument's sake, that is what the Court is doing). *See* Wis. Const. art. VII, § 3. As discussed above, in terms of stare decisis, the Court can and does revisit erroneous rulings of its own making. *See supra* part I.A.3. That makes sense: this Court not only is the last word on state constitutional matters, but its superintending authority in the court system "is unlimited in extent" and "indefinite in character." *In re Jerrell C.J.*, 2005 WI 105, ¶ 40, 283 Wis. 2d 145, 699 N.W.2d 110. The Court's power is "as broad and as flexible as necessary to insure the

[5] Thus, Respondents' arguments attempting to recast this case as a motion to reopen *Johnson*, as an improper collateral attack, or as an improper declaratory judgment action are without merit. (Legislature's Br. 48–52.) This Court has broad, freestanding authority to address the issues raised in this action, regardless of how Respondents seek to characterize the suit.

due administration of justice in the courts of this state.'" *Koschkee v. Evers*, 2018 WI 82, ¶ 8, 382 Wis. 2d 666, 913 N.W.2d 878 (exercising superintending authority in original action).[6] Relatedly, a court may "always permit or order such modification or suspension [of its own previous injunctions] where it believes the ends of justice will be thereby served"; "[s]uch change in the law does not deprive the complainant of any vested right in the injunction because no such vested right exists." *Condura Const. Co. v. Milwaukee Bldg. & Const. Trades Council AFL*, 8 Wis. 2d 541, 546, 99 N.W.2d 751 (1959) (citation omitted).

It follows that there is no procedural barrier to this Court reaching the merits, as it may craft procedures "to implement a remedy for a violation of recognized rights" under its broad and malleable powers. *State v. Ernst*, 2005 WI 107, ¶ 19, 283 Wis. 2d 300, 699 N.W.2d 92. All of Respondents' procedural arguments fall away given that the Court has already properly decided to accept this original action and proceed to the merits.

For the sake of completeness, if the procedural arguments were analyzed in more detail, they would each fail for additional reasons, discussed next.

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[6] The history of article VII, section 3 makes clear that the superintending authority applies to the Court's authority to revisit its own decisions. Originally, the provision stated: "The supreme court shall have a general superintending control over all *inferior* courts." Wis. Const. art. VII, § 3 (1849) (emphasis added). In 1978, it was amended to its current form, providing: "The supreme court shall have superintending and administrative authority over *all* courts." Wis. Const. art. VII, § 3 (emphasis added); *see also In re Jerrell C.J.*, 2005 WI 105, ¶¶ 70–95, 283 Wis. 2d 145, 699 N.W.2d 110 (Abrahamson, C.J., concurring) (describing evolution of superintending authority).

### B. The Governor has standing under established law.

It is settled law that the Governor has standing in a redistricting lawsuit challenging the constitutionality of districts: "This [C]ourt has consistently held that the state, acting either through the Governor or the Attorney General, may challenge the constitutionality of a state reapportionment plan as a violation of state constitutional rights of the citizens." *Reynolds*, 22 Wis. 2d at 552 (approving the Governor acting as "relator" in a redistricting challenge). When the Governor so acts, he acts on behalf of the public "to protect the constitutional right of its citizens to an equitable apportionment." *Id.*

There thus is no bona fide standing issue in this case. Because the Governor may act on behalf of all citizens to challenge the maps' constitutionality and promote their right to equitable apportionment, there is no question that at least one Petitioner has standing to challenge all districts and seek a remedy. In other words, Respondents' attempt to divvy up which districts may be challenged based on individual Petitioners' places of residence makes no possible difference (Legislature's Br. 19–20), because all a lawsuit needs is one party with standing: "[a]s long as there is 'at least one individual plaintiff who has demonstrated standing' . . . a court 'need not consider whether the other . . . plaintiffs have standing to maintain the suit.'" *Chi. Joe's Tea Room, LLC v. Vill. of Broadview*, 894 F.3d 807, 813 (7th Cir. 2018) (citing U.S. Supreme Court precedent).[7]

