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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.

RESPONSE 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

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INTRODUCTION

Despite four separate briefs, the Petitioner Parties[1] fail to marshal persuasive historical evidence or precedent for their novel contiguity and separation-of-power claims. They cannot point to anything in the text or first 100 years of Wisconsin's history that sheds much light on how the contiguity requirement should apply to municipal islands, which did not exist in 1848 or become relevant to redistricting until the 1960s. If anything, both text and history support allowing islands to keep towns and wards together, as the constitution prioritizes. They cannot deny that such islands have been allowed in legislative maps for the past fifty years and that both the Governor's and Legislature's maps included them last year. Although they suggest that this issue was somehow overlooked, it is undisputed that this Court was aware of the islands and approved them in *Johnson*. They do not explain how the islands—which affect very few voters—could possibly justify a wholesale reconstruction of the maps approved last year.

Nor do they cite a single case finding a separation-of-powers violation in similar circumstances; in the cases they do cite, courts did exactly what this Court did in *Johnson*—they considered all proposals equally, *including previously vetoed maps*, without giving special deference to any. Making this case even more abnormal, multiple of the parties from *Johnson* have now flipped positions, raising serious concerns of issue preclusion, claim preclusion, and judicial estoppel. Petitioners themselves had numerous opportunities to intervene and raise these issues in *Johnson*, but failed to do so. This Court should reject the claims, for any or all of these reasons.

[1] "Petitioner Parties" refers to the Petitioners, the Atkinson Intervenors, the Governor, and the Democratic Senators. Although the Democratic Senators are technically respondents, they advocate for the Petitioners on both claims.

But even if this Court were to find a violation on one or both of the claims, there is a very simple remedy, as the Johnson Intervenors previously explained and elaborate in more detail below. The Petitioner Parties do not give any reasons why the obvious remedy would be insufficient. Both claims are nothing more than Trojan horses—an attempt to use a perceived change in the composition of this Court to smuggle in the partisan gerrymandering claim that *Johnson* rejected and this Court has said it will not consider. To allow this gambit to succeed would raise profound questions of legitimacy and due process.

ARGUMENT

I. Question 1: The Existing State Legislative Maps Do Not Violate the Contiguity Requirements of the Wisconsin Constitution.

There are essentially four arguments made collectively by the Petitioner Parties in favor of the proposition that the existing maps violate the contiguity requirements of Article IV, Sections 4 and 5: (1) that *Johnson v. Wis. Elections Comm'n,* 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 ("*Johnson I*") and *Prosser v. Elections Bd.,* 793 F. Supp. 859 (W.D. Wis. 1992) did not adequately consider the contiguity issue and/or were incorrectly decided; (2) the word "contiguous," based on dictionary definitions, means literal contiguity; (3) the original drafters of the Wisconsin Constitution understood "contiguous" to mean literal contiguity; and (4) various annexation cases show that "contiguous" means literal contiguity. None of these arguments are persuasive.

A. *Johnson* and *Prosser* Control This Case.

The Petitioner Parties contend that both *Johnson* and *Prosser* were wrongly decided, suggesting that neither this Court nor the federal court spent enough time analyzing the contiguity issue, but that argument ignores what actually occurred in those cases.

Take *Prosser* first. The map submitted by the Legislature (at the time, controlled by Democrats) relied on municipal contiguity, whereas the plaintiffs' maps (led by David Prosser, then a Republican member of the Assembly; referred to as the "Prosser Plans") used literal contiguity. Thus, the dispute over literal versus municipal contiguity was squarely presented and litigated in that case. The court had to decide if literal contiguity was required because, if it was, only the Prosser Plans would comply. Yet the court held to the contrary: "Towns in Wisconsin are permitted to annex noncontiguous areas, and this is sometimes done. The legislative plan treats these 'islands' … as if they were contiguous. … *We are not persuaded by the plaintiffs' argument that the Wisconsin constitution requires literal contiguity.*" 793 F. Supp. at 866 (emphasis added). Thus, the issue was both argued and decided in *Prosser*.

Then, in *Johnson*, over all three iterations, every Justice of this Court affirmed *Prosser*'s holding with respect to contiguity. In *Johnson I*, this Court held that "detached portions of [a] municipality [are] legally contiguous even if the area around the island is part of a different district." 2021 WI 87, ¶36. No Justice disagreed with this portion of the opinion. In *Johnson II*, the three dissenting Justices in *Johnson I* plus Justice Hagedorn held that "all districts [in the Governor's map] are contiguous"—even though the Governor's map contained municipal islands. 2022 WI 14, ¶9. And in *Johnson III*, a different majority held that "[t]he assembly districts [in the Legislature's map] are contiguous," 2022 WI 19, ¶70, and no Justice disagreed with that holding.

Given that history, the Petitioner Parties' argument that this was all just "nonbinding dicta" is puzzling, to say the least. Pet'rs. Br. 21; Governor's Br. 14.[2] The meaning of "contiguous" was not a "tangential matter"—it was "central to the question presented." *Wisconsin Just.*

[2] Page numbers refer to the pagination at the bottom of the briefs.

Initiative, Inc. v. Wisconsin Elections Comm'n, 2023 WI 38, ¶142, 407 Wis. 2d 87, 990 N.W.2d 122 (Hagedorn, J., concurring). The main question in *Johnson* was "what factors [this Court] should [ ] consider in evaluating or creating new maps." 2021 WI 87 at ¶7. The task before the Court was to adopt maps that complied with the state constitution. As this Court recognized, contiguity was one of the core issues that needed to be understood and addressed. After considering all the parties' submissions, this Court decided that contiguity meant municipal contiguity, and that all maps satisfied that requirement. To argue that a legal principle that this Court (1) asked to be addressed, (2) decided, and (3) relied upon in formulating a remedy was merely "dicta" stretches that concept far beyond anything recognizable.

The Petitioners' argument that this Court failed to "acknowledge *Lamb*," Pet'rs. Br. 21, is also more than a little strange, given that this Court *cited Lamb* directly in its discussion of contiguity. 2021 WI 87, ¶36. This Court clearly was aware of that decision and nevertheless came to the same conclusion as *Prosser*. Moreover, as the Johnson Intervenors explained, *Lamb* was *not* a dispute about literal versus municipal contiguity; the issue was never argued or even considered in that case. Johnson Intervenors' Br. 13–14. To the extent anything is dicta, it is the passage in *Lamb* that the Petitioner Parties put so much weight upon—not the direct holdings in *Prosser* and *Johnson* on the question.

As the Johnson Intervenors explained and this Court is well aware, overruling a prior case—especially one as recent as *Johnson*—requires a "compelling [ ] justification," and a mere "change in the membership of the court" is not sufficient. Johnson Intervenors' Br. 22. The Petitioner Parties do not even attempt to apply the *stare decisis* factors for overruling a case, much less provide a "compelling justification" for doing so. Thus, *Johnson* and *Prosser* control here and resolve the contiguity claim.

B. The Petitioner Parties Do Not Point to Any Persuasive Basis for Overruling *Prosser* and *Johnson*

Even if this Court were inclined to reconsider *Prosser*'s and *Johnson*'s holdings with respect to contiguity, the Petitioner Parties do not point to anything persuasive from the text or history to lead to a different result.

