FILED
01-12-2024
CLERK OF WISCONSIN
SUPREME COURT

No. 2023AP001399-OA

IN THE SUPREME COURT OF WISCONSIN

REBECCA CLARKE, RUBEN ANTHONY, TERRY DAWSON, DANA GLASSTEIN, ANN GROVES-LLOYD, CARL HUJET, JERRY IVERSON, TIA JOHNSON, ANGIE KIRST, SELIKA LAWTON, FABIAN MALDONADO, ANNEMARIE MCCLELLAN, JAMES MCNETT, BRITTANY MURIELLO, ELA JOOSTEN (PARI) SCHILS, NATHANIEL SLACK, MARY SMITH-JOHNSON, DENISE (DEE) SWEET, AND GABRIELLE YOUNG,

Petitioners,

GOVERNOR TONY EVERS, IN HIS OFFICIAL CAPACITY; NATHAN ATKINSON, STEPHEN JOSEPH WRIGHT, GARY KRENZ, SARAH J. HAMILTON, JEAN-LUC THIFFEAULT, SOMESH JHA, JOANNE KANE, AND LEAH DUDLEY,

Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION; DON MILLIS, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, AND JOSEPH J. CZARNEZKI, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS COMMISSION; MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION; SENATOR ANDRÉ JACQUE, SENATOR TIM CARPENTER, SENATOR ROB HUTTON, SENATOR CHRIS LARSON, SENATOR DEVIN LEMAHIEU, SENATOR STEPHEN L. NASS, SENATOR JOHN JAGLER, SENATOR MARK SPREITZER, SENATOR HOWARD L. MARKLEIN, SENATOR RACHAEL CABRAL-GUEVARA, SENATOR VAN H. WANGGAARD, SENATOR JESSE L. JAMES, SENATOR ROMAINE ROBERT QUINN, SENATOR DIANNE H. HESSELBEIN, SENATOR CORY TOMCZYK, SENATOR JEFF SMITH, AND SENATOR CHRIS KAPENGA, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN SENATE,

Respondents,

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

Intervenors-Respondents.

OPENING REMEDIAL BRIEF OF INTERVENOR-RESPONDENT WISCONSIN LEGISLATURE AND RESPONDENTS SENATORS CABRAL-GUEVARA, HUTTON, JACQUE, JAGLER, JAMES, KAPENGA, LEMAHIEU, MARKLEIN, NASS, QUINN, TOMCZYK, AND WANGGAARD

Counsel Listed on Following Page

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

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

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

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

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

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

** Admitted pro hac vice*

TABLE OF CONTENTS

TABLE OF AUTHORITIES 5

INTRODUCTION 10

STATEMENT OF THE ISSUE 10

ORAL ARGUMENT & PUBLISHING 10

STATEMENT OF THE CASE 11

ARGUMENT 14

I. The Court must balance the equities before imposing a mandatory injunction 15

A. Petitioners have made no showing of irreparable harm warranting a statewide redraw 16

B. The harm from redrawing districts statewide vastly outweighs any harm from noncontiguity 19

II. The Legislature's proposal, or something equivalent, is the only appropriate judicial remedy 24

A. The Legislature's remedy tailors the remedy to the constitutional violation found 25

B. The Legislature's proposed remedy complies with all constitutional and statutory requirements 29

C. The Legislature's proposed remedy has no "partisan impact" and is "neutral." 46

1. The Legislature's remedy avoids plunging the Court into the political thicket of redistricting 47

2. The Wisconsin Constitution does not prescribe a standard for "partisan neutrality" 50

3. A plan that recasts the partisan balance of the Legislature will not be neutral. 53

III. These remedial proceedings must comply with due process, which requires more time than the Court has 58

CONCLUSION.....60

CERTIFICATION REGARDING LENGTH AND FORM.....62

TABLE OF AUTHORITIES

Cases

Anderson v. Davila,
125 F.3d 148 (3d Cir. 1997) 60

Baldus v. Brennan, No. 11-cv-562,
2011 WL 5040666 (E.D. Wis. Oct. 21, 2011) 21, 43

Baldus v. Mem. of Wis. Gov't Acct. Bd.,
862 F. Supp. 2d 860 (E.D. Wis. 2012) 28

Baldus v. Members of Wis. Gov't Acct. Bd.,
849 F. Supp. 2d 840 (E.D. Wis. 2012) 21, 44

