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SUPREME COURT

No. 2023AP001399-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 (DEE) 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, AND JOSEPH J. CZARNEZKI, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS COMMISSION; MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION; SENATOR ANDRÉ JACQUE, SENATOR TIM CARPENTER, SENATOR ROB HUTTON, SENATOR CHRIS LARSON, SENATOR DEVIN LEMAHIEU, SENATOR STEPHEN L. NASS, SENATOR JOHN JAGLER, SENATOR MARK SPREITZER, SENATOR HOWARD L. MARKLEIN, SENATOR RACHAEL CABRAL-GUEVARA, SENATOR VAN H. WANGGAARD, SENATOR JESSE L. JAMES, SENATOR ROMAINE ROBERT QUINN, SENATOR DIANNE H. HESSELBEIN, SENATOR CORY TOMCZYK, SENATOR JEFF SMITH, AND SENATOR 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 INTERVENOR-RESPONDENT WISCONSIN LEGISLATURE AND RESPONDENTS SENATORS CABRAL-GUEVARA, HUTTON, JACQUE, JAGLER, JAMES, KAPENGA, LEMAHIEU, MARKLEIN, NASS, QUINN, TOMCZYK, AND WANGGAARD

Counsel Listed on Following Page

BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Suite 2200
Madison, WI 53718
608.216.7995
kstjohn@bellgiftos.com

CONSOVOY MCCARTHY PLLC
TAYLOR A.R. MEEHAN*
RACHAEL C. TUCKER*
DANIEL M. VITAGLIANO*
C'ZAR D. BERNSTEIN**
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
703.243.9423
taylor@consovoymccarthy.com

LAWFAIR LLC
ADAM K. MORTARA, SBN 1038391
40 Burton Hills Blvd., Suite 200
Nashville, TN 37215
773.750.7154
mortara@lawfairllc.com

AUGUSTYN LAW LLC
JESSIE AUGUSTYN, SBN 1098680
1835 E. Edgewood Dr., Suite 105-478
Appleton, WI 54913
715.255.0817
jessie@augustynlaw.com

LEHOTSKY KELLER COHN LLP
SCOTT A. KELLER*
SHANNON GRAMMEL*
GABRIELA GONZALEZ-ARAIZA*
200 Massachusetts Avenue, NW
Suite 700
Washington, DC 20001
512.693.8350
scott@lkcfirm.com

LEHOTSKY KELLER COHN LLP
MATTHEW H. FREDERICK*
408 West 11th St., Fifth Floor
Austin, TX 78701
matt@lkcfirm.com

** Admitted pro hac vice*
*** Pro hac vice motion pending*

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INTRODUCTION

Deciding this case as Petitioners want would require this Court to dispense with indispensable rules that distinguish the judiciary from the political branches. Petitioners' strategic delay should make their case a nonstarter, and it precludes the rushed schedule they have proposed. *Johnson* decides the issues here, and there is no basis for revisiting them. If *Johnson* was the problem that Petitioners make it out to be, then where were Petitioners in *Johnson*? And why did the Governor, Senate Democrats, and Citizen Mathematicians argue things the other way in *Johnson*? Because this case isn't about contiguity or belated separation-of-powers claims. Petitioners have said what they want: more Democrats in the Legislature. Pet. ¶5. And they've now asked this Court to backdoor that political goal as part of a remedy for their meritless claims. The state and federal Constitutions do not empower this Court to redistrict "anew," *contra* Evers Br.32; they do not empower this Court to "prohibit the litigants" from basic discovery and factfinding, *contra* Citizen-Math. Br.51; and they certainly do not empower this Court "to make a political judgment cloaked in the veneer of neutrality," *Johnson v. Wis. Elections Comm'n* (*Johnson I*), 2021 WI 87, ¶86, 399 Wis. 2d 623, 967 N.W.2d 469 (Hagedorn, J., concurring). The petition should be dismissed.

ARGUMENT

I. *Johnson III*'s districts are constitutionally contiguous.

A. Petitioners' contiguity claim is barred.

Petitioners and Intervenors-Petitioners ignore the procedural flaws precluding relief for their belated redistricting claims. They have nothing to say about standing, laches, preclusion, and estoppel. *See* Legis. Br.19-26; Memo. ISO Mot. Dismiss 12-27.[1]

1. Petitioners lack standing for the statewide remedy they seek. Legis. Br.19-20. Some do not even claim to live in an allegedly non-contiguous district, let alone a municipal island. *Id*. Harms from re-districting are "district specific," "result[ing] from the boundaries" of the voter's "particular district." *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018). Contrary to Citizen Mathematicians' passing suggestion (at 1, 6, 17), residing in a district "adjacent to" or "neighboring" an allegedly unlawful district presents no cognizable injury. *Sinkfield v. Kelley*, 531 U.S. 28, 29-31 (2000) (per curiam).

Even Petitioners in districts with municipal islands cannot identify an injury for standing. *See Foley-Ciccantelli v. Bishop's Grove*

[1] *See* Sens. Opp. to Pet.23-26 (raising laches and impermissible collateral attack); Legis. Amicus Br.13-20 (same); Legis. Amicus Br.13-19, *Wright v. Wis. Elections Comm'n*, No. 2023AP1412-OA (same and claim preclusion); *Clarke v. Wis. Elections Comm'n*, 2023 WI 70, 2023 WL 6564041, at *6 & nn.6-7 (Ziegler, C.J., dissenting) (raising claim and issue preclusion, and arguing there is no "legal basis or procedural mechanism for this court to once again re-examine these maps"); *id.* at *13 (Grassl Bradley, J., dissenting) (raising laches); *id.* at *16 & n.35 (Hagedorn, J., dissenting) (arguing Petitioners' "collateral attack" on *Johnson* "[p]rocedurally . . . may be impermissible").

Condo. Ass'n, 2011 WI 36, ¶40 & n.17, 333 Wis. 2d 402, 797 N.W.2d 789. Without citation, Petitioners claim (at 29) that noncontiguous districts have "real representational consequences" because "[l]egislators are less likely . . . to interact with constituents residing in disconnected pieces of their district." Petitioners must prove that (they haven't). Even if they could, it is not their injury to raise unless they live in the allegedly "disconnected pieces."

It beggars belief that sparsely populated municipal islands are causing Petitioners harm. *See* Legis. Br.18 & App.4-11 (roughly one-third of allegedly noncontiguous municipal islands contain zero people, and more than 80% contain 20 or fewer people); *cf. Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶25, 403 Wis. 2d 607, 976 N.W.2d 519 (standing exists under vote dilution/pollution theory only where "the level of pollution is high enough"). Water does not prevent legislators from interacting with constituents on the "disconnected" Washington Island in AD1 and Madeline Island in AD74.[2] Ice does not stop legislative aid to bus constituents from ice-surrounded islands to school in Bayfield.[3] Here too, invisible district lines do not stop legislators or voters from traveling between municipalities and nearby municipal islands. If a legislator can represent Wisconsin's northern districts,

[2] Press Release, Joel Kitchens, AD1, Death's Door BBQ (Sept. 1, 2017), https://perma.cc/5W9K-LD76; @beth_rep, Twitter (July 22, 2022, 10:04 AM), https://perma.cc/P5WY-82VN.

[3] *See* Susan Saulny, *Across the Bay, on a School Bus Wearing Skis*, N.Y. Times (Feb. 22, 2008), https://archive.ph/Q2k2o; *accord* Wis. Stat. §121.58(2)(d).

spanning hundreds of miles, a legislator can represent the Town of Middleton's municipal islands in AD80, spanning only a few miles. Likewise, a legislator can represent the entire Town of Lawrence or City of De Pere (AD2), including their nearby islands, just as local officials do. Local supervisors represent "disconnected" wards every day.

2. Preclusion and judicial estoppel require dismissal too. Legis. Br.22-26. Citizen Mathematicians did *not* "argue[] that districts containing detached territory were unconstitutionally noncontiguous" before *Johnson I*, as they now claim (at 15 n.6). They acknowledged early in *Johnson* that municipal islands are constitutionally permissible. *See* Citizen-Math. Br.13, *Johnson*, No. 2021AP1450-OA (Oct. 25, 2021) ("literal contiguity" is "not require[d]" for municipal "islands"); Citizen-Math. Br.13-14 (Nov. 1, 2021) (same). Then, weeks before *Johnson I*, all parties—including the Governor, Senate Democrats, and Citizen Mathematicians—stipulated they were constitutionally permissible:

> Contiguity for state assembly districts is satisfied when a district boundary follows the municipal boundaries. Municipal "islands" are legally contiguous with the municipality to which the "island" belongs.

Joint Stip. of Facts & Law 15 ¶20 (Nov. 4, 2021). And in December 2021, parties proposed remedial plans with municipal islands and argued they were constitutionally contiguous. *See* Evers Br.17 (Dec. 15, 2021); Citizen-Math. Br.27-28 (Dec. 15, 2021); Evers Districts Map,

LTSB, https://bit.ly/3Fmc4UB; Citizen-Math. Districts Map, LTSB, https://bit.ly/3FtI22U. Preclusion and judicial estoppel bars relitigating that issue now. *See* Evers Br.6 (all parts "must be physically connected"); Citizen-Math. Br.7 (same).

