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.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION BY INTERVENORS-RESPONDENTS WISCONSIN LEGISLATURE, JOHNSON, GOEBEL, PERKINS, O'KEEFE, SANFELIPPO, MOULTON, JENSEN, ZAHN, ELMER, AND STRECK AND RESPONDENTS SENATORS CABRAL-GUEVARA, HUTTON, JACQUE, JAGLER, JAMES, KAPENGA, LEMAHIEU, MARKLEIN, NASS, QUINN, TOMCZYK, AND WANGGAARD

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INTRODUCTION

Petitioners, a group of Democratic voters, waited 474 days after this Court issued its final judgment in the *Johnson* litigation to file this do-it-again redistricting lawsuit. *See Johnson v. Wis. Elections Comm'n* (*Johnson III*), 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559. Despite that delay, the parties were given 10 days—half of them falling on weekends and a federal holiday—to brief the merits of Petitioners' claims. *See Clarke v. Wis. Elections Comm'n*, 2023 WI 70, 995 N.W.2d 779. And now, announced the Friday before Christmas, the parties have been given 21 days—a third of them falling on weekends and state holidays—to submit proposed remedies, lengthy remedial briefs, and expert reports. The message is clear: The regular rules apply to Republicans. *See, e.g.*, *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568. But here, Democrats get special solicitude. *See Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶238 (Grassl Bradley, J., dissenting).

Petitioners filed this case to collect on a campaign promise that electoral districts could be redrawn to change "the outcome of the

2024 election."[1] They announced their plans the morning after judicial elections in April.[2] And then they waited months more to file their lawsuit, holding it until one day after the investiture of the Court's newly elected Justice.

Given Petitioners' delay, there is not enough time before the 2024 elections to fully litigate this case. Perhaps aware of that, the Court's Christmas decision and scheduling order have stripped these proceedings of the most basic steps in litigation. Petitioners have obtained an injunction without offering any evidence. The Legislature has been effectively denied its constitutionally assigned redistricting power. The parties have been deprived of any discovery, the opportunity to cross-examine witnesses, and a hearing to resolve material factual disputes. And Petitioners' political wish for new districts statewide will be granted in record speed.

The Legislature moves for reconsideration of the Court's Christmas decision, *Clarke*, 2023 WI 79, and the accompanying

[1] @janetforjustice, Twitter (Mar. 27, 2023, 12:47 PM), https://perma.cc/YAL9-JR8R; Janet for Justice, Facebook (Apr. 3, 2023), https://perma.cc/HVD7-PXD5.

[2] Jack Kelly, *Liberal law firm to argue gerrymandering violates Wisconsin Constitution*, Cap Times (Apr. 6, 2023), https://perma.cc/5TCG-4EQF.

remedial scheduling order, Order, *Clarke v. Wis. Elections Comm'n*, No. 2023AP1399-OA (Dec. 22, 2023) ("Scheduling Order"). *See* Wis. Stat. §§809.14, 809.64. The Legislature must have a reasonable opportunity to redistrict in light of the newly announced contiguity rules, and the parties must have a full and fair opportunity to present remedial evidence and arguments should the Legislature fail to redistrict. It appears the Court, moreover, has not meaningfully considered the parties' arguments and has instead pre-decided them in a decision written and circulated immediately after oral argument. And even looking past those errors, voters and candidates must have sufficient time to acclimate to entirely new district lines—which this Court has promised will be redrawn statewide without regard to existing district boundaries, *Clarke*, 2023 WI 79, ¶¶60-63—before election deadlines commence. None of that can occur on the Court's schedule.

BACKGROUND

On August 2, 2023, Petitioners asked this Court to take up redistricting again. The petition came 679 days after this Court invited "any prospective intervenor" to file a motion and participate in the *Johnson* redistricting litigation following the 2020 census. *See* Order 3,

Johnson v. Wis. Elections Comm'n, No. 2021AP1450-OA (Sept. 22, 2021). Petitioners did not intervene in *Johnson*. And no party in *Johnson* asked for reconsideration of the final judgment to correct any alleged contiguity errors. Instead, Petitioners waited 474 days after that final judgment in *Johnson*—and one day after this Court's membership changed—to seek an injunction of the *Johnson* injunction and declaratory relief.

Petitioners raised various claims in their Petition for an Original Action, but this Court refused to entertain all of them and has since found a violation of only one of them: noncontiguity of some, but not all, districts. *See Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶¶3 & n.8, 9-10. This Court refused to exercise original jurisdiction over Petitioners' claims of partisan gerrymandering. *See Clarke*, 995 N.W.2d at 781. The Court explained that there was not enough time before the 2024 elections to address partisan-gerrymandering claims because of "the need for extensive fact-finding (if not a full-scale trial)." *Id*.

On December 22, 2023, this Court issued an opinion promising to redraw districts statewide and a scheduling order for further remedial proceedings. *See generally Clarke*, 2023 WI 79; Scheduling Order. The Court enjoined the Wisconsin Elections Commission from using all existing district lines in forthcoming elections—that is, the Court issued an injunction prohibiting the Commission from complying with the Court's *Johnson* injunction. *Clarke*, 2023 WI 79, ¶¶3-4, 56. The opinion and injunction was preceded only by the parties' legal briefs on 10-day turnarounds and oral argument. Petitioners have yet to submit any evidence in these proceedings.

The Court's opinion declared that nearly 100 years of Wisconsin redistricting plans violate the Wisconsin Constitution's requirement that assembly districts "consist of contiguous territory" and senate districts consist "of convenient contiguous territory." Wis. Const. art. IV, §§4-5; *see Clarke*, 2023 WI 79, ¶3.[3] The opinion was silent on the Legislature's principal argument that the Wisconsin Constitution's

[3] *See* Legis. Resp. Br.22-23 (explaining that as early as the 1930s, the Town of Madison's municipal islands were districted separately from the surrounding City of Madison).

particular text speaks to how counties or towns can be combined into districts—that is, for a district to "consist of contiguous territory," the district must combine adjoining counties or towns, versus combining faraway counties or towns. *See* Legis. Opening Br.29-34; Legis. Resp. Br.21-28. A district that combines the Towns of Verona and Middleton is a district "consist[ing] of contiguous territory" because those towns share a north-south border, even if those towns have municipal islands as a result of municipal annexations by surrounding cities. *See* Legis. Opening Br.29-34; Legis. Resp. Br.21-28. The opinion offered no response to that argument. *See Clarke*, 2023 WI 79, ¶206 (Grassl Bradley, J., dissenting) (stating the Legislature "provided an interpretation of 'contiguous territory' the majority finds too difficult to refute").

The Court's opinion also declared that Petitioners' years-delayed suit was timely and not barred by laches. *See id.* ¶¶41-43 (majority op.). As for the Governor and other Intervenor-Petitioners who already participated in *Johnson* and took the opposite position on contiguity, the Court rejected Respondents' arguments that doctrines of laches, preclusion, and estoppel barred their requests for a statewide

redraw. *Id.* ¶¶36-55. Accordingly, with the Governor free to participate, the Court deemed the Governor's involvement sufficient to justify a statewide remedy, even if other Petitioners did not have standing to seek such a remedy. *Id.* ¶39.

Also on December 22, 2023, this Court announced that it would impose new remedial maps *before* the "fast-approaching" 2024 elections, rather than wait for the 2026 elections. *Id.* ¶¶4, 56. The Court stated that it did not think the remedial map could be limited to only those districts with detached pieces because "a remedy modifying the boundaries of the non-contiguous districts will cause a ripple effect across other areas of the state." *Id.* ¶56. The Court did not address Respondents' arguments that a more limited remedy could resolve Petitioners' contiguity claim. *See* Legis. Opening Br.60-61; Legis. Resp. Br.36-54; Johnson Opening Br.28-33; Johnson Resp. Br. 22-31. The Court never acknowledged that there are no populated noncontiguities in Milwaukee-area districts; that nearly all areas of noncontiguity affect between 0 and 20 people; and that all municipal islands could be dissolved into surrounding districts or attached to their assigned

districts by moving only a ward or a few census blocks. Legis. Opening Br. 57-58, 60-61; Johnson Opening Br.31-33; Legis. Resp. Br.53; *see also* Citizen Math. Resp. Br.31-32.