Baumgart v. Wendelberger, No. 01-cv-0121,
2002 WL 34127471 (E.D. Wis. May 30, 2002) 21, 35, 53

Benisek v. Lamone,
138 S. Ct. 1942 (2018) 19

Burling v. Chandler,
804 A.2d 471 (N.H. 2002) 53

Cavanaugh v. Andrade,
202 Wis. 2d 290, 550 N.W.2d 103 (1996) 18

Chestnut v. Merrill,
377 F. Supp. 3d 1308 (N.D. Ala. 2019) 20

Clarke v. Wis. Elections Comm'n,
2023 WI 70, --- Wis. 2d ---, 995 N.W.2d 779 ..... 13, 17, 59

Clarke v. Wis. Elections Comm'n,
2023 WI 79, --- Wis. 2d ---, --- N.W.2d --- ..... passim

Colegrove v. Green,
328 U.S. 549 (1946) 46

Davis v. Bandemer,
478 U.S. 109 (1986) 10, 53

Diaz v. Silver,
932 F. Supp. 462 (E.D.N.Y. 1996) 24

Fabick v. Evers,
2021 WI 28, 396 Wis. 2d 231, 956 N.W.2d 856 16

Flynn v. Dep't of Admin.,
216 Wis. 2d 521, 576 N.W.2d 245 (1988) 11, 28

Gahl v. Aurora Health Care, Inc.,
2023 WI 35, 989 N.W.2d 561 ..... 16, 19

Goldberg v. Kelly,
397 U.S. 254 (1970) 18, 59

Harper v. Hall,
886 S.E.2d 393 (N.C. 2023) 51, 52

Jensen v. Wis. Elections Bd.,
2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537 ..... 49, 53

Johnson v. Wis. Elections Comm'n,
2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 ..... passim

Johnson v. Wis. Elections Comm'n,
2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 ..... passim

Johnson v. Wis. Elections Comm'n,
2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559 ..... passim

Knox v. Milwaukee Cnty. Bd. of Elections Comm'rs,
581 F. Supp. 399 (E.D. Wis. 1984) 20

League of Women Voters of Wis. v. Evers,
2019 WI 75, 387 Wis. 2d 511, 929 N.W.2d 209 29

Linden Land Co. v. Milwaukee Elec. Ry. & Lighting Co.,
107 Wis. 493, 83 N.W. 851 (1900) 29

McCormick v. United States,
500 U.S. 257 (1991) 22

McKinnon v. Benedict,
38 Wis. 2d 607, 157 N.W.2d 665 (1968) 19

Md. Citizens for a Representative Gen. Assembly v. Gov. of Md.,
429 F.2d 606 (4th Cir. 1970) 23

Medeco Sec. Locks, Inc. v. Swiderek,
680 F.2d 37 (7th Cir. 1981).....60

New York State Bd. of Elec. v. Torres,
552 U.S. 196 (2008).....18

North Carolina v. Covington,
138 S. Ct. 2548 (2018).....28

Purcell v. Gonzalez,
549 U.S. 1 (2006).....20

Pure Milk Prod. Co-op v. Nat'l Farmers Org.,
90 Wis. 2d 781, 280 N.W.2d 691 (1979)..... passim

Reynolds v. Sims,
377 U.S. 533 (1964).....24

Rivera v. Schwab,
512 P.3d 168 (Kan. 2022).....52

Rucho v. Common Cause,
139 S. Ct. 2484 (2019).....50, 51, 52

See State ex rel. Lamb v. Cunningham,
83 Wis. 90, 53 N.W. 35 (1892).....14

Serv. Emps. Int'l Union, Loc. 1 v. Vos,
2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35.....28

Shaffer v. Globe Prot., Inc.,
721 F.2d 1121 (7th Cir. 1983).....17

Simkins v. Gressette,
495 F. Supp. 1075 (D.S.C. 1980).....20, 22

State ex rel. Attorney General v. Cunningham,
81 Wis. 440, 51 N.W. 724 (1892).....37

State ex rel. Reynolds v. Zimmerman,
22 Wis. 2d 544, 126 N.W.2d 551 (1964).....14, 24

State ex rel. Sonneborn v. Sylvester,
26 Wis. 2d 43, 132 N.W.2d 249 (1965).....14, 24

