IN THE SUPREME COURT OF WISCONSIN

No. 2023AP1399-OA

REBECCA CLARKE, RUBEN ANTHONY, TERRY DAWSON, DANA GLASSTEIN, ANN GROVES-LLOYD, CARL HUJET, JERRY IVERSON, TIA JOHNSON, ANGIE KIRST, SELIKA LAWTON, FABIAN MALDONADO, ANNEMARIE MCCLELLAN, JAMES MCNETT, BRITTANY MURIELLO, ELA JOOSTEN (PARI) SCHILS, NATHANIEL SLACK, MARY SMITH-JOHNSON, DENISE (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 CARRIE RIEPL, 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; ANDRÉ JACQUE, TIM CARPENTER, ROB HUTTON, CHRIS LARSON, DEVIN LEMAHIEU, STEPHEN L. NASS, JOHN JAGLER, MARK SPREITZER, HOWARD L. MARKLEIN, RACHAEL CABRAL-GUEVARA, VAN H. WANGGAARD, JESSE L. JAMES, ROMAINE ROBERT QUINN, DIANNE H. HESSELBEIN, CORY TOMCZYK, JEFF SMITH, AND CHRIS KAPENGA, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN SENATE,

Respondents,

WISCONSIN LEGISLATURE; BILLIE JOHNSON, CHRIS GOEBEL, ED PERKINS, ERIC O'KEEFE, JOE SANFELIPPO, TERRY MOULTON, ROBERT JENSEN, RON ZAHN, RUTH ELMER, AND RUTH STRECK,

Intervenors-Respondents.

WRIGHT PETITIONERS' RESPONSE TO RESPONDENTS' MOTION FOR RECONSIDERATION

Sarah A. Zylstra (Bar No. 1033159)
Tanner G. Jean-Louis (Bar No. 1122401)
Boardman Clark LLP
1 South Pinckney Street, Suite 410
Madison, WI 53701
(608) 257-9521
szylstra@boardmanclark.com
tjeanlouis@boardmanclark.com

Sam Hirsch*
Jessica Ring Amunson*
Jenner & Block LLP
1099 New York Avenue NW, Suite 900
Washington, DC 20001
(202) 639-6000
shirsch@jenner.com
jamunson@jenner.com
(*additional counsel listed on inside cover*)

Elizabeth B. Deutsch*
Arjun R. Ramamurti*
Jenner & Block LLP
1099 New York Avenue NW, Suite 900
Washington, DC 20001
(202) 639-6000
edeutsch@jenner.com
aramamurti@jenner.com
* *Appearing pro hac vice*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

This Court should reject Respondents'[1] request to cast aside its thorough and well-reasoned decision of December 22. Reconsideration is "seldom granted," and no ground for reconsideration exists here.[2] The Court has not overlooked any controlling legal precedent; has not disregarded any important policy considerations; and has not overlooked or misconstrued a controlling or significant fact appearing in the record. Mere disagreement with the Court's decision is not a proper basis for reconsideration.

In their motion, Respondents either raise arguments that this Court has already rightly rejected or attempt to repackage their dissatisfaction with the Court's decision into a supposed due-process problem. The Court should reject Respondents' transparent ploy to use a motion for reconsideration to try to transform a state court decision about the application of state constitutional law to state legislative districts into a federal issue. There is no federal due-process problem here. First, the Court *agreed* that the Legislature should be given the opportunity to enact new legislative plans that comply with the Constitution and has given the Legislature that opportunity, leaving Respondents with no issue about which to complain. Second, the litigation

[1] Following the Court's December 22 opinion, this brief collectively refers to the Legislature; Senators Cabral-Guevara, Hutton, Jacque, Jagler, James, Kapenga, LeMahieu, Marklein, Nass, Quinn, Tomcyzk, and Wanggaard; and the Johnson Intervenors as "Respondents."

[2] Wis. Supreme Court Internal Operating Procedures, III.J.

procedures and timeline prescribed by the Court are typical of redistricting litigation, comport with the State's own requested deadlines for election administration, and afford all parties all the process to which they are entitled. Third, the Court's decision does not evince any bias or prejudgment, and certainly none that gives rise to a federal due-process problem. This Court should therefore deny Respondents' motion.

BACKGROUND

In August 2023, the Clarke Petitioners filed a petition for leave to commence an original action challenging the maps adopted in *Johnson v. Wisconsin Elections Commission*, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559 ("*Johnson III*"), as, *inter alia*, failing to comply with the Wisconsin Constitution's contiguity and separation-of-powers requirements. The Wisconsin Legislature moved to intervene and, with a group of Respondent Senators, unsuccessfully moved to recuse Justice Janet C. Protasiewicz. *See Clarke v. Wis. Elections Comm'n*, 2023 WI 66, 995 N.W.2d 735 (Order of Protasiewicz, J.). The Court subsequently granted the petition with respect to the contiguity and separation-of-powers claims, permitted intervention by all parties who timely sought to intervene (including Wright Petitioners[3]), ordered two rounds of simultaneous briefing on the merits of the petition, and held oral argument.