Start with the text. Neither § 4 nor § 5 of article IV define the word "contiguous." And dictionaries are not particularly illuminating. As the Legislature points out, numerous dictionaries (from the 1800s and today) define the word "contiguous" to mean "near," "close to," or other similar phrases. Dictionary.com's second definition is: "in close proximity without actually touching; near."[3] This Court, itself, relied on a similar definition in *Town of Lyons v. City of Lake Geneva*, 56 Wis. 2d 331, 335–36, 202 N.W.2d 228 (1972), holding that "contiguous" does *not* always mean that the lands must be touching. There, this Court noted that "contiguous" was defined in Black's Law Dictionary, Fourth Edition, p. 391, to mean "in close proximity," and "near, though not in contact," as well as "neighboring," "adjoining," and "touching." *Id*. And, in fact, some of the very dictionaries the Petitioner Parties invoke contain similar definitions of contiguous. Noah Webster's 1848 dictionary, *see* Pet'rs. Br. 16, says that "the word [contiguous] is sometimes used in a wider sense, though not with strict propriety, for *adjacent* or *near*, without being absolutely in contact." Pet'rs. App. 007.[4] "Contiguous," like many words in the English language, has more than one meaning.

To the extent that the text provides any clues, it supports the holdings in *Prosser* and *Johnson*. Recall that article IV, § 4 requires districts "to be bounded by county, precinct, town or ward lines." This

[3] https://www.dictionary.com/browse/contiguous

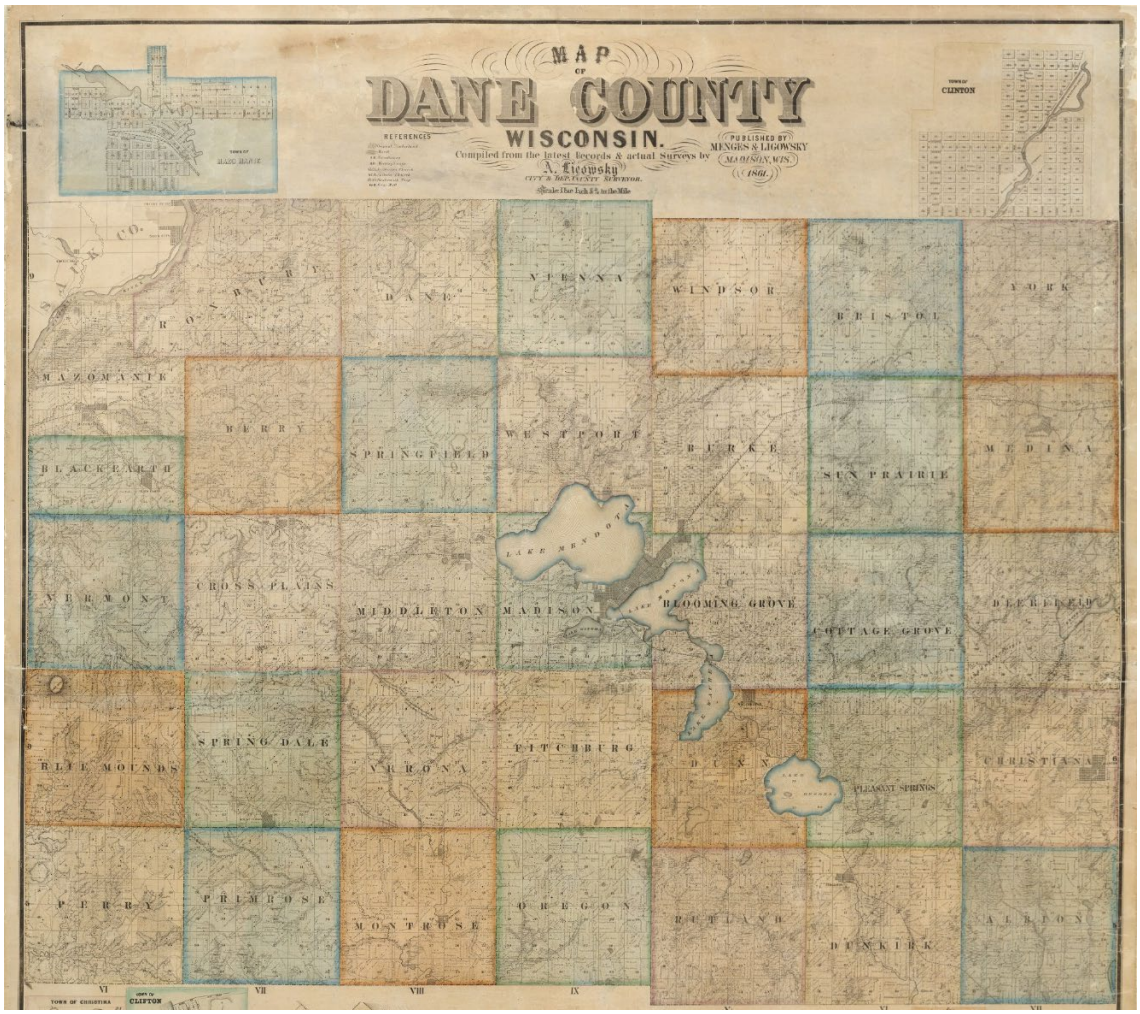
[4] https://books.google.com/books?id=0GBGAAAAYAAJ&pg=PA222

requirement comes *first*, suggesting not only that it takes precedence, but also that, when § 4 later refers to contiguity, it means contiguity *between* the different precincts, towns, or wards that are combined to form a district, rather than contiguity *within* a given town, precinct, or ward. *See State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 742 (1892) (holding that, "[u]nder familiar and elementary rules of construction," preserving county lines "should first be regarded in making [an] apportionment," because counties are "first named" in the constitution); *Lamb*, 53 N.W. at 57 (emphasizing that, after county lines, "the primary factors of each assembly district are either towns or wards or both," and "neither a town nor a ward can be divided."). The re-use of the word "contiguous" in article IV, § 5, reinforces the point. Given that senate districts are to be formed by a combination of assembly districts which were already contiguous ("no assembly district shall be divided"), "contiguous" clearly referred to a connection between the subunits that formed the district.

In other words, when multiple towns, precincts, or wards are combined to form a district, the various different jurisdictional units must be connected to each other—the Legislature could not combine two towns at the opposite corners of a county, for example—but the constitution is not concerned with *intra*– town, precinct, or ward contiguity. The initial districts established in the Constitution illustrate the point: besides those that consisted of one or more counties, every single district was simply a combination of towns, wards, and/or precincts. Dane County, for example, had three districts: one consisting of "[t]he towns of Madison, Cross Plains, Clarkson, Springfield, Verona, Montrose, Oregon, and Greenfield"; another of "[t]he towns of Rome, Dunkirk, Christiana, Albion and Rutland," and a third of "[t]he towns of Windsor, Sun Prairie and Cottage Grove." All of the early apportionment acts followed the same pattern—every assembly district was a combination of towns, wards, or precincts, and, occasionally, villages or

cities. *E.g.* ch. 499, Laws of 1852; ch. 109, Laws of 1856; ch. 216, Laws of 1861; ch. 101, Laws of 1866. The focus, clearly, was on combining nearby jurisdictional subdivisions.

Now, at the time, most towns consisted of near-perfect squares (town boundaries usually subdivided a county in a neat checkerboard pattern); so combining towns also happened to result in literal contiguity. Here is a map of Dane County's town boundaries circa 1861[5]:



[5] A high resolution version is available online at https://content.wisconsinhistory.org/digital/collection/maps/id/1839/rec/27. Many other maps of early town boundaries are also available online on the Wisconsin Historical Society's website.

Over time, however, as various cities and villages incorporated, the surrounding towns were sometimes fragmented, such as when Madison was initially incorporated, dividing the Town of Madison into "5 such separated portions of the town." *Town of Blooming Grove v. City of Madison*, 275 Wis. 342, 346, 81 N.W.2d 721 (1957). But even then, given that population equality was considered second in importance to preserving county, town, and ward boundaries, *Cunningham*, 51 N.W. at 745; *Lamb*, 53 N.W. at 56, the issue of municipal "islands" was never confronted because apportionment maps could simply combine a city or village with the surrounding town. *E.g.* Laws of 1861; ch. 101 (making "the town of Madison and the City of Madison" an assembly district).