Town of Blooming Grove v. City of Madison,
275 Wis. 342, 81 N.W.2d 721 (1957) 13

Vieth v. Jubelirer,
541 U.S. 267 (2004) ..... passim

White v. Daniel,
909 F.2d 99 (4th Cir. 1990) 23

Whitford v. Nichol,
180 F. Supp. 3d 583 (W.D. Wis. 2016) 58

Williams v. Pennsylvania,
579 U.S. 1 (2016) 48

Williams v. Rhodes,
393 U.S. 23 (1968) 21

Wis. AFL-CIO v. Elections Bd.,
543 F. Supp. 630 (E.D. Wis. 1982) 35

Wis. Legislature v. Wis. Elections Comm'n,
595 U.S. 398 (2022) 12, 27, 44, 45

Constitutional Provisions

Mo. Const. art. III, §3 52

Ohio Const. art. XI, §9(D)(3)(c)(ii) 52

Wis. Const. art. IV, §3 27

Wis. Const. art. IV, §4 ..... passim

Wis. Const. art. IV, §5 ..... 20, 36, 43

Wis. Const. art. VII, §2 ..... 10, 27, 47

Statutes

Wis. Stat. §4.001 ..... 30, 36

Wis. Stat. §4.001(2) (1971) 13

Wis. Stat. §5.15 ..... 40, 41, 43

Wis. Stat. §7.51(4)(c) 43

Wis. Stat. §7.60 43

Wis. Stat. §8.15(1) 19

Other Authorities

"SCOWIS map case," Marquette Law School Poll (Oct. 26-Nov.2, 2023), https://perma.cc/C36G-FJWT 20

"Wisconsin," *Minor Civil Divisions: 2020 to 2022*, U.S. Census, https://www.census.gov/data/tables/time-series/demo/popest/2020s-total-cities-and-towns.html 39

1 James High, *A Treatise on the Law of Injunctions* §2 (4th ed. 1905) 15

Bernard Grofman & Sean Trende, Special Masters' Mem. (Va. Sup. Ct. Dec. 27, 2021), https://www.vacourts.gov/courts/scv/districting/2021_virginia_redistricting_memo.pdf 46

Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77 (1985) 54

Gregory Herschlag, et al., *Evaluating Partisan Gerrymandering in Wisconsin*, arXiv (Sept. 7, 2017), https://arxiv.org/pdf/1709.01596.pdf 57

Redistricting Update, Wis. Elections Comm'n (Apr. 18, 2022), https://elections.wi.gov/news/redistricting-update 12, 41, 42

Report of Special Master Jonathan Cervas at 15, *Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct. May 20, 2022) 45

Sandra Chen, et al., *Turning Communities of Interest into a Rigorous Standard for Fair Districting*, 18 Stan. J. Civ. Rights & Civ. Liberties 101 (2022) 45

Wis. Legis. Reference Libr., The Wisconsin Blue Book (1933) 13

INTRODUCTION

The Legislature's proposed remedy resolves all noncontiguities without going beyond that constitutional violation.[1] This remedy is the only conceivable remedy within the Court's "judicial power." Wis. Const. art. VII, §2. It moves less than 0.1% of Wisconsinites statewide, eliminating all noncontiguities without any "ripple effect." *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶56, --- Wis. 2d ---, --- N.W.2d ---. It avoids introducing constitutional violations in the existing districts, which this Court deemed constitutional less than two years ago. And it keeps this Court out of the "'political thicket'" of redistricting. *Davis v. Bandemer*, 478 U.S. 109, 148 (1986) (O'Connor, J., concurring in judgment).

STATEMENT OF THE ISSUE

What judicial remedy is appropriate to redress noncontiguities in existing districts, adopted in *Johnson v. Wisconsin Elections Commission* (*Johnson III*), 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559?

ORAL ARGUMENT & PUBLISHING

Oral argument is warranted, along with discovery and a hearing on disputed factual issues. The opinion should be published given the statewide importance of the issues.

[1] As the Wisconsin Legislative Technology and Services Bureau (LTSB) did during the 2021-2022 redistricting litigation, LTSB will post remedial proposals to its interactive mapping site: https://ltsb.maps.arcgis.com/apps/instant/portfolio/index.html?appid=1de5f945a97a49999682fee2b4433d96.