[7] The Wisconsin Supreme Court treats "federal case law as persuasive authority regarding standing questions." *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15 n.7, 326 Wis. 2d 1, 783 N.W.2d 855. If anything, Wisconsin's standing rules are more "permissive" than federal standing rules. *Teigen v. Wis. Elections Comm'n,* 2022 WI 64, ¶ 14, 403 Wis. 2d 607, 976 N.W.2d 519. "Unlike in federal courts, . . . standing in Wisconsin

Further, the Governor's standing is doubly supported here because the separation of powers claim implicates the Governor's own authority. The Governor of course has standing to litigate whether executive powers have been abridged. The Court has consistently recognized that governmental officers and entities may litigate alleged encroachment on that officer's or branch's powers. For example, in *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, this Court explained that the Legislature had standing for a claim "grounded in the concept of separation of powers" and an alleged invasion of "core powers." *Id.* ¶ 13; *see also Panzer v. Doyle*, 2004 WI 52, ¶ 42, 271 Wis. 2d 295, 680 N.W.2d 666 (rejecting standing challenge "when there is a claimed breach of the separation of powers"); *Koschkee v. Evers*, 382 Wis. 2d 666, ¶¶ 3–15 (officer has standing to challenge infringement of constitutional authority). Likewise, the Governor has standing because this case implicates executive veto authority: "The injury in fact to a legally protected interest . . . relates to the executive's constitutional power and duty to either approve or veto legislative acts." *Romer v. Colorado Gen. Assembly*, 810 P.2d 215, 219 (Colo. 1991) (recognizing a governor's standing).

The foregoing resolves any possible standing issue regarding the Governor and should make irrelevant other parties' standing since it is beyond dispute that at least one party has it.

### C. Laches does not apply to the Governor in this action.

Laches has three requirements: "(1) unreasonable delay . . . , (2) lack of knowledge on the part of the [party invoking laches] that the petitioner would be asserting [a

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is not a matter of jurisdiction, but of sound judicial policy," considering "judicial efficiency." *McConkey*, 326 Wis. 2d 1, ¶¶ 15, 18.

position], and (3) prejudice." *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 15, 389 Wis. 2d 516, 936 N.W.2d 587. Even where those elements are present "the court may—in its discretion—choose not to apply laches if it determines that application of the defense is not appropriate and equitable." *Id.*

Here, it is not appropriate to apply laches to the publicly important issue of whether Wisconsin's state legislative maps are constitutional and, in any event, the elements of laches are not satisfied.

First, laches cannot apply in these unique circumstances, where the harm is ongoing, and the Governor is a petitioner enforcing a generally applicable public right. Each on its own would be reason enough to reject the laches argument; together, they leave no doubt that laches is inappropriate.

Laches is inappropriate "[b]ecause of the ongoing nature of the violation." *Garza v. County of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990). *Garza* involved a 1988 lawsuit brought after "four rounds of elections" had occurred under a 1981 reapportionment plan. *Id.* A "regular reapportionment [was] scheduled to occur in 1991." *Id.* Nonetheless, laches did not apply because "each election" would cause a fresh injury. *Id.* Other courts have employed similar reasoning in redistricting cases. *E.g.*, *Luna v. County of Kern*, 291 F. Supp. 3d 1088, 1144 (E.D. Cal. 2018) (rejecting laches where there is an ongoing violation in a voting rights case); *Miller v. Bd. of Comm'rs*, 45 F. Supp. 2d 1369, 1373 (M.D. Ga. 1998) ("The defense of laches does not apply to voting rights actions wherein aggrieved voters seek permanent injunctive relief insofar as the electoral system in dispute has produced a recent injury or presents an ongoing injury to the voters."); *Ohio A. Philip Randolph Inst. v. Smith*, 335 F. Supp. 3d 988, 1002 (S.D. Ohio 2018) (laches inapplicable to redistricting suit seeking prospective injunctive relief); *League of Women Voters*

*of Michigan v. Benson*, 373 F. Supp. 3d 867, 909 (E.D. Mich.), *vacated sub nom. on different grounds in Chatfield v. League of Women Voters of Mich.*, 140 S. Ct. 429 (2019) (in redistricting matter, holding that laches inapplicable because of "ongoing or recurring harms").