As for the remedial considerations, the Court announced that it would not use existing district lines as a benchmark and would instead consider a panoply of "principles" beyond contiguity to redraw districts statewide. *Clarke*, 2023 WI 79, ¶60. In particular, the Court "will consider partisan impact when evaluating remedial maps," even though the Court "declined to hear the issue of whether extreme partisan gerrymandering violates the Wisconsin Constitution." *Id.* ¶69. The Court said that "neutrality" required that it not "enact maps that privilege one political party over another." *Id.* ¶70. The Court's opinion did not further define or quantify what would be an impermissible "partisan impact." *See id.* ¶¶69-71.

The opinion did not address Respondents' remedial arguments that the only neutral judicial remedy was one limited to redressing the contiguity problem in the existing districts. *See, e.g.*, Johnson Opening Br.28-36; Legis. Resp. Br.36-52. Nor did the Court address its

precedential holdings in *Johnson* that it was beyond this Court's "competence" and "judicial power" to decide whether a judicial remedy in a redistricting case is politically fair, or to ignore existing districts. *See Johnson v. Wis. Elections Comm'n* (*Johnson I*), 2021 WI 87, ¶¶39-52, 69-72, 399 Wis. 2d 623, 967 N.W.2d 469; *accord id.* ¶¶84-86 (Hagedorn, J., concurring) ("The petition here—that we should use our equitable authority to reallocate political power in Wisconsin—is not a neutral undertaking. It stretches far beyond a proper, focused, and impartial exercise of our limited judicial power."). Never did the Court acknowledge that in Wisconsin, "[t]he 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.).

To assess proposed remedies, the Court appointed two out-of-state "consultants . . . to assist the court in this case." Scheduling Order 1. The Court's order does not identify whether it has appointed the consultants as referees or as expert witnesses. *Compare* Wis. Stat. §805.06, *with* §907.06. The Court directed the Director of State Courts

"to enter into one or more retainer agreements" for their services and stated the parties will bear the costs of those services. Scheduling Order 1, 4.

The Court's remedial schedule commences immediately. The Court's schedule gives the parties three weeks over the Christmas and New Year holidays to put together remedial proposals, briefs, and expert reports, and another ten days for responses. Scheduling Order 2-4. The Court's order states that "[n]o further discovery shall be permitted" and does not provide for a hearing on disputed issues of material fact. *Id.* at 3.

Finally, as for the Legislature's role, the Court will not permit the Legislature to first apply the Court's newfound contiguity rules. Rather, the Court said that the Legislature can work "concurrently" with the Court's accelerated remedial proceedings. *Clarke*, 2023 WI 79, ¶76. The Court intimated that there was no time for the Legislature to act first because that would not "ensure maps are adopted in time for the 2024 election." *Id.* ¶4.

ARGUMENT

Reconsideration is warranted "when the court has overlooked controlling legal precedent or important policy considerations or has overlooked or misconstrued a controlling or significant fact appearing in the record." Wis. Supreme Court Internal Operating Procedures (IOP), III.J., https://perma.cc/MY47-JZYN. That standard is met here for any one of the reasons set forth below. Respondents further request that the Court reconsider, for purposes of this motion, its view that motions will not stay proceedings. *See* Scheduling Order 4. Respondents ask that all deadlines be stayed pending a decision on this motion, thereby deferring substantial expenses for the parties and Court-appointed consultants. *See* Wis. Stat. §809.14(3).

I. The Legislature must have the first opportunity to cure any newfound constitutional violations.

The Wisconsin Constitution vests in the *Legislature*, not the *Court*, the power to "district anew." Wis. Const. art. IV, §3. But rather than give the Legislature a reasonable opportunity to apply the Court's new contiguity rule first, the Court has delegated that task to Court-appointed "consultants" who will consider parties' statewide

redistricting plans based on various policy and political factors. *See Clarke*, 2023 WI 79, ¶¶64-71 And while the Legislature can redistrict "concurrently," the Court put the Legislature in a footrace—starting the Friday before Christmas—to redistrict before 2024 election deadlines commence. *Id.* ¶76. Those imminent election deadlines, which are the result of Petitioners' strategically delayed lawsuit, are no basis for stripping the Legislature of a reasonable opportunity to redistrict.

A. "[I]n our constitutional order [redistricting] remains the legislature's duty." *Johnson I*, 2021 WI 87, ¶19; *see also Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam). It is "a fundamental principle" that the Legislature be given "an opportunity to enact a remedial plan" when an apportionment scheme is declared unlawful. *Whitford v. Gill*, No. 15-cv-421, 2017 WL 383360, at *1 (W.D. Wis. Jan. 27, 2017), App.4. "[J]udicial relief becomes appropriate only when a legislature fails to reapportion according to . . . constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Upham v. Seamon*, 456 U.S.

37, 41 (1982) (per curiam). "Clearly," this approach "is not novel . . . as so many other courts have done" it. *Clarke*, 2023 WI 79, ¶25.[4]

The majority opinion gives lip service to this ordinary process. The Court says that "when an existing plan is declared unconstitutional, it is 'appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure.'" *Id.* ¶57 (quoting *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978)). But the Court then deprives the Legislature of any such reasonable opportunity here. The Court offers the Legislature the opportunity to try and pass redistricting legislation "concurrently" with the Court's warp-speed remedial proceedings. *Id.* ¶76. That so-called opportunity to redistrict is not the reasonable opportunity required. There is no basis for making the Legislature compete with the Court, as though the Court were acting as a separate

[4] *See, e.g.*, *Terrazas v. Ramirez*, 829 S.W.2d 712, 720 (Tex. 1991) (noting "[a]fter a legislative plan has been invalidated," the legislature must "be given a reasonable opportunity to enact a substitute statute" and "[o]nly in the most exigent circumstances should a court intrude into this arena without affording the Legislature a full opportunity to remedy any defects"); *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702, 706 (Tenn. 1982) (collecting cases and observing "that the courts should act only if the legislature fails to act constitutionally after having had a reasonable opportunity to do so").

legislature, in a footrace to the 2024 election deadlines. Those hoping for the Court to grant Petitioners' political wish will simply wait for the Court to reach the finish line first. *See, e.g.*, @GovEvers, Twitter (Dec. 22, 2023, 5:04 PM), https://perma.cc/3Z4C-RMDJ (Statement of Governor Evers) ("Wisconsin is a purple state, and I look forward to submitting maps to the Court to consider and review that reflect and represent the makeup of our state.").

Wisconsin's own oft-cited redistricting litigation shows how backwards and rushed that approach is. By failing to wait, the Court's "judicial usurpation of the legislative function with respect to the apportionment" is clear. *State ex rel. Bowman v. Dammann*, 209 Wis. 21, 243 N.W. 481, 485 (1932). For decades, this Court refused to do anything but enjoin the use of existing district lines in redistricting suits and give the Legislature an opportunity to correct constitutional flaws through the legislative process. In the *Cunningham* cases, for example, the Court did not impose its own desired districts, even after the Legislature failed in its first attempt to cure malapportioned districts. *See State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892);

State ex rel. Lamb v. Cunningham, 83 Wis. 90, 53 N.W. 35 (1892). When it was "said that the court should suggest a plan for such apportionment," the Court declined, "disclaim[ing] any and all legislative functions." *Lamb*, 53 N.W. at 58. Instead, the Court left it to the Legislature to hold special sessions and pass new plans. *See* Ch. 1, Laws of 1892, Special Session 1; Ch. 1, Laws of 1892, Special Session 2.

Then for the first time in the 1960s, the Court stepped in to issue a mandatory injunction with new district lines in the *Zimmerman* litigation—but only after giving the Legislature an entire election cycle and then two more months to remedy the malapportioned districts itself. *See State ex rel. Reynolds v. Zimmerman* (*Zimmerman II*), 23 Wis. 2d 606, 128 N.W.2d 16 (1964); S*tate ex rel. Reynolds v. Zimmerman* (*Zimmerman I*), 22 Wis. 2d 544, 126 N.W.2d 551 (1964). No better case illustrates the error in the Court's Christmas decision than *Zimmerman*.