"Law of the case" does not excuse parties' failure in *Johnson* to raise their newfound contiguity arguments, as Citizen Mathematicians now contend (at 15 n.6). If they were so sure of their contiguity arguments, then they could and should have pressed them in *Johnson*, not belatedly here. *See State v. Moeck*, 2005 WI 57, ¶¶28, 31, 280 Wis. 2d 277, 695 N.W.2d 783 (law of the case "properly disregarded" where court "erred as a matter of law"); *State v. Stuart*, 2003 WI 73, ¶24, 262 Wis. 2d 620, 664 N.W.2d 82 (law of the case may be overcome where "cogent, substantial, and proper reasons exist," including "erroneous" decision). And yet, parties never took that opportunity. They did not move for reconsideration of *Johnson I*. *See* Wis. Stat. §809.64; *City of Cedarburg v. Hansen*, 2020 WI 45, 391 Wis. 2d 671, 943 N.W.2d 544 (per curiam) (granting reconsideration to modify opinion where Court "overlooked" precedent). They did not object to any proposed remedial maps on contiguity grounds. They did not move to reopen *Johnson III*. *See* Wis. Stat. §806.07; *Dietrich v. Elliott*, 190 Wis. 2d 816, 823, 528 N.W.2d 17 (Ct. App. 1995). They instead filed this collateral attack more than a year later. Judicial estoppel bars such "manipulative perversion of the judicial process." *State v. Petty*, 201 Wis. 2d 337, 354, 548 N.W.2d 817 (1996).

B. Petitioners' contiguity claim fails on the merits.

Petitioners maintain (at 16) that districts with municipal islands are unconstitutionally noncontiguous because they do not "physically touch" other parts of the district. But they abandon their own rule for physical islands, removing AD89 from their initial list of allegedly noncontiguous districts. Clarke Br.15 n.1. Petitioners' rule, with its convenient exception, is contrary to precedent, text, and historical practice.

1. Stare decisis forecloses Petitioners' contiguity claim.

Ruling for Petitioners requires overruling *Johnson*'s contiguity holdings. Yet "stare decisis" appears nowhere in their papers. Instead, they mischaracterize *Johnson*'s contiguity holdings as dicta. Evers Br.14-15; Clarke Br.21-22. Any arguments about overcoming stare decisis are forfeited. *See Bilda v. County of Milwaukee*, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661.

Johnson's contiguity holdings are precedential. *See Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 2023 WI 38, ¶¶138-42, 407 Wis. 2d 87, 990 N.W.2d 122 (Hagedorn, J., concurring). *Johnson I* held that detached portions of municipalities are "legally contiguous even if the area around the island is part of a different district." 2021 WI 87, ¶36; *see* Citizen-Math. Br.3-4 (recognizing the Court so "held"). The Court twice again held that districts with municipal islands are constitutionally contiguous when adopting proposed remedies with districts containing municipal islands. *See* Legis. Br.26-28; *Johnson v. Wis.*

Elections Comm'n (*Johnson II*), 2022 WI 14, ¶¶9, 36, 400 Wis. 2d 626, 971 N.W.2d 402; *Johnson v. Wis. Elections Comm'n* (*Johnson III*), 2022 WI 19, ¶70, 401 Wis. 2d 198, 972 N.W.2d 559. These holdings cannot be reduced to dicta as though they were "not essential to the determination of the issues" before the Court. *State v. Sartin*, 200 Wis. 2d 47, 60 n.7, 546 N.W.2d 449 (1996). They were essential to deciding the question of lawful remedies. *See Johnson I*, 2021 WI 87, ¶34; *Johnson II*, 2022 WI 14, ¶¶9, 36; *Johnson III*, 2022 WI 19, ¶70.

Petitioners and Intervenors-Petitioners suggest *Johnson*'s contiguity discussions were too short to make them precedential holdings. Evers Br.15; Clarke Br.21; Citizen-Math. Br.14. But *Johnson* specifically rejected Petitioners' newfound position that municipal islands are noncontiguous. *Johnson I*, 2021 WI 87, ¶36 (citing *Prosser v. Elections Bd.*, 793 F. Supp. 859, 866 (W.D. Wis. 1992) (three-judge court)). And *Johnson*'s understandable brevity, given precedent and practice, "is no reason to disregard [its] holdings and in fact indicates the Court deemed [what it said] adequate treatment to give this issue." *Schacht v. United States*, 398 U.S. 58, 64 (1970).

That holding should be "scrupulously" followed. *Hinrichs v. DOW Chem. Co.*, 2020 WI 2, ¶66, 389 Wis. 2d 669, 937 N.W.2d 37. Accepting Petitioners' "end run around stare decisis" would "undermine[] our common law tradition of fidelity to precedent." *Est. of Genrich v. OHIC Ins.*, 2009 WI 67, ¶85, 318 Wis. 2d 553, 769 N.W.2d 481 (Walsh Bradley, J., concurring in part and dissenting in part).

Petitioners offer no legitimate justification to depart from *Johnson*'s three contiguity holdings, so stare decisis forecloses their contiguity claim. Legis. Br.28-29.

2. Petitioners ignore §4's whole text and history.

a. Focusing exclusively on the word "contiguous," Petitioners and Intervenors-Petitioners fail to see that Article IV, §4's first "bounded by" clause and the second "contiguous territory" clause work as building blocks. And the Court must consider "contiguous" not "in isolation" but as part of that "entire text." *Brey v. State Farm Mut. Auto. Ins.*, 2022 WI 7, ¶13, 400 Wis. 2d 417, 970 N.W.2d 1. The "bounded by" clause is specific to particular counties, towns, and wards. The "contiguous territory" clause then speaks to how multiple counties, towns, or wards might be combined to form one district. A district can be "bounded by" Door County, including Washington Island, but it cannot then combine Door County with faraway Douglas County without violating the "contiguous territory" clause. Legis. Br.29-34. Similarly, §5's "contiguous territory" clause prohibits combining two Milwaukee assembly districts with a third Madison assembly district to form a single senate district. *See State ex rel. Reynolds v. Zimmerman*, 23 Wis. 2d 606, 607, 128 N.W.2d 16 (1964) (per curiam) (adopting remedial plan where "[t]he *territory* of individual senate districts consists of *contiguous assembly districts*" (emphasis added)).

Petitioners collapse §4's separate clauses, such that a district "bounded by" municipal lines would simultaneously violate the

"contiguous territory" clause if those municipal lines include municipal islands. That interpretation unnecessarily brings the clauses into conflict. It ignores that municipalities are the object of only the "bounded by" clause; the object of the contiguity clause is different—"territory." The "territory" contemplated in §4 is the *combination* of existing "governmental entities," whether different counties or towns, stitched together to form an equally populated district. *See* H. Rupert Theobald, *Equal Representation: A Study of Legislative and Congressional Apportionment in Wisconsin*, Wis. Blue Book 71, 199 (1970).[4] Unlike Petitioners' reading, *Johnson*'s contiguity rule gives effect to all of §4. *See, e.g.*, *Appling v. Walker*, 2014 WI 96, ¶23, 358 Wis. 2d 132, 853 N.W.2d 888 (constitutional "language is read where possible to give reasonable effect to every word").

b. *Johnson*'s contiguity rule, moreover, is the one with historical support. Parties' observations about the State's first legislative districts, Clarke Br.19-20; Citizen-Math. Br.10-11, do not preclude politically contiguous municipal islands that resulted from annexation soon after the State's founding.[5] The Legislature incorporated the City

[4] *Accord* James Barclay, *New Universal English Dictionary* 871 (1835) (Territory: "in Geography, an extent or compass of land, within the bounds, or belonging to the jurisdiction, of any state, city, or other division of a country"); Noah Webster, *An American Dictionary of the English Language* 831 (1842) (similar); 3 John Ogilvie, *The Imperial Dictionary of the English Language* 336 (1885) (similar).

[5] Likewise, the Apportionment Act of 1842, ch. 47, §2, 5 Stat. 491, did not purport to preclude districting municipal islands with their municipalities. *See* Clarke Br.18-19; Citizen-Math. Br.12-13. Debates concerned Congress's power to require single-member districts, not contiguity. *See, e.g.*, Cong. Globe, 27th Cong., 2d Sess. App. 340 (Rep. Davis); *id.* at 493 (Sen. Huntington).

of Madison "between portions of the town of Madison" in 1856, leaving five "separated portions of the town." *Town of Blooming Grove v. City of Madison*, 275 Wis. 342, 346, 81 N.W.2d 721 (1957); *see* Ch. 75, Laws of 1856. And legislators have long represented those "separated portions." *See, e.g.*, Wis. Legis. Reference Libr., The Wisconsin Blue Book 232 (1933) (Rep. Baker) (representing Town of Madison and various other Dane County towns in then-AD3).[6] Rowboat districts drawn in 1861 likewise confirm that "contiguous territory" was never understood as "physically touching" as Petitioners posit. *See* Legis. Br.36-37.

Similarly, ratification debates Petitioners highlight are consistent with *Johnson*. Contiguity arose when delegates debated *combining counties* into one district. They ultimately approved an amendment giving Calumet and Manitowoc Counties different representatives, given concerns that a legislator from one county would not "be sufficiently familiar with the local wants and interest of [the other] county to represent it properly." Journal of the Convention to Form a Constitution for the State of Wisconsin 363 (1848) (Delegate Reed)

[6] Petitioners contend (at 27) that not all alleged noncontiguities are municipal islands and contend that islands in AD53 are "just part of the City of Oshkosh" surrounded by the City of Oshkosh in AD54. The argument highlights the further factfinding required. It appears some or all of these islands were previously part of the Town of Algoma and annexed by Oshkosh after 2010, or are part of disconnected wards in AD53, or both. *See Cooperative Plan Between City of Oshkosh & Town of Algoma* at 8 (2004), https://perma.cc/H845-M5TX (discussing "staged expansion" of Oshkosh into Algoma); "City of Oshkosh," *Municipal Ward Maps*, Winnebago County (2022), https://perma.cc/MFV5-AXVK. The islands keep wards whole and, if previously part of Algoma, are a function of *Johnson*'s least-changes remedy.