STATEMENT OF THE CASE

A. After the 2020 census, the Legislature and the Governor were at an impasse over redistricting. *See Johnson v. Wis. Elections Comm'n (Johnson I)*, 2021 WI 87, ¶2, 399 Wis. 2d 623, 967 N.W.2d 469. Voters initiated an original action in this Court—the *Johnson* litigation. *Id.* ¶5. They claimed the existing districts, enacted in 2011, were malapportioned, and all parties agreed. *Id.* This Court then embarked on "implementing a judicial remedy" for the malapportionment. *Id.* ¶7.

The Court directed the parties to propose remedies that equalized population across all districts and complied with all other state and federal constitutional and statutory requirements. *See id.* ¶¶24-37. Beyond that, the Court held it had no power to redistrict anew or rebalance the political makeup of the Legislature. *Id.* ¶¶39, 45-63.

The Court emphasized that it could not do more than remedy the legal deficiencies of existing districts. The Court explained that it had only "the power to provide a judicial remedy." *Id.* ¶71 (plurality) (citing *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 528-29, 576 N.W.2d 245 (1988)); *accord id.* ¶¶85-86 (Hagedorn, J., concurring). And "doing anything more than securing legal rights would be profoundly incompatible with Wisconsin's commitment to a nonpartisan judiciary." *Id.* ¶75 (majority).

The Court initially selected the Governor's proposed remedy, which the Court deemed to comply with the State's constitution in all respects. *See Johnson v. Wis. Elections Comm'n* (*Johnson II*), 2022 WI 14,

¶36, 400 Wis. 2d 626, 971 N.W.2d 402. The U.S. Supreme Court, however, held that the proposed remedy flunked federal constitutional requirements. *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398 (2022) (per curiam). The Governor redrew Milwaukee's majority-minority districts to extend well beyond Milwaukee County and targeted an exacting 50% Black voting age population for those districts. *Id.* at 399 & n.1. The Supreme Court held that neither the Governor nor the Court had carried their burden to justify that race-based remedy. *Id.* at 403-06.

On remand, this Court selected the Legislature's proposed remedy, holding that it satisfied all state and federal constitutional and statutory requirements. *Johnson III*, 2022 WI 19, ¶¶60-70.[2] The judgment became final, and election officials implemented *Johnson*'s remedial plan for future elections.[3]

B. More than a year later and a day after this Court's membership changed, the Clarke Petitioners filed this action to challenge the *Johnson* districts on three grounds: they were a partisan gerrymander, noncontiguous, and violated separation-of-powers. The Court refused to exercise original jurisdiction over Petitioners' partisan-gerrymandering claims because of "the need for extensive fact-finding (if

[2] The Legislature's proposed remedy was 2021 legislation that the Governor vetoed. *See* 2021 Wis. Senate Bill 621. It had the virtue of making minimal changes to comply with *Johnson*'s remedial requirements and could be submitted as a proposed judicial remedy. *See Johnson III*, 2022 WI 19, ¶¶71-72.

[3] *See, e.g.*, Redistricting Update, Wis. Elections Comm'n (WEC) (Apr. 18, 2022), https://elections.wi.gov/news/redistricting-update.

not a full-scale trial)" and approaching election deadlines. *Clarke v. Wis. Elections Comm'n*, 2023 WI 70, --- Wis. 2d ---, 995 N.W.2d 779, 781.

This Court has since found only one constitutional violation: noncontiguity in some districts. *Clarke*, 2023 WI 79, ¶3. It held that contiguity requires that a district "be physically intact such that a person could travel from one point in the district to any other point in the district without crossing district lines." *Id.* ¶16.[4]

C. The Court ordered parties to propose remedies that address noncontiguity and otherwise "comply with state and federal law." *Id.* ¶¶59, 64-67. The Court also said it would also consider secondary criteria, even though not constitutionally prescribed. *Id.* ¶68 ("reducing municipal splits and preserving communities of interest"). But such "criteria will not supersede constitutionally mandated criteria." *Id.*

Unlike *Johnson*, the Court said it "will consider partisan impact when evaluating remedial maps," reasoning that it "must remain politically neutral" and does "not have free license to enact maps that privilege one political party over another." *Id.* ¶¶69-70. But

[4] Before *Clarke*, whole towns or wards were included in districts, even if pieces of those towns or wards were "municipal islands," separated by short distances from the rest of the town or ward. These "islands" have existed since 1856, when the City of Madison incorporated in and around the Town of Madison, leaving the town in five detached pieces. *See Town of Blooming Grove v. City of Madison*, 275 Wis. 342, 346, 81 N.W.2d 721 (1957). Beginning in the 1930s, districts included whole towns or wards, including their detached pieces, so long as the towns or wards themselves were contiguous with other towns or wards in the district. *See* Wis. Legis. Reference Libr., The Wisconsin Blue Book 232 (1933) (showing legislators separately represented Dane County towns and the City of Madison); Wis. Stat. §4.001(2) (1971).