All of that changed in the 1960s with the Supreme Court's decision in *Reynolds v. Sims*, 377 U.S. 533 (1964), as the Johnson Intervenors explained. Johnson Intervenors' Br. 16–17. That decision, along with population changes and the increasing formation of cities and villages, finally forced the Legislature and courts to consider—for the first time—how the "contiguity" requirement would apply to municipal "islands." And both the Legislature and the courts concluded that "[i]sland territory (territory belonging to a city, town or village but not contiguous to the main part thereof) is considered a contiguous part of its municipality." Wis. Stat. §4.001(2) (1971); *Prosser*, 793 F. Supp. at 866. That has now been the rule for the last 50 years.

The Petitioner Parties do not point to anything relevant from either the drafting of the Wisconsin Constitution, or the next one hundred years, that sheds any light on the meaning of the word "contiguous" with respect to municipal islands, precisely because the question was never considered until the mid-1900s. They emphasize that Calumet and Manitowoc Counties were given separate assembly representatives in the original map because they were perceived as being "disconnected." Pet'rs. Br. 18. But Calumet and Manitowoc Counties

share a long border; no one would dispute that they are contiguous. As the discussion they cite indicates, the concern was that these two counties were *politically* disconnected and had "separate[ ] [ ] interests." *Id*. If anything, that discussion supports the interpretation in *Prosser* and *Johnson*. Different sections of the same town, city, or village, although geographically separated, are still politically connected and have similar "interests," and so should be in the same assembly district, to the extent possible. Moreover, none of the municipal islands at issue here involve "far-flung territory," Pet'rs. Br. 18, separated at great distance from the core of the main district. They are instead tiny sections of the same town, city, or village, separated by small sections of land due to the unique history of incorporation and annexation in the local area.[6]

Petitioners also argue that the delegates to the Wisconsin Constitution in 1848 "presumably understood that, six years earlier, Congress used the … term 'contiguous territory'" to require that congressional elections be conducted using single-member "districts composed of contiguous territory." Pet'rs. Br. 18–19. Whether the delegates actually understood that is not known, and Petitioners have not explained the basis for that presumption. They cite no evidence that the delegates discussed it in any way at the convention, nor do they explain how or why this means that the word "contiguous" in the Wisconsin Constitution does not include municipal contiguity. In fact, none of the Petitioner Parties point to any discussion of municipal versus literal contiguity at the time of the convention.

[6] Petitioners suggest that some of the islands do not reflect municipal boundaries, circling a few in the Oshkosh area. Pet'rs. Br. 27. But these all appear to be ward splits by the City of Oshkosh, itself. The apportionment map simply appears to have kept entire Oshkosh wards in the same assembly district. As far as the Johnson Intervenors have been able to determine, these "ward islands" resulted from a series of annexations from the Town of Algoma by the City of Oshkosh after the 2010 redistricting cycle.

The rest of the Petitioner Parties' historical argument is that the first apportionment consisted of districts that were all literally contiguous. But, as explained above, that had far more to do with the fact that the early maps were all based on county, town, and ward lines—which were almost entirely simple squares at the time—and that the districts were not as strictly bound to population equality as they are today. See 58 Op. Atty. Gen. 88 (1969); *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 635 (E.D. Wis. 1982). The original apportionments would likely be unconstitutional today. The first legislative apportionment in 1852, for example, was nothing but an apportionment based on counties and towns with no accounting for equal population of any kind. ch. 499, Laws of 1852. In fact, Wisconsin was not apportioned based on population until 1972. *Wisconsin State AFL-CIO*, 543 F. Supp. at 637.

C. Annexation Cases Are of Little Use in Determining the Meaning of "Contiguous" in the Apportionment Context.

The Petitioner Parties rely on a number of annexation cases to support their definition of "contiguous," but they provide little support for the Petitioner Parties' position. First, the annexation cases vary on the meaning of contiguous. *See*, *Chi. & N.W.R. Co. v. Town of Oconto*, 50 Wis. 189, 6 N.W. 607 (holding that to be "contiguous" parcels must be touching); *Town of Lyons*, 56 Wis. 2d at 335–36 (holding that "contiguous" does *not* always mean that the lands must be touching). More recently, this Court in *Town of Delavan v. City of Delavan*, 176 Wis. 2d 516, 530–31, 500 N.W.2d 268 (1993), approved an annexation because the parcel to be annexed was near enough to the annexing municipality and the difference was trivial.

The Petitioner Parties also ignore *Town of Blooming Grove*, 275 Wis. 342, which noted that when the Legislature incorporated the City

of Madison only eight years after the adoption of the constitution, that act divided the Town of Madison into five separate (meaning not literally contiguous) portions. *Id*. at 346. That was done even though Wisconsin law required that towns be made up of contiguous territory. *Id*. at 345 (citing *Oconto* for the proposition that "a town must consist of contiguous territory"). The only way to explain that event is that the Town of Madison was still considered contiguous, even though its various parts were not touching. The Court even explained a theoretical justification for this: "a town [i]s a political subdivision of a county the existence and boundaries of which remain unaffected by the incorporation of cities and villages just as is the case with counties." *Id*. at 346.

Finally, there can be no dispute that the various annexation statutes allow for situations that *result* in separate sections of the same municipality. That was the situation addressed directly in *Blooming Grove*. Moreover, current Wisconsin statutes permit the annexation of land "lying near" to a municipality even if not touching, Wis. Stat. §66.0223(1), as well as creating a "town island" surrounded by a city or village, Wis. Stat. §66.0221(2). Regardless of how they originated, the reality is that Wisconsin now has hundreds of municipal islands, as the existing map shows. Redistricting must account for this reality, and should allow keeping political jurisdictions together, to the maximum extent possible.

D. Interpreting "Contiguous" to mean Municipal Contiguity Balances the Two Separate Requirements of Article IV, Section 4.

As noted above, preserving county, town, and ward boundaries is also a constitutional requirement in article IV, § 4, and this Court has treated it as taking precedence, since it comes first in the text. *Cunningham*, 51 N.W. at 742; *Lamb*, 53 N.W. at 57. As everyone agrees, strict population requirements make it impossible to perfectly comply

with this requirement, *Wisconsin State AFL-CIO*, 543 F. Supp. at 635 (E.D. Wis. 1982), but preserving municipal boundaries is still an important constitutional directive. If this Court interpreted contiguity to mean literal contiguity, it will necessarily increase the number of municipal splits, as the Petitioner Parties appear to concede, resulting in a greater intrusion on the first part of article IV, § 4. The Atkinson Intervenors admit that "making districts contiguous could require splitting wards and municipalities," given the interrelated nature of these requirements: "Improving a district's performance on one requirement often creates 'downstream consequences' for the district's compliance with other requirements." Atkinson Intervenors' Br. 32 and n.9. The two separate requirements in Art. IV, § 4 can both be honored (to the maximum extent possible) if contiguity means municipal contiguity.

II. Question 2: The Petitioner Parties Fail to Provide Any Persuasive Support for the Separation of Powers Claim.

The Petitioner Parties all assert that this Court violated Wisconsin's separation-of-powers doctrine when it adopted the Legislature's proposed map because, as they put it, that map was "the precise map proposed by the Legislature but vetoed by the Governor." Pet'rs. Br. 29; Atkinson Intervenors' Br. 18 ("the very same maps"); Governor's Br. 16 ("the very maps"); Democratic Senators' Br. 19 ("the very map"). Their theory is that, by adopting that one, "precise map," this Court somehow overrode the Governor's veto power.