[3] Wright Petitioners, per this Court's December 22 decision, are Intervenors-Petitioners Stephen Joseph Wright, Gary Krenz, Sarah J. Hamilton, Jean-Luc

On December 22, 2023, this Court issued a decision and scheduling order to govern future proceedings. *See Clarke v. Wis. Elections Comm'n*, 2023 WI 79, __ N.W.2d __, 2023 WL 8869181; Order, *Clarke v. Wis. Elections Comm'n*, No. 2023AP1399-OA (Dec. 22, 2023) ("Scheduling Order"). On the merits, after examining the constitutional text, dictionary definitions, early Wisconsin redistricting practices, and state and federal precedent, the Court concluded that the contiguous-territory requirements enshrined in the Wisconsin Constitution require "touching" or "actual contact" between the physical geography of a district, "such that a person could travel from one point in the district to any other point in the district without crossing district lines." *Clarke*, 2023 WI 79, ¶16; *see generally id.* ¶¶10–29. The Court rejected the Legislature's theory of "political contiguity," reasoning that this theory "would essentially require us to read an exception into the contiguity requirements—that district territory must be physically touching, except when the territory is a detached section of a municipality located in the same district." *Id.* ¶18. Because the "current state legislative districts contain separate, detached territory," including at least 50 assembly districts and at least 20 senate districts, the Court held that the existing map "violate[s] the [Wisconsin] constitution's contiguity requirements." *Clarke*, 2023 WI 79, ¶3. "None of the

---

Thiffeault, Somesh Jha, Joanne Kane, Leah Dudley, and Nathan Atkinson. Previous filings had referred to them as Atkinson Intervenors.

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.

The Court's decision then considered each of Respondents' procedural defenses raised in the motion to dismiss filed after the initial briefing had been completed.[4] The Court "explain[ed] why none of the[] proffered defenses preclude us from holding in favor of Petitioners on the merits." *Id.* ¶36. In particular, the Court considered and rejected Respondents' state-law arguments that Petitioners lacked standing to challenge the contiguity of the current legislative maps (*id.* ¶¶38–39); that laches (*id.* ¶¶41–43), issue preclusion (*id.* ¶¶44–45), claim preclusion (*id.* ¶¶46–48), or judicial estoppel (*id.* ¶¶49–50) barred Petitioners' claims; and that the suit was an impermissible collateral attack on *Johnson III*, foreclosing declaratory and injunctive relief (*id.* ¶¶51–55). The Court also concluded that Respondents' federal due-process arguments were "underdeveloped" and therefore declined to address them. *See id.* ¶37 n.16 (citing *Casanova v. Polsky (In re Atrium Racine, Inc.)*, 2023 WI 19, ¶44, 406 Wis. 2d 247, 278, 986 N.W.2d 780, 794).

[4] Because the Court rejected Respondents' defenses on the merits, the Court concluded it "need not address" Petitioners' argument that the "motion to dismiss is procedurally improper because the rules governing original actions do not permit it." *Clarke*, 2023 WI 79, ¶37 n.17.

Given the identified state constitutional violation, the Court "enjoin[ed] the Wisconsin Elections Commission from using the current legislative maps in future elections." *Id.* ¶3; *see also id.* ¶56. The Court repeatedly acknowledged the primacy of the Legislature in adopting new maps, stating that it is "essential to emphasize that the legislature, not this court, has the primary authority and responsibility for drawing assembly and senate districts." *Id.* ¶57; *see also id.* ("Should the legislative process produce a map that remedies the contiguity issues discussed above, there would be no need for this court to adopt remedial maps."); *id.* ¶4 (recognizing that the "legislature has the primary authority and responsibility to draw new legislative maps" and "urg[ing] the legislature to pass legislation creating new maps that satisfy all requirements of state and federal law").

However, acknowledging the "possibility that the legislative process may not result in remedial maps," the Court observed that "[i]n such an instance, it is this court's role to adopt valid remedial maps." *Id.* ¶58 (citing *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 571, 126 N.W.2d 551, 566 (1964) ("*Zimmerman I*"); *Growe v. Emison*, 507 U.S. 25, 33 (1993); and *Johnson III*, 2022 WI 19, ¶73); *see also id.* ¶4 (noting that the Court is "mindful … that the legislature may decline to pass legislation creating new maps, or that the governor may exercise his veto power"); *id.* ¶76 (noting that the Court's remedial process will allow it "to adopt remedial legislative maps in time for

the upcoming elections if legislation creating remedial maps is not enacted"). In so doing, the Court reiterated that its map would be adopted if and only "the legislative process does not result in remedial legislative maps." *Id.* ¶58.

Finally, the Court's decision and Scheduling Order then set forth a process that would guide the Court in "adopting remedial maps unless and until new maps are enacted through the legislative process." *Id.* ¶4; *see also id.* ¶¶75–76. That process "afford[s] all parties a chance to be heard, while bearing in mind the need for expediency given that [2024's] elections are fast-approaching." *Id.* ¶76. In particular, all parties are "given the opportunity to submit remedial legislative district maps to the court, along with expert evidence and an explanation of how their maps comport with the principles laid out" in the Court's opinion. *Id.* ¶75; *see* Scheduling Order at 2–3 (outlining parameters for parties' proposed remedial maps, expert reports, and supporting materials). In addition, the parties "will have the opportunity to respond to each other," *Clarke*, 2023 WI 79, ¶75, and the parties are required to "produce to each other … all other data and inputs that their experts used in their remedial analyses," Scheduling Order at 3.