(Clarke App.26). They were separated by "a dense forest" and "a swamp through which there was no road, and which was wholly impassible," *id.* at 365 (Delegate Featherstonhaugh) (Clarke App.28).

Apply those concerns to municipal islands, and the logic runs in the opposite direction. Including municipal islands ensures that districts remain "bounded by" their municipal lines, ensuring that the same voters are represented by the same government officials at the state and local levels. *See State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1892).

3. Petitioners misread "contiguous."

Even considering only the word "contiguous," Petitioners' rule that "contiguity" means "all parts of a district physically touch, with no detached pieces" is contrary to the text and precedent. Clarke Br.16; *see also* Citizen-Math. Br.7; Evers Br.6

a. When interpreting "the plain meaning" of constitutional text, *Wis. Just. Initiative*, 2023 WI 38, ¶22, the Court's "approach is not 'literalistic,'" *Brey*, 2022 WI 7, ¶11. The Court will adopt a provision's "fair meaning," *id.*, over a construction that is "too strict[] and literal[]," *Chicago & Nw. Ry. Co. v. Forest County*, 95 Wis. 80, 70 N.W. 77, 78 (1897), or "would lead to an absurd or unreasonable result," *Kayden Indus. v. Murphy*, 34 Wis. 2d 718, 732, 150 N.W.2d 447 (1967). Here, *Johnson*'s reading is the fair meaning, making sense of the whole text, and consistent with dictionary definitions and early legislative acts

around the time of ratification that understood "contiguous" as "near" or "close" to. Legis. Br.35-36 & n.4.

Petitioners' "literalistic interpretation" of contiguity, based on cherry-picked definitions and historical sources, would "border on the absurd." *Teigen*, 2022 WI 64, ¶62; *see* Clarke Br.16-17; Citizen-Math. Br.9; Evers Br.8-9. Under Petitioners' "physically touching" interpretation, Door County's Washington and Chambers Islands in AD1 and Ashland County's Madeline and Rocky Islands in AD74—each surrounded by water—are unconstitutionally noncontiguous. So too are AD4, AD56-AD57, and AD90, separated by the Fox River; AD9, AD14, and AD17-AD19, separated by the Menomonee River; AD49, AD51, AD85, and AD96, separated by the Wisconsin River; and AD10 and AD23, separated by the Milwaukee River, among many others. Yet none appears on Petitioners' list of allegedly non-contiguous districts.

Instead, Petitioners gerrymander their contiguity rule to *exempt* parts of districts "separated by water." Clarke Br.24 n.3. Citizen Mathematicians explain (at 8 n.4) that "an actual island surrounded by water" is contiguous because it "can be reached from any other point in the same district without crossing into another district's territory." By that measure, Kenosha and Green Bay are contiguous via Lake Michigan; Vilas and Crawford Counties are contiguous via the Wisconsin River; and even Anchorage, Alaska, and Miami, Florida, are contiguous.

But "contiguous" does not mean one thing for physical islands and another for municipal islands. Petitioners' convenient exception is not in their cited dictionaries or the Wisconsin Constitution. For good reason—imagine if Door County's Washington Island were districted with Kenosha; someone in Door County could reach Kenosha by boat "without crossing into another district's territory," Citizen-Math. Br.8 n.4. It would pass Petitioners' test, but it would not result in "contiguous territory," as the two are nowhere "near" or "close."

b. Precedent also goes against Petitioners. The Court held three times over in *Johnson* that districts with municipal islands are constitutionally contiguous, and those holdings are precedential. *Supra* Part I.B.1. Before *Johnson*, the *Prosser* court also held that the Wisconsin Constitution does not require "literal contiguity" given Wisconsin's history. 793 F. Supp. at 863, 866. Petitioners would have this Court unnecessarily pit those precedents against earlier cases. *See* Clarke Br.20-21; Citizen-Math. Br.11-12; Evers Br.6-8.

Petitioners rely predominantly on *Chicago & North Western Railway Co. v. Town of Oconto*, 50 Wis. 189, 6 N.W. 607, 607-09 (1880), holding that a newly organized town cannot consist of "separate, detached, and remote bodies of territory." In dicta, the Court noted new towns with detached territory would "restrict" the Legislature's ability to redistrict. *Id.* at 609. But *Town of Blooming Grove* later limited *Town of Oconto* to "the *original* organization of a town," as opposed to islands later resulting *after* "a town has been validly organized." 275

Wis. at 345 (emphasis added). *Town of Blooming Grove* confirmed that towns like the Town of Madison might be divided "into separate parts" as a result of annexation by nearby cities. *Id.* at 345-48; *see* Theobald, *supra*, at 200 (noting annexations "superseded" *Town of Oconto*'s holding). As for redistricting those separate parts, *Town of Blooming Grove* cited with approval Wis. Stat. §4.04(2) (1957), which provided that "territory annexed to a city becomes a part of the assembly district of which the ward in which it is incorporated forms a part." *Id.* at 348. In other words, redistricting may simply follow municipal lines, including those changed by annexation.

Petitioners next point to *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35, 57 (1892), where the Court observed that §4 "requires that each assembly district must consist of contiguous territory" and "cannot be made up of two or more pieces of detached territory." *Lamb* did not consider the contiguity of municipal islands. And its language about "detached territory" is consistent with *Johnson*—faraway counties or municipalities cannot be combined in a single district, but politically contiguous towns or wards may be. *Supra* Part I.B.2.

And Petitioners rely on *Town of Wilson v. City of Sheboygan*, 2020 WI 16, ¶18, 390 Wis. 2d 266, 938 N.W.2d 493, which the Legislature addressed (at 37). Petitioners do not grapple with the preceding decades of precedent and resulting municipal islands that are now a feature of municipalities across the State. *See, e.g.*, *Town of Lyons v. City of*

Lake Geneva, 56 Wis. 2d 331, 336, 202 N.W.2d 228 (1972) ("'contiguous' does not always mean the land must be touching"); *N. Pac. Ry. Co. v. Douglas County*, 145 Wis. 288, 130 N.W. 246, 248 (1911) ("strictly speaking," contiguous is "more properly" used to signify "near to but not touching" than "touching on or bounded by"); *Hennessy v. Douglas County*, 99 Wis. 129, 74 N.W. 983, 985 (1898) (defining adjacent as "lying near, close to, or contiguous, but not actually touching" and adjoining as "touching or contiguous").[7] A redistricting plan takes those municipalities as it finds them. Legis. Br.38. *Town of Wilson* does not purport to retroactively invalidate those existing annexations; it does not even categorically preclude them prospectively. 2020 WI 16, ¶19. And it certainly does not change the meaning of Wisconsin's constitution as it was understood when ratified.

Finally, Petitioners claim out-of-state precedent gives contiguous its "literal meaning." Puzzlingly, they lead with a decision from the island archipelago State of Hawai'i that did not even define contiguity. Clarke Br.24 (quoting *Kawamoto v. Okata*, 868 P.2d 1183, 1186 n.7 (Haw. 1994)). In any event, case law of other states "obviously is not binding" on this Court. *State v. Muckerheide*, 2007 WI 5, ¶46, 298 Wis. 2d 553, 725 N.W.2d 930; *accord Att'y Gen. ex rel. Bashford v. Barstow*, 4 Wis. 567, 758 (1855). Those out-of-state authorities do not

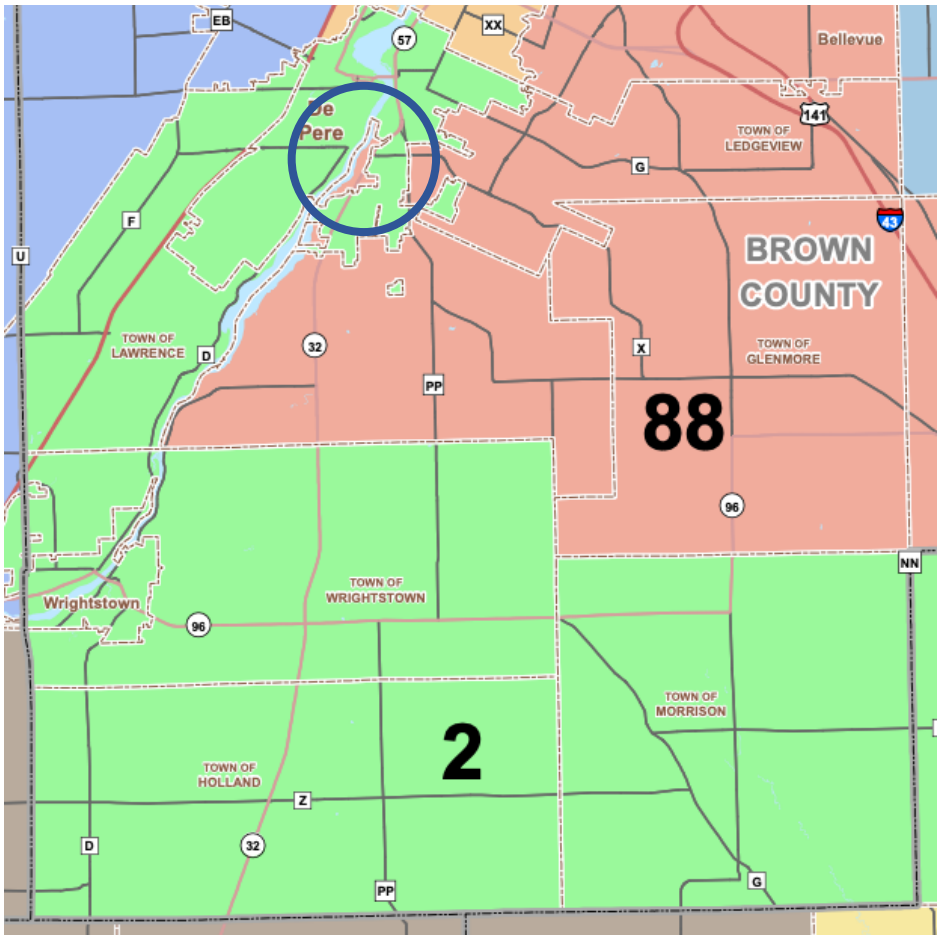
[7] *Town of Wilson* also does not address the municipal islands that are Petitioners' principal complaint. The municipal islands in Dane County's AD80 and AD47 were once whole towns. Those towns have been reduced to an archipelago of islands after organization of and annexation by the City of Madison and others. *See Town of Blooming Grove*, 275 Wis. at 345; Ch. 75, Laws of 1856.