What the Petitioner Parties' overlook, however, is that judicial participation in redistricting is *not* part of the legislative process. As the Johnson Intervenors and the Legislature explained, *Johnson* was a necessary exercise of judicial—not legislative—power, to remedy constitutionally defective maps after the legislative redistricting process had failed. Johnson Intervenors' Br. 25–26; Legislature's Br. 42–43. No

one disputes that the Governor plays an integral role in the legislative redistricting process—the Johnson Intervenors expressly acknowledged that role. Johnson Intervenors' Br. 23–24. But when legislative redistricting fails due to an impasse between the legislative and executive branches, the legislative process ends and judicial involvement begins, the purpose of which is to remedy the undisputed constitutional defect in the existing maps. *See Johnson I*, 2021 WI 87, ¶¶17–19, 71–72 (main op.); *id*. ¶¶82–85 (Hagedorn, J., concurring).

Over the past several decades, courts have consistently been involved in Wisconsin redistricting disputes. *See Jensen v. Wis. Elections Bd*., 2002 WI 13, ¶7, 249 Wis. 2d 706, 639 N.W.2d 537; *Johnson I*, 2021 WI 87, ¶19. Contrary to the Democratic Senators' assertions, the legislative redistricting process in *Johnson* was not "incomplete." Democratic Senators' Br. 18. The process failed, having reached an impasse, as often happens in redistricting. The upcoming election could not be conducted with the existing maps, which were then unconstitutional due to population shifts, so this Court's involvement was appropriate and necessary. *Johnson I*, 2021 WI 87, ¶¶17–19 (main op.); *Id*. ¶82 (Hagedorn, J., concurring). This Court has a duty to intervene in the event of a redistricting impasse, and, when that happens, the Court's role in redistricting is a judicial function.

The Petitioner Parties cite no authority to support their novel claim that, in redistricting litigation, this (or any) Court's ultimate adoption of maps submitted by the Legislature that had previously been vetoed somehow violates the separation of powers doctrine. The Governor and Democratic Senators do not even pretend that there is case law in support, relying instead on general principles about the Governor's role in the legislative process and rhetorical arguments as to how that applies here. *See* Democratic Senators' Br. 17–21; Governor's Br. 16–24. The Petitioners and Atkinson Intervenors cite a few cases, but

all are easily distinguished and ultimately reveal that the separation-of-powers claim has no basis.

Illustrating the weakness of their claim, the best—and only—case Petitioners could come up with is an obviously irrelevant New Mexico case. *State ex rel. American Federation of State, County & Municipal Employees v. Johnson*, 994 P.2d 727 (N.M. 1999). According to Petitioners, the New Mexico Supreme Court, "in parallel circumstances," "concluded that it could not order the adoption of vetoed legislation." Pet'rs. Br. 32. But the facts in that case are not remotely "parallel" to those here. Most obviously, it was not a redistricting case. Nor was there any constitutional violation that the Court needed to remedy. Instead, the petitioners there simply asked the New Mexico Supreme Court to order the governor, by writ of mandamus, to extend the duration of a public-employee bargaining agreement after a legislative attempt to do so was vetoed by the Governor. 994 P.2d at 727. In *Johnson*, by contrast, everyone agreed that the existing maps were unconstitutional and needed to be replaced. This Court did not—and was not asked to—issue a writ compelling the Governor to agree with the Legislature's proposed redistricting plan. The Court merely considered all proposed submissions to remedy the agreed-upon violation equally.

The Atkinson Intervenors also point to several cases, Atkinson Intervenors' Br. 20–21, but each is an example of courts declining to give special *deference* to vetoed redistricting plans; none of them held or indicate that the Legislature's maps could not be submitted, considered, or "ordered into effect as the litigation's ending point." Atkinson Intervenors' Br. 21. If anything, they suggest the opposite. Importantly, in the cited cases where courts accepted and reviewed various proposed maps, the courts' refusal to *defer* to vetoed maps did not *remove* those maps from the courts' consideration. Rather, those courts considered the legislatures' vetoed maps against required constitutional principles with

the same weight as every other party's maps. *O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982) ("[W]e are bound to give only 'thoughtful consideration' to plans that were passed by the state legislature but subsequently vetoed by the Governor."); *Hippert v. Ritchie*, 813 N.W.2d 374, 379 (Minn. 2012) ("The Hippert plaintiffs' proposed plan, which reflects in substantial part the Legislature's plan that the Governor vetoed, was considered on an equal footing with the proposed plans of the other parties to this action."). The fact that these courts were perfectly willing to consider plans that had been vetoed by the governor strongly undercuts the separation-of-powers claim here.

This Court did exactly the same thing in *Johnson*; it held that the Legislature's map would not receive any special deference, but would be considered equally with all other proposals. *Johnson I*, 2021 WI 87, ¶72 n.8 ("The legislature asks us to use the maps it passed during this redistricting cycle as a starting point, characterizing them as an expression of 'the policies and preferences of the State[.]' … The legislature's argument fails because the recent legislation did not survive the political process.") (citation omitted). Thus, none of these cases support the separation-of-powers claim.

Carstens v. Lamm, 543 F. Supp. 68 (D. Colo. 1982), which the Atkinson Intervenors deeply mischaracterize, illustrates the point further. They assert that *Carstens* declined to "override the Governor's veto" by adopting the Legislature's proposed (and previously vetoed) map, because it realized that "a partisan state legislature could simply pass any bill it wanted, wait for a gubernatorial veto, file suit on the issue, and have the Court defer to their proposal." Atkinson Intervenors' Br. 25. But in *Carsten*, as with the other cases the Atkinson Intervenors cite, the court declined to *defer to* the legislature's proposed maps as "current legislative policy," because those maps had failed the legislative process. *Carstens,* 543 F. Supp. at 79. Notably, the court also gave no

deference to the governor's maps for the same reason. *Id*. But the court did not refuse to *consider* the maps proposed by the legislature and governor, it instead chose to "regard the plans submitted by both the Legislature and the Governor as 'proffered current policy' rather than clear expressions of state policy and [would] review them in that light." *Id*. That is what this Court did in *Johnson*. The Legislature's maps were ultimately implemented after this Court reviewed all proffered maps against neutral standards and determined that the Legislature's maps were the only "legally compliant" maps it received. *Johnson III*, 2022 WI 19, ¶72 (main op.); *id*. ¶155 (Hagedorn, J., concurring).

Lastly, in their focus on the Governors' relationship to the legislative process, the Petitioner Parties fail to acknowledge the flipside of the arguments they raise: what of the Legislature's right to keep its core powers free from intrusion? "Legislative power is the power to make the law, to decide what the law should be." *Serv. Emps. Int'l Union, Local 1 (SEIU) v. Vos*, 2020 WI 67, ¶1, 393 Wis. 2d 38, 946 N.W.2d 35. If this Court violated the separation of powers doctrine by adopting the Legislature's maps, then *Johnson II*'s adoption of the Governor's congressional maps also violated the separation of powers doctrine by usurping the Legislature's right to draft those maps. The Democratic Senators' brief hints at this, *see* Democratic Senators' Br. 20–21, but does not follow the argument to its logical conclusion. If it did, they and the other Petitioner Parties would see that success on this argument necessarily renders the Governor's congressional maps unconstitutional too. And, as the Johnson Intervenors discussed in their opening brief, any map imposed by this Court would likewise violate separation of powers because the executive and legislative branches would not have drafted and approved it. *See* Johnson Intervenors' Br. 26–27.

In summary, none of the Petitioner Parties' arguments show that this Court's adoption of the current maps violated separation of powers.