To facilitate its review of the parties' proposed maps, the Court also appointed two consultants "who will aid in evaluating the remedial maps" by preparing a report to which the parties will also be permitted to respond. *Clarke*, 2023 WI 79, ¶75; *see* Scheduling Order at 3–4 (outlining requirements

of consultants' report and response briefs to the consultants' report). The Court's Scheduling Order thus ensures the creation of a map to remedy the constitutional violation in time for the 2024 elections. *See* Wisconsin Elections Commission Br. 3 (Oct. 16, 2023) (noting that new maps in place by March 15, 2024, would give the Commission adequate time to prepare for the 2024 general election).[5]

ARGUMENT

Reconsideration is warranted "only 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, III.J; *see generally* Wis. Stat. § 809.64.[6] No ground for reconsideration exists here. First, the Court

[5] Indeed, while the Wisconsin Elections Commission would like maps to be in place by March 15, 2024, courts in Wisconsin adopted legislative districts in mid-April in both 2012 and 2022 (Clarke Mot. for Scheduling Order 8 n.2), and in 2002 the districts were adopted on May 30—all without deleterious effects on election administration. *See* Atkinson Br. 51 n.29 (Oct. 30, 2023).

[6] *See, e.g.*, *Anthony Gagliano & Co. v. Openfirst, LLC*, 2015 WI 13, ¶1, 360 Wis. 2d 1, 3, 860 N.W.2d 855, 855 (2014) (Prosser, J., concurring) ("The court has established strict standards for reconsideration and they are seldom met." (footnote omitted)); *State v. Henley*, 2011 WI 67, ¶4, 338 Wis. 2d 610, 613, 802 N.W.2d 175, 177 (per curiam) (denying motion for reconsideration because the motion "cites no controlling legal precedent, important policy consideration or controlling or significant fact of record that the court's … opinion overlooked"); *State v. Saunders*, 2002 WI 119, ¶4, 256 Wis. 2d 59, 61, 652 N.W.2d 391, 392 (per curiam) (Abrahamson, C.J., concurring) ("Most motions for reconsideration are denied because they re-argue issues already argued and considered.").

has already *agreed* with the Legislature (and rejected the Clarke Petitioners' arguments to the contrary) that the Legislature should be given the opportunity to pass new, constitutionally compliant plans. Second, this Court's litigation procedures and timeline are in keeping with ordinary practices in redistricting litigation and afford all parties all process to which they are due. Finally, there is no issue of bias or prejudgment with the Court's decision.

I. There Is No Reason to Reconsider the Court's Decision Agreeing with Respondents that the Legislature and Governor Retain the Opportunity to Enact Lawful Maps.

Respondents' initial complaint is that this Court's remedial order does not afford the Legislature a "reasonable opportunity" to enact constitutionally compliant maps. Mot. for Reconsideration 18. The opposite is true.

In their October briefing, the Clarke Petitioners specifically argued that this Court "need not afford the political branches another opportunity to enact new maps" and urged the Court not to "give the Legislature and Governor an additional redistricting opportunity" if the Court declared the existing maps unconstitutional. Clarke Br. 53 (Oct. 16, 2023); *see also* Clarke Br. 49–50 (Oct. 30, 2023) (arguing that "[t]here is no reason the replacement of one court-drawn map with another should trigger a special, additional opportunity" for the Legislature and Governor to enact new maps). In contrast, the Legislature argued that the "political branches must have the first opportunity to redistrict." Legislature Br. 52 (Oct. 16, 2023).

The Court *rejected* the Clarke Petitioners' position and sided with Respondents. The Court's December 22 decision expressly recognized that "[t]he legislature has the *primary authority and responsibility* to draw new legislative maps." *Clarke*, 2023 WI 79, ¶4 (emphasis added). The majority opinion's opening paragraphs therefore "urge[d] the legislature to pass legislation creating new maps that satisfy all requirements of state and federal law." *Id.* And the Court noted that this litigation will proceed only "unless and until new maps are enacted through the legislative process." *Id.*

Respondents thus *prevailed* in their arguments to the Court on this issue, rendering their request for reconsideration puzzling. Respondents' main complaint now appears to be that they should not be forced to work "concurrently" with the Court, calling it a "footrace." Mot. for Reconsideration 19. But the Court's decision is fully in accord with the "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) (three-judge court), App. 4. Likewise, the Court's decision recognizes and respects that "judicial 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)

(quotation marks omitted).[7] From the issuance of the Court's decision to the date when the Wisconsin Elections Commission has stated it would like maps to be in place, there are at least 84 days for the legislative process to unfold, which is more than an "adequate opportunity."[8] Citizens should not be forced to vote under unconstitutional maps when that outcome is entirely avoidable.[9]

More fundamentally, in arguing that courts consistently allow state legislatures to have the first, and sufficiently lengthy, crack at redrawing maps, Respondents chiefly rely on *federal court* cases holding that the *State* should be allowed first to remedy a federal constitutional violation in its maps.[10] But, of

---

[7] Respondents suggest that the existence of the ongoing litigation may frustrate the political process by disincentivizing compromise. *See* Mot. for Reconsideration 28–29. But Respondents do not submit a sworn affidavit or any other evidence supporting that proposition or proposing any timeframe whatsoever under which the Legislature might submit to the Governor a proposed remedial map, even if the ongoing litigation were stayed.