"consideration of partisan impact will not supersede constitutionally mandated criteria." *Id.* ¶71. The Court did not explain how "partisan impact" would be measured, how it would weigh against other secondary criteria, or when a proposal would be deemed "to advantage one political party over another." *Id.*

Finally, the Court rejected a "'least change'" metric for evaluating remedies as "unworkable." *Id.* ¶63. The Court "overrule[d] portions of *Johnson*…that mandate a least change approach." *Id.* The Court nevertheless acknowledged "that the legislature, not this court, has the primary authority and responsibility for drawing assembly and senate districts." *Id.* ¶57.

ARGUMENT

The Court has held that the 2022 *Johnson* districts violate the Wisconsin Constitution's contiguity requirement. To remedy that constitutional violation, the Court should have issued a declaratory judgment alone. *See State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 60-62, 132 N.W.2d 249 (1965) (declaring statute unconstitutional, allowing the next election to proceed, and deferring injunctive relief to "future elections"). The Court could have issued a prohibitory injunction and left it to the Legislature to correct the districts. *See State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35, 51-54 (1892). A mandatory injunction is a last resort. *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 571-72, 126 N.W.2d 551 (1964). And it is not without limits. *See Johnson I*, 2021 WI 87, ¶67 ("Courts issue mandatory

injunctions … 'with extreme caution' and 'only in cases of equitable cognizance[.]'" (quoting 1 James High, *A Treatise on the Law of Injunctions* §2 (4th ed. 1905))).

Before ordering injunctive relief, the Court must balance the equities, which it has yet to do. Even assuming that an injunction is warranted, that injunction must be limited to redressing the constitutional violation found: noncontiguity. And the Court must afford sufficient process to resolve material factual disputes.

I. The Court must balance the equities before imposing a mandatory injunction.

"[I]njunctions are not to be issued lightly." *Pure Milk Prod. Co-op v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). Before obtaining a mandatory injunction (revising district lines), Petitioners must still prove three things: (1) "a sufficient probability that future conduct of the defendant will violate a right" and cause "injur[y]," (2) "that the injury is irreparable," and (3) "that on balance equity favors issuing the injunction" after "competing interests" are "reconciled." *Id.*

The Court erred by not requiring Petitioners to make that showing before issuing a prohibitory injunction. *See Clarke*, 2023 WI 79, ¶¶56, 77 (enjoining use of district lines without saying anything about the equities). Declaring a constitutional violation is not alone grounds for injunctive relief. *See Pure Milk*, 90 Wis. 2d at 803 ("The mere fact that a defendant has committed an illegal act does not justify an injunction.…"); *see also Fabick v. Evers*, 2021 WI 28, ¶¶136-37, 396 Wis.

2d 231, 956 N.W.2d 856 (Ann Walsh Bradley, J, dissenting, joined by Dallet & Karofsky, JJ.) (questioning how a permanent injunction could issue "with no irreparable harm sufficiently alleged and none whatsoever demonstrated"). The majority failed "to recognize that the granting of a permanent injunction also requires a showing of irreparable harm" and weighing the equities. *Fabick*, 2021 WI 28, ¶135-36 & n.22 (Ann Walsh Bradley, J., dissenting). That flouted "'a process of reasoning with a rational and explainable basis'" that "'depend[s] on facts that are of record.'" *Gahl v. Aurora Health Care, Inc.*, 2023 WI 35, ¶22, 989 N.W.2d 561 (Ann Walsh Bradley, J.).

Notwithstanding that the Court "made no specific finding[s]" as to the equitable factors in December, it must do so before granting mandatory injunctive relief redrawing district lines. *See Pure Milk*, 90 Wis. 2d at 801. The "breadth of th[at] injunction depends on the circumstances" of this case—circumstances that in no way justify the extraordinary redraw Petitioners seek. *Id.* at 803.

