**IN THE SUPREME COURT OF WISCONSIN**

No. 2023AP1399

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; 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.*

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**PETITIONERS' RESPONSE TO MOTION FOR RECONSIDERATION**

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## INTRODUCTION

Respondents and Intervenor-Respondents ("Respondents") make no effort to demonstrate that they satisfy the standard for reconsideration—that 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." Internal Operating Procedures III.J. Respondents instead spend 62 pages rehashing arguments the Court did not overlook, but rather considered and rejected on the merits. All parties in this case have been given ample process and opportunity to be heard throughout—indeed, not even counting the current motion for reconsideration or previous recusal motion, Respondents have filed at least five briefs in this matter totaling well over two hundred pages, and presented extensive oral argument. Should the Legislature fail to enact constitutionally compliant maps through the political process, the remedial process constructed by the Court will be equally robust. Each Respondent group will have the opportunity to file proposed remedial plans, three additional briefs, and to present and respond to expert evidence and the proposed plans recommended by the Court-appointed expert consultants. None of this remotely violates the Fourteenth Amendment's Due Process Clause or any Wisconsin law or policy.

## I. The Court Has Given the Legislature a Fair Opportunity to Redistrict.

Respondents' complaints about the Legislature's opportunity to redistrict rest on a fundamental misconception. Nothing about this Court's remedial order requires the Legislature to engage in a redistricting "footrace." Mem. in Supp. of Mtn. for

Recon. ("Mem.") 19, 21. Rather, the Court's December 22 opinion and contemporaneous order ("Scheduling Order") make two things clear. First, if the Legislature adopts constitutional maps, "there would be no need for [the] court to adopt remedial maps." *Clarke v. Wisconsin Elections Commission*, 2023 WI 79, ¶57. Second, no court-ordered remedial map will be, or could be, adopted before February 9. Scheduling Order 4 (setting February 8 at 5 p.m. as the deadline for the parties' final remedial submissions).

In other words, the Court has afforded the Legislature *at least seven weeks* to enact compliant maps. Respondents concede that 7 weeks is "reasonable." *See* Mem. 31 & n.9 (5 and 6 weeks are "reasonable"). Indeed, courts across the country routinely give legislatures far less time to enact remedial maps. *See, e.g.*, Order, *Caster v. Allen,* No. 2:21-cv-1536-AMM (N.D. Ala. June 20, 2023), Doc. 156, *stay denied*, *Allen v. Milligan*, __ U.S. __, 2023 WL 6218394 (U.S. Sept. 26, 2023) (Mem.) (providing legislature 31 days to adopt and file remedial plan); *Robinson v. Ardoin*, 37 F.4th 208, 232 (5th Cir. 2022) (affirming order providing 14 days for legislature to adopt and file remedial plan); Order, *League of Women Voters of Pa. v. Commonwealth of Pa.*, 175 A.3d 282, 284 (Pa. Jan. 22, 2018) (per curiam) (giving legislature 18 days to submit plan to the Governor); *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *134 (N.C. Super. Sep. 3, 2019) (giving legislature "two weeks" to enact remedial maps); Order, *Szeliga v. Lamone*, No. 21-cv-001816 (Md. Cir. Ct. Mar. 25, 2022) (giving legislature five days to enact

remedial map); *Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016) (two weeks); *Larios v. Cox*, 305 F. Supp. 2d 1335, 1336 (N.D. Ga. 2004) (19 days).

Respondents protest that they will need time to conduct "public hearings," "committee debates," and floor debates." Mem. 25. But the last time that the Legislature successfully passed legislative maps, in 2011, the process moved far more swiftly than will be required here: the legislative redistricting bill was introduced on July 11, 2011, the Legislature held a single one-day hearing on July 13, only days after the bill was introduced, the bill was passed on July 20, 2011, and it was signed on August 9. *See* Wisconsin Legislature, Senate Bill 148, https://docs.legis.wisconsin.gov/2011/proposals/sb148. The much lengthier period afforded the Legislature here will easily accommodate any public hearings and debate the Legislature wishes to hold.

Nor is there anything unreasonable—much less unlawful—about this Court's decision to begin the remedial process concurrently with the Legislature's opportunity to redistrict. Indeed, it is routine. For example, in 2018, the Pennsylvania Supreme Court appointed Nathaniel Persily as a special advisor to assist the court in adopting a remedial plan and ordered the parties to simultaneously work on their own remedial map submissions "in anticipation of the possible eventuality that the General Assembly and the Governor do not enact a remedial congressional districting plan." *See*, *e.g.*, Order, *League of Women Voters of Pa.*, No. 159 MM 2017 (Pa. Jan. 26, 2018). The parties' remedial submissions were due

the same day as the deadline for the Governor to sign any enacted remedial map. *League of Women Voters of Pa.*, 175 A.3d at 284.