[8] *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 572, 126 N.W.2d 551, 567 (1964) ("*Zimmerman I*") (providing only 63 days for legislative action).

[9] Respondents' reliance on the *Zimmerman* decisions from the 1960s to argue the contrary is misleading at best because it leaves out the U.S. Supreme Court's decisions in *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964). It was against that backdrop that the Wisconsin Supreme Court decided *Zimmerman I*, explaining that because the Court had previously relied on the "political question" rationale to abstain from judicial intervention in redistricting, and that rationale had since been overruled by the U.S. Supreme Court, the Wisconsin Supreme Court would reconsider the propriety of judicial intervention in redistricting. 22 Wis. 2d at 561–62, 126 N.W.2d at 561.

[10] *See, e.g., Whitford*, 2017 WL 383360, at *1 (three-judge court) (quoting *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("When a federal court declares an existing apportionment scheme unconstitutional, it is ... appropriate, *whenever practicable*, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for

course, this is a case about state constitutional violations in state legislative maps that is proceeding in a state court, so the same federalism concerns are not present. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). And in fact, in cases recognizing that the federal courts should provide *States* with a reasonable opportunity to redistrict, the U.S. Supreme Court has consistently recognized that state *courts* are an important part of a State's redistricting apparatus. *See Growe v. Emison*, 507 U.S. 25, 33 (1993) (criticizing federal district court for "overlook[ing] this Court's teaching that state courts have a significant role in redistricting"); *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam) ("The power of the judiciary of a State to require valid reapportionment or to

---

the federal court to devise and order into effect its own plan." (emphasis added)); *Upham*, 456 U.S. at 41 ("[R]eapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.' … In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary." (quoting *White v. Weiser*, 412 U.S. 783 (1973) (internal citations omitted)); *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring) ("This Court has repeatedly stated that *federal* courts ordinarily should not enjoin a state's election laws in the period close to an election" (emphasis added)); *see also id.* ("It is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and re-do a State's election laws in the period close to an election."); *Carson v. Simon*, 978 F.3d 1051, 1062 (8th Cir. 2020) ("The *Purcell* principle—that federal courts should usually refrain from interfering with state election laws in the lead up to an election—is well established.").

formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.").

The Court's December 22 decision therefore appropriately recognizes that lawful maps enacted through the legislative process are preferable and will take precedence, but that the Court must be prepared to adopt remedial maps itself if the legislative process does not succeed so as to ensure that Wisconsin voters do not have to vote under unconstitutional state legislative maps again in 2024. There is no reason to reconsider that decision.

II. This Litigation Provides Sufficient Time and Process.

Respondents also request reconsideration on the ground that the parties purportedly lack a full and fair opportunity to litigate. That is incorrect. The litigation schedule provides sufficient time. There is sufficient process. And there is no constitutional issue with the scope of the remedy ordered by the Court.

A. There Is Sufficient Time to Litigate this Case.

Respondents say, in several places, that there is not enough time to decide this case before the upcoming elections. Mot. for Reconsideration 42–46, 59–62. But this case's timeline is not at all out of the ordinary in redistricting litigation. Indeed, the schedule provides even more time than was permitted for the parties' remedial submissions and briefing in the *Johnson*

litigation. *See* Order at 2, *Johnson v. Wis. Elections Comm'n*, No. 2021AP0001450 (Wis. Nov. 17, 2021) (ordering submission of remedial maps, briefs in support, and expert reports on December 15, 2021; submission of response briefs and expert reports on December 30, 2021; and submission of reply briefs and expert reports on January 4, 2022). Courts across the country have conducted redistricting litigation on similar schedules. *See, e.g.*, *Harper v. Hall*, 867 S.E.2d 554, 558 (N.C. Feb. 4, 2022) (ordering submission of proposed remedial maps to trial court by February 18, 2022; submission of comments on maps by February 21, 2022; approval or adoption of districting plans by trial court and filing of any emergency application for a stay pending appeal by February 23, 2022); Order, *Carter v. Chapman*, Nos. 464 M.D. 2021, 465 M.D. 2021 (consolidated) (Pa. Jan. 14, 2022) (ordering submission of proposed redistricting plans by parties and amici, along with an optional supporting brief and/or supporting expert report, by January 24, 2022; filing of a responsive brief and/or a responsive expert report addressing other parties' January 24 submissions and a joint stipulation of facts by January 26, 2022; holding of an evidentiary hearing on January 27 and January 28, 2022; and issuance of a court opinion by January 30, 2022).[11]

[11] Expedited scheduling is the norm in redistricting cases, as courts must adjudicate and remedy the constitutionality of a redistricting plan before the next election cycle. *See, e.g.*, Findings of Fact and Conclusions of Law, *Egolf v. Duran*, No. D-101-cv-201102942 (N.M. 1st Judicial Dist. Ct. Dec. 29, 2011)