consider contiguity of annexed municipal islands. Nor is Wisconsin the "national outlier." Citizen-Math. Br.18. As Petitioners acknowledge (at 28 & nn.10-13), portions of Tennessee, Massachusetts, and Pennsylvania districts are not touching, despite the latter States' constitutions having "contiguous territory" provisions. Mass. Const. amends., art. 101, §§1-2; Pa. Const. art. II, §16.

4. Municipal islands appropriately balance §4's competing criteria.

Even if the Court were to adopt Petitioners' interpretation, districts with municipal islands still permissibly balance the Constitution's redistricting provisions. Petitioners agree that the "bounded by" clause "is not an inflexible requirement, and at times, splitting municipal boundaries is necessary to adhere to the one person, one vote, principle." Clarke Br.37 (cleaned up); *see* Dem.-Sens. Br.24; *see also* Citizen-Math. Br.32 n.9 (literal contiguity "could require splitting wards and municipalities"). The same must be true of the "contiguous territory" clause.

Applied here, municipal islands are permissible because they follow municipal or ward lines, even if they require sacrificing Petitioners' version of contiguity. That "delicate balancing of competing considerations" is inherent in redistricting. *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 187 (2017). For example, circled below is a Town of Ledgeview municipal island in AD88:



Fox Valley Assembly Districts, LTSB, https://perma.cc/8CVL-W38D. This island is one of the largest, containing roughly 250 people. Legis. App.10. It can be dissolved into AD2 without upsetting population equality requirements, but doing so requires splitting the Town of Ledgeview between two districts. If *all* of Ledgeview were put into AD2, that would upset population equality requirements (with its roughly 8,800 people[8]) and leave actually "[non]contiguous territory," with nothing connecting the Town of Glenmore to the south with Bellevue to the north in AD88.

[8] *See* Town of Ledgeview, Brown County, Wisconsin, U.S. Census Bureau, https://perma.cc/FM2Q-ZBCT.

If, as Petitioners acknowledge, §4's requirements sometimes require balancing, then this Court has no basis to strike that balance anew after *Johnson*.

II. Petitioners' separation-of-powers claim fails.

Petitioners concede (at 53) that, just like the "other parties" in this case, the Legislature and Governor "both will have the ability to propose plans for the Court's consideration." That concession dashes their separation-of-powers claim. In proposing remedial plans in *Johnson*, the Governor and the Legislature were parties in the judicial process. And in selecting among those least-changes remedies, this Court was an adjudicator, not a lawmaker.

A. Petitioners' separation-of-powers claim is barred.

Petitioners have not asserted any personal stake in their separation-of-powers claim sufficient for standing; even if they could, the claim is barred by laches, preclusion, and estoppel. *See* Legis. Br.41-42; Memo. ISO Mot. Dismiss 18-27. Governor Evers and the Democratic Senators allege *Johnson* encroached on their constitutional lawmaking roles, but the Court was not "lawmaking" in *Johnson*. *See infra* Parts II.B, III.A. Nor have they explained why the Court could remedy that injury now, having failed to raise any separation-of-powers claim during or shortly after *Johnson*, consistent with Wis. Stat. §806.07. *See* Legis. Br.41-42; Memo. ISO Mot. Dismiss 25-27. Likewise, Petitioners lack standing to assert a generalized grievance about the Court's exercise of judicial power. *See Teigen*, 2022 WI 64, ¶¶213-14 (Walsh

Bradley, J., dissenting). And they offer no reason why this Court should belatedly revisit the settled holding in *Johnson*, making this case the exception to procedural bars that would apply in any other case. *See Trump v. Biden*, 2020 WI 91, ¶32, 394 Wis. 2d 629, 951 N.W.2d 568; Legis. Br.41-42; Memo. ISO Mot. to Dismiss 18-27.

B. Petitioners' separation-of-powers claim is meritless.

Petitioners and Intervenors-Petitioners fundamentally misunderstand the nature of the relief awarded in *Johnson*. This Court did not "legislate." Dem.-Sens. Br.17. It did not enact any "law." Clarke Br.31. Nor was there any "judicial override" of the Governor's veto. Evers Br.24; *see* Citizen-Math. Br.20-23. Rather, this Court "issue[d] [a] mandatory injunction[], an equitable remedy." *Johnson I*, 2021 WI 87, ¶67. That injunction is not a statute. Far from "abdicat[ing] its own constitutional power," Evers Br.21, the Court exercised its "judicial power" to enjoin the Elections Commission to modify its enforcement of an existing statute only as necessary to remedy the constitutional violation. The very reason for the Court's "least-changes" approach was to ensure that its injunction required the Elections Commission to depart only as much as necessary from the 2011 legislation—the political branches' last-enacted redistricting statute, which remains on the books today. *Johnson I*, 2021 WI 87, ¶64; *accord id.* ¶84 (Hagedorn, J., concurring) (rejecting that the Court "should simply ignore the law on the books . . . and draft a new one more to its liking"). When this Court first adopted the Governor's proposed parameters for that injunction, it did not legislate; nor did it "assume and subvert

legislative powers expressly conferred to the political branches." Dem.-Sens. Br.20. So too with *Johnson III*'s adoption of the Legislature's proposed parameters. An injunction to the Elections Commission is not a statute.

Petitioners and Intervenors-Petitioners have fallen prey to the writ-of-erasure fallacy—the mistaken "assumption that a judicial pronouncement of unconstitutionality has canceled or blotted out a duly enacted statute." Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 937 (2018). Only legislation can repeal legislation. *Cf. Seider v. O'Connell*, 2000 WI 76, ¶80, 236 Wis. 2d 211, 612 N.W.2d 659. When a court holds a law unconstitutional, it does not erase that law. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 469 (1974) ("Of course, a favorable declaratory judgment . . . cannot make even an unconstitutional statute disappear."); *Arizona v. Biden*, 31 F.4th 469, 483 (6th Cir. 2022) (Sutton, C.J., concurring) ("[Courts] do not remove—'erase'—from legislative codes unconstitutional provisions."). Likewise, when a court enjoins operation of a law, it does not rewrite that law. The law remains as it is, and the court simply "enjoins the executive from enforcing [the] statute." Mitchell, *supra*, at 986; *cf. Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 521 (7th Cir. 2021) ("A federal injunction does not erase an unconstitutional state law from existence; federal courts cannot repeal state laws."). To say otherwise would assume that the Court is exercising legislative power it does not have,

infra Part III.A, rather than the "judicial power" it does have, Wis. Const. art. VII, §2.

Assertions that the "legislative process was incomplete when the Court ruled" in *Johnson* are thus both wrong and irrelevant to the separation-of-powers claim. Dem.-Sens. Br.18. As a factual matter, the legislative process reached an impasse, requiring the Court to step in. *Johnson I*, 2021 WI 87, ¶¶5, 19. As a legal matter, the Court in *Johnson* did not "interfere with" that failed "legislative process." Dem.-Sens. Br.18. It exercised judicial power, fulfilling its limited constitutional "duty to remedy the constitutional defects in the existing plan." *Johnson I*, 2021 WI 87, ¶66. And it did so by starting with the existing 2011 legislation, not with vetoed legislation. *Id.* ¶64; *accord id.* ¶85 (Hagedorn, J., concurring). The Court ultimately chose the Legislature's proposal because it provided a least-changes judicial remedy that did not "creat[e] another" constitutional violation. *Id.* ¶34 (majority op.); *Johnson III*, 2022 WI 19, ¶22 (describing the Legislature's proposal as "the best, and only, viable proposal").

Courts have long recognized the constitutional role courts must play where, as in *Johnson*, the lawmaking branches failed to enact valid redistricting legislation after the census and the next elections are approaching. *See Johnson I*, 2021 WI 87, ¶66; *see also, e.g.*, *Growe v. Emison*, 507 U.S. 25, 33 (1993). All parties here likewise recognize this role. *See* Clarke Br.34; Citizen-Math. Br.25-26: Evers Br.16; Dem.-Sens.

Br.17. And they agree that the Governor and Legislature can participate by proposing remedies, just like the other parties. Clarke Br.53.

On top of that, Petitioners cannot explain away the separation-of-powers problems their own arguments create. They would give the Governor super-legislative power and super-judicial power, using his veto to exclude the Legislature from proposing a remedy like other parties in impasse litigation and thus hamstringing courts' remedial powers. *See* Legis. Br.45-46; Johnson Br.26. And their rejection of *Johnson*'s least-changes approach presumes this Court has legislative power, as if it were a third legislative chamber redrawing districts "anew." *Infra* Part III.A.