Likewise, the New Hampshire Supreme Court, after finding state legislative maps unconstitutional, gave the legislature until May 26, 2022 to enact a new map—and simultaneously (1) appointed a special master, (2) ordered the parties to submit their own proposed maps by May 16 and to respond to the other parties' proposed maps by May 18, and (3) ordered the special master to issue a recommendation by May 27, if the legislature failed to act. Order, *Norelli v. Secretary of State*, No. 2022-0184 (N.H. May 12, 2022).

In the North Carolina partisan gerrymandering litigation in 2022, the North Carolina Supreme Court ordered all parties wishing to submit remedial maps to do so by the deadline for the legislature to enact a remedial map. Order Striking Maps, *Harper v. Hall*, 867 S.E.2d 554, 558 (N.C. Feb. 4, 2022) (Mem.). Similarly, in the North Carolina partisan gerrymandering litigation in 2019, the court observed that, "[n]otwithstanding the General Assembly having the opportunity to draw Remedial Maps in the first instance, the Court will still immediately appoint a Referee [to] (1) assist the Court in reviewing any Remedial Maps enacted by the General Assembly; and (2) to develop remedial maps for the Court should the General Assembly fail to enact lawful Remedial Maps within the time allowed." *Common Cause*, 2019 WL 4569584, at *134.

Federal courts take the same approach. In *Soto Palmer v. Hobbs*, the court recently declared that Washington state's legislative map violated Section 2 of the

Voting Rights Act. Observing that "the Court will not wait until the last minute to begin its own redistricting efforts," the Court set a December 1, 2023 deadline for the parties to submit remedial proposals and supporting expert reports, a December 1, 2023 deadline for the parties to propose a special master to evaluate the parties' proposals, a December 22, 2023 deadline for the parties to submit briefs and expert reports in response to others parties' proposals, and a January 5, 2024 deadline for reply briefs and corresponding expert reports. Order, *Soto Palmer v. Hobbs*, No. 3:22-cv-05035-RSL (W.D. Wash. Oct. 4, 2023). The court noted that "[i]f, as the Minority Caucus Leaders hope, the Legislature is able to adopt revised legislative maps . . . the Court's parallel process . . . will have been unnecessary." But the court observed that "[e]stablishing earlier deadlines for the presentation of alternative remedial proposals will allow a more deliberate and informed evaluation of those proposals." *Id.* at 2.

Respondents do not contend that any of their arguments relating to the Legislature's opportunity to redistrict presents a federal constitutional question. They do not contend that any federal constitutional provision bars state courts engaged in remedial redistricting processes from allowing the Legislature an opportunity to redistrict concurrently. Indeed, though this Court has determined that it is appropriate to give the Legislature a chance to redistrict as a matter of Wisconsin policy, Respondents do not contend that any federal constitutional provision actually required that result. *Cf. Wise v. Lipscomb,* 437 U.S. 535, 540 (1978) (opinion of White, J.) ("When a *federal court* declares an existing

apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." (emphasis added)). Here, the Court has determined that the Legislature should have an opportunity to enact constitutional maps through the legislative process, based on its "primary authority" in this area under the Wisconsin Constitution. *Clarke*, 2023 WI 79, ¶57. Nothing precludes the Legislature from doing so, and Respondents' misapprehension of the Court's opinion and Scheduling Order in no way suggests that this Court should reconsider either.

## II. The Briefing Schedule and Remedial Order Comport with Due Process.

Respondents' contention that the briefing schedule and remedial process in this case violate due process does not satisfy the standard for reconsideration either. Indeed, the remedial process this Court has ordered is much like the one the Court adopted in *Johnson*—involving briefing and expert submissions, but no additional "discovery."