Nor does the litigation timeline shortchange the parties a fair process. Respondents complain, for instance, that eight of the 21 days given for the parties to submit plans "are weekends and widely celebrated state holidays," including the Christmas holiday. Mot. for Reconsideration 43–44 & n.16. But the *Johnson* briefing and argument likewise spanned the holiday period from December 15 through January 19 and there was no issue with that. *Cf. Vidal v. Nielsen*, No. 16-CV-4756, 2017 WL 9400687, at *2 (E.D.N.Y. Dec. 15, 2017) (agreeing that government counsel's "holiday plan[s] were not 'good cause' justifying an extension" (citation omitted)); *Anderson v. Griswold*, No. 23SA300, __ P.3d __, 2023 WL 8770111, at *16–17 (Colo. Dec. 19, 2023) (rejecting argument that expedited litigation proceedings are "inherent[ly]" "unfair[]" on basis that "[l]awyers who practice in this area are well[ ]aware" that "[l]ooming elections trigger a cascade of deadlines under both state and federal law that cannot accommodate protracted litigation schedules," and that "a state's interest in protecting the integrity of the election process" justifies abbreviated

(determining adoption of plans within a month of a three-day argument held on December 5, 6, and 22, 2011); *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 599, 617 (Fla. 2012) (noting that although the court had an extremely limited timeframe within which to review the legislative plans' compliance with constitutional standards, "such a limitation cannot deter the Court from its extremely weighty responsibility entrusted to us by the citizens of this state through the Florida Constitution to interpret the constitutional standards and to apply those standards to the legislative apportionment plans" and rejecting the Florida Senate's argument that the court's "task is futile, endless, or impossible").

litigation schedules (internal quotation marks omitted)), *petition for cert. filed*, No. 23-696 (U.S. Dec. 28, 2023).

As to timing, Respondents also claim that imposing a remedy for 2024 would "inject[] intolerable uncertainty and confusion into the 2024 elections." Mot. for Reconsideration 59. But the Wisconsin Elections Commission has already stated that so long as new maps are in place by March 15, 2024, there will be no issue with the "proper, efficient, and effective administration" of the 2024 elections. Wisconsin Elections Comm'n Br. 3 (Oct. 16, 2023).[12] Respondents' arguments based on the so-called "*Purcell* principle" about federal-court interference with state-law processes therefore are entirely inapposite where the State's own election authority has already accepted the relevant timeline. *Cf.* Mot. for Reconsideration 59–60 (citing *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (per curiam); *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring); *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam)).

Nor are Respondents accurate to characterize the Court as having decided that "there is insufficient time for the fact-finding that will be required" in this matter. Mot. for Reconsideration 45. It is true that this Court's October 6 Order declined to take up the petitioners' partisan-gerrymandering claims

[12] *See supra* note 5 (noting that in prior decades, there was no issue with proper election administration even though plans were not in place until mid-April or later).

because "the need for extensive fact-finding (if not a full-scale trial) counsel[ed] against" doing so at that time. *Clarke v. Wis. Elections Comm'n*, 2023 WI 70, 995 N.W.2d 779, 781. But on the issue that is now before the Court—contiguity—there are no disputes of fact and therefore no timing issues with fact-finding. *See Clarke*, 2023 WI 79, ¶31 ("None 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."). Indeed, all parties are on record agreeing as to both the "municipal islands" that are at issue in this case and the "ward fragments" that appear to be simply errors in the data. *See* Joint Stipulation (Dec. 30, 2023).

Remedying the contiguity violations in a manner consistent with the principle of judicial neutrality (*i.e.*, ensuring that the court does "not select a plan that seeks partisan advantage," *Clarke*, 2023 WI 79, ¶70 (quoting *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶12, 249 Wis. 2d 706, 714, 639 N.W.2d 537, 541)), will not require extensive fact-finding. Rather, the Court will be looking to well-established quantitative metrics explained in expert reports and accompanying briefs. *See Carter v. Chapman*, 270 A.3d 444, 470 (Pa.) (discussing the "numerous metrics [that] have been developed to allow for objective evaluation of proposed districting plans to determine their partisan fairness"), *cert. denied*, 143 S. Ct. 102 (2022); Atkinson Br. at 41–42 (Oct. 30, 2023) (discussing measurement of a particular map's neutrality based on how

likely it is to convert a voting majority for either major political party into control over the Legislature by that party). Respondents thus misrepresent the Court's October 6 Order: This Court has never said that there is not enough time for fact-finding as to the basic principle of judicial neutrality.

B. No Further Process Is Required.

Respondents further argue that the Court's schedule does not afford them a hearing or discovery and that the appointment of "consultants" compounds these problems. But the Court's procedures provide the parties all the process to which they are due.

Similar to the *Johnson* litigation, the Court has provided all parties the opportunity to submit expert reports; review all data and inputs used by other parties' experts; and respond to other parties' submissions. The Court has also permitted all parties an opportunity to respond to the consultants' report. Scheduling Order at 3–4. These procedures amply allow an opportunity to be heard and facilitate the Court's resolution of any material factual disputes. Plus, because the Court's outlined remedial procedures end on February 8, 2024, *see id.* at 4, if the Court finds for some reason that unresolved material factual disputes remain, it could yet order additional procedures if they prove necessary and still be in full compliance with the Wisconsin Elections Commission's request that new maps be in place by March 15, 2024. *See* Atkinson Br. at 49–51 (Oct. 30, 2023) (describing additional procedure the

Court could follow if unresolved questions of material fact remain after the parties submit expert reports and briefing).