Moreover, laches is unavailable because the Governor is challenging the ongoing violation of a right that is generally applicable, structural, and constitutional: lawful maps that govern voting throughout Wisconsin. When the Governor participates in redistricting actions, he is acting on behalf of Wisconsin's citizens to enforce *their* rights. *See Reynolds*, 22 Wis. 2d at 552. The Court has held that laches in inapplicable to this scenario: "[l]aches on the part of the government in bringing suit is said not to be a defense in the case of a claim which is founded on sovereign right" or "to a claim which is made by the government" "to protect a public right." *State v. Josefsberg*, 275 Wis. 142, 155, 81 N.W.2d 735 (1957); *accord State v. Chippewa Cable Co.*, 21 Wis. 2d 598, 608, 124 N.W.2d 616 (1963) ("the doctrine of laches is not applicable to an action by the state to protect a public right."); *see also Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("As a general rule, laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest.").

The Court need not reject Respondents' invocation of laches on any one of these bases (although it could). Together, the circumstances of this case—the Governor is a petitioner defending the public's rights from a constitutional violation that is ongoing, seeking only a prospective remedy—unquestionably demonstrate the inappropriateness of applying laches.

Second, there also is no cognizable prejudice because exclusively prospective relief imposes no prejudice "concerning elections to be held in future years." *Navarro v. Neal*, 716 F.3d 425, 429–30 (7th Cir. 2013). "[L]aches is

generally not a bar to prospective injunctive relief. . . . [T]he defendant will not be prejudiced by a bar on future conduct." *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 840 (9th Cir. 2002); *accord Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 799 (4th Cir. 2001).

Petitioners' request for prospective relief distinguishes this case from *Trump v. Biden,* 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568 (2020). In *Trump*, voters cast their votes in reliance on elections officials' instructions – instructions that were widely publicized and based in some instances on policies that were a decade old. Yet, the petitioner waited until after the election results were known to challenge the practices, arguing for the invalidation of hundreds of thousands of already-cast votes in an attempt to reverse the election results. The Court applied laches because "if the relief the Campaign sought was granted, it would [have] invalidate[d] nearly a quarter of a million ballots cast in reliance on interpretations of Wisconsin's election laws that were well-known before election day." *Id.* at ¶ 28.

Granting relief in this case would not undo any past election and instead would impose new maps prospectively for future elections. The Johnson Respondents attempt to manufacture prejudice because adopting new maps would cause certain Senators to run for re-election sooner than otherwise. But that in no way supports concluding, as they argue, that previous votes for those Senators would be invalidated. All votes in past elections were counted and the prevailing Senators were seated. If prospective relief is granted, all voters will be entitled to vote again and have their ballots counted.

At root, the Johnson Respondents' argument is that voters are prejudiced by voting in districts that comport with this state's Constitution. The opposite is true. "[I]ndividuals in the infirm districts . . . have suffered significant harm. Those citizens are entitled to have their rights vindicated as

soon as possible so that they can vote for their representatives under a constitutional apportionment plan." *Smith v. Beasley,* 946 F. Supp. 1174, 1212 (D.S.C. 1996).

Respondents' additional argument that their previous investment in the *Johnson* litigation would be prejudiced by prospective relief, (Legislature's Br. 22), is similarly untenable. Courts have repeatedly refused to treat litigation costs as prejudice. *See Prestwick Grp., Inc. v. Landmark Studio Ltd.*, No. 14-CV-731, 2015 WL 2384191, at *10 (E.D. Wis. May 19, 2015) (rejecting argument "that litigation costs should be considered as part of the prejudice analysis"); *see also Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 808 (8th Cir. 1979) ("[W]e reject the contention that the cost of litigation . . . by itself could constitute prejudice within the contemplation of a laches defense."). The *Johnson* litigation was necessary to resolve an impasse and remedy malapportionment; any delay in bringing contiguity and separation of powers claims did not cause the parties in *Johnson* to incur costs associated with that litigation.