In *Zimmerman*, the Legislature and the Governor were at an impasse with respect to new redistricting legislation after the 1960 census. The Legislature recessed in January 1962 (through January 1963) without new legislation. *See Zimmerman I*, 22 Wis. 2d at 549. That same

month, Attorney General John W. Reynolds asked this Court to enjoin the use of the existing districts for the 1962 elections and "to conduct the elections pursuant to such plan as the court might direct, or to conduct the elections at large." *Id.* This Court refused. It dismissed Reynolds's suit as too late, telling him that he could try again after the 1962 elections. *Id*; *see also id.* at 550 (describing dismissal of federal suit as too late, too (citing *Wisconsin v. Zimmerman*, 209 F. Supp. 183 (W.D. Wis. 1962))). So in 1963, Reynolds, now governor, sued again to enjoin the use of the malapportioned districts in the 1964 elections. *Id.* The Court agreed that the districts were malapportioned but refused to immediately insert itself in a redraw. *Id.* at 569-70. Instead, the Court gave the Legislature *another* opportunity—63 days—to try and redistrict, even though it had already previously given the Legislature the 1963 legislative session. *Id.* at 569-71 ("although the legislative process has not produced a redistricting act from 1961 to the present, it is appropriate that the senate, the assembly, and the governor have a further opportunity . . . to enact a valid plan"). Only then, after the political branches again "failed to enact any legislative apportionment,"

did the Court impose a remedial plan. *See Zimmerman II*, 23 Wis. 2d at 606.

The lesson from *Zimmerman* is that late-filed lawsuits are not an excuse to rush the legislative process. For the first time in Wisconsin's history, this Court has read the "contiguous territory" clauses in the Wisconsin Constitution, art. IV, §§4-5, to mean that the State's treatment of municipal islands in districting plans has been flawed. If the Court were following its precedents, chiefly *Zimmerman*, the Legislature would have the first opportunity to apply the Court's new rule. And the imminence of election deadlines due to Petitioners' own delay would be a reason to *dismiss* Petitioners' suit without prejudice, not to *accelerate* it. *See Zimmerman I*, 22 Wis. 2d at 549-50; *accord Trump*, 2020 WI 91.

Or take the more recent example from *Gill v. Whitford*, 138 S. Ct. 1916 (2018). Plaintiffs filed that lawsuit in July 2015. *Id.* at 1923. The parties did not rush to judgment before the 2016 election deadlines. They instead prepared for and went to trial in May 2016, consistent with the amount of time cases normally take in Wisconsin's state and

federal courts. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 857 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018); *see also* Legis. Resp. Br.57 (discussing typical duration of state and federal cases in Wisconsin); *infra* Part II.C.1. Months later, the Court issued its decision and concluded state assembly districts would be redrawn. *Whitford*, 218 F. Supp. 3d 837. As far as subsequent remedial proceedings, the Court gave the Legislature *10 months* to redistrict first, and the Court ensured that any new lines would be in place months before election deadlines commenced. *See Whitford*, 2017 WL 383360, at *2.

The Court's remedial scheduling order offers none of that here. The Court has left the Legislature with no time to attempt to apply the newly announced contiguity rules. The Legislature's last redistricting process entailed public hearings, a public portal, committee debates, and floor debates in both the Assembly and Senate, where various proposals were voted up or down. *See* S.B. 621, 2021-22 Session (Wis. 2021), https://perma.cc/FEF5-VVJ5 (bill history and hearing materials). This time around, the legislative process would require some or all of that. And, given the Governor's commitment to vetoing

any redistricting reforms,[5] it could require time for legislators to work across the aisle to try and override that veto. It is not something that can be rushed over Christmas and New Year holidays. When the Court has not even left *itself* with enough time to conduct the statewide redraw that it has promised before imminent election deadlines, *infra* Parts II.C.1-2 & III, how can it say it has left 132 state legislators enough time?

B. Important policy considerations also counsel giving the Legislature the first opportunity to redistrict. Wisconsinites "have a strong interest in a redistricting map drawn by an institution of state government—ideally and most properly, the legislature." *Jensen*, 2002 WI 13, ¶17. The Legislature "is the best institution to identify and then reconcile traditional state policies within the constitutionally mandated framework." *Whitford*, 2017 WL 383360, at *1 (cleaned up). And as such, the Legislature is the branch vested with the power to "district anew." Wis. Const. art. IV, §3.

[5] *See* Scott Bauer, *Wisconsin Assembly Republicans pass sweeping redistricting reform, but likely veto awaits*, AP (Sept. 15, 2023), bit.ly/576PLKJU; *see also* @GovEvers, Twitter (Dec. 22, 2023, 5:04 PM), https://perma.cc/3Z4C-RMDJ.

But by leapfrogging the Legislature in the forthcoming remedial proceedings, the Court will necessarily have to make myriad policy decisions to deliver the statewide redraw it has promised. Consider, for instance, the technical specifications required of the Court-appointed consultants. *See* Consultants' Technical Specifications Memo., *Clarke*, No. 2023AP1399-OA (Dec. 26, 2023). The consultants have asked parties' proposed remedies to account for "[c]ommunity [c]onsiderations" and to "specify the size and geographic location of any communities of interest identified," "the degree to which these communities of interest have been split," and "how they arrived at their definition and identification of communities of interest." *Id.* at 2. But in Wisconsin's constitutional system, the Legislature—not Court-appointed consultants—is the branch of government with the power to make policy decisions, based on legislative expertise, about what constitutes a community of interest and what communities ought to be kept together versus what communities can be split. *See Jensen*, 2002 WI 13, ¶10 ("the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely

these sorts of political and policy decisions, is preferable to any other").

The Court, on the other hand, "may not exercise legislative power" as part of the remedial process. *Donaldson v. Bd. of Comm'rs of Rock-Koshkonong Lake Dist.*, 2004 WI 67, ¶48, 272 Wis. 2d 146, 680 N.W.2d 762. And yet, the Court's unlimited remedial plans, giving no deference to the existing districts, will render the Court no more than "a 'super-legislature' by inserting [itself] into the actual lawmaking function." *Johnson I*, 2021 WI 87, ¶71 (quoting *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 528-29, 576 N.W.2d 245 (1998)); *see* Legis. Resp. Br.36-52.

C. The Court's invitation that the Legislature work "concurrently" with the Court is also designed to fail given the promises made about the forthcoming Court-drawn plan. Petitioners brought this lawsuit "to achieve a Democratic majority in the state legislature." Pet. ¶5. By entertaining the petition, it was clear the Court "will adopt new maps to shift power away from Republicans and bestow an electoral advantage for Democrat candidates, fulfilling one of

[Justice] Protasiewicz's many promises to the principal funder of her campaign." Order 2, *Clarke v. Wis. Elections Comm'n*, No. 23AP1399-OA (Aug. 15, 2023) (Grassl Bradley, J., dissenting). So when the Assembly passed a sweeping redistricting reform bill in September—a plan similar to one the Governor previously endorsed—the Governor promptly dismissed it as "bogus."[6] Instead, Democrats would "pin[] their hopes on the new liberal-controlled Wisconsin Supreme Court ordering that new maps be drawn that are more beneficial to them."[7]

The Court's Christmas decision reveals that "[t]he majority has the same goal" as Petitioners: "new maps that give more political power in the state legislature to Democratic Party candidates." *Clarke*, 2023 WI 79, ¶275 (Hagedorn, J., dissenting); *see also id.* ¶209 (Grassl Bradley, J., dissenting) ("The majority's decision . . . unveils its motivation to redraw the legislative maps for the benefit of Democratic

[6] Vanessa Swales, *Did Wisconsin's governor reject Iowa modeled redistricting plan he had earlier endorsed?*, Politifact (Dec. 22, 2023), https://perma.cc/2KMT-YBEP.