III. Question 3: The Petitioner Parties Do Not Provide Any Reasons Why the Simple Remedy Would Be Insufficient.

In their opening brief, the Johnson Intervenors provided a preliminary overview of the number and population of "islands" to illustrate that there is a very simple remedy for both of the alleged violations—merely absorb the islands into their surrounding districts. Johnson Intervenors' Br. 29–33. In an appendix to their brief, the Legislature submitted a more thorough (and presumably complete) list of islands, with the population of each.[7] That report confirms the main points the Johnson Intervenors made in their opening brief, but they update the details below.

The Legislature's report identifies 282 islands.[8] Leg. App. 4–11. Of those, 90 have zero people in them. Another 102 have less than ten, and another 74 have less than 100. Only 16 islands have over 100 people, and only one has over 1,000 people.

Put in terms of districts, 11 of the 54 districts with islands have only islands with zero people in them.[9] Leg. App. 4–11. Another 11 have

[7] Intervenors had attempted to count the number of islands manually via Dave's redistricting app (which uses the data from the LTSB). Some of the discrepancy was due to different methodologies. Intervenors, for example, did not count sections touching via corners as "islands," whereas the Legislature's report does. And the Legislature's report treats different wards within an island as separate islands, even if physically connected. In other cases, some of the islands in the Legislature's report were not visible in Dave's redistricting app, or Intervenors simply missed them. Intervenors accept the Legislature's report as a complete and accurate list.

[8] The Legislature's report has 285 islands, but three of these, in district 89, are connected by water, which Petitioners have conceded are contiguous. Pet'rs. Br. 15 n.1.

[9] Assembly districts 37, 39, 44, 59, 66, 72, 76, 81, 91, 95, and 98. (This is the same list as in Intervenors' opening brief at p. 30, n.9, with the additions of districts 76 and 98, and the removal of district 6).

only islands with less than ten people in them,[10] and yet another 24 have only islands with less than 100 people.[11] Thus, only eight districts[12] have islands with more than 100 people, and five of these still have less than 300 total people in islands.[13] Of the 51 districts just described, assembly district 80 has the most people in islands, with a total of 431 people in 53 islands (only .7% of that district's current population). Only three districts (47, 54, and 68) have islands containing more than 1,000 people, and only one (47, in Madison), has over 1,500, with a total of 3,747 people in islands.

By the Johnson Intervenors' updated analysis using the numbers in the Legislature's report, if this Court were to do nothing more than absorb the islands into their containing districts, the total population deviation among all assembly districts would be 9.72%. And the majority of that deviation comes from three clusters of districts—districts 47–48 and 76–77 in Madison, districts 53–54 in Oshkosh, and districts 68 and 91 in Eau Claire. By making a few minor adjustments to these districts,[14] the Johnson Intervenors were able to get the total population deviation to 1.67%—below what this Court found acceptable in the Governor's map

[10] Assembly districts 3, 24, 25, 28, 32, 33, 41, 52, 83, 93, and 94. (This is the same list as in Intervenors' opening brief at p. 31, n.10, with the addition of district 83, and the removal of districts 60 and 88).

[11] Assembly districts 2, 5, 6, 15, 26, 27, 30, 38, 40, 42, 45, 46, 53, 58, 60, 61, 63, 67, 70, 79, 80, 86, 97, and 99. (This is the same list as in Intervenors' opening brief at p. 31, n.11, with the addition of districts 6, 60, and the removal of district 43).

[12] Assembly districts 29, 31, 43, 47, 48, 54, 68, and 88

[13] Assembly districts 29, 31, 43, 48, and 88.

[14] In the Madison cluster, moving ward 14 from district 48 to 47, moving part of ward 55 from district 76 to 77, and moving ward 71 from district 77 to 47; in the Oshkosh cluster, moving ward 2 from district 52 to 54; and in the Eau Claire cluster, moving wards 48 and 70 from district 91 to 68.

in *Johnson II*.[15] And this solution would only move between 16,000–17,000 total people from one district to another. If this Court finds a violation, it should make clear, at this stage, that it will adopt this simple remedy and allow the parties to weigh in on what adjustments to make to get the population deviation below 2%.

Petitioners assert—without any support whatsoever—that there is "no simple (or isolated) fix" to the contiguity claim and that the current maps are "unsalvageable." Pet'rs. Br. 47–48. According to them, the "constitutional infirmities … are far too widespread [to] permit it to serve as the starting point of a remedial map." Pet'rs. Br. 40. Likewise, the Atkinson Intervenors argue, also without support, that there is no easy remedy because the map is "entirely infected by noncontiguity." Atkinson Intervenors' Br. 36. These assertions are demonstrably false, as shown above. Petitioners may *want* this Court to "start from a clean slate," Pet'rs. Br. 40, but there is no legitimate reason for the Court to do so. As both the Johnson Intervenors and the Legislature explained, courts typically go no further than necessary to remedy any constitutional violation. Johnson Intervenors' Br. 28–29; Legislature's Br. 55–57. That principle goes to the heart of what it means to be a court and to the limits of the judicial power. *Id.* This Court should adopt the obvious, simple fix here if it holds that municipal islands are not contiguous.[16]

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[15] The Atkinson Intervenors also concede this would be within the acceptable range. *See* Atkinson Intervenors' Br. 27.

[16] The Governor's perfunctory argument based on the word "anew" in Article IV, § 3, does not add anything. Governor's Br. 32. That provision is simply a direction to the Legislature to adopt new maps in response to population changes reflected in the decennial census; it does not purport to dictate the scope of the remedy when redistricting comes to the Court due to an impasse between the Legislature and Governor. Even if that provision were relevant to redistricting *litigation*, it is clearly

The Petitioner Parties may argue that the simple remedy the Johnson Intervenors propose would result in more municipal splits, and while true, that is an unavoidable consequence of requiring literal contiguity, as courts have recognized. *Prosser*, 793 F. Supp. at 863 ("[T]he achievement of perfect contiguity and compactness would imply ruthless disregard for other elements of homogeneity; would require breaking up counties, towns, villages, wards, even neighborhoods."). Indeed, the Petitioner Parties concede the point. The Atkinson Intervenors admit that resolving contiguity "necessarily will impact the districts' degree of population equality [and] respect for political-subdivision boundaries," and, "[i]n particular, making districts contiguous could require splitting wards and municipalities." Atkinson Intervenors' Br. 32 and n.9. Likewise, Petitioners and the Governor submit that preserving political subdivisions is not "an inflexible requirement." Pet'rs. Br. 36–37; Governor's Br. 27 ("some allowances may be made for natural or political subdivision boundaries."). This concession is aptly made, given that *the very purpose* of the existing islands is to *preserve* municipal boundaries as much as possible. If this Court is to change fifty years of history and require literal contiguity, splitting municipalities will be inevitable, and therefore would not be a legitimate reason for rejecting the obvious solution of absorbing islands into their surrounding districts.

As the Johnson Intervenors explained, the simple fix described above would also remedy any separation-of-powers problem, to the extent this Court finds one, because the resulting map would no longer be "the precise map proposed by the Legislature but vetoed by the Governor"—which is Petitioners' theory. Pet'rs. Br. 29; *id*. 30 ("the precise maps"). The Governor, Atkinson Intervenors, and Democratic

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focused on redistricting to resolve population equality problems—which have already been resolved. It has no relevance whatsoever to the contiguity and separation-of-powers claims at issue here.

Senators all take the same view, emphasizing that their objection is limited to this Court adopting "the very same maps that the Legislature passed in SB 621." Atkinson Intervenors' Br. 18; *id*. at 23 ("These maps are not 'nearly identical' to the maps the Governor vetoed. … They *are* the maps the Governor vetoed."); Governor's Br. 16 (emphasizing the "unusual circumstances" of the Court adopting "the very maps that the Governor had vetoed"); *id*. 24 ("unique circumstances" of "install[ing] the Legislature's vetoed maps"); Democratic Senators' Br. 19 ("the very map …"). So too did the dissent in *Johnson III*. 2022 WI 19, ¶187 (Karofsky, J. dissenting) (arguing that the Court "judicially enact[ed] the very bill that failed the political process"). Nothing in any of the briefs of the Petitioner Parties provides any coherent rationale for why a modified map—one that resolves the contiguity problem—would not also resolve the separation-of-powers claim.