Post-*Johnson*, the individual parties' have no vested interest in unconstitutional maps—rather, having lawful maps serves the public's interest. It concerns "the voting inhabitants of the state" and their interest in proper maps, *Reynolds*, 22 Wis. 2d at 557, with the aim of "fair and effective representation." *Gaffney*, 412 U.S. at 748. That interest is enhanced, not prejudiced, by this litigation. Consistent with that, courts have rejected laches in a redistricting matter even where "a remedial order favorable to the plaintiffs would likely carry with it a considerable price tag," because that is "a necessary consequence of ensuring that the voting rights of" the public "are upheld." *Knox v. Milwaukee Cnty. Bd. of Election Comm'rs*, 607 F. Supp. 1112, 1119 (E.D. Wis. 1985). Nor do allegations of "constituent confusion as to the identity of their elected representatives" and "political careers" give rise to "undue prejudice sufficient to establish laches." *Id.* at

1118–19. That makes sense: any prejudice must be viewed in terms of the true parties in interest to redistricting, the public, and the public is served by this kind of "parens patriae" suit. *Reynolds*, 22 Wis. 2d at 553.

In sum, there is no appropriate and equitable use of laches here. *Wren*, 389 Wis. 2d 516, ¶ 15. Rather, this Court should act to ensure Wisconsin's maps are legal, period.

### D. Neither preclusion nor estoppel apply.

#### 1. Equitable doctrines like preclusion and estoppel should not apply against government actors in their official capacities, especially where public rights are at stake.

Just like the laches doctrine generally does not apply to state actors forwarding public rights, the other equitable doctrines invoked by Respondents—preclusion and estoppel—have no proper application to the Governor here.

As a general matter, "[s]trong reasons of public policy exist why estoppel should not be invoked against the government, or an agency of government, when it is sought to exercise the police power for the protection of the public health, safety or general welfare." *Chippewa Cable Co.*, 21 Wis. 2d at 608. Thus, Wisconsin courts "do not apply equitable estoppel 'as freely against governmental agencies as [we do] in the case of private persons.'" *Vill. of Hobart v. Brown County*, 2005 WI 78, ¶ 29, 281 Wis. 2d 628, 643, 698 N.W.2d 83 (alteration in original) (citation omitted). Rather, "estoppel should be applied against the Government with utmost caution and restraint." *Wis. Dep't of Revenue v. Moebius Printing Co.*, 89 Wis. 2d 610, 638, 279 N.W.2d 213 (1979) (citation omitted).

Wisconsin courts have repeatedly ruled that doctrines like preclusion and estoppel should not apply to the government when, as here, it would be contrary to public policy—and it is clearly publicly important that the maps underlying our democracy be constitutional. *See*, *e.g.*, *Gould v. Dep't of Health & Soc. Servs.*, 216 Wis. 2d 356, 370, 576 N.W.2d 292 (Ct. App. 1998) ("We conclude that a state agency's position as a litigant is sufficiently different from that of a private litigant such that the economy of interests underlying a broad application of issue preclusion do not, as a general rule, justify the non-mutual offensive application of the doctrine against the agency."); *Teriaca v. Milwaukee Emps.' Ret. Sys./Annuity & Pension Bd.*, 2003 WI App 145, ¶ 15, 265 Wis. 2d 829, 667 N.W.2d 791 (same); *Davis v. Psych. Examining Bd.*, 146 Wis. 2d 595, 602, 431 N.W.2d 730 (Ct. App. 1988) ("[R]es judicata . . . principles do not apply to administrative agencies."); *Turkow v. DNR*, 216 Wis. 2d 273, 280, 576 N.W.2d 288 (Ct. App. 1998) (holding that "estoppel is not applicable" to an agency's duties).

In any event, even if these doctrines could be applied against the Governor, the prerequisites to imposing estoppel or issue or claim preclusion are not present, as discussed next.