### A. Respondents' "pre-decision" argument does not warrant reconsideration.

Nothing about the fulsome process in this case supports Respondents' claim that the Court somehow violated the Fourteenth Amendment by "pre-deciding" the issues here. Mem. 34, 36-42. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"

*Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *see also Milwaukee Dist. Council 48 v. Milwaukee Cnty.,* 2001 WI 65, ¶48, 244 Wis. 2d 333, 627 N.W.2d 866 (quoting *Goldberg v. Kelly,* 397 U.S. 254, 267 (1970)) ("The fundamental requisite of due process of law is the opportunity to be heard."). The Court gave all parties opportunities to brief the case and to respond to other parties' briefs; heard a lengthy oral argument; and issued a 49-page decision a month after oral argument. This included an opportunity to brief and respond to arguments related to remedial criteria and process. Order, *Clarke v. Wisconsin Elections Comm'n*, No. 2023AP1399-OA (Wis. Oct. 6, 2023). Respondents cite not a single decision from any court suggesting that this sort of process could violate the Fourteenth Amendment. Respondents' apparent belief that this Court should have found their arguments more persuasive does not amount to a violation of the federal Constitution. The Court's decision addresses Respondents' principal merits argument—that "political" contiguity rather than physical contiguity suffices to meet the state constitutional standard—at length. *Clarke*, 2023 WI 79, ¶¶18-26. And in a fulsome discussion entitled "Defenses," the Court's decision dismantles Respondents' standing, laches, preclusion, and estoppel arguments, as well as their argument that the case was an impermissible "collateral attack" on the *Johnson* decision. *Clarke* 2023 WI 79, ¶¶36-55. Rejecting a party's arguments is not the same thing as "disregard[ing]" them. Mem. 36.

Nor has this Court treated this case any differently than other important cases with similar time-sensitivity. The remedial briefing schedule the Court ordered on

December 22 falls well within the normal bounds for redistricting cases, including briefing orders this Court issued in *Johnson*, with which both the Legislature and Johnson intervenors complied without complaint or objection. *See* Order, *Johnson v. Wisconsin Elections Comm'n*, No. 2021AP1450-OA (Wis. Jan. 4, 2022) (requiring motion responses by 4:00 P.M. the next day); Order, *Johnson*, No. 2021AP1450-OA (Wis. Jan. 31, 2022) (requiring motion responses by noon on February 2, 2022); Order, *Johnson*, No. 2021AP1450-OA (Wis. Mar. 7, 2022) (requiring responses to motion for a stay by 11:00 A.M. on March 9, 2022). This Court regularly orders expedited briefing in time-sensitive cases, including those brought by the Legislature. *See* Order, *Trump v. Biden*, No. 2020AP2038 (Wis. Dec. 11, 2020) (supplemental briefs to be filed by 10:00 P.M. that night); *see also* Order, *Fabick v. Palm*, No. 2020AP828-OA (Wis. May 5, 2020) (responses to be filed no later than May 8, 2020 and replies by May 11); Order, *Wisconsin Leg. v. Palm*, No. 2020AP765-OA (Wis. Apr. 21, 2020) (responses to be filed no later than April 28, 2020 and replies by April 30); Order, *Wisconsin Leg. v. Evers*, No. 2020AP608-OA (Wis. Apr. 6, 2020) (responses to be filed by 3:30 that afternoon). Ordering expedited briefing does not mean the Court has pre-decided anything.

### B. The remedial schedule and process do not warrant reconsideration.

The Court's remedial schedule—which will last at least seven weeks and afford all parties opportunities to submit proposed maps, expert reports, and three briefs—is fully commensurate with remedial proceedings in other cases and is not

unconstitutional. The parties have three full weeks to propose maps—more time than many other state courts have given *legislatures* to enact remedial maps. *Supra* Section I (citing examples). Having ten days to respond to other parties' maps and seven days to respond to the consultants' recommendations is entirely normal, and even generous, in the context of remedial redistricting. This remedial process is the opposite of "unprecedented." *Contra* Mem. 43. Nor does the Court's order prohibit parties from filing rebuttal reports at the same time as they file their responsive briefs on January 22, as Respondents contend. Mem. 44.

Notably, this remedial process is similar to the one in *Johnson*, in which many of the Respondents[1] participated and raised no objection. There, parties were given until Dec. 15, 2021 to file proposed remedial maps with expert reports, Dec. 30, 2021 to file responsive briefs, and Jan. 4, 2022 to file replies. And all parties, including the Legislature and the petitioners in that case, all movants here, agreed that no "fact discovery is needed beyond the exchange of maps, expert disclosures, and any documents or data that a party intends to rely upon or an expert has relied upon"—*i.e.*, the same sort of expert backup files that the Court ordered disclosed here. Proposed Joint Discovery Plan, *Johnson*, No. 2021AP1450-OA (filed Dec. 3, 2021). Respondents did not suggest that "depositions" were required. And the Court held oral argument but did not hold any evidentiary hearing.