The remedy described above is the appropriate one because it is consistent with the proper role of this Court and its judicial power—to resolve the claims before it and nothing more. But that remedy is also, separately, required by this Court's "least changes" holding in *Johnson I*. In an attempt to circumvent *Johnson*, Petitioners and the Atkinson Intervenors argue that the "least-changes approach" was not a holding in *Johnson* and therefore "is not precedent." Pet'rs. Br. 45–46; Atkinson Intervenors' Br. 35. This grossly mischaracterizes the case. Although there were minor differences between Justice R. Bradley's majority opinion (joined by Chief Justice Ziegler and Justice Roggensack) and Justice Hagedorn's concurrence on *how* to implement a least-changes approach, a majority of the Justices *did* agree on using a least-changes approach, and they said so explicitly. 2021 WI 87, ¶82 n.4 (Hagedorn, J., concurring) ("I concur in the majority's conclusion[ ] that … our relief should modify existing maps under a least-change approach."). That is a binding, precedential holding of *Johnson*. *State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995) ("[If] a majority of the participating judges

… agreed on a particular point[,] [ ] it [is] considered the opinion of the court."); *Vincent v. Voight*, 2000 WI 93, ¶ 46, 236 Wis. 2d 588, 614 N.W.2d 388 (summarizing points on which "[t]he plurality and concurrence [ ] agreed" in a prior case and characterizing those as holdings).

None of the Petitioner Parties even attempt to apply this Court's precedents on stare decisis, much less provide any "compelling 'special justification'" for overruling *Johnson* on this point. *E.g. State v. Prado*, 2021 WI 64, ¶68, 397 Wis. 2d 719, 960 N.W.2d 869; Johnson Intervenors' Br. 22. Thus, they have waived any argument that *Johnson*'s least-changes holding should be overruled. *SEIU*, 2020 WI 67, ¶ 24 ("We do not step out of our neutral role to develop or construct arguments for parties; it is up to them to make their case.").

Even if this Court rejects the obvious remedy and starts from scratch, it should not consider the partisan results of any proposed replacement maps for the reasons the Johnson Intervenors explained in their opening brief. Johnson Intervenors' Br. 35–36. As expected, all of the Petitioner Parties ask this Court to consider the partisan effects of replacement maps, a transparent attempt to work the partisan gerrymandering claim that this Court declined to take into the back-end of this case. Pet'rs. Br. 37–41; Atkinson Intervenors' Br. 37–42; Governor's Br. 28–30; Democratic Senators' Br. 25–27.

But, as the Johnson Intervenors already explained, doing so would require overruling part of *Johnson*, decided less than two years ago. While Petitioners do ask this Court to overrule that part of *Johnson*, Pet'rs. Br. 37, they, again, make no attempt to apply this Court's precedents on stare decisis or to show that this case meets any of the five "special justification[s]" this Court has identified to overturn a holding of this Court. *State v. Johnson*, 2023 WI 39, ¶ 20, 407 Wis. 2d 195, 990

N.W.2d 174. And none fit here; the only thing that has changed is the membership of this Court, which is insufficient.[17]

In addition, considering the partisan impact of proposed maps would smuggle back into the case the very fact-finding that prompted this Court to decline consideration of the gerrymandering claims. Petitioners also make no attempt to explain how this Court should measure or determine the partisan "fairness" of a map. The Governor's brief, for example, name-checks—but does not explain—a series of complex statistical methods for "measuring" gerrymandering, implying that each are straightforward to apply and that their usefulness is not subject to dispute. That simply is not true.

Both the United States Supreme Court and this Court, in *Johnson*, recognized that there are no workable standards for determining whether a map is "fair" politically. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019); *Johnson I*, 2021 WI 87, ¶¶41–45. This was not a one-off conclusion or the product of only the current majority on the United States Supreme Court. *Rucho* traced an almost fifty-year history in which the Court (and a changing line-up of justices) were unable to agree on a standard by which partisan gerrymandering could be measured. *Rucho*, 139 S. Ct at 2496–98. All of the standards on offer "invariably sound in a desire for proportional representation." *Id.* at 2499. The

[17] Petitioners separately attempt to argue that *Johnson*'s holding regarding partisan effects is not binding here because, according to them, "the Court's decision not to consider the partisan implications of remedial maps was tied directly to its decision to impose a remedy with least changes." Pet'rs. Br. 40–41. That is not even a remotely fair characterization of *Johnson I*. This Court considered the question at length, separately from its "least-changes" holding, and held that it would be inappropriate for the Court to consider partisan effects because there are no "standards by which to judge partisan fairness," because deciding "what constitutes a 'fair' map poses an entirely subjective question," and because doing so would "plung[e] this court into the political thicket lurking beyond its constitutional boundaries," among other reasons. 2021 WI 87, ¶¶39–63.

Governor and Democratic Senators explicitly make that claim, arguing that "fairness" means that the political parties should get the same proportion of legislative seats as their share of the statewide vote, Governor's Br. 25; Democratic Senators' Br. 27, but this is inconsistent with a winner-take-all system, as the Supreme Court has recognized. *Rucho*, 139 S. Ct. at 2500. Consider a simple example. In a map where every district is equally competitive and has the same partisan makeup, the party that wins slightly less than half of the vote would receive *zero* seats. *Id*. at 2499 (giving the example of the Whigs in Alabama in 1840, who received "43 percent of the statewide vote, yet did not receive a single seat."); *Johnson I*, 2021 WI 87, ¶¶47–49 (giving the example of "third party candidates").

The methods proffered by the Petitioner Parties are intrinsically intertwined with the "natural political geography" of Wisconsin, *Rucho*, 139 S. Ct. at 2500, in which partisans are not uniformly distributed across the state or equally concentrated in separate enclaves. Proportional representation—whether measured by an "efficiency gap," mean-median difference, or otherwise—is not a neutral measure of "fairness," but an attempt to use this Court to adopt a Democratic gerrymander. As the federal courts in redistricting litigation last cycle found (after extensive fact-finding, by the way), Wisconsin's "political geography … affords the Republican Party a natural, but modest, advantage in the districting process," due to the "particularly high concentration of Democratic voters in urban centers like Milwaukee and Madison." *Whitford v. Gill*, 218 F. Supp. 3d 837, 921 (W.D. Wis. 2016); *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *6 (E.D. Wis. May 30, 2002); *Johnson I*, 2021 WI 87, ¶48. All four of the Petitioner Parties quote *Prosser*, 793 F. Supp. at 867, for the proposition that this Court should not select a map that allows "one party [to] do better than it would do under a plan drawn up by persons having no political agenda." Pet'rs. Br. 39; Atkinson Intervenors' Br. 39; Governor's

Br. 28; Democratic Senators' Br. 26. Yet that is exactly what this Court would be doing if it ignored Wisconsin's political geography and required any remedial map to allow each party to equally translate their share of the statewide vote into legislative seats, as the Governor and Democratic Senators urge.

It does little good for the Petitioner Parties to argue that some particular partisan outcome results in an efficiency gap that is just "too much." How are we to know other than by an ad hoc political judgment? Choosing from competing notions of partisan fairness and deciding "how much is too much" poses "basic questions that are political, not legal." *Rucho*, 139 S. Ct at 2500–01. As the Court noted, "[a]ny judicial decision on what is 'fair' in this context would be an 'unmoored determination' of the sort characteristic of a political question beyond the competence of the federal courts." *Id.* (citing *Zivotofsky v. Clinton*, 566 U. S. 189, 196 (2012)).