Respondents suggest that "Wisconsin law and due process" require a hearing *any* time factual disputes exist. Mot. for Reconsideration 48. But neither Wisconsin law nor federal due-process law says so. *See Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) ("Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits."); *FCC v. WJR, the Goodwill Station*, 337 U.S. 265, 276 (1949) ("[T]he right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations. Certainly the Constitution does not require oral argument in all cases … [,] even [those in which] substantial [questions] are raised."); *see also County of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 393 ¶31, 588 N.W.2d 236, 246 (1999) (stating that the Wisconsin Constitution's procedural due-process protections are "identical" to those of the United States Constitution).

Indeed, Respondents' wish for a due-process right to discovery or oral argument in civil litigation finds no basis in precedent. *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (endorsing a case-specific approach). Respondents' citations prove only that, in the context of motions for a sanction of dismissal with prejudice, "distinct" from usual civil-litigation motions practice, "if there are disputed facts or disputed inferences from the facts," an evidentiary

hearing may be warranted. *Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis. 2d 707, 725 n.8, 599 N.W.2d 411, 420 n.8 (Wis. Ct. App. 1999); *see also Indus. Roofing Servs., Inc v. Marquardt*, 2007 WI 19, ¶16 n.13, 299 Wis. 2d 81, 106 n.13, 726 N.W.2d 898, 911 n.13 (citing *Garfoot*, 228 Wis. 2d at 725 n.8). And in the other case Respondents cite, *Codd v. Velger*, 429 U.S. 624 (1977) (per curiam), the U.S. Supreme Court held that the plaintiff was *not* entitled to an evidentiary hearing regarding his civil constitutional claim. *Id.* at 627–28.

Nor does the Court's appointment of consultants have anything to do with due process or violate any aspect of Wisconsin law. The Court has general authority to enlist whatever assistance it requires to select a new, constitutional map. *See State ex rel. Universal Processing Servs. of Wis., LLC v. Circuit Court*, 2017 WI 26, ¶59 & n.24, 374 Wis. 2d 26, 55 n.24, 892 N.W.2d 267, 281 n.24 (quoting *Ex Parte Peterson*, 253 U.S. 300, 312 (1920), which held that courts have "inherent power to provide themselves with appropriate instruments required for the performance of their duties," including "appoint[ing] persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause"); *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 749–50 ¶19, 595 N.W.2d 635, 641 (1999) (explaining that Wisconsin's courts have "inherent authority" to act to ensure "the orderly and efficient exercise of [their] jurisdiction"). Courts often appoint technical experts as consultants or advisors in

redistricting cases. *See, e.g.*, Order at 3–4, *Common Cause v. Lewis*, No. 18 CVS 014001 (N.C. Super. Ct. Sept. 13, 2019); Order, *Bethune-Hill v. Va. State Board of Elections*, No. 14-cv-00852 (E.D. Va. Oct. 18, 2018); Order at 2, *League of Women Voters of Pa. v. Commonwealth*, No. 159 MM 2017 (Pa. Jan. 26, 2018). And the Court here, at oral argument and thereafter, afforded all parties an opportunity to suggest to the Court potential consultants or advisors to assist in evaluating proposed remedial maps.

Even assuming the Court's consultants were appointed as "referees" under Wis. Stat. § 805.06, it would not follow that Respondents have an affirmative right to present witnesses to them, nor would it entitle Respondents to a hearing on objections to their report. Mot. for Reconsideration 50 (citing Wis. Stat. § 805.06(4)(b), (5)(a)(b)). Rather, the Court always has discretion to "specify or limit" the powers of its consultants or referees, or to "direct" them to "report only upon particular issues or to do or perform particular acts." Wis. Stat. § 805.06(3).[13] Here, the Court has appropriately exercised that discretion to properly scope the consultants' work and has asked the consultants to prepare a report to which all parties will

[13] Respondents refer to § 805.06(4)(b), but that provision speaks only to the mechanisms available to parties to secure witnesses' attendance at any hearing before a referee in which parties are permitted to present witnesses. It does not create a freestanding right to present witness testimony regardless of the scope of the referee's duties. *See* Wis. Stat. § 805.06(4)(a) (contemplating that such a hearing may not take place if "the order of reference otherwise provides").

be entitled to respond, which is, in essence, the procedure Wis. Stat. § 805.06 provides.[14]

C. The Court's Remedy Is Proper.

Respondents also argue that the Court's decision "violates due process by entertaining statewide remedies with no connection to the legal violation the Court should be redressing." Mot. for Reconsideration 56. But as the Court recognized, if the Court is required to adopt a remedial map because the legislative process fails, the judiciary is held to a higher standard. "Unlike the legislative and executive branches, which are political by nature, this court must remain politically neutral" and does not have "free license to enact maps that privilege one political party over another." *Clarke*, 2023 WI 79, ¶70.

That principle flows directly from this Court's prior decision in *Jensen v. Wisconsin Elections Board*, stating that when the Court is "comparing submitted plans with a view to picking the one … most consistent with judicial neutrality," the Court "should not select a plan that seeks partisan advantage—that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda." 2002 WI 13, ¶12, 249 Wis. 2d 706, 714, 639 N.W.2d 537, 541 (citation and quotation marks omitted). It is also consistent with how both the U.S. Supreme Court and other

[14] Respondents argue there is no legal basis for the Court ordering the parties to pay for the consultants, but § 805.06(1) authorizes the referring court to assign such fees to the parties.

state and federal courts have approached the task of remedial redistricting. *See* Atkinson Br. 37–42 (Oct. 16, 2023) (citing cases).