[7] Scott Bauer, *Wisconsin Assembly Republicans pass sweeping redistricting reform, but likely veto awaits*, AP (Sept. 15, 2023), bit.ly/576PLKJU.

state legislative candidates."). The Governor knows this. He said as much within an hour of the Court's opinion:

> Wisconsin is a purple state, and I look forward to submitting maps to the Court to consider and review that reflect and represent the makeup of our state. And I remain as optimistic as ever that, at long last, the gerrymandered maps Wisconsinites have endured for years might soon be history.[8]

In short, the Court has promised a remedy far more sweeping than what a judicial remedy of Petitioners' noncontiguity claims would entail. *See, e.g.*, Legis. Resp. Br.39-40; Johnson Resp. Br.22-24. The parties want more Democratic seats in the Legislature as part of that remedy. *See* Pet. ¶5. They are poised to get them. The Governor and other Democrats thus have no reason to participate in the legislative process to solve what is supposed to be at issue—isolated instances of noncontiguity, more than a third of which affect zero people and nearly all of which affect 20 or fewer people. *See* Legis. Opening Br.18 & App.4-11; Johnson Resp. Br.22-24; *infra* pp.38-39 & nn.11-12.

[8] @GovEvers, Twitter (Dec. 22, 2023, 5:04 PM), https://perma.cc/3Z4C-RMDJ.

D. The Court's only stated basis for denying the Legislature a reasonable opportunity to apply the new contiguity rules is "to ensure maps are adopted in time for the 2024 election." *Clarke*, 2023 WI 79, ¶4. But "next year's legislative elections are fast-approaching," *id.* ¶56, only because of Petitioners' strategically delayed suit. That delay is a ground for *deferring* a court-ordered plan and allowing the Legislature another opportunity to redistrict during the next legislative session. *See Zimmerman I*, 22 Wis. 2d at 549-50. It is hardly a reason to effectively shut out the Legislature.

* * *

Reconsideration is warranted to permit the Legislature a reasonable opportunity to redistrict. The Court must do more than merely "urge the legislature to pass legislation creating new maps"—over the Christmas and New Year holidays. *Clarke*, 2023 WI 79, ¶4. That is not the reasonable opportunity to redistrict that has been given to the Wisconsin Legislature and others time and again.[9] The Court's

[9] *See Zimmerman I*, 22 Wis. 2d at 549-550, 569-71 (allowing 1963 legislative session plus an additional 63 days); *Whitford*, 2017 WL 383360, at *2 (allowing more than 10 months); *see also, e.g.*, *Singleton v. Allen*, Nos. 2:21-cv-1291, 2:21-cv-1530, 2023 WL 5691156, at *2 (N.D. Ala. Sept. 5, 2023) (giving legislature five weeks and

remedial scheduling order should be amended to give the Legislature the first opportunity to apply the Court's newly announced contiguity rule to what are isolated areas of noncontiguity. Only if that legislative process fails should this Court initiate remedial proceedings. The 2024 elections will come and go. But that is a problem of Petitioners' own making. If they wanted their contiguity claims resolved before the 2024 elections, they should have participated in *Johnson*, or at least filed their contiguity claim a year or more earlier. *See Trump*, 2020 WI 91, ¶32 (emphasizing that election claims "must be brought expeditiously").

II. The remedial order must be reconsidered to comport with due process.

The Court's remedial schedule will add to the due process issues pervading this litigation. The majority opinion confirms that the objective risk of prejudgment and bias in these proceedings is constitutionally intolerable. The Court has fast-tracked its Christmas decision. Before Petitioners ever offered a shred of evidence and without

"delay[ing] remedial proceedings to accommodate the Legislature's efforts"), App.7; *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, Nos. 1:21-cv-05337, 1:21-cv-05339, 1:22-cv-00122, 2023 WL 7037537, at *143 (N.D. Ga. Oct. 26, 2023) (giving legislature six weeks), App.80.

weighing the equities, the Court has jettisoned the existing districts and enjoined the Wisconsin Elections Commission from using them. *But see Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979) ("Injunctive relief is addressed to the sound discretion of the trial court; competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction."). And the forthcoming remedial proceedings will be accelerated and stripped of basic litigation process like discovery or a hearing, all "to ensure maps are adopted in time for the 2024 election," *Clarke*, 2023 WI 79, ¶4, as promised.[10]

A. The Legislature's due process arguments are not "underdeveloped."

As an initial matter, the majority opinion had no basis for waving off Respondents' due process arguments in a footnote as "underdeveloped." *See Clarke*, 2023 WI 79, ¶37 n.16. The majority opinion "hides from the law concerning due process" and "relegate[s] litigants' fundamental due process rights to hopeful inconspicuousness

[10] @janetforjustice, Twitter (Mar. 27, 2023, 12:47 PM), https://perma.cc/YAL9-JR8R; Janet for Justice, Facebook (Apr. 3, 2023), https://perma.cc/HVD7-PXD5.

in a footnote." *Id.* ¶174 (Zeigler, C.J., dissenting). And those due process problems will compound in the forthcoming remedial proceedings.

Respondents' due process arguments are anything but "underdeveloped." Within the severely truncated deadlines and words allotted for briefs, Respondents provided "detailed analysis to support" their due process arguments and "request[ed] . . . relief to remedy" the due process issues. *In re Atrium of Racine, Inc.*, 2023 WI 19, ¶44, 406 Wis. 2d 247, 986 N.W.2d 780; *see Douglas v. Alabama*, 380 U.S. 415, 422 (1965) ("an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to . . . preserve the claim for review here").

Respondents have argued from the outset of this case that it has been unconstitutionally pre-decided, in violation of the Fourteenth Amendment, beginning with the Legislature's 47-page brief in support of its recusal motion. *See generally* Legis. Memo. ISO Recusal; *see also* Legis. Opening Br.58-60; Johnson Opening Br.35-38; Legis. Resp.

Br.56-57; Johnson Resp. Br.30, 36-39. The Legislature's opening brief argued and "preserve[d] for appeal all constitutional arguments that modifying, dissolving, or ignoring the *Johnson* injunction here, without recusal by Justice Protasiewicz, violates due process." Legis. Opening Br.58. It further argued that the prejudgment and bias "will be confirmed if this Court departs from black-letter procedural rules to reach the judgment endorsed in Justice Protasiewicz's campaign statements." *Id.* at 59. Respondents raised additional due process arguments should the Court rush or preclude necessary factfinding in remedial proceedings or otherwise depart from Wisconsin's normal rules. Legis. Opening Br.58-62; Johnson Opening Br.35-38; Legis. Resp. Br.55-58; Johnson Resp. Br. 36-39. And the Legislature, citing Supreme Court precedent, specifically highlighted due process issues with not allowing an opportunity to test Petitioners' proposed remedies, including cross-examination of experts, as well as insufficient procedures to resolve disputed factual issues. Legis. Resp. Br.55-58. But these arguments from Respondents' briefs are nowhere in the Court's opinion—as though they were never considered.

B. The rushed Christmas decision appears to confirm this case has been pre-decided.

Were there any doubt that the outcome of this case was pre-decided all along, the majority's Christmas decision removes it. As the dissents observe, the majority's opinion "sophomorically parrots the petitioners' briefing," *Clarke*, 2023 WI 79, ¶187 (Grassl Bradley, J., dissenting), and "mischaracterizes the relevant arguments," *id.* ¶277 (Hagedorn, J., dissenting). It disregards the Respondents' response briefs and oral arguments, and it does not acknowledge, let alone grapple with, 160 pages of dissents. Consider these non-exhaustive examples:

- The majority opinion's contiguity discussion never once identifies or addresses the Legislature's principal argument. *Clarke*, 2023 WI 79, ¶¶10-35; *see id.* ¶¶203-06 (Grassl Bradley, J., dissenting); *id.* ¶277 & n.4 (Hagedorn, J., dissenting). Remarkably, the majority opinion states that "[n]one of the parties disputes that the current legislative maps contain districts with discrete pieces of territory that are not in actual contact with the rest of the district." *Id.* ¶31 (majority op.). But that is precisely what the Legislature disputed. There is no detached "territory" in the existing districts if the "to consist of contiguous territory" clause is properly read to refer to the particular towns or wards combined to make up the district. *See supra* p.13; *see also* Legis. Resp. Br.21-22, 27; Legis. Opening Br.29-34; *see Clarke*, 2023 WI 79, ¶206 (Grassl Bradley, J., dissenting).