Petitioners and Intervenors-Petitioners cannot salvage their arguments with out-of-state cases. Their New Mexico decision is not even about redistricting and says nothing that would preclude a court from entertaining remedial proposals from all parties as in *Johnson*. Clarke Br.32-33 (discussing *State ex rel. Am. Fed'n of State, Cnty. & Mun. Emps. v. Johnson*, 994 P.2d 727 (N.M. 1999)). And the "line of cases declining to afford deference to vetoed plans," Citizen-Math. Br.20-21 (cleaned up), is fully consistent with *Johnson*. Those cases stand only for the proposition that courts should not *defer* to proposed plans that only "made it partway through the legislative process" and should consider them on equal footing with all other proposed remedies. *Carter v. Chapman*, 270 A.3d 444, 460 (Pa.), *cert. denied sub nom.*, *Costello*

v. Carter, 143 S. Ct. 102 (2022).[9] The Court in *Johnson* agreed. Citizen Mathematicians' fear (at 25) 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." *Johnson I* already rejected that possibility, refusing to give special deference to the Legislature's proposed remedy. 2021 WI 87, ¶72 n.8 (plurality op.).

Johnson III did not violate separation of powers any more than *Johnson II* did by adopting the Governor's proposed remedy. The separation-of-powers claim should be dismissed as unduly delayed, precluded, and baseless.

III. A judicial remedy is not a redraw.

Any remedy would entail reopening *Johnson* and modifying that existing injunction only to the extent necessary to redress proven legal violations. Legis. Br.49-50. The Court cannot start from square one.[10] And it cannot act as the partisan police in choosing between

[9] *See also Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982) (three-judge court) (reviewing "plans submitted by both the Legislature and the Governor as 'proffered current policy' rather than clear expressions of state policy"); *Hippert v. Ritchie*, 813 N.W.2d 374, 379 (Minn. 2012) (considering plan governor vetoed "on an equal footing with the proposed plans of the other parties to this action"); *Hartung v. Bradbury*, 33 P.3d 972, 979 (Or. 2001) (declining to defer, but not putting any thumb on the scale against Assembly's proposed plan); *O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982) (three-judge court) (explaining that courts are still to give "'thoughtful consideration' to plans that were passed by the state legislature but subsequently vetoed by the Governor").

[10] At least for the Milwaukee districts, Petitioners agree (at 49) that the Court should freeze those districts as part of any remedy.

proposed remedies, which would exceed any "'plausible grant of authority' to the judiciary." *Johnson I*, 2021 WI 87, ¶52 (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019)).

Petitioners' contrary remedial arguments call for a last-minute do-over of *Johnson* now that the Court's membership changed. Petitioners and Intervenors-Petitioners cite a string of impasse cases and suggest that parties propose statewide remedial maps. *See* Clarke Br.39-40; Citizen-Math. Br.39-40; Evers Br.35. Suggesting the Court start from scratch, Clarke Br.47-49; Citizen-Math. Br.35-37; Evers Br.16 n.4, they fail to see that ignoring *Johnson*'s continuing mandatory injunction would lead to conflicting injunctions. Legis. Br.50-52.

Worst of all, they urge this Court to test those proposed statewide remedies for "partisan symmetry," "partisan bias," their "efficiency gap," or "responsiveness to the vote," using "thousands of sample maps." Evers Br.25, 28-30; *see also* Clarke Br.37-39; Citizen-Math. Br.41-42. This Court cannot backdoor partisan fairness claims into a remedy. This Court already decided there is insufficient time "for extensive fact-finding (if not a full-scale trial)" to adjudicate such claims. *Clarke*, 2023 WI 70. And they are beyond the Court's power to decide. *Johnson I*, 2021 WI 87, ¶3. What Petitioners seek is no "neutral undertaking." *Id.* ¶86 (Hagedorn, J., concurring). It is a political wish.

A. This Court's remedial power remains limited.

The *Johnson* injunction was a judicial remedy, not legislation, and the "least-changes" label was "nothing more than a convenient way to describe the judiciary's properly limited role in redistricting."

Id. ¶72 (plurality op.); *accord id.* ¶85 (Hagedorn, J., concurring). As Justice Hagedorn put it, this Court had no power to "simply ignore the law on the books . . . and draft a new one more to its liking." *Id.* ¶84; *see also, e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 79 (1997) ("When faced with the necessity of drawing district lines by judicial order, a court, as general rule, should be guided by the legislative policies underlying the existing plan . . . ."); *Upham v. Seamon*, 456 U.S. 37, 42 (1982) (per curiam) (court-ordered plan should not change "more than [is] necessary to meet the specific constitutional violations involved").

Parties incorrectly suggest that there was no majority in *Johnson* for that "least-changes" holding. Clarke Br.45-46; Citizen-Math. Br.35. The majority, plurality, and concurring portions of *Johnson I* are unequivocal: this Court's judicial power is limited, making existing law the only conceivable starting point for a remedy. *Johnson I*, 2021 WI 87, ¶72 (plurality op.); *accord id.* ¶¶82, 85 (Hagedorn, J., concurring). That "least-change approach is far from a novel idea." *Id.* ¶73 (majority op.). It was the approach in *Zimmerman* decades ago. *See id.* ¶85 n.13 (Hagedorn, J., concurring). As Justice Hagedorn elaborated, "our role is appropriately limited to altering current district boundaries only as needed to comply with legal requirements." *Id.* ¶82. And the majority in *Johnson III* reaffirmed that the Court "would not tread further than necessary to remedy deficiencies of the current maps" and then selected the Legislature's proposed remedy as "address[ing]

malapportionment in a least changes way." 2022 WI 19, ¶¶71-72 (cleaned up).

1. The starting point for any remedy is *Johnson*'s least-changes injunction of the 2011 legislation.

The same remedial limitations continue to apply here. This case is not a blank check to redistrict "anew" as if the Court were "the legislature." Wis. Const. art. IV, §3. *Contra* Evers Br.32. The Court is not "creating new state legislative districts." Clarke Br.35. At most, it would be modifying the *Johnson* injunction. And even that remedy would be extraordinary—making this case an exception to numerous procedural bars that ought to preclude a remedy altogether.

Any remedy would not be statewide but be limited to districts where there is a party with standing (and otherwise not barred by laches, preclusion, or estoppel). The remedy would be further limited to districts with proven unconstitutional noncontiguities. If there is any such district, the remedial question that remains is how to modify the existing district to rectify the noncontiguity, just as the remedy in a racial gerrymandering or Voting Rights Act case would be limited to rectifying that violation. *See, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 2548, 2554-55 (2018) (per curiam); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012). Here, that would entail simply dissolving municipal islands into surrounding districts, either by the political branches or, failing that, by the Court. *See* Legis. Br.60-61. Because the municipal islands are so sparsely populated, there is little risk of "creating another" constitutional harm in

that remedy. *Johnson I*, 2021 WI 87, ¶34; *see also* Clarke Br.37 (keeping municipalities whole is "not an inflexible requirement"); Citizen-Math. Br.27-29, 32 & n.9 (similar); Evers Br.27 & n.6 (similar). It appears only one district might have to be further adjusted to meet population equality requirements. *See* Legis. Br.60 & App.6, 13. The alleged noncontiguities—many with *no* residents—are no basis for starting over.

Likewise, remedying a separation-of-powers claim does not require starting from scratch. Remedying a contiguity claim would simultaneously remedy the supposed separation-of-powers violation because the districts would no longer be "the exact remedy vetoed by the Governor." Evers Br.16; *see* Clarke Br.29. Remedying the separation-of-powers violation alone would be just as simple. By Petitioners' own logic (at 29), the Court can move a single line so that the injunction is not the "precise map . . . vetoed by the Governor." To do more would only compound constitutional violations, rather than "limit the solution to the problem." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-30 (2006).

2. Starting from scratch takes this Court beyond its judicial power.

Parties nevertheless invite this Court to draw district lines anew. Citizen-Mathematicians, for example, say (at 49) that parties' remedial submissions should be "one or two state-legislative maps" with all 99 assembly districts and all 33 senate districts. Petitioners contend (at 47) that there is no need to worry about "usurping"

lawmaking power here because the existing maps are "judicially imposed." *See also* Citizen-Math. Br.36 ("'Least change' has never required judicial deference to maps that *fail* the political process.").

By Petitioners' logic, the Court has lawmaking power unless and until the legislature preempts it. The Court has refuted such assertions time and again.[11] And it should refute it again here.

If this Court acts, it must do so pursuant to its "judicial power." Wis. Const. art. VII, §2. It is not exercising "the legislature['s]" power to redistrict "anew." *Id*. art. IV, §3. And while the Court "may differ with the legislature's choices" embodied in past redistricting legislation, the Court cannot rest its remedial "decision on that basis lest [it] become no more than a super-legislature." *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 528-29, 576 N.W.2d 245 (1998).