Respondents cite various non-redistricting cases to argue that, in general, a court-ordered remedy must fit the constitutional or statutory violation. Mot. for Reconsideration 57 (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006); *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶46, 393 Wis. 2d 38, 946 N.W.2d 35; *Linden Land Co. v. Milwaukee Elec. Ry. & Lighting Co*., 107 Wis. 493, 83 N.W. 851, 856 (1900)). True enough, but as the Court recognized, the contiguity problems with the current map are pervasive: At least 50 assembly districts and at least 20 senate districts in the current map did not consist of contiguous territory, in violation of Sections 4 and 5, respectively, of Article IV of the Wisconsin Constitution. *See Clarke*, 2023 WI 79, ¶¶2, 34, 56, 77. As the Court explained: "Given this pervasiveness, a remedy modifying the boundaries of the non-contiguous districts will cause a ripple effect across other areas of the state as populations are shifted throughout." *Id.* ¶56.

Moreover, as even Respondents recognize, redistricting involves balancing multiple criteria. For example, Respondents themselves have conceded that the Court could not fix the contiguity violations in a way that would violate other state and federal constitutional requirements. Legislature

Br. 60–61 (Oct. 16, 2023) (recognizing one-person-one-vote constraints on remedying contiguity issues).

Nor can the Court fix the contiguity violation in a manner inconsistent with its judicially neutral role. Indeed, in the very redistricting cases relied on by Respondents, the U.S. Supreme Court recognized that courts play a different role when it comes to redistricting remedies. In *Upham*, the Court noted that "court-ordered reapportionment plans are subject in some respects to stricter standards than are plans developed by a state legislature." 456 U.S. at 42. And in *North Carolina v. Covington*, 581 U.S. 486 (2017), the U.S. Supreme Court stated that in remedying a redistricting violation, the court "must undertake an 'equitable weighing process' to select a fitting remedy for the legal violations it has identified, taking account of 'what is necessary, what is fair, and what is workable.'" *Id.* at 488 (citations omitted). The Court was thus correct to recognize that with respect to the appropriate role for the judiciary, "courts can, and should, hold themselves to a different standard than the legislature," and that is particularly true when it comes to the "partisanship of remedial maps." *Clarke*, 2023 WI 79, ¶71.[15]

[15] Respondents err in saying that the Court, in considering partisan impact of the parties' proposed maps as a way of preserving its judicial neutrality, runs afoul of *Johnson I*, where the Court stated in dicta that it had no judicial competence to consider *partisan-gerrymandering claims*. *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶¶40–63, 399 Wis. 2d 623, 649–61, 967 N.W.2d 469, 482–88 ("*Johnson I*"). The Court expressly declined to take up Petitioners'

III. This Court's December 22 Decision Does Not Evince Bias or Prejudgment.

Respondents claim that the Court's December 22 decision was biased or prejudged either because Justice Protasiewicz participated—a basis this Court has already rejected—or due to the timing and content of the majority opinion. Neither argument succeeds.

A. Respondents' Attempt to Relitigate Justice Protasiewicz's Participation Is Improper and Incorrect.

Respondents suggest there is a due-process problem with Justice Protasiewicz's participation in this proceeding. *See* Mot. for Reconsideration 42. That argument is both procedurally and substantively barred.

As to process, Respondents are precluded from relitigating their failed recusal motion. This Court, pursuant to its governing operating procedures, has already finally resolved Respondents' precise complaints of prejudgment and bias. *See* Wis. Supreme Court Internal Operating Procedures, III.L.1; *Clarke*, 2023 WI 66, ¶¶60–79. Respondents did not timely seek reconsideration of that decision. *Compare Clarke*, 2023 WI 66 (denying recusal motion on Oct. 6, 2023), *with* Wis. Supreme Court Rule 809.64 ("A party may seek reconsideration of the judgment or opinion of the supreme court by filing a motion under

---

partisan-gerrymandering claims and reserved the question whether such claims would be justiciable in its October 6 Order, *Clarke*, 2023 WI 70, 995 N.W.2d at 781; the Court's remedy here in no way implicates the justiciability of partisan-gerrymandering claims.

s. 809.14 for reconsideration within 20 days after the date of the decision of the supreme court."). They do not get a second, belated bite at the apple. *See Miller v. Carroll (In re Paternity of B.J.M.)*, 2020 WI 56, ¶59, 392 Wis. 2d 49, 78–79, 944 N.W.2d 542, 557 ("When the motion for recusal is made only to the judge against whom bias is asserted and no review is requested, … the decision regarding recusal begins and ends with the decision of that judge." (Ann Walsh Bradley, J., concurring)); *Village of Tigerton v. Minniecheske*, 222 Wis. 2d 219, 587 N.W.2d 214, 1998 WL 644906, at *1 (Wis. Ct. App. 1998) (per curiam) (unpublished table decision) (party precluded, in postjudgment proceeding, from raising conflict-of-interest issue not raised in prejudgment recusal request).