### 2. Judicial estoppel would not apply for multiple additional reasons.

Three elements are required for judicial estoppel to apply: (1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position. *Salveson v. Douglas County*, 2001 WI 100, ¶ 38, 245 Wis. 2d 497, 630 N.W.2d 182. Even where those elements are present, whether to apply judicial estoppel is left to the discretion of the court. *Id.* For instance, it should not be applied when contrary to "public policy." *May v. May*, 2012 WI 35, ¶ 14, 339 Wis. 2d 626, 813 N.W.2d 179.

These criteria are not met here for the reasons discussed above and additional ones.

First, regarding contiguity, the Governor did not "convince[ ] the first court to adopt its position." *Salveson,* 245 Wis. 2d 497, ¶ 38. In fact, in *Johnson*, there was no adversarial briefing on contiguity. Further, after *Johnson I* was decided, the parties were bound to propose a "least change" map—and the existing maps already had noncontiguous districts. *Johnson I*, 399 Wis. 2d 623, ¶ 81.

Second, regarding separation of powers, the Governor took no inconsistent position and did not convince the *Johnson* court to adopt a different position. The circumstances giving rise to the separation of powers issue were a culmination of errors throughout the *Johnson* litigation and only came to fruition once the Court finally adopted the Legislature's vetoed maps. The Governor vigorously argued against that result. At no time did the Governor attempt to convince the *Johnson* Court that adoption of those vetoed maps posed no separation of powers problem.

Third, it remains the case that estoppel should not apply to this case about the fundamentals of our democracy. It can have no application as a matter of "public policy." *May*, 339 Wis. 2d 626, ¶ 14. The citizens of Wisconsin have a right to be heard on the propriety of Wisconsin's maps, period.

### 3. Claim preclusion would not apply for multiple additional reasons.

Respondents bear the burden on claim preclusion to prove its applicability. *DSG Evergreen Fam. Ltd. P'ship v. Town of Perry*, 2020 WI 23, ¶ 23, 390 Wis. 2d 533, 939 N.W.2d 564. They cannot meet that burden for the reasons stated above and for the additional reasons below.

Claim preclusion has three elements: "(1) identity between the parties or their privies in the prior and present

suits; (2) prior litigation resulted in a final judgment on the merits by a court with jurisdiction; and (3) identity of the causes of action in the two suits." *Kruckenberg v. Harvey*, 2005 WI 43, ¶ 21, 279 Wis. 2d 520, 694 N.W.2d 879. Further, "in certain types of cases 'the policy reasons for allowing an exception override the policy reasons for applying the general rule.'" *Id.* ¶ 37. In other words, the Court does not "'blindly apply' the doctrine of claim preclusion without exceptions," but rather applies it "to render justice," not "undermine[ ] it." *Kruckenberg,* 279 Wis. 2d 520, ¶ 40.

Here, assuming claim preclusion could apply at all, its criteria still would not be met for two reasons.

First, there is no identity of the causes of action, as required. *Johnson*'s claim was solely that of malapportionment: that the existing maps were illegal under the one-person-one-vote principle due to shifts in population. (*Johnson v. WEC*, 21AP1450-OA, *Petition for an Original Action* at 1 (Wis. Sup. Ct. Aug. 23, 2021).) Here, there are entirely different causes of action. Petitioners seek rulings on whether the state legislative maps are unlawfully noncontiguous and whether their adoption violated the separation of powers. (Pet. 42–43.) Those were not the claims in *Johnson* and, thus, there is no "identity of the causes of action" on that basic level.

Second, claim preclusion would not apply under equitable considerations to render justice. Again, the Governor participates in this action "on behalf of [Wisconsin's] citizens." *Reynolds*, 22 Wis. 2d at 553. Applying preclusion makes no sense in that public-rights context. There can be no policy reason to apply claim preclusion that would trump the universal public interest in holding elections according to proper maps.

Claim preclusion has no possible application here.