For similar reasons, parties' core-retention arguments miss the mark. Clarke Br.43-45; Evers Br.31-32. Petitioners posit (at 43-44) that

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[11] *See League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶35, 387 Wis. 2d 511, 929 N.W.2d 209 ("judicial power cannot legislate"); *Donaldson v. Bd. of Comm'rs of Rock-Koshkonong Lake Dist.*, 2004 WI 67, ¶48, 272 Wis. 2d 146, 680 N.W.2d 762 ("the court may not exercise legislative power"); *Wagner Mobil, Inc. v. City of Madison*, 190 Wis. 2d 585, 594 & n.4, 527 N.W.2d 301(1995) ("it is not the function of this court to usurp the role of the legislature" (collecting cases)); *Goodland v. Zimmerman*, 243 Wis. 459, 466-67, 10 N.W.2d 180 (1943) ("the fundamental principles of our constitutional government . . . confine legislative powers to the legislature"); *State ex rel. McCarty v. Gantter*, 240 Wis. 548, 555, 4 N.W.2d 153 (1942) ("It is beyond the power of the court to legislate . . . ."); *Town of Remington v. Wood County*, 238 Wis. 172, 298 N.W. 591, 595 (1941) ("to exercise legislative power" is something "a court may not do"); *Friedrich v. Zimmerman*, 238 Wis. 148, 298 N.W. 760, 762 (1941) ("The courts have no power to legislate."); *State ex rel. Rose v. Superior Ct. of Milwaukee Cnty.*, 105 Wis. 651, 81 N.W. 1046, 1053 (1900) ("the judicial power cannot legislate").

the Legislature doesn't have any "history of adherence to core retention." But the remedial question is one of *this Court's* power. And this Court, unlike the Legislature, does *not* have "wide discretion to draft new maps from scratch based on the policy considerations it chooses." *Johnson I*, 2021 WI 87, ¶85 n.14 (Hagedorn, J., concurring); *accord id*. ¶¶71-72 (plurality op.). Core retention can be considered insofar as it is one indication, among others, that this Court is abiding by its limited remedial role.[12] A remedy that abandons core retention is not a judicial remedy at all; it is unconstitutional judicial legislation.

Petitioners and Intervenors-Petitioners next argue that existing lines "are not a legally appropriate starting point" because the 2011 maps were "intentionally and severely gerrymandered," Clarke Br.48, and would "only serve[] to entrench the[se] characteristics," Evers Br.33; *see* Citizen-Math. Br.36-37 (similar). These assertions are just that—assertions. There is no partisan unfairness claim before this Court. *Clarke*, 2023 WI 70. Nor could there be. This Court searched and did not find any right to partisan fairness, symmetry, or competitiveness in the Wisconsin Constitution. *Johnson I*, 2021 WI 87, ¶¶53-63. No court with jurisdiction has ever held that the 2011 districts were unconstitutionally gerrymandered. *See Gill*, 138 S. Ct. at 1923 (holding the district court "lack[ed] the power to resolve [partisan

[12] Contesting core retention, the Governor relies on Voting Rights Act and racial gerrymandering cases, some still ongoing. Evers Br.31-32. Those cases are about whether *lawmakers* may rely on core retention to defend district lines against Voting Rights Act or gerrymandering claims. They are not about judicial remedies.

gerrymandering] claims" for lack of standing). And laches would bar any such challenge now. *See Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶1, 393 Wis. 2d 308, 946 N.W.2d 101. The Court cannot change the existing districts as a matter of policy just because Petitioners don't like them.

Contrary to Petitioners' arguments, if Petitioners prove a contiguity or separation-of-powers violation, the Court can identify it, afford the political branches an opportunity to fix it, and, only if they fail to do so, remedy that particular constitutional harm. That does not open the door to redistricting anew. In the *Baldus* litigation, for example, the court did not order the parties to submit statewide maps reconfiguring all assembly districts; it ordered the parties to propose changes to two districts. *See* 862 F. Supp. 2d at 862. Even within those two assembly districts, the court rejected changes to wards unrelated to the Voting Rights Act violation. *Id.* Similarly in *Covington*, the U.S. Supreme Court reversed a trial court for treading beyond what was necessary to remedy the constitutional violation proved in that case. 138 S. Ct. at 2554. This Court cannot "order far broader relief than necessary." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶46, 393 Wis. 2d 38, 946 N.W.2d 35. To go further "is simply an exercise of arbitrary power." *Linden Land Co. v. Milwaukee Elec. Ry. & Lighting Co.*, 107 Wis. 493, 83 N.W. 851, 856 (1900).

To be sure, in remedying one constitutional harm, the Court cannot "creat[e] another." *Johnson I*, 2021 WI 87, ¶34. But there should

be little risk of that here. Redistricting involves a host of requirements and criteria, but no remedy for Petitioners' particular claims should entail a rebalancing of those criteria statewide. *Supra* Part III.A.1. This is not an impasse case where a court is saddled with remedying malapportionment claims, such as those in the *Prosser*, *Baumgart*, or *Wisconsin State AFL-CIO* litigation.[13] The operative districts are constitutionally apportioned by virtue of *Johnson*. The only question is whether that injunction should be further modified in a limited way.

B. This Court has no power to divine politically "neutral" remedies.

The Court must reject Petitioners and Intervenors-Petitioners' call for politically "neutral" remedies. By "neutral," they mean redrawing districts to advantage Democrats. *See Johnson I*, 2021 WI 87, ¶86 (Hagedorn, J., concurring). As *Johnson* already held, this Court cannot divine what is "fair" as between Republicans and Democrats, let alone Wisconsin's many independents. *Id.* ¶43 (majority op.). And there is no basis to backdoor partisan unfairness claims—claims that this Court denied, *Clarke*, 2023 WI 70—as part of a remedy.

[13] Likewise, Petitioners' out-of-state remedial authorities are all impasse cases requiring statewide remedies, unlike the case here. *See, e.g.*, *Carter*, 270 A.3d at 451; *Maestas v. Hall*, 274 P.3d 66, 70 (N.M. 2012); *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1073 (D. Kan. 2012) (per curiam); *Wattson v. Simon*, 970 N.W.2d 42, 43-44 (Minn. 2022); *Peterson v. Borst*, 786 N.E.2d 668, 670 (Ind. 2003) (per curiam).

1. The Court cannot overrule *Johnson I* based on a change in membership.

This Court in *Johnson I* faced the same remedial arguments that remedying malapportionment claims required a "neutral" remedy, tested for "partisan fairness." *See* 2021 WI 87, ¶39; *id.* ¶86 (Hagedorn, J., concurring). It rejected them: "The people have never consented to the Wisconsin judiciary deciding what constitutes a 'fair' partisan divide; seizing such power would encroach on the constitutional prerogatives of the political branches." *Id.* ¶45 (majority op.). Deciding "what constitutes a 'fair' map poses an entirely subjective question with no governing standards grounded in law" under the federal or state Constitutions. *Id.* ¶44. "The Wisconsin Constitution contains 'no plausible grant of authority' to the judiciary to determine whether maps are fair to the major parties . . . ." *Id.* ¶52 (quoting *Rucho*, 139 S. Ct. at 2507). That conclusion was "central to the disposition" of *Johnson I*'s decision on remedial considerations and is thus precedential. *Wis. Just. Initiative*, 2023 WI 38, ¶142 (Hagedorn, J., concurring).[14]

A change in the Court's membership does not change the Constitution. Still today, the Court has "no license to reallocate political

[14] Citizen Mathematicians call that holding "dicta . . . on a question that no party had presented." Citizen-Math. Br.34. Contrary to their retelling, every party in *Johnson* submitted more than 100 pages of briefing on the partisanship question after parties "further complain[ed] that the 2011 maps reflect a partisan gerrymander . . . and ask[ed] [the Court] to redraw the maps to allocate districts equally between the[] dominant parties." *Johnson I*, 2021 WI 87, ¶2. The Court responded: "We *hold* . . . the partisan makeup of districts does not implicate any justiciable or cognizable right." *Id.* ¶8 (plurality op.) (emphasis added); *accord id.* ¶82 n.4 (Hagedorn, J., concurring).

power between the two major political parties." *Johnson I*, 2021 WI 87, ¶52 (quoting *Rucho*, 139 S. Ct. at 2507). There is still no "right to partisan fairness" in the Wisconsin Constitution. *Id.* ¶53. Accordingly, "[a]djudicating claims of 'too much' partisanship" in proposed remedies "would recast this court as a policymaking body rather than a law-declaring one." *Id.* ¶52. It would be a task with "no legal standards," only political ones. *Id.*

There is no reason except politics to overrule *Johnson I.* Abandoning it raises "serious concerns as to whether the court is implementing principles founded in the law" versus "the proclivities of individuals." *Progressive N. Ins. v. Romanshek*, 2005 WI 67, ¶42, 281 Wis. 2d 300, 697 N.W.2d 417 (cleaned up).

Nor are Petitioners' out-of-state decisions (at 39-40) a reason for overruling *Johnson*. *See Muckerheide*, 2007 WI 5, ¶46; *Bashford*, 4 Wis. at 758. All but *Carter* preceded *Johnson*, and Petitioners omit that *Carter* turned on Pennsylvania's Free and Equal Elections Clause. *See* 270 A.3d at 451. Similarly, Petitioners rely on *Essex v. Kobach*, 874 F. Supp. 2d 1069 (D. Kan. 2012), but omit that both the U.S. Supreme Court and the Kansas Supreme Court have since concluded that its courts have no power to adjudicate claims of partisan unfairness. *See Rucho*, 139 S. Ct. at 2507; *Rivera v. Schwab*, 512 P.3d 168, 187 (Kan. 2022). Indeed, Petitioners never cite *Rucho*, let alone reconcile it with their cited federal cases.