- The majority opinion states that Petitioners did not unreasonably delay for their suit to be barred by laches because they "ran out of time and could not obtain relief prior to the 2022 elections." *Id.* ¶42 (majority op.). The majority opinion never once acknowledges, let alone explains away, the reason for Petitioners' delay: the change in the Court's membership. *Id.* ¶170 (Zeigler, C.J., dissenting) ("the parties are forthright enough to tell us themselves that this is in fact their reason for bringing this claim now—after waiting two years . . . —to ensure that this case coincided with the changed composition of the court"); *id.* ¶238 (Grassl Bradley, J., dissenting) ("[Petitioners] waited until the day after the composition of the court changed—a fact so embarrassing the majority never acknowledges it"); *id.* ¶281 n.6 (Hagedorn, J., dissenting) ("petitioners deliberately delayed bringing this case until August 2, 2023, the day after a new justice joined the court"). The opinion then recasts Respondents' prejudice arguments as "vague assertions about disruption to the status quo," *id.* ¶43 (majority op.), dodging Respondents' actual arguments that Petitioners' delay does not give the Legislature sufficient time to redistrict, does not give the parties sufficient time to litigate this case, and does not give voters and candidates sufficient time to adjust to redrawn district lines statewide, in addition to the extraordinary costs resulting from requiring parties to litigate redistricting twice in two years. *See, e.g.*, Legis. Resp. Br. 57-58; Legis. Opening Br. 22, 53-54, 61-62; Legis. Memo. ISO Mot. Dismiss 21-22; *see also Clarke*, 2023 WI 79, ¶¶240-44 (Grassl Bradley, J., dissenting).

- The majority opinion rejects Respondents' procedural arguments by simply repeating Petitioners' briefs and ignoring contrary facts and precedent in Respondents' briefs. *See Clarke*, 2023 WI 79, ¶174 (Zeigler, C.J., dissenting) (arguing "the majority ignored procedural and legal principles which would bar consideration of this case"); *id.* ¶277 (Hagedorn, J., dissenting) ("the court's opinion ignores inconvenient facts and issues"). For just one example, the majority opinion concludes that the Governor has standing to seek a statewide redraw, thereby

filling in for individual voters who live only in Dane County and Beloit-area districts with noncontiguities. *Id.* ¶39 (majority op.). The majority does not respond to pages of Respondents' arguments or dissents explaining that the Governor's participation here is necessarily barred by claim preclusion and judicial estoppel. *See, e.g.*, Legis. Opening Br. 24-27; Legis. Resp. Br. 17-18; Legis. Memo. ISO Mot. Dismiss 22-27; *Clarke*, 2023 WI 79, ¶282 (Hagedorn, J., dissenting) (observing that the Governor participated in *Johnson* and "submitted proposed remedial maps *with municipal islands*—the very thing the Governor now argues violates the constitution!"). Instead, the majority opinion simply declares, without acknowledging its circular logic, that *Johnson* and this case "are fundamentally different" because *Johnson* was about "only the 2011 maps and the 2020 census results" and this case is about *Johnson*. *Id.* ¶48 (majority op.); *see id.* ¶¶285-87 (Hagedorn, J., dissenting) (arguing majority's preclusion analysis "makes no sense," is "absurd," and "does not withstand scrutiny" because "the facts here are part of the same common nucleus of facts: the nature and substance of the judicial remedy that must be in place due to the continued unlawfulness of the 2011 maps").

- The majority opinion states that because "[a]t least 50 of 99 assembly districts" contain detached territory, "a remedy modifying the boundaries of the non-contiguous districts will cause a ripple effect across other areas of the state." *Id.* ¶56 (majority op.). The majority opinion does not acknowledge "that almost all of the challenged municipal islands have a population smaller than the roster of the Milwaukee Brewers," *id.* ¶280 (Hagedorn, J., dissenting)—a point Respondents made repeatedly in their briefs and at oral argument.[11] More than a third of

[11] *See, e.g.*, Legis. Opening Br.18; Johnson Resp. Br.22-23. Eleven of the faulted assembly districts have detached pieces where *zero* people live. *See* Legis. Opening Br. App.4-11 (AD37, AD39, AD44, AD59, AD66, AD72, AD76, AD81, AD91, AD95, AD98). Another 10 districts have detached pieces where a total of 10 or fewer people live. *See id.* (AD3, AD24, AD25, AD28, AD32, AD33, AD41, AD52,

the detached pieces across the State have *zero* people, while the most populated detached pieces can be fixed by staying entirely within Dane County, Winnebago County, or a City of Beloit ward.[12] Petitioners never proved with any evidence that there would be a "ripple effect" caused by resolving these isolated instances of noncontiguity that could justify a statewide redraw.

- The majority opinion states that "least change" as a remedial consideration "did not fit easily or consistently into the balance of other requirements and considerations essential to the map-making process." *Clarke*, 2023 WI 79, ¶62. The majority opinion never mentions Respondents' pages of argument that "least change" is simply a label for the Court's constitutionally limited power in imposing a judicial remedy. *See* Legis. Resp. Br.36-44; *accord Johnson I*, 2021 WI 87, ¶¶64-79. The majority opinion never explains where it derives its power to "district anew," as though it were supplanting the Legislature. *See* Wis. Const. art. IV, §3.

- The majority opinion states that the Court "will consider partisan impact when evaluating remedial maps." *Clarke*, 2023 WI 79, ¶69. It recites, nearly verbatim, cases cited in Petitioners' brief and completely ignores the Legislature's response. *Id.* ¶¶69-71; *see* Legis. Resp. Br.45-52. Nor does it offer an answer

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AD83, AD93). Another 14 districts have detached pieces where a total of 50 or fewer people live. *See id.* (AD2, AD5, AD6, AD15, AD38, AD40, AD45, AD46, AD60, AD61, AD67, AD86, AD94, AD99). Only 13 of the 99 assembly districts, mostly in Dane, Rock, and Winnebago Counties, contain detached pieces where a total of 100 or more people live. *See id.* (AD27, AD29, AD31, AD43, AD47, AD48, AD53, AD54, AD68, AD70, AD80, AD88, AD97).

[12] *See* Legis. Opening Br.18; Wisconsin Supreme Court: Rebecca Clarke v. Wisconsin Elections Commission at 1:35:08-1:37:22, Wis. Eye (Nov. 21, 2023), bit.ly/3RYb9CB. Given how sparsely populated the detached pieces are, the majority's suggestion that they are perpetrating "a legislative evil, commonly known as the gerrymander," *Clarke*, 2023 WI 79, ¶35, does not follow. The detached pieces are merely a consequence of keeping towns whole, as counsel explained repeatedly at oral argument.

to the unanswerable question of "how much is too much" of a political advantage given that one-third of Wisconsin voters don't even associate with the major parties and given that single-member districts will naturally advantage Republicans. *See id.*; *see also Clarke*, 2023 WI 79, ¶224 (Grassl Bradley J., dissenting); *accord Johnson I*, 2021 WI 87, ¶¶43, 47-48. Instead, the majority leaves its amorphous "partisan impact" criterion entirely undefined. *Clarke*, 2023 WI 79, ¶157 (Zeigler, C.J., dissenting) ("They provide no measurable standard for calculating [partisan impact]. Apparently then, it is for them to know, and for us to find out!"); *id.* ¶210 (Grassl Bradley, J., dissenting) (noting Court imposes "'partisan impact' factor bereft of any definition"); *id.* ¶294 (Hagedorn, J., dissenting) ("But what does [partisan impact] mean? . . . I have no idea, and neither do the parties.").

- The majority appoints consultants to choose between remedies and prohibits further discovery and a hearing. The majority opinion never acknowledges the Legislature's argument that doing so would violate due process. *See* Legis. Resp. Br.55-58; *infra* Part II.C.2.