[1] The Legislature was a party in *Johnson*, although its composition is not completely the same. Respondents Senators Rob Hutton, Rachael Cabral-Guevara, Jesse James, Romaine Quinn, and Cory Tomczyk assumed office in 2023. And while some of the Johnson Intervenors participated in the *Johnson* litigation, Intervenors Chris Goebel, Joe Sanfelippo, Terry Moulton, Robert Jensen, Ruth Elmer, and Ruth Streck did not. *Cf. Johnson v. Wisconsin Elec. Comm'n*, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559 (*Johnson III*).

Apparently recognizing that the process here mirrors the *Johnson* process, Respondents contend that *Johnson* was different because "the parties were able to stipulate to all material facts" and "remedies were appropriately confined by the Court's adherence to existing district lines and its refusal to consider partisan impact." Mem. 48. This misstates the situation in *Johnson*. While the *Johnson* Court did not consider partisan impact as part of the remedial process, it did consider "least change" and various other contested factual issues about which the parties, experts, and members of the Court vehemently disagreed. Nor is there anything inconsistent (*contra* Mem. 45) about this Court's conclusion that assessing partisan impact in the context of evaluating remedial maps would be less complex and time-consuming than developing and applying standards for a potential constitutional bar on partisan gerrymandering.

Consistent with *Johnson*, nothing in Wisconsin law or the Due Process Clause requires an evidentiary hearing in the remedial mapmaking context. The Wisconsin cases Respondents cite (Mem. 48) concern litigation sanctions; none has anything to do with remedial redistricting. And the various federal cases Respondents cite concern the process due when a person is being, for example, criminally prosecuted or deprived of property benefits; they show that even in the latter situation an evidentiary hearing is not always required. Respondents cite no case for the proposition that the Due Process Clause requires an evidentiary hearing in the context of remedying an invalid redistricting map.

To the contrary, this precise sort of remedial process (or even a less fulsome process) is common in redistricting litigation—including cases in which evaluating remedial plans required evaluating contested factual issues relating to partisan fairness. After the Pennsylvania Supreme Court struck down Pennsylvania's congressional map as a partisan gerrymander in 2018, it gave each party an opportunity to propose remedial maps, but no opportunity even to respond to the maps proposed by other parties or to the special master's recommendation. Nor was there any opportunity to depose or cross-examine witnesses or to present evidence at a remedial evidentiary hearing. *League of Women Voters of Pennsylvania*, 175 A.3d at 289. In *Common Cause v. Lewis*, the North Carolina state court gave each party fourteen days to propose remedial maps, seven days to submit responses to other parties' remedial maps, and no opportunity to respond to the referee's map or analysis. Order, *Common Cause*, No. 18 CVS 014001 (N.C. Super. Sep. 13, 2019). There was, again, no opportunity to depose or cross-examine anyone or to present evidence at a remedial evidentiary hearing. And in *Harper v. Hall*, the North Carolina Supreme Court gave the legislature and the parties fourteen days to enact or submit remedial maps, and only three days to submit responses to the enacted map or to remedial maps submitted by other parties. Order Striking Maps, *Harper*, 867 S.E.2d at 558. Although expert reports could be (and were) submitted with the remedial maps and responses, there was no opportunity for any party to respond to the special master's report, take depositions, engage in cross-examination, or present evidence or argument at a hearing. Order, *Harper v. Hall*, No. 21-cvs-

015426 (N.C. Super. Feb. 8, 2022). And in *Baldus*, the federal district court accepted remedial map proposals supported by expert reports, but held no hearing or additional argument before choosing a map. *Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 862 F. Supp. 2d 860, 861 (E.D. Wis. 2012).

Respondents also object on state-law grounds to the appointment of two consultants, but the provisions they cite are inapplicable to this Court's appointment of consultants (or referees). Mem. 51. Wisconsin law has separate statutes for referees appointed by circuit courts to aid in trials, Wis. Stat. § 805.06, and referees appointed by the Supreme Court to aid in adjudicating matters over which it exercises original jurisdiction, Wis. Stat. § 751.09. Section 805.06 is part of Chapter 805 of the Wisconsin Statutes, titled "Civil Procedure—Trials." *See State v. Lopez*, 2019 WI 101, ¶26, 389 Wis. 2d 156, 936 N.W.2d 125 (explaining that statute titles aid in interpreting statutory meaning and context). The procedures of Chapter 805—including the ability of parties to subpoena witnesses and to have a hearing—do not govern referees appointed by the Supreme Court. Construing Wis. Stat. § 805.06 to govern this Court's appointment of referees would render § 751.09—which expressly applies to Supreme Court original actions (and contains none of § 805.06's limitations)—superfluous. This Court's authority under Wis. Stat. § 751.09 is not constrained by the procedures set forth in Wis. Stat. § 805.06. The differential treatment accords with this Court's broad authority to set procedures in adjudicating cases pursuant to its constitutional authority to hear original actions. *See, e.g.*, Wis. Stat. § (Rule) 809.70(3) (upon granting petition for original action,