#### 4. Issue preclusion would not apply for multiple additional reasons.

The Legislature incorrectly asserts that issue preclusion bars all parties to the *Johnson* litigation, including the Governor, from challenging the current maps' contiguity and adherence to the separation of powers. (*See* Legislature's Br. 22–23 (contiguity), 41 (separation of powers).) For multiple reasons, Respondents do not meet their burden to show issue preclusion applies. *Aldrich v. Lab. & Indus. Rev. Comm'n*, 2012 WI 53, ¶ 88, 341 Wis. 2d 36, 814 N.W.2d 433, (stating burden).

For issue preclusion to apply, four prerequisites must be met:

> the question of fact or law that is sought to be precluded [1] actually must have been litigated [2] in a previous action and [3] be necessary to the judgment. [4] If the issue actually has been litigated and is necessary to the judgment, the circuit court must then conduct a fairness analysis to determine whether it is fundamentally fair to employ issue preclusion given the circumstances of the particular case at hand.

*Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶ 17, 281 Wis. 2d 448, 699 N.W.2d 54.

The Legislature fails to even identify—let alone prove—all four of these prerequisites. (*See* Legislature's Br. 23.) Here, assuming issue preclusion could apply at all, the first and fourth elements are not satisfied as to the Governor's claims.

##### a. The Governor's challenge to the current maps' contiguity was not actually litigated.

In the *Johnson* litigation, the parties stipulated to the definition of contiguity and thus did not actually litigate whether municipal islands satisfy the constitutional contiguity requirement. (Joint Stip. of Facts & Law ¶ 20,

*Johnson v. WEC*, No. 21AP1450-OA (Wis. Sup. Ct. Nov. 4, 2021).) "An issue is not actually litigated . . . if it is the subject of a stipulation between the parties." *City of Sheboygan v. Nytsch*, 2006 WI App 191, ¶ 12, 296 Wis. 2d 73, 722 N.W.2d 626 (quoting Restatement (Second) of Judgments § 27, cmt. e (1982));[8] *accord Molitor v. Advantage Cmty. Bank*, 2013 WI App 13, ¶ 46, 345 Wis. 2d 848, 826 N.W.2d 123 (unpublished, judge-authored) (quoting *City of Sheboygan*, 2006 WI App 191, ¶ 12 and stating same). Similarly, this Court has clearly stated that "issue preclusion should not rest on civil judgments by consent, stipulation, or default." *Mrozek*, 281 Wis. 2d 448, ¶ 20.

Here, because the parties to the *Johnson* litigation stipulated to the definition of contiguity, whether the non-contiguity in the current maps violates the Constitution was not "actually litigated" for issue preclusion purposes.

**b. The Governor's claim that enactment of the current maps violated the separation of powers was not actually litigated.**

The Legislature does not attempt to establish that the Governor's separation of powers claim was "actually litigated" for issue preclusion purposes. Instead, it just asserts that "laches, preclusion, and estoppel bar Petitioners' separation-of-powers claim just as they bar their contiguity claims," citing only to the sections of their brief addressing their procedural arguments about contiguity. (*See* Legislature's Br. 41.) Given the naked assertion of issue preclusion, the Legislature has failed to carry its burden to establish that the Governor's separation of powers claim is barred. *See Aldrich*, 341 Wis. 2d 36, ¶ 88.

[8] When this Court reviewed *City of Sheboygan*, it expressed "no position on the merits of the court of appeals' decision." *City of Sheboygan v. Nytsch*, 2008 WI 64, ¶ 3, 310 Wis. 2d 337, 750 N.W.2d 475.

In any event, the separation of powers issues raised here—that the *Johnson* Court improperly exercised the judicial power when it overrode the Governor's veto—was not "determined" by the *Johnson* Court, which denied the Governor's request for further briefing after the case was remanded from the U.S. Supreme Court. Because the *Johnson* Court did not address separation of powers issue, issue preclusion cannot apply to the Governor's separation of powers claim. *See Dostal v. Strand*, 2023 WI 6, ¶ 24, 405 Wis. 2d 572, 984 N.W.2d 382.