- The majority's remedial scheduling order states that "[t]he court contacted all of the persons identified by one or more of the parties as potential consultants," which is not true, and then orders that the parties will pay for the Court's chosen consultants, which is not permitted. Scheduling Order 1, 4. As far as the undersigned counsel are aware, the Court did not contact the Wisconsin Legislative Technology Services Bureau, offered at argument by the Legislature as the most obviously equipped entity for offering state demography services and at no cost to the Court or to the parties.

- The majority has declared that the case will finish before the 2024 elections, *Clarke*, 2023 WI 79, ¶4, without acknowledging the Legislature's arguments that there is not sufficient time to complete the case before the imminent election deadlines given

> Petitioners' delay. *See* Legis. Resp. Br.57-58; Legis. Opening Br.61-62.

The timing of the Court's Christmas decision explains the majority's failure to address Respondents' arguments. Based on the Court's internal operating procedures, the majority opinion seemingly was circulated just after the hours-long oral argument on November 21, 2023—a mere 31 days before the decision issued. *See* IOP, *supra*, III.G.2-4 (allowing up to 30 days for the circulation of dissents after circulation of majority opinion). That would also explain why the majority opinion makes no reference to the dissenting opinions, which would have delayed the issuance of the opinion several more weeks. IOP, *supra*, III.G.4. That timing is remarkable given the Court's procedures providing that "[n]o case is assigned to a justice until after oral argument and after the court has reached its tentative decision." IOP, *supra*, III.F.

The majority's failure to grapple with Respondents' actual arguments confirms Respondents' due process concerns—that this case has been pre-decided from the start. *See* Memo. ISO Recusal 16-38; Legis. Opening Br. 58-60; Order 2-3, *Clarke*, No. 2023AP1399-OA

(Aug. 15, 2023) (Grassl Bradley, J., dissenting); *Clarke*, 995 N.W.2d at 783-84, 786, 789 (Zeigler, C.J., dissenting); *id.* at 791-96 (Grassl Bradley, J., dissenting); *Clarke*, 2023 WI 79, ¶¶174-83 (Zeigler, C.J., dissenting); *id.* ¶186 (Grassl Bradley, J., dissenting).

C. The Court's remedial schedule does not afford the parties a full and fair opportunity to litigate this case.

The Court's warp-speed remedial schedule is geared toward delivering new maps by the 2024 elections, without regard to existing district lines, and thereby changing "the outcome of the 2024 election," as promised.[13] Respondents renew their arguments that Justice Protasiewicz's failure to recuse is a Fourteenth Amendment violation. Legis. Memo. ISO Recusal 16-38. The Christmas decision and remedial procedures confirm that this case has been pre-decided. And they independently violate the Fourteenth Amendment's due process guarantee by depriving the parties of a full and fair opportunity to litigate this case.

1. The remedial schedule gives the parties no time to litigate material issues of fact.

[13] @janetforjustice, Twitter (Mar. 27, 2023, 12:47 PM), https://perma.cc/YAL9-JR8R; Janet for Justice, Facebook (Apr. 3, 2023), https://perma.cc/HVD7-PXD5.

The Court's remedial schedule is unprecedented given the factual issues that will arise during the remedial proceedings. Last year, cases before the Wisconsin Court of Appeals took roughly 15 months to be decided.[14] Likewise, cases in Wisconsin's state and federal trial courts took on average nine months to be resolved, *excluding* cases that went to trial.[15]

Here, the Court is rushing to judgment before the 2024 elections, giving the litigants only weeks to propose remedies and submit lengthy briefs and expert reports. Worse, the parties' shot clock started the Friday before Christmas Day.[16] The Court has asked the parties and their experts to work in overdrive over the holidays, all to

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

[15] See *Federal District Court Management Statistics – Profiles*, U.S. Courts, https://perma.cc/3KR5-ZZ7U; *Circuit court caseload statistics*, Wis. Ct. Sys., https://bit.ly/4774wmi; *see also* G. Michael Parsons, *Justice Denied: Equity, Elections, and Remedial Redistricting Rules*, 19 J.L. Soc'y 229, 235 (2019) (observing that in redistricting cases "[e]ven litigants that achieve a favorable merits determination may find a timely and effective remedy elusive.").

[16] For Catholics and other Christian denominations, Christmas Day *begins* the Christmas holiday. Pursuant to religious tradition, Christmas lasts 12 days ending with the Twelfth Night on January 5, also celebrated as the Eve of the Epiphany. *See, e.g.*, Edwin & Jennifer Woodruff Tait, *The Real Twelve Days of Christmas*, Christian History Inst., https://perma.cc/FA6D-93NR; *see also* @CardinalDolan, Twitter (Dec. 26, 2023, at 11:06 AM), https://bit.ly/4aFP5nR ("Don't take down that Christmas tree yet! We celebrate Christmas for 12 days.").

make up for Petitioners' strategically delayed lawsuit. Eight of the 21 days given to the parties to throw together new statewide redistricting plans are weekends and widely celebrated state holidays. Worse still, once those proposed remedial maps are submitted, parties have only 10 days to respond—four of them weekends—with no time provided in the schedule for depositions, response reports, or other proceedings necessary to identify and resolve disputed issues of fact. Scheduling Order 2-3. The parties then have only one week to respond to the consultants' recommendation for a new map that will govern more than 5 million Wisconsinites. *Id.* at 3-4.

Were this any other case, remedial proceedings would be working toward the 2026 elections, not the 2024 elections, given Petitioners' delay. *See supra* pp.24-25 (discussing *Whitford* schedule). In other redistricting cases that likewise involve substantial factfinding for Voting Rights Act or partisan gerrymandering claims, litigants seeking relief before the 2024 elections initiated their lawsuits more than a year ago, while other redistricting litigants who waited to file their cases until this year (like Petitioners) are not attempting to seek relief

before the 2024 elections. *See, e.g.*, Third Am. Compl., *S.C. State Conf. of the NAACP v. Alexander*, No. 3:21-cv-3302 (D.S.C. May 6, 2022); *see also, e.g.*, Compl., *League of Women Voters v. Utah Legis.*, No. 220901712 (Utah 3d D. Ct.) (Mar. 17, 2022); Compl., *Tenn. State Conf. of the NAACP v. Lee*, No. 3:23-cv-00832 (M.D. Tenn. Aug. 9, 2023) (seeking relief before 2026 elections).

Indeed, *this Court* has already said there is insufficient time for the fact-finding that will be required. Because the Court will consider "partisan impact" of proposed remedies, *Clarke*, 2023 WI 79, ¶¶69-71, there will be material factual disputes about *how to reliably measure* "partisan impact" in proposed remedies and *how much is too much* "partisan impact" in proposed remedies. *See* Legis. Resp. Br.47-52. This Court already decided there is insufficient time before the 2024 elections "for extensive fact-finding (if not a full-scale trial)" that would be required to adjudicate partisan gerrymandering claims, *Clarke*, 995 N.W.2d at 781; there is no basis for now declaring there is now sufficient time for the same factfinding (and full-scale trial) required to adjudicate "partisan impact" of proposed remedies.

The Court's decision to depart from normal scheduling rules and reward Petitioners for their delay creates a strong impression that this case has been unconstitutionally prejudged and is being rushed to judgment to fulfill the campaign promise to deliver new maps to change "the outcome of the 2024 election."[17] The Court's "unnecessary fast tracking due to the parties' own inexplicable delay . . . rightfully raise[s] questions of intrusion on [Respondents'] rights to fully litigate the claims presented." *Clarke*, 2023 WI 79, ¶170 (Ziegler, C.J., dissenting).

2. The Court's rushed schedule does not afford the parties a hearing or necessary discovery to resolve disputed factual issues.