A. Petitioners have made no showing of irreparable harm warranting a statewide redraw.

Petitioners have not shown irreparable injury. This Court cannot make that showing for them. *See Fabick*, 2021 WI 28, ¶135 n.22 (Ann Walsh Bradley, J., dissenting). Nor could it.

1. As an initial matter, Petitioners' undue delay negates any possible showing of irreparable harm. Rather than participate in *Johnson*, Petitioners "were forthright enough to tell" the Court that they waited until the Court's membership changed. *See Clarke*, 2023 WI 79,

¶170 (Ziegler, C.J., dissenting); *id.* ¶281 n.6 (Hagedorn, J., dissenting). Their delay belies any contention that using existing districts for the 2024 election would cause irreparable injury. *See, e.g.*, *Shaffer v. Globe Prot., Inc.*, 721 F.2d 1121, 1123 (7th Cir. 1983) (finding plaintiff's two-month delay "inconsistent with a claim of irreparable injury"). Rushing to judgment without holding Petitioners to the most basic equitable showing is yet another procedural irregularity, further indicating that the case has been pre-decided. *See Clarke*, 995 N.W.2d at 782-84, 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).

2. Even ignoring their delay, Petitioners cannot show that noncontiguities warrant a statewide redraw. The Court predicted that noncontiguities will create a "ripple effect," *Clarke*, 2023 WI 79, ¶56, but Petitioners have offered no such evidence.

No Petitioner or intervenor even claims to live in most of the allegedly noncontiguous districts. A voter in Madison cannot claim she is harmed by a non-populated municipal island in Green Bay. *See* Legis. Opening Br.19-20. As for the handful of noncontiguous districts where they claim to live, they have not established irreparable injury. Without any evidence or citations, Petitioners noncontiguities make legislators "less likely … to interact with constituents residing in disconnected pieces of their district." Opening Br.29. Petitioners have done nothing to prove that assertion. Nor could they. Nearly half

(43.9%) of the noncontiguous census blocks contain zero people, and nearly all (98.1%) contain fewer than 100 people. *See* LTSB Ex.5 (listing noncontiguous blocks). Many districts require no contiguity corrections, and many more can be corrected without affecting any people. *Infra* Part II.A.

The only other harm Petitioners have asserted is their "inability to achieve a Democratic majority in the state legislature." Pet. ¶5. Nothing in the constitution guarantees electoral success for any political party. *See Johnson I*, 2021 WI 87, ¶¶59-63; *see also, e.g.*, *New York State Bd. of Elec. v. Torres*, 552 U.S. 196, 205 (2008) ("None of our cases establishes an individual's constitutional right to have a 'fair shot' at winning[.]"). And Petitioners' political wishes have nothing to do with contiguity. It beggars belief that a factfinder could conclude noncontiguities caused Petitioners' "inability to achieve a Democratic majority." Pet. ¶5; *see, e.g.*, *Est. of Cavanaugh v. Andrade*, 202 Wis. 2d 290, 306, 550 N.W.2d 103 (1996) ("causation … is generally [question] of fact"). The only evidence is that noncontiguities are too sparsely populated to affect a single election. *See* LTSB Ex. 5. If Petitioners wish to contest those facts, they must do so with actual evidence. *See Pure Milk*, 90 Wis. 2d at 800-02. And if the facts are contested, there must be an "impartial" factfinder to resolve them with a hearing. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

In short, Petitioners have not proved that noncontiguous districts (where they do not live) have caused them some cognizable

harm warranting sweeping mandatory injunctive relief. *See Pure Milk*, 90 Wis. 2d at 800. And while they want more Democrats in the Legislature, Pet. ¶5, the Court cannot backdoor that politically-aimed remedy to resolve the constitutional violation the Court actually did find: noncontiguities affecting next to no Wisconsinites.

B. The harm from redrawing districts statewide vastly outweighs any harm from noncontiguity.

The Court must also consider the other side of the ledger when issuing a mandatory injunction: harms to voters, legislators and candidates, and election officials, particularly on the eve of election deadlines. *See Gahl*, 2023 WI 35, ¶¶21-23 (requiring a complete analysis by courts before injunction entered). "[A]n injunction 'should not be granted where the inconveniences and hardships caused outweigh the benefits.'" *McKinnon v. Benedict*, 38 Wis. 2d 607, 616-17, 157 N.W.2d 665 (1968). That balancing is also a factual issue. *See Pure Milk*, 90 Wis. 2d at 800.