**c. Applying issue preclusion against the Governor to stop litigation of the bedrock constitutional issues here would violate fundamental fairness.**

As with Respondents' other procedural arguments, principles of fundamental fairness strongly weigh against issue preclusion. "Such determination of fundamental fairness is a matter of discretion to be determined . . . on a case-by-case basis." *Paige K.B. ex rel. Peterson v. Steven G.B.*, 226 Wis. 2d 210, 221, 594 N.W.2d 370 (1999) (citation omitted). There are at least five factors that are relevant to a court's fundamental fairness decision. *See Mrozek*, 281 Wis. 2d 448, ¶ 17. "No single factor is dispositive in the fundamental fairness analysis, and the final decision must rest on a 'sense of justice and equity.'" *Aldrich*, 341 Wis. 2d 36, ¶ 111.

Here, the first factor—"whether the party against whom preclusion is sought could have obtained review of the judgment," *Mrozek*, 281 Wis. 2d 448, ¶ 17—strongly counsels against applying issue preclusion because the *Johnson* litigation was an original action in this Court and thus no appeal was available to the parties on state constitutional grounds. Where an appeal is "unavailable" it "cut[s] strongly

in favor of not applying issue preclusion." *Aldrich*, 341 Wis. 2d 36, ¶ 114.

The third factor—"whether there are apt to be significant differences in the quality or extensiveness of the two proceedings such that relitigation of the issue is warranted," *Mrozek*, 281 Wis. 2d 448, ¶ 17—also does not support applying issue preclusion. The *Johnson* litigation suffered from numerous shortcomings from which this Court can learn with the benefit of hindsight. All said, the *Johnson* Court process endured multiple "difficult[ies]" that need not be repeated here. 401 Wis. 2d 198, ¶ 153 (Hagedorn, J., concurring).

Last, and most important, the fifth factor—"whether matters of public policy . . . would render the application of issue preclusion fundamentally unfair," *Mrozek*, 281 Wis. 2d 448, ¶ 17—weighs heavily against applying issue preclusion. "Redistricting determines the political landscape for the ensuing decade and thus public policy for years beyond." *Jensen*, 249 Wis. 2d 706, ¶ 10. "[A]ny reapportionment or redistricting case is, by definition, publici juris, implicating the sovereign rights of the people of this state." *Id.* at ¶ 17. The overarching public policy implications therefore warrant hearing the Governor's claims, particularly because the Governor, as the "only person" who "represents the people as a whole," *Reynolds*, 22 Wis. 2d at 558, is uniquely suited to defend the people's sovereign rights.

More specifically, the particular constitutional provisions at issue here make judicial oversight all the more important. As the Governor demonstrated in his opening brief, the Wisconsin Constitution's contiguity requirement was intended to ensure that legislative districts are composed of constituents with shared needs and interests and to prevent gerrymandering. (Governor Br. 11–12.) Likewise, the Constitution's separation of powers serves two vital purposes: it protects against encroachment by one branch on powers the

Constitution commits to the others, and it protects the people and their individual liberties. (Governor Br. 17–18.) Moreover, the Governor is seeking to vindicate executive veto power, a "core" executive power that dates back to the state's founding and is "uniquely broad and expansive" in Wisconsin. *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 450, 424 N.W.2d 385 (1988). Because foundational democratic principles are at the core of this litigation, applying issue preclusion—or any preclusion or estoppel doctrine—would violate fundamental fairness.

* * * *

As this Court has long recognized, "[t]here is no question but that this matter warrants this court's original jurisdiction." *Jensen*, 249 Wis. 2d 706, ¶ 17. Respondents' attempts to derail it run headlong into that proposition. Of course this Court should hear a case raising serious and meritorious challenges to the state legislative maps. The Court can and should address the infirmities, and it should do so efficiently. No further elections should be held under the current unconstitutional 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 Wisconsin Constitution's separation of powers. The Court should expeditiously adopt new maps prior to the next state legislative election's deadlines.

Dated this 30th 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 10,994 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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