The Court's remedial schedule denies the litigants even the most rudimentary features of civil process, and it appears to violate Wisconsin law regarding the appointment of referees or expert witnesses. In the redistricting context "this court must act *as a court*, and provide, in this as in any other case, all of the procedural protections

[17] @janetforjustice, Twitter (Mar. 27, 2023, 12:47 PM), https://perma.cc/YAL9-JR8R; Janet for Justice, Facebook (Apr. 3, 2023), https://perma.cc/HVD7-PXD5.

that due process and the right to be heard require." *Jensen*, 2002 WI 13, ¶22. The Court's remedial scheduling order denies those protections.

i. The remedial "principles" that the Court has adopted will raise a host of factual disputes that require fact-finding, trial-type proceedings, and time. *See* Legis. Resp. Br.47-52. Starting from scratch and considering "partisan impact" (under whatever to-be-determined standard the Court chooses) will entail multiple experts in fields ranging from demography to political science to mathematics, sometimes with millions of simulated maps. *E.g.*, *Harper v. Hall*, 868 S.E.2d 499, 516-22 (N.C. 2022) (describing plaintiffs' six experts and defendants' three experts); *see also Rivera v. Schwab*, 512 P.3d 168, 175-76 (Kan. 2022) (summarizing experts); *see also, e.g.*, *Ohio A. Philip Randolph Inst. v. Householder*, 367 F. Supp. 3d 697, 717-19 (S.D. Ohio 2019) (finding genuine disputes of material fact on "partisan effect" of legislative maps); *Whitford v. Nichol*, 180 F. Supp. 3d 583, 591-97 (W.D. Wis. 2016) (finding "fact issues that need to be resolved at trial" regarding efficiency gap). Likewise other considerations, including but

not limited to the consultants' desire to hear about "communities of interest" as part of the technical specifications are also bound to elicit factual disputes. *Supra* p.27. That makes this case unlike the *Johnson* litigation where the parties were able to stipulate to all material facts and where remedies were appropriately confined by the Court's adherence to existing district lines and its refusal to consider partisan impact. *See generally Johnson I*, 2021 WI 87; *see also* Legis. Resp. Br.56-57.

Wisconsin law and due process do not permit this Court (or its "consultants") to resolve those factual disputes without a hearing. *See, e.g.*, *Indus. Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶66 n.13, 299 Wis. 2d 81, 726 N.W.2d 898 ("an evidentiary hearing, rather than simply oral argument based on briefs, affidavits, and depositions, is necessary to resolve the [factual] disputes"); *Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis. 2d 707, 725, 599 N.W.2d 411 (Ct. App. 1999) ("[I]f there are factual disputes, or conflicting reasonable inferences from undisputed facts, an evidentiary hearing will be necessary."); *cf. Codd v. Velger*, 429 U.S. 624 (1977) (per curiam). As Respondents already

argued, due process demands that parties be given an opportunity to try factual disputes about parties' proposed remedies, including cross-examination of experts and other basic litigation procedures. *See* Legis. Resp. Br. 56-57. The Court cannot simply deny the parties those basic procedural protections because Petitioners' delay has left insufficient time to resolve disputed fact issues before the artificial deadline of the 2024 election process.

But that is precisely what the Court has done, foreclosing any opportunity to raise or resolve the inevitable factual disputes about partisan impact or other remedial "principles" through normal discovery with depositions or cross-examination. The Court's order provides that "[n]o further discovery shall be permitted" beyond the submission of initial expert reports. Scheduling Order 3. It does not anticipate response reports, let alone any actual proceedings before the consultants. There will be no hearing to make credibility determinations. Due process requires more, and reconsideration is warranted.

ii. The Court's appointment of "consultants" does not ameliorate that lack of process; it compounds the problem. The Court does

not say whether it appoints them as referees or, alternatively, as expert witnesses. *See* Wis. Stat. §805.06 (referee); *id.* §907.06 (experts). The distinction matters because it determines the scope of their services and "procedural safeguards that ensure litigants due process of law." *Ehlinger v. Hauser*, 2010 WI 54, ¶204, 325 Wis. 2d 287, 785 N.W.2d 328 (Zeigler, J., concurring in part, dissenting in part). And the parties must know in what capacity these consultants have been appointed to take advantage of those procedural safeguards on the Court's wildly accelerated schedule.

All the Court says is, "Parties will have the opportunity to respond to each other, and to the consultant[s'] report." *Clarke*, 2023 WI 79, ¶75. If the "consultants" are serving as referees and will "make findings of fact and conclusions of law" in their report, the parties may subpoena witnesses and are entitled to a hearing on objections. Wis. Stat. §805.06(4)(b), (5)(a)-(b). If the "consultants" are serving as court-appointed experts, their "deposition[s] may be taken by any party" and they "shall be subject to cross-examination by each party." *Id.* §907.06(1). Either way, Wisconsin law mandates more process than

the Court's remedial scheduling order anticipates. The order must be reconsidered for that reason alone.

Respondents object to the court's nebulous appointment "consultants." They have not been appointed pursuant to Wisconsin law as referees or court-appointed experts, and there is no legal basis for the court to order the parties pay for them. Scheduling Order 4; *see id.* at 5-6 (Grassl Bradley, J., dissenting). Respondents had no input on their appointment. *See supra* p.40. And the Director of State Courts cannot enter into contracts with consultants when the Director holds the position unconstitutionally. *See Clarke,* 2023 WI 79, ¶ 83 & n.13 (Ziegler, C.J., dissenting).

3. The Court has violated the parties' due process rights to fair notice and an opportunity to be heard on proposed remedies.

The Court's Christmas decision and remedial schedule also leaves the parties in the dark about what legal standards will be used to evaluate proposed remedies. In particular, the Court's failure to explain how "partisan impact" will be evaluated, among other criteria, denies the parties' their right to fair notice and an opportunity to be heard.

When this case began, the Court declined to consider Petitioner's partisan gerrymandering claims and granted the petition for original jurisdiction *only* on Petitioners' contiguity and separation-of-powers claims. *Clarke*, 995 N.W.2d at 781. Noted above, the Court explained that there was not enough time to address partisan gerrymandering claims because of "the need for extensive fact-finding (if not a full-scale trial)." *Id.* The parties accordingly limited their briefing mainly to the issues upon which the Court granted review (contiguity and separation of powers). Seeing the writing on the wall, Respondents addressed partisanship as one of myriad remedial factors, despite binding precedent barring its consideration. *See Johnson I*, 2021 WI 87, ¶¶39-63. The Court's opinion then found a violation only of contiguity under the Wisconsin Constitution. *Clarke*, 2023 WI 79, ¶¶9-10. And the Court then announced that it would entertain statewide remedial proposals and that it "will consider partisan impact" when choosing between statewide redraws, *id.* ¶69, making no mention of binding precedent that it has no judicial competence to do so. *See Johnson I*, 2021 WI 87, ¶¶39-63. The Court's opinion contains no further

explanation of what an impermissible "partisan impact" might be, or why statewide remedial proposals could be necessary to redress isolated instances of noncontiguity. This procedure has deprived and will deprive Respondents of their federal due process rights in the following two ways.

i. *First*, this procedure deprives Respondents of fair notice about what the Court will consider to be a permissible remedy, and in particular what the rules are for too much "partisan impact" in a proposal. The Court expressly declined to exercise jurisdiction over partisan gerrymandering claims, so Respondents never had the chance to fully brief the merits of the question, and the Court's opinion does nothing to fill in those gaps. The opinion does not even address what arguments Respondents did have time and space to make as part of the earlier briefing. *Supra* Part II.B. The Court's endorsement of an undefined "partisan impact" standard—having nothing to do with the contiguity violation—amounts to an unconstitutional "bait and switch." *Reich v. Collins*, 513 U.S. 106, 111 (1994). The proceedings have denied and will continue to deny the parties notice of the

governing legal standard or an opportunity for a fair hearing on the application of that standard. It inevitably gives "retroactive effect" to whatever criteria the Court ultimately relies upon to evaluate the partisan impact of district boundaries. *See Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). Those criteria will be revealed—if at all—only when the Court ultimately adopts a remedial plan at the end of these proceedings.

Contrary to the Court's approach, the federal Due Process Clause entitles parties to "a meaningful opportunity to present their case"—"at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 349 (1976); *see, e.g.*, *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). This includes the right "to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). The Due Process Clause "imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair." *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 33 (1981); *accord Bouie*, 378 U.S. at 353-55.