It is unlikely that this Court will find what the United States Supreme Court tried to find for fifty years, but could not. Any claim of judicial gerrymandering or judicial remedy for malapportionment must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral." *Rucho*, 139 S. Ct. at 2498 (citing *Vieth v. Jubelirer*, 541 U.S. 267, 306–308 (2004) (Kennedy, J., concurring)). To do otherwise would plunge this Court into the political thicket that it clearly wishes to—and must—avoid. The essentially standard-less undertaking would raise profound due process concerns.

Finally, the Petitioner Parties argue that this Court should not consider "core retention" or "senate disenfranchisement." Pet. Br. 43–45. Their gambit is obvious—the goal here is political, to change the makeup of the current Wisconsin Legislature as much as possible. Maximizing core retention and minimizing senate disenfranchisement are well-recognized "traditional redistricting criteria," as even the dissent in

Johnson acknowledged. *Baumgart*, 2002 WL 34127471, at *3; *Prosser*, 793 F. Supp. at 866; *Johnson I*, 2021 WI 87, ¶¶94, 97 (Dallet, J., dissenting); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) ("preserving the cores of prior districts"). These two factors minimize the harm to voters of being moved to a different district, which, for many, results in no longer being represented by the person they voted for and have come to know.

Petitioners' suggestion that *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35, 36 (1892), somehow "underscor[es] the conclusion that core retention is not a valid criterion," is completely meritless. Pet'rs. Br. 44. *Lamb* did not discuss or even consider "core retention." It merely recognized that people have to be moved between districts to resolve population inequalities. But that problem—the "changed composition of the State," as Petitioners put it—has been resolved by *Johnson*. No one argues otherwise. The only claims at issue here are contiguity and separation-of-powers. As explained, the simple remedy the Johnson Intervenors propose would resolve those claims in a way that would maximize core retention and minimize senate disenfranchisement.

IV. Question 4: Little Fact-Finding Would Be Required for the Simple Remedy; Anything Beyond That Would Require Substantial Fact-Finding, Especially if This Court Considers Partisan Effects.

As Petitioners already explained, if this Court adopts the simple remedy described above, little to no fact-finding would be required. If, on the other hand, this Court tosses out the existing maps and starts from scratch—even though the problems could be remedied easily with minor adjustments—substantial fact-finding would be required. Johnson Intervenors' Br. 37.

That is especially true if this Court accepts the Petitioner Parties' request to make the partisan effects of maps one of the factors this Court considers. Indeed, *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) contains a lengthy description of the competing evidence submitted in that case to assess the partisan effects of a map, as well as the effects of the political geography of Wisconsin. *Id*. at 857–62, 903–910, 912–27. As noted above, this case would require similar competing expert testimony, and depositions of those experts, at a minimum. Application of complicated statistical methods is going to require a trial. Basic fairness means disclosure of experts, expert discovery, and the opportunity to cross-examine opposing experts. Credibility determinations will have to be made. This is not what happened in *Johnson* and is not the stuff of original actions.

This Court denied the partisan gerrymandering claims precisely because of "the need for extensive fact-finding (if not a full-scale trial)" to resolve them. Order Partially Granting Petition at 2. The exact same is true if partisan effects are considered at the remedial phase. The extremely abbreviated schedule that Petitioners propose, Pet'rs. Br. 50–53, simply does not allow enough time to air an issue that, despite numerous attempts at nailing it down, the Supreme Court has found no workable standards for evaluating. *Rucho*, 139 S. Ct. 2484.

Finally, Petitioners argue that this Court "need not afford the political branches another opportunity to enact new maps." Pet'rs. Br. 53–55. If there is any separation-of-powers problem here, that would be it. The Constitution assigns to the Legislature and the Governor the primary role of redistricting. If this Court were to toss out the existing maps based on novel legal claims that could and should have been brought in the *Johnson* litigation, and then impose its own replacement map without giving the other branches any opportunity to correct

whatever problem this Court identifies, it would raise serious separation of powers concerns.

V. Issue Preclusion, Judicial Estoppel, and Claim Preclusion Apply in This Case.

The Petitioner Parties' briefing raises significant problems of issue and claim preclusion, as well as judicial estoppel. The Governor, the majority of the Atkinson Intervenors, and most of the Democratic Senators[18] were parties in the *Johnson* litigation. They are now re-litigating issues that were litigated and decided in that case, or could have been litigated in that case. And Petitioners had numerous opportunities to participate in *Johnson* and raise the issues they raise here. This violates the doctrines of issue preclusion, judicial estoppel, and claim preclusion.

A. Issue Preclusion and Judicial Estoppel

The doctrine of issue preclusion, as explained by Chief Justice Abrahamson in *Aldrich v. LIRC*, 2012 WI 53, 341 Wis. 2d 36, 814 N.W.2d 433, is designed to limit the re-litigation of issues that have already been litigated in a previous action. *Id.* ¶88. To determine whether issue preclusion applies, the first step is to ask whether the issue was "actually litigated and determined in the prior proceeding by a valid judgment … [and] the determination was essential to the judgment." *Id.* ¶97. The court then considers whether applying issue preclusion would be

[18] In *Johnson*, Senate Minority Leader Janet Bewley intervened "on behalf of the Senate Democratic Caucus," and called themselves the "Senate Democrats." Bewley Motion to Intervene (filed Oct. 6, 2021). Three of the five Democratic Senators named as respondents in this case were senators when *Johnson* was litigated. And they are represented by the same counsel.

"fundamentally fair," considering various factors. *Id.* ¶¶89, 110. That test is easily met here.

Contiguity was one of the issues that this Court said it would take into consideration when selecting new maps in *Johnson*, 2021 WI 87, ¶¶36–38, and the parties discussed the contiguity standard as part of the litigation.[19] The Governor, for example, argued that "Assembly and Senate districts also should be 'contiguous' … but municipal islands are acceptable." Governor's Brief at 17 (filed Dec. 15, 2021).

The Atkinson Intervenors (called the "Citizen Mathematicians and Scientists" in the *Johnson* case)[20] similarly cited *Prosser* for the proposition that the Wisconsin Constitution does not require "literal contiguity" where a town had annexed noncontiguous "islands" and "the distance between town and island is slight." Citizen Mathematicians' Br. 13 (filed Oct. 25, 2021). When advocating for their own maps, they again wrote: "An exception to this general rule of contiguity lies where 'annexation by municipalities creates a municipal "island."' Order ¶ 36. Such annexations are common in Wisconsin. In that circumstance, a district may contain detached portions of a single municipality and still be deemed contiguous for purposes of the state constitutional requirement, so long as 'the distance between town and [annexed] island is slight.'" Citizen Mathematicians' Br. 27 (filed Dec. 15, 2021).

This Court ultimately held that both the Governor's map and the Legislature's map, both of which contained islands, were contiguous, *Johnson II,* 2022 WI 14, ¶9; *Johnson III*, 2022 WI 19, ¶70, and that

[19] This is true not only for contiguity, but also for the least changes approach adopted in *Johnson*, as well as the holding that this Court will not consider partisan effects when selecting a remedy in redistricting litigation.

[20] *See* Atkinson Intervenors Motion to Intervene. The exceptions are Nathan Atkinson, Joanne Kane and Leah Dudley who were added to the group later and did not participate in *Johnson*. *Id.*

municipal contiguity was appropriate, *Johnson I,* 2021 WI 87, ¶36. The contiguity issue was raised, litigated, and decided in *Johnson*, and the Governor and a majority of the Atkinson Intervenors and Democratic Senators were parties in that case. They are now re-litigating an issue that was decided and incorporated in the final judgment in *Johnson*.