2. There is no "neutral" way to balance partisanship.

Petitioners cloak their arguments in the "veneer of neutrality." *Johnson I*, 2021 WI 87, ¶86 (Hagedorn, J., concurring). But "neutrality" is simply a euphemism for court-ordered reallocation of political power. Petitioners quote (at 37-38, 41) *Gaffney v. Cummings*, 412 U.S. 735 (1973), for the proposition that this Court *cannot* take a "politically mindless approach" and "must consider the partisan effects of proposed remedial maps." Likewise, Citizen Mathematicians cite *Gaffney* and say, "being judicially neutral does not mean being politically blind." Citizen-Math. Br.37-38. But *Gaffney*'s dicta, when put back in context, is about *legislators*' flexibility to make political judgments. It rejects the idea that *judges* have the power to replace those political judgments with their own. *See Gaffney*, 412 U.S. at 752-53.

This Court has no power to rebalance the political scales, as *Johnson* already decided. The question is beyond this Court's judicial "competence." *Johnson I*, 2021 WI 87, ¶40 (quoting *Rucho*, 139 S. Ct. at 2494). There are no judicial standards to assess whether a remedial proposal is too Republican or too Democratic, nor any judicial power to reallocate political power if such standards existed. *Id.* ¶41. Look no further than what Petitioners have said that "neutral" reallocation requires—more Democrats in the Legislature. Pet. ¶5.

For starters, the Court cannot reliably measure partisanship. *Johnson I*, 2021 WI 87, ¶43. Parties' promised political science tests and thousands of simulations, Evers Br.30; Citizen-Math. Br.33, are a blunt instrument for predicting future votes based on past votes, which

might be good enough for a pollster but not for a Court. *See, e.g.*, *Harper v. Hall*, 886 S.E.2d 393, 424-27 (N.C. 2023) (rejecting test as unworkable after "no one—not even the four justices who created it—could apply it to achieve consistent results"); *see also Allen v. Milligan*, 599 U.S. 1, 36-37 (2023) (rejecting reliance on two million simulations as "not many maps at all," asking "[w]hat would the next million maps show? The next billion?" and concluding "[a]nswerless questions all"). Real-life politics aren't that simple. *See Vieth v. Jubelirer*, 541 U.S. 267, 287 (2004) (plurality op.); *Davis v. Bandemer*, 478 U.S. 109, 156 (1986) (O'Connor, J., concurring) ("voters can—and often do—move from one party to the other or support candidates from both parties"); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649, 659-60 (2002) (prior margins of victory are only poor indicators of an incumbent's future prospects). Is a voter who simultaneously voted for their Republican Assembly candidate and President Biden—as many did—a Republican or a Democrat?[15] What about the State's independents? *Johnson I*, 2021 WI 87, ¶43 ("more than one-third of Wisconsinites self-identify as independents" according to 2021 Marquette Poll).

[15] *See, e.g.*, *Elections Results Archive: 2020 Fall General Election Results*, Wis. Elections Comm'n, https://perma.cc/XR42-8637 (showing a majority of voters in AD24 voted Knodl (R) for Assembly but Biden (D) for President, while a majority of voters in AD94 voted Doyle (D) for Assembly but Trump (R) for President).

Even if the Court could reliably measure partisanship, it cannot divine what is "fair," "an entirely subjective question with no governing standards grounded in law." *Id.* ¶44. Are districts "fair" when they are safe for a political party, or are they "fair" when they are intensely competitive? *Compare Bandemer*, 478 U.S. at 130-31 (plurality op.), *with* Persily, *supra*, at 668, *and Vieth*, 541 U.S. at 359 (Breyer, J., dissenting) (closely contested districts could result in "a seismic shift in the makeup of the legislative delegation," with consequences that themselves "seem highly undemocratic"). How many safe seats are "fair"? Do "fair" districts in Madison look different than "fair" districts in the Northwoods?

And even if the Court could divine what is "fair," the Court's "law-declaring" role surely does not encompass deciding who wins and who loses in the reallocation of political power. *Johnson I*, 2021 WI 87, ¶52; *Rucho*, 139 S. Ct. at 2500. For the lone Democrat in a rural town, or the lone Republican in a Milwaukee ward, or the many independents everywhere—what power does this Court have to ignore them in its search for district-wide or statewide "neutrality"?

Some parties suggest that the test for a "neutral" remedy is proportionality, whereby the number of legislative districts for Democrats is proportionate to the number of statewide votes for Democrats. According to Citizen Mathematicians (at 41), "the Court must ensure that a map does not systematically award most of the legislative seats to one political party if another party's candidates earned most of the

votes statewide. Neutral judges should not bless schemes designed to hand the gold medal to the team that finishes second." Likewise, the Governor says (at 25) a neutral map is one "responsive to the vote," meaning "shifts in the statewide vote translate to changes in composition of the Legislature." And Petitioners (at 40) rely on cases adopting proportionality as the rule for what is "neutral." Clarke Br.40 (citing *e.g.*, *Good v. Austin*, 800 F. Supp. 557, 566-67 (E.D & W.D. Mich. 1992)).

Proportionality is not "neutral." It is a rule for a political system that Wisconsin has not adopted. Wisconsin's existing constitutional provisions for single-member, winner-take-all districts conflict with proportionality. Single-member districts will always have some inherent "unfairness," *Rucho*, 139 S. Ct. at 2500, because "the voting strength of less evenly distributed groups will invariably be diminished by districting as compared to at-large proportional systems for electing representatives," *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring). "[D]rawing contiguous and compact single-member districts of approximately equal population often leads to grouping large numbers of Democrats in a few districts and dispersing rural Republicans among several," especially in States like Wisconsin where "Democrats tend to live close together in urban areas, whereas Republicans tend to disperse into suburban and rural areas." *Johnson I*, 2021 WI 87, ¶48. Time and again, the U.S. Supreme Court has rejected the notion "that farmers or urban dwellers, Christian fundamentalists

or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers." *Vieth*, 541 U.S. at 288 (plurality op.); *see also id.* at 308 (Kennedy, J., concurring); *Rucho*, 139 S. Ct. at 2499; *Bandemer*, 478 U.S. at 130 (plurality op.). And this Court rightly rejected any such elusive right under the Wisconsin Constitution. *See Johnson I*, 2021 WI 87, ¶¶46-49. Achieving proportionality in Wisconsin would perversely "force the two dominant parties to create a 'bipartisan' gerrymander to ensure the 'right' outcome" as far as proportionality goes, while forgetting about third-party and independent candidates and voters entirely. *Id.* ¶¶48-49.

Proportionality is thus not an available remedial standard. A constitutional amendment would be necessary to settle the inherent conflict between requiring single-member districts and aiming for proportionality. In Ohio, for example, a recent amendment expressly requires the "statewide proportion of districts" favoring each major party to "correspond closely to the statewide preferences of the voters of Ohio." Ohio Const. art. XI, §9(D)(3)(c)(ii); *see League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 192 N.E.3d 379 (Ohio 2022). Wisconsin has no similar constitutional provision. Indeed, Wisconsin has none of the recent constitutional innovations adopted in some States and highlighted in *Rucho* as departures from the default rule that redistricting will be "root-and-branch a matter of politics," *Vieth*, 541 U.S. at 285 (plurality op.), whether the legislature or the court has the pen, *see Rucho*, 139 S. Ct. at 2507-08; *see also* Nathaniel Persily, *When*

Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans, 73 Geo. Wash. L. Rev. 1131, 1158 (2005) ("there are no such things as 'neutral' districting principles"). Just as there is no "'Fair Districts Amendment' to the Federal Constitution," *Rucho*, 139 S. Ct. at 2507, there is no such amendment to the Wisconsin Constitution. That leaves this Court with only political judgments, not judicial ones, about what is "neutral" or "fair."

C. If the remedy is properly limited, incumbency should be irrelevant.

The parties contend that the Court cannot "protect incumbents" but can consider incumbent addresses "to ensure the avoidance of a partisan gerrymander in the resulting maps." Clarke Br.41; *see also* Evers Br.28 (similar). *But see White v. Weiser*, 412 U.S. 783, 797 (1973) (minimizing contests between incumbents is not inherently "invidious[]"). To the extent Petitioners suggest that this Court can target incumbents based on their political affiliation, that itself is an off-limits political choice. *See Johnson I*, 2021 WI 87, ¶¶40-52; *see also, e.g.*, *Essex*, 874 F. Supp. 2d at 1093 (rejecting similar arguments). In any event, Petitioners' particular claims ought not require consideration of incumbents. At most, the Court could only modify the *Johnson* injunction to remedy sparsely populated, allegedly noncontiguous pieces of districts, which simultaneously would remedy any separation-of-powers claim too. *Supra* Part III.A.1.

D. A properly limited remedy will avoid senate disenfranchisement.

The problem of senate disenfranchisement will not arise if the Court abides by its limited remedial role, devising a remedy that "limit[s] the solution to the problem." *Johnson I*, 2021 WI 87, ¶68; *see Gill*, 138 S. Ct. at 1931 (explaining that remedies should be limited to "such districts as are necessary to reshape the voter's district" in keeping with the "rule that 'a remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established'"). Most municipal islands in assembly districts are surrounded by assembly districts in the same senate district. Legis. App.4-11. Of those municipal islands surrounded by different senate districts, nearly all are surrounded either by a similarly odd-numbered district or an even-numbered senate district. *Id.* Dissolving islands into those surrounding districts would not implicate senate disenfranchisement. It appears there are only *five* populated municipal islands that, if dissolved, would move roughly 350 people from even-numbered senate districts to odd-numbered senate districts.[16] That would be a tiny fraction of the more than 100,000 people moved between senate districts in the Governor's and Legislature's proposed remedies selected in *Johnson*. *See* Legis. Br.6 tbl.2, *Johnson*, No. 2021AP1450-OA (Dec. 30, 2021).