But here, the lack of time, *supra* Part II.C.1, the lack of basic litigation procedures, *supra* Part II.C.2, and the lack of an identifiable legal standard leaves the parties to guess at what will be too much partisanship in proposed remedies. Once they know, it will be too late. The Court's sharp "depart[ure] from the accepted and usual course of judicial proceedings," *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010) (per curiam), has deprived and will continue to deprive Respondents of any meaningful opportunity to present arguments about "partisan impact" in proposed remedies. "Courts enforce the requirement of procedural regularity on others, and must follow those requirements themselves." *Id.* at 184.

The Court's undisclosed standards epitomizes the arbitrary governmental action forbidden by the Due Process Clause. *See County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (the "touchstone" of which "is protection of the individual against arbitrary action of government"). This unconstitutionally vague governmental action violates the "fundamental principle in our legal system" that laws "must give fair notice of conduct that is forbidden or required." *FCC v. Fox*

Television Stations, Inc., 567 U.S. 239, 253 (2012); *see also, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1225 (2018) (Gorsuch, J., concurring) (collecting historical sources confirming that application of the vagueness doctrine "civil" judicial proceedings ensures individuals "know with particularity what legal requirement [was] alleged to have [been] violated and, accordingly, what would be at issue in court").

ii. *Second*, the Court's decision to backdoor politics into the remedy violates due process by entertaining statewide remedies with no connection to the legal violation the Court should be redressing. The Court limited this case to contiguity and separation of powers, and it has found a violation of law only with respect to contiguity. A remedy rebalancing the political scales in the Wisconsin Legislature will wildly exceed any colorable exercise of the Court's equitable power to enter an injunction, because it is completely divorced from Petitioners' contiguity claim.

This Court, moreover, just held that it has no power to reapportion political power in the Wisconsin Legislature. The decision in this case did not overturn that holding. Examining "partisan impact" of

proposed remedies thus remains beyond this Court's judicial "competence" and judicial power. *Johnson I*, 2021 WI 87, ¶¶40-52. The Court has identified no judicial standards to assess whether a remedial proposal is too Republican or too Democratic, nor has it identified any source of judicial power to reallocate political power in the first place. *Id.* ¶¶41, 53. There are none. *See* Legis. Resp. Br.47-52. And the Court certainly has no judicial authority to deliberately reallocate political power in a case about contiguity.

Basic "principles of equity jurisprudence" dictate that "the scope of injunctive relief is dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Courts must "limit the solution to the problem." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006); *see Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶46, 393 Wis. 2d 38, 946 N.W.2d 35 (courts cannot "order far broader relief than necessary to alleviate any unconstitutional applications of the law"); *Linden Land Co. v. Milwaukee Elec. Ry. & Lighting Co.*, 107 Wis. 493, 83 N.W. 851, 856 (1900) (court may enjoin acts that "produce injury to the plaintiff's rights, but it will go no

further than necessary"). Court-ordered modifications of a redistricting plan must be "limited to those necessary to cure any constitutional or statutory defect." *Upham*, 456 U.S. at 43; *see North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018) (holding that the remedy for race-based assignment of voters is "limited to ensuring that the plaintiffs were relieved of the burden of voting in racially gerrymandered legislative districts"). When a court enters a remedy completely divorced from the adjudicated legal violation, its remedy goes beyond the limits of its equitable powers—and thus ceases to be an exercise of *judicial* power. Here, the Court has far "exceeded the bounds of ordinary judicial review," *Moore v. Harper*, 600 U.S. 1, 36 (2023), by ordering a remedy for partisan impact that has nothing to do with the contiguity violation it found. This reading of "state law" unconstitutionally attempts to "circumvent federal constitutional provisions." *Id.* at 35. Just as "state courts do not have free rein" to violate the federal Elections Clause, *id.* at 34, they have never had free rein to violate Fourteenth Amendment due process protections.

III. Reconsideration is warranted because insufficient time remains before the 2024 election deadlines commence.

Whether the Court corrects the foregoing defects or not, there will be insufficient time to complete this case on the Court's desired schedule without injecting intolerable uncertainty and confusion into the 2024 elections. The remedial plan will redraw districts statewide without regard to the existing lines, *see Clarke*, 2023 WI 79, ¶¶60-63, rather than the "more modest" and "most logical and adequate remedy" of "dissolving the detached territory into its surrounding district," *id.* ¶213 (Grassl Bradley, J., dissenting).

Such sweeping, last-minute changes to election rules risk "work[ing] a needlessly 'chaotic and disruptive effect upon the electoral process.'" *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (per curiam). It is a "bedrock tenet of election law" that "[w]hen an election is close at hand, the rules of the road must be clear and settled." *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring). Courts therefore must refrain from "swoop[ing] in and redo[ing] a State's election laws in the period close to an election." *Id.* at 881.

The Court's statewide redraw so close to 2024 election deadlines will needlessly disrupt the electoral process, prejudicing candidates, including sitting legislators, and voters. Candidates will not know until the eve of election deadlines, or perhaps later, what the redrawn districts will look like. "Almost every legislator in the state will need to respond, with lightning speed, to the newly minted maps, deciding if they can or want to run, and scrambling to find new candidates for new districts." *Clarke*, 2023 WI 79, ¶78 (Zeigler, C.J., dissenting).

Because the Court is redrawing districts statewide, the Court's rejection of the *quo warranto* remedy for senators in odd-numbered senate districts, *id.* ¶¶72-74 (majority op.), is no solution. It gives little assurance to the Senator who just successfully ran for election in an odd-numbered senate district in 2022 and, come March, is redistricted into an even-numbered senate district and so must replenish his campaign funds, recruit volunteers, and run again—a task that becomes virtually impossible if the new district comprises mostly new

constituents. *Cf. id.* ¶243 (Grassl Bradley, J., dissenting) (noting "many legislators have developed relationships with their constituents").

The Court's statewide redraw will also "maximize" the "disruption to Wisconsin voters." *Id.* ¶213. Voters will be in the dark about eleventh-hour changes to districts, contrary to the wishes of a majority of voters to keep the current districts in place for the 2024 elections.[18] Citizens will not "know if they will have the same representation," and no one knows the "implications of dual representation for citizens who may have new and old representation, as they may have just elected their senator under the existing maps." *Id.* ¶78 n.3 (Zeigler, C.J., dissenting). Such "[c]ourt orders affecting elections, especially conflicting orders," like that in *Johnson* and that here, "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam); *see Clarke*, 2023 WI 79, ¶243 (Grassl Bradley, J., dissenting)

[18] *See* Marquette Law School Poll: Oct. 26-Nov.2, 2023, https://perma.cc/C36G-FJWT (51% of registered voters surveyed want to "keep [current] maps in place").

("Redrawing the maps so soon after *Johnson*, and after elections have occurred under those maps, risks severe voter confusion . . . .").

At this point in the election calendar, and with all that remains to be done to litigate Petitioners' claims, the Court must maintain the *status quo* for the 2024 elections. *See, e.g.*, *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 215-16 (Iowa 2020) ("declin[ing] on the eve of this election to invalidate the legislature's statute"); *Moore v. Lee*, 644 S.W.3d 59, 65-67 (Tenn. 2022) (finding plaintiff's alleged harm "is outweighed by the significant harm the injunction will inflict on the Defendants and the public interest"); *Carson v. Simon*, 978 F.3d 1051, 1062 (8th Cir. 2020) (per curiam) (similar).

CONCLUSION

The Court should grant the motion for reconsideration, allow the Legislature a reasonable opportunity to redistrict, allow the parties a full and fair opportunity to litigate this case, and stay all proceedings pending a decision on this motion.

Dated this 28th day of December, 2023.

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CERTIFICATION REGARDING LENGTH AND FORM

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.81, which governs the form of documents filed in this court where Chapter 809 does not expressly provide for alternate formatting. The length of this brief is 10,841 words as calculated by Microsoft Word.

Dated this 28th day of December, 2023

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