Court "may establish as schedule for pleading, briefing and submission with or without oral argument"). The Court's authority over original actions is necessarily flexible and broad, and, as the Court with constitutionally granted superintending power over the judiciary, *see* Wis. Const. art. VII, § 3, the Court has the constitutional authority to set the procedures that govern its exercise of its original action. Moreover, this Court has the inherent constitutional authority to employ judicial staff to aid in the administration of justice. *See, e.g.*, *Barland v. Eau Claire Cnty.*, 216 Wis. 2d 560, ¶¶24-26, 575 N.W.2d 691 (1998). The Court's engagement of Drs. Grofman and Cervas as consultants in this matter easily falls within both its inherent powers and its Wis. Stat. § 751.09 power, and none of the procedures that regulate a circuit court referee under Wis. Stat. § 805.06 applies here.

### C. The Court's articulation of remedial legal standards does not warrant reconsideration.

Respondents next complain that this Court has violated due process because the Court's remedial decision, rather than its liability decision, will apply the partisan-impact criteria to proposed remedial maps. Like Respondents' other due process arguments, this one is unmoored from any precedent or constitutional text. It is entirely typical for courts of equity to elucidate legal standards at the time they are applying those standards to facts before them, rather than in advance. *See, e.g.*, *Johnson v. Wisconsin Elections Comm'n*, 2022 WI 14 ¶¶13, 31, 32, 400 Wis. 2d 626, 971 N.W.2d 402 (*Johnson II*) (simultaneously determining that "least change" meant "core retention," deemphasizing other "least change" metrics recommended

by the parties, and applying the core retention test to remedial maps); Order, *League of Women Voters v. Evers,* No. 2019AP559 (Ct. App. March 27, 2019) (explaining how stay factors are evaluated and simultaneously applying them to the pending motion).

It is likewise typical for parties to be required to both articulate a preferred legal standard and apply it to the facts of their case in the same brief, even though they do not know what legal standard the Court will ultimately adopt. Respondents do not have a "due process" right to two decisions—one describing the legal standard in advance, and then one applying it after a second round of briefing. If they did, most decisions of the United States Supreme Court would be unconstitutional. As the U.S. Supreme Court has recognized, "[i]n the context of common law doctrines …, there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves." *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001). The cases Respondents cite about fair notice and retroactivity concern cases where individuals face criminal consequences or civil consequences like financial penalties or deportation as a result of a new legal interpretation that is applied to individual conduct *predating* that interpretation. Respondents do not cite any decision suggesting that the federal Due Process Clause imposes any limits at all on how a state supreme court may develop the law in any other context.

Finally, it is also typical at the remedial stage for courts to consider criteria like compactness, communities of interest, or other redistricting criteria that were

not briefed or disputed at the liability stage—due process again imposes no requirement that a court set forth exactly how it will define or apply those criteria *ex ante*.

### D. The extent of the remedy does not present any federal constitutional question but, rather, is required by the Wisconsin Constitution.

Given the extensive noncontiguity—at least 50 of 99 Assembly districts, and 20 of 33 Senate districts—Wisconsin requires entirely new maps. The federal Due Process Clause does not require Wisconsin courts selecting remedial maps to blind themselves to the partisan impacts of those maps, or even bear on that question. And the remedy here (new maps) is not "divorced" from the legal violation (invalid maps). Mem. 58. Respondents' invocation of *Moore v. Harper*, 600 U.S. 1 (2023), is nonsensical. The "federal constitutional provision" (Mem. 58) at issue there was the Elections Clause of Article I, not the Due Process Clause—but the Elections Clause does not apply here because it does not address state *legislative*, as opposed to congressional, elections. U.S. Const. art. I, sec. IV. And in any event, nothing in *Moore* remotely suggests that state courts may not consider partisan impact when imposing remedial maps. To the contrary, *Moore* reaffirmed that state courts *could* interpret state constitutional provisions to ban partisan gerrymandering entirely. *Moore*, 600 U.S. at 27-30.