[16] There are islands of 26 people in Town of Freedom (SD2), 31 people in Town of Trenton (SD14), 9 people in Town of Mukwonago (SD28), 16 people in Town of Rockland (SD30), and 269 people in Town of Ledgeview (SD30). *See* Legis. App.4-11.

Senate disenfranchisement is thus no excuse for Petitioners' extraordinary special-elections remedy—especially not in the vast majority of districts unaffected by senate disenfranchisement. *Contra* Clarke Br.45; Evers Br.27-28. Some senate disenfranchisement is inherent with senators' staggered terms and decennial redistricting. But by prescribing both, Wis. Const. art. IV, §§3, 5, the Wisconsin Constitution shows that some is constitutionally tolerable. If the Constitution tolerates such senate disenfranchisement every ten years as voters move between senate districts for population equality, then the Constitution tolerates the *de minimis* senate disenfranchisement resulting from dissolving a few islands. Petitioners' demands to cut short senators' constitutionally prescribed terms, undoing the effect of an election, on the other hand, is constitutionally intolerable.

E. Special elections cannot be part of the remedy.

1. Petitioners have not identified "the most extraordinary of circumstances" necessary to justify the "extraordinary remedy" of special elections here. *Bowes v. Ind. Sec'y of State*, 837 F.3d 813, 817 (7th Cir. 2016). The few authorities they cite establish that special elections are rarely justified, even in cases of racial gerrymandering. Memo ISO Mot. to Dismiss 33. Nothing justifies them here. *See* Johnson Br.32-33. It makes no sense to reward Petitioners and Intervenors-Petitioners with special elections after Petitioners sat out *Johnson* and Intervenors-Petitioners agreed districts were contiguous and raised no separation-of-powers arguments in *Johnson*. Having failed to object to districts before the 2022 elections were conducted pursuant to *Johnson III*,

parties cannot demand shortening the elected senators' terms after the fact.

2. For similar reasons, Petitioners cannot justify a writ *quo warranto*. Petitioners offer (at 55-56) only a conclusory demand for a writ "declaring the election of senators in November 2022 from unconstitutionally configured districts to be unlawful and ordering special elections in November 2024 for all odd-numbered state senate districts." Nor have Petitioners adequately justified their extraordinary request for a writ *quo warranto* in previous filings. *See* Clarke Memo. ISO Pet.82-84. There is no adequate justification. *See* Sens. Opp. Pet.26-29; Memo. ISO Mot. Dismiss 29-31. Petitioners have not alleged that any voting irregularities occurred in the 2020 election, *see* Wis. Stat. §784.06, that any other individual is entitled to a senator's seat, that any senator has "usurp[ed], intrude[d] into or unlawfully hold[s] or exercise[s]" his or her office, or that any senator has done anything to "work a forfeiture of office," *id.* §784.04(1)(a)-(b). In short, they do not allege that any senator is not able or legally entitled to hold office. *See State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶13, 402 Wis. 2d 539, 976 N.W.2d 821. They made no such arguments before, during, or after *Johnson*. And they cannot upset the approaching 2024 election schedule by belatedly and baselessly arguing so now.

IV. The Court cannot rush—or preclude—necessary factfinding.

A. Parties surmise that remedial proceedings will "require little or no fact-finding." Citizen-Math. Br.42; *see* Clarke Br.49. They say

"[n]o pre-hearing discovery should be allowed" and the Court must "prohibit the litigants from taking depositions or any other discovery." Citizen-Math. Br.48, 51; Clarke Br.49 ("solely on written submission from the parties"). They rely on *Johnson* as a benchmark, contending remedial submissions took only five weeks. Citizen-Math. Br.42.

If the Court adopts their view of a proper remedy, remedial proceedings will look nothing like *Johnson*. In *Johnson*, parties stipulated to malapportionment and proceeded directly to remedies. Remedial submissions had the guardrails of this Court's least-changes approach. The parties agreed no discovery was required beyond expert reports. *See* Proposed Joint Discovery Plan 2, *Johnson*, 2021AP1450-OA (Dec. 3, 2021). There will be no such agreement here if those guardrails are off. If, for instance, the Court imposes a partisan "neutrality" requirement, what is "neutral" will be disputed. And those disputes cannot be resolved "solely on written submission." *Contra* Clarke Br.49.

It would also violate due process to deny Respondents an opportunity to test Petitioners' standing, merits claims, proposed remedies, and experts with cross-examination and other features of ordinary civil litigation. *See, e.g.*, *Greene v. McElroy*, 360 U.S. 474, 496-99 & n.25 (1959) ("basic ingredients in a fair trial"); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("due process requires an opportunity to confront and cross-examine adverse witnesses"). Those constitutional harms will be compounded if the Court exempts this case from normal

procedural rules and judicial impartiality. *See Allen v. Georgia*, 166 U.S. 138, 140 (1897); *accord Jordan v. Massachusetts*, 225 U.S. 167, 174-75 (1912).

B. There is insufficient time before 2024 election deadlines commence to conduct remedial proceedings. Legis. Br.61-62. Because of their delay, Petitioners have left only a few months—covering the holidays—to litigate this case if Petitioners have their way. Petitioners' truncated schedule (at 51) leaves the parties a mere 14 days to submit remedial briefing, find experts, and oversee expert reports. That is unnecessarily rushed by any standard. Last year, cases before the Wisconsin Court of Appeals took roughly 15 months.[17] Likewise, cases in Wisconsin's state and federal trial courts took an average 9 months to resolve, *excluding* cases that go to trial.[18] After waiting almost two years from their first opportunity to intervene in *Johnson* and over one year after *Johnson*'s final judgment, Petitioners cannot fast-track this case in a way that would deny the parties' rights to fully litigate Petitioners' claims.

C. The parties must have time to complete multiple stages of proceedings, with costly and numerous experts and a neutral fact-finder. *See* Leg. Br.61-62; *see also, e.g.*, Citizen-Math. Br.48-52. But if the

[17] *See Court of Appeals Annual Report-2022* at 3, Wis. Ct. Sys., https://bit.ly/3SjfjFF.

[18] *See Federal District Court Management Statistics – Profiles*, U.S. Courts, https://bit.ly/46NPIcF; *Circuit court caseload statistics*, Wis. Ct. Sys., https://bit.ly/4774wmi.

Court entertains Petitioners' expedited schedule, then the Court must also entertain sitting as the factfinder. There would not be sufficient time to refer proceedings to a "referee" under Petitioners' or Intervenors' rushed schedules. Wis. Stat. §751.09. And referring to a three-judge panel, as Citizen Mathematicians suggest, is not contemplated by the relevant statute. *Id*.

D. Finally, only Petitioners contend (at 53-55) that the Court should skip giving the political branches a reasonable opportunity to redistrict. The argument misunderstands that this Court acted in *Johnson* only after an impasse, *Johnson I*, 2021 WI 87, ¶19, and it ignores settled practice, Legis. Br.52-53. As for Petitioners' alternative argument (at 54) that the Court should order the Legislature to legislate "in full public view," this Court "has no jurisdiction or right to interfere with the legislative process" any more than the Legislature could tell this Court to conference in public. *Goodland*, 243 Wis. at 467-68.

CONCLUSION

The Court should reject Petitioners' constitutional claims and dismiss the petition.

Dated this 30th day of October, 2023.

Respectfully submitted,

Electronically Signed by
Jessie Augustyn

AUGUSTYN LAW LLC
JESSIE AUGUSTYN, SBN 1098680
1835 E. Edgewood Dr., Ste. 105-478
Appleton, WI 54913
715.255.0817
jessie@augustynlaw.com

Counsel for Respondents Senators Cabral-Guevara, Hutton, Jacque, Jagler, James, Kapenga, LeMahieu, Marklein, Nass, Quinn, Tomczyk, & Wanggaard

LEHOTSKY KELLER COHN LLP
SCOTT A. KELLER*
SHANNON GRAMMEL*
GABRIELA GONZALEZ-ARAIZA*
200 Massachusetts Ave., NW, Ste. 700
Washington, DC 20001
512.693.8350
scott@lkcfirm.com

LEHOTSKY KELLER COHN LLP
MATTHEW H. FREDERICK*
408 West 11th St., Fifth Floor
Austin, TX 78701

Counsel for Wisconsin Legislature & Respondents Senators Cabral-Guevara, Hutton, Jacque, Jagler, James, Kapenga, LeMahieu, Marklein, Nass, Quinn, Tomczyk, & Wanggaard

Electronically Signed by
Kevin M. St. John

BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Ste. 2200
Madison, WI 53718
608.216.7995
kstjohn@bellgiftos.com

CONSOVOY MCCARTHY PLLC
TAYLOR A.R. MEEHAN*
RACHAEL C. TUCKER*
DANIEL M. VITAGLIANO*
C'ZAR BERNSTEIN**
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
703.243.9423
taylor@consovoymccarthy.com

LAWFAIR LLC
ADAM K. MORTARA, SBN 1038391
40 Burton Hills Blvd., Ste. 200
Nashville, TN 37215
773.750.7154
mortara@lawfairllc.com

Counsel for Wisconsin Legislature

* *Admitted pro hac vice*
** *Pro hac vice motion pending*

CERTIFICATION REGARDING LENGTH AND FORM

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c) for a brief. Excluding the portions of this brief that may be excluded, the length of this brief is 10,963 words as calculated by Microsoft Word.

Dated this 30th day of October, 2023.

Respectfully submitted,

Electronically Signed by
Kevin M. St. John

BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Suite 2200
Madison, WI 53718
608.216.7995
kstjohn@bellgiftos.com