As an aside, not only are they attempting to re-litigate the issue, the Governor and Atkinson Intervenors are *changing their position on contiguity*, so the doctrine of judicial estoppel also applies and bars them from taking this inconsistent position. That doctrine is "intended to protect against a litigant playing fast and loose with the courts by asserting inconsistent positions." *State v. Harrison*, 2020 WI 35, ¶26, 391 Wis. 2d 161, 942 N.W.2d 310 (citation omitted). All three elements are clearly met here: the Governor's and Atkinson Intervenors' position now is "clearly inconsistent with the[ir] earlier position," "the facts at issue [are] the same in both cases," and they "convinced [this Court] to adopt [their] position" with respect to contiguity in *Johnson*. *Id.* ¶27. That sort of gamesmanship is exactly what judicial estoppel is meant to avoid.

Returning to issue preclusion, although Petitioners were not parties in *Johnson*, "an identity of parties is not required in issue preclusion." *N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 550–51, 525 N.W.2d 723, 727 (1995) (citing *Michelle T. v. Crozier,* 173 Wis. 2d 681, 687, 495 N.W.2d 327, 330 (1993)). When applied to a litigant who was not a party to the prior proceeding, the Court looks to see if the litigant has sufficient identity of interest with a prior party to satisfy due process. *Paige K.B. ex rel. Peterson v. Steven G.B.*, 226 Wis. 2d 210, 223, 594 N.W.2d 370, 376 (1999). Here, Petitioners do, given the unique history of this litigation. The Court in *Johnson* "granted intervention to all parties that sought it," *Johnson II*, 2022 WI 14, ¶2, including multiple groups of democratic voters, one of which was represented by the same attorneys who represent Petitioners here. The Governor, the

Legislature, the WEC, and the State Senate Democratic Caucus were all parties in *Johnson*. Moreover, all of the Petitioner Parties make the same arguments in their briefs, illustrating that they have the same interests.

For similar reasons, applying issue preclusion to the Petitioners would be "fundamentally fair." They had numerous opportunities to join *Johnson* to "obtain[ ] review" of the contiguity issue, yet they chose not to. *Aldrich*, 2012 WI 53, ¶110. Again, this Court "granted intervention to all parties that sought it." *Johnson II*, 2022 WI 14, ¶2. Petitioners could have sought to intervene when *Johnson* was first filed. Or, if they believed the parties were missing the correct interpretation of "contiguity," they could have sought to intervene after they saw the parties' briefing, or after this Court's decision in *Johnson I*, holding that the Constitution's contiguity requirement allows for municipal islands. 2021 WI 87, ¶36. Or they could have sought to intervene after this Court held, in *Johnson II*, that the Governor's maps were contiguous, even though they contained islands. Or they could have sought to intervene to file a motion to reconsider after this Court held that the Legislature's maps were contiguous in *Johnson III*. They even could have moved to intervene during the year after *Johnson III*, as long as they fell within the deadline for moving to reconsider the judgment. Wis. Stat. §806.07(2); *e.g.*, *C.L. v. Edson*, 140 Wis. 2d 168, 173, 409 N.W.2d 417 (Ct. App. 1987) (allowing a post-judgment motion to intervene). Yet they waited over a year and a half, until just days after the composition of the Court changed.

Even if this Court concludes that issue preclusion cannot apply because the Petitioners were not parties in *Johnson*, this only serves to reinforce the Johnson Intervenors' argument that the doctrine of laches should apply here and bar their claim. Johnson Intervenors' Br. 19–22. Most of the parties here are the same as those in *Johnson*, and multiple are now switching their position. Four of the Johnson Intervenors were

prevailing parties in *Johnson*, and they are now being forced to re-litigate the very holdings that they achieved in *Johnson* against the same parties they litigated against in *Johnson*. That is extraordinarily odd, deeply unfair, and adds to the due process issues enumerated in the Johnson Intervenors' Opening Brief.

B. Claim Preclusion

Finally, the doctrine of claim preclusion also bars the parties here from bringing claims that could have been brought in *Johnson*, which includes both the contiguity and separation-of-powers claims. There are three requirements for claim preclusion: (1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction. *State ex rel. Barksdale v. Litscher*, 2004 WI App 130, ¶13, 275 Wis. 2d 493, 685 N.W.2d 80. Unlike issue preclusion, claim preclusion extends to all claims that *could have been brought*, not just claims that were actually litigated. *Dostal v. Strand*, 2023 WI 6, ¶24, 405 Wis. 2d 572, 948 N.W.2d 382.

As explained above, there is identity between the parties. Most of the parties are the same, and even those that were not parties in *Johnson* are their privies—Petitioners stand in the same position as the Democratic voters in *Johnson*, they are represented by the same lawyers, and they easily could have become parties in *Johnson* but chose not to. This Court has previously held that there is an identity of parties when the parties are, "for the most part, identical," *Wickenhauser v. Lehtinen*, 2007 WI 82, ¶ 28, 302 Wis. 2d 41, 734 N.W.2d 855, and "privity exists when a person is so identified in interest with a party to former litigation that he or she represents precisely the same legal right in respect to the subject matter involved." *Pasko v. City of Milwaukee,* 2002 WI 33, ¶16, 252 Wis. 2d 1, 643 N.W.2d 72. The Petitioners here, who assert only their general interests as voters, have the same legal rights with respect to an

apportionment map as the many groups of voters who participated in the *Johnson* litigation.

There is also an "identity of claims" here. *Wickenhauser*, 2007 WI 82, ¶ 30. As this Court has explained, "all claims arising out of one transaction or factual situation are treated as being part of a single cause of action." *Id*. (citation omitted). "[I]t is irrelevant that the legal theories, remedies sought, and evidence used may be different between the first and second actions." *Id*. In both cases, the "transaction or factual situation" is the validity of the apportionment maps. The ultimate request in both cases was and is for an order declaring the apportionment maps unlawful and imposing new maps. There was a final judgment on the merits in *Johnson*, and there is no dispute that this is a court of competent jurisdiction.

Finally, both claims here were or could have been litigated in *Johnson*. As explained above, the contiguity issue was litigated there. While the separation of powers issue was not specifically litigated, it could have been. The Governor, or any of the other parties, could have objected to the Legislature's submission on separation-of-powers grounds—each party had a chance to comment on the other parties' submission—but none did. And, after Justice Karofsky hinted at the issue in her dissent in *Johnson III*, the Governor or any of the parties could have moved to reconsider on that basis.

In sum, there is no reason to give any of these parties a do-over. The claims and arguments raised here either were litigated or could have been litigated in *Johnson*.

* * * * *

Allowing the parties in the *Johnson* case to reargue and change their position on issues that were decided against them (including not

only contiguity but also the least changes approach adopted in *Johnson*, as well as the holding that this Court will not consider partisan effects when selecting a remedy in redistricting litigation), and to argue separation of powers, which could have been litigated in *Johnson*, further contributes to substantial due process concerns about the "fundamental fairness" of this proceeding. Johnson Intervenors' Br. 35–36. The preclusion and estoppel issues, combined with the *Caperton* issue referenced in the Johnson Intervenors' opening brief, the stare decisis issue, the laches issue, and the abbreviated schedule set by the Court, all give the appearance of a preordained outcome and raise questions about the fairness of this case.

CONCLUSION

This Court should hold that Petitioner's claims are barred by laches, stare decisis, issue preclusion, claim preclusion, or judicial estoppel, or reject their claims on the merits. At very least, this Court should adopt the simple and obvious remedy that resolves both claims.

Dated: October 30, 2023.

Respectfully submitted,

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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 10,538 words.

Dated: October 30, 2023.

Electronically Signed by Luke N. Berg

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