## III. There Is Sufficient Time To Redistrict before the 2024 Election.

The Wisconsin Elections Commission advised the Court that putting a map in place by March 15 would enable orderly elections in 2024, and this Court's

remedial schedule will allow that to happen. Candidate nomination petitions do not begin to circulate until April 15, and the primary is not until August. Wis. Stat. §§ 8.15(1), 5.02(12s). The remedial map accordingly will not be chosen on the "eve of election deadlines," as Respondents baselessly claim. Mem. 60. This argument—which rehashes an argument Respondents already made—is not a basis for reconsideration. The timing here is no different (and if anything, will provide more of a cushion) than the timing for issuance of new maps in *Baldus* and *Johnson*.

## IV. Respondents' Arguments Do Not Justify a Stay.

In addition to its meritless arguments for reconsideration, the motion requests that this Court "stay all proceedings pending a decision on this motion." Mtn. for Recon. 3, 5; Mem. 63. The request for a stay is, effectively, an additional request that the Court reconsider its Scheduling Order. *See* Scheduling Order ("[N]otwithstanding the terms of Wis. Stat. § 809.14(3), the filing of a motion in this proceeding shall not operate as an automatic stay of any of the deadlines set forth in this order."). As an initial matter, the relevant statutes do not permit a party to request reconsideration of a procedural *order*[2] of the Court—only an "opinion or judgment." Wis. Stat. § (Rule) 809.64 ("A party may seek reconsideration of the judgment or opinion of the supreme court by filing a motion under s. 809.14"); *Archdiocese of Milwaukee v. City of Milwaukee*, 91 Wis. 2d 625, 626, 284 N.W.2d

[2] The statute permits "a party adversely affected by a procedural order" to seek reconsideration only if it the appellate court issued the order without providing the party an opportunity to respond. Wis. Stat. § 809.14(2). The Court issued its Scheduling Order after extensive briefing by all parties and oral argument.

29 (1979) (per curiam) (Rules of Appellate Procedure did not permit party to seek reconsideration of order denying petition for review).

To the extent Respondents independently seek a stay of the Court's opinion or scheduling order, they neither articulate nor meet the relevant criteria under Wisconsin law. The Court has already determined that the automatic tolling provisions of Wis. Stat. § (Rule) 809.14(3)(a) do not apply. A party seeking a stay pending review must normally demonstrate (1) a "strong showing that it is likely to succeed on the merits;" (2) unless a stay is granted, the moving party will suffer irreparable injury;" (3) "no substantial harm will to other parties;" and (4) a "stay will do no harm to the public interest." *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995) (per curiam)[3]; *Waity v. LeMahieu*, 2022 WI 6, ¶49, 400 Wis. 2d 356, 969 N.W.2d 263.; *see generally State ex rel. Three Unnamed Petitioners v. Peterson*, 2015 WI 103, ¶38, 365 Wis. 2d 351, 875 N.W.2d 49 (applying *Gudenschwager* to a motion for a stay accompanying a motion for reconsideration).

Respondents address none of this. The only authority they cite is Wis. Stat. § (Rule) 809.14(3), which the Court has already determined would not apply. None of the moving papers reference *Gudenschwager* or any other authority, although it is plainly the movants' burden to demonstrate the propriety of a requested stay.

[3] A petition requesting that the Court clarify the standard of review for a decision on a motion for a stay pending appeal is currently pending before the Court. *In the Matter of Amending Wis. Stat. § 809.12, Relating to Appellate Review of Motions for Relief Pending Appeal*, Rules Pet. 23-01 (filed Jan. 23, 2023).

*Gudenschwager*, 191 Wis. 2d at 440; *see also Nken v. Holder*, 556 U.S. 418, 433-34 (2009) ("The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion."). The complete failure to articulate any authority that would support a request for a stay is fatal to the request.

## CONCLUSION

For the reasons stated herein, the Motion for Reconsideration by Intervenors-Respondents Wisconsin State Legislature, Johnson, Goebel, Perkins, O'Keefe, Sanfelippo, Moulton, Jensen, Zahn, Elmer, and Strek, and Respondents Senators Cabral-Guevara, Hutton, Jacque, Jagler, James, Kapenga, LeMahieu, Marklein, Nass, Quinn, Tomczyk, and Wanggaard should be denied.

Dated this 4th day of January, 2024.

By *Electronically signed by Daniel S. Lenz*

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