On the substance, for the reasons already supplied by Justice Protasiewicz in her carefully reasoned 47-page opinion, her participation raises no due-process problem. The constitutional standard for recusal is extraordinarily high, reserved for only the most "exceptional" and "extreme" circumstances. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884, 886 (2009); *see FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948) ("[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level."). That standard is unmet here based on Respondents' invocation of alleged statements by Justice Protasiewicz on the campaign trail, as well as political-party contributions. *See* Mot. for Reconsideration 34–35. These types of allegations

have never been enough to find a due-process problem. *See, e.g.*, *Cement Inst.*, 333 U.S. at 702–03 ("[No] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law."); *Republican Party of Minn. v. White*, 536 U.S. 765, 775–77 (2002) (rejecting contention that judge's campaign remarks could give rise to due-process violation and stating that a "judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason"); *Storms v. Action Wis. Inc.*, 2008 WI 110, ¶19, 314 Wis. 2d 510, 523, 754 N.W.2d 480, 487 (per curiam) ("There is no case in Wisconsin or elsewhere that requires recusal of a judge or justice based solely on a contribution to a judicial campaign." (quotation marks omitted)).

B. Respondents' Attempt to Show Bias or Prejudgment by a Majority of this Court's Justices Likewise Fails.

Respondents also repackage their prejudgment and bias arguments against the *entire* Court. The "rushed Christmas decision," Respondents say, "confirm[s] this case has been pre-decided." Mot. for Reconsideration 36. It does no such thing.

Respondents chiefly argue that the Court's December 22 decision was biased because it followed 31 days from oral argument. From that timing, Respondents speculate that the majority opinion must have been "circulated

just after the hours-long oral argument." Mot. for Reconsideration 41. And from that, Respondents further guess that the majority could not have adequately addressed Respondents' points raised at oral argument. *See id.* Setting aside that Respondents' allegations are entirely speculative, plainly there is no federal due-process constraint that bars judges from rendering decisions expeditiously after oral argument, nor from penning initial drafts based on the parties' briefs.

Respondents also accuse the Court of "parrot[ing] the petitioners' briefing." *See* Mot. for Reconsideration 36 (internal quotation marks omitted). Even were this a fair characterization of the majority's painstaking 50-page opinion—it is not—Respondents can muster no legal support for the proposition that drawing arguments from the parties' briefs constitutes a due-process violation. To the contrary, the due-process themes underlying courts' attention to party presentation counsels *for*, not against, deciding issues based on the arguments presented by the parties. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) ("In our adversarial system of adjudication … we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." (internal quotation marks omitted)); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) ("The premise of our adversarial system is that the appellate courts do not sit as self-

directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").

Each of Respondents' examples of the Court's "disregarding" or "mischaracterizing" their arguments is simply incorrect. *Compare* Mot. for Reconsideration 36–41 with *Clarke*, 2023 WI 79. And in any event, a court "is not required to be persuaded by every argument parties make, and it may, in its discretion, dismiss arguments that it does not find compelling without a detailed explanation." *Concepcion v. United States*, 597 U.S. 481, 501 (2022). Respondents' complaint that the Court declined to address their "underdeveloped" due-process arguments just highlights the procedural impropriety of their motion for reconsideration. The entirety of Respondents' due-process argument prior to this motion consisted of rehashing their position that Justice Protasiewicz should have recused herself, summed up in a pro forma recitation that they were "preserv[ing] for appeal all constitutional arguments that modifying, dissolving, or ignoring the *Johnson* injunction here, without recusal by Justice Protasiewicz, violates due process." Legislature Br. 58 (Oct. 16, 2023).

It is only now, for the first time on a motion for reconsideration, that Respondents attempt to recast issues about the timing and procedures for this litigation into supposed federal due-process problems. This is a case about the application of the state constitution to state legislative maps before the state's

highest court. The Court should reject Respondents' attempt to inject purported federal due-process issues into this case through a belated motion for reconsideration where none of the state-law criteria for reconsideration are met.

CONCLUSION

The Court should deny the motion for reconsideration.

Dated: January 4, 2024

Respectfully submitted,

Electronically signed by Sarah A. Zylstra
Sarah A. Zylstra (Bar No. 1033159)
Tanner G. Jean-Louis
(Bar No. 1122401)
Boardman Clark LLP
1 South Pinckney Street
Suite 410
Madison, WI 53701
(608) 257-9521
szylstra@boardmanclark.com
tjeanlouis@boardmanclark.com

Sam Hirsch*
Jessica Ring Amunson*
Elizabeth B. Deutsch*
Arjun R. Ramamurti*
Jenner & Block LLP
1099 New York Avenue NW
Suite 900
Washington, DC 20001
(202) 639-6000
shirsch@jenner.com
jamunson@jenner.com
edeutsch@jenner.com
aramamurti@jenner.com

* *Appearing pro hac vice*

CERTIFICATE OF COMPLIANCE

I hereby certify that this Response 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 Response is 7,140 words.

Dated: January 4, 2024.

Electronically signed by Sarah A. Zylstra

Sarah A. Zylstra
(WI Bar No. 1033159)
Boardman Clark LLP
1 South Pinckney Street
Suite 410
Madison, WI 53701
(608) 257-9521