Only the Legislature's proposed remedy, or something like it, will avoid the confusion that is bound to ensue over new district lines. A statewide redraw risks "work[ing] a needlessly 'chaotic and disruptive effect upon the electoral process,'" *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (per curiam), with election deadlines commencing in April, Wis. Stat. §8.15(1).

1. Voters. A statewide redraw harms voters, most of whom want districts to remain the same.[5] "Court orders affecting elections, especially conflicting orders" (*i.e.*, *Johnson*) "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 also Chestnut v. Merrill*, 377 F. Supp. 3d 1308, 1317 (N.D. Ala. 2019) (raising concerns about "educat[ing] voters on where the newly drawn district lines lay"); *Simkins v. Gressette*, 495 F. Supp. 1075, 1081 (D.S.C. 1980) ("considerable voter confusion would result" from new districts and "unfamiliar candidates for Senate seats"), *aff'd* 631 F.2d 287 (4th Cir. 1980).

A particular harm caused by statewide redraws is senate disenfranchisement. If a proposed remedy moves voters from even-numbered senate districts (2020/2024 election cycle) to odd-numbered senate districts (2022/2026 election cycle), those voters will have to wait six years to vote for senate, not the "4 years" prescribed by the Wisconsin Constitution. *See* Wis. Const. art. IV, §5. Because Wisconsin senate elections are staggered, a statewide redraw could disenfranchise hundreds of thousands of voters or more. Such an injunction would be completely unwarranted. *See Knox v. Milwaukee Cnty. Bd. of Elections Comm'rs*, 581 F. Supp. 399, 405 (E.D. Wis. 1984) ("exercising … discretion to deny" injunction because of "certain

[5] *See* "SCOWIS map case," Marquette Law School Poll (Oct. 26-Nov.2, 2023), https://perma.cc/C36G-FJWT.

disenfranchisement of nearly one million voters," creating prejudice "of the highest magnitude"); *Baldus v. Brennan*, 2011 WL 5040666, at *3-4 (E.D. Wis. Oct. 21, 2011) ("a redistricting plan cannot unnecessarily disenfranchise voters"); *see also Baumgart v. Wendelberger*, 2002 WL 34127471, at *4 (E.D. Wis. May 30, 2002) (finding "plans are riddled with their own partisan marks" where they had "higher levels of disenfranchisement" and involved "pair[ing] a substantial number of … incumbents" of one party). And it would raise more problems still if Republicans were systematically targeted for disenfranchisement in a case where the parties are supposedly remedying noncontiguity. *See Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968) (cannot impose "unequal burdens on the right to vote and the right to associate"); *Baldus v. Members of Wis. Gov't Acct. Bd.*, 849 F. Supp. 2d 840, 852-53 (E.D. Wis. 2012) (requiring that "no particular group is uniquely burdened"). An injunction created to remedy the contiguity violation creates no such problem. *See infra* Part II.A-B.

2. Legislators and candidates. A statewide redraw will substantially harm legislators and potential candidates. "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). It will also upset existing constituent relationships and require legislators to simultaneously represent their old district while campaigning in their redrawn district. While the job

of a legislator contains many facets, "[s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator." *McCormick v. United States*, 500 U.S. 257, 272 (1991).

Consider a senator who currently represents an odd-numbered district and is redistricted into an even-numbered district. She will either have to move or prepare for an unexpected election in unexpected new district lines. *Cf. Clarke*, 2023 WI 79, ¶243 (Grassl Bradley, J., dissenting) (explaining that "many legislators have developed relationships with their constituents"). All the while, she must continue to represent her existing constituents. "Such critical political intangibles as recognition among, and identification with, constituents would be irreversibly affected." *Simkins*, 495 F. Supp. at 1081.

Legislative candidates will be harmed, too. Before December, district lines were settled and candidates could consider running (or not running) based existing districts, their possible supporters, and other known information. But now that the Court has invited statewide redraws, *see Clarke*, 2023 WI 79, ¶56, candidates cannot know what district to run in, what that district looks like, their possible supporters, or other necessary information. They will have weeks, or maybe less, to make that decision before candidate qualifying begins.

3. Election officials. A statewide redraw so close to election deadlines also burdens election officials. Only two years ago,

municipalities and their election officials were tasked with implementing new district lines. Now they will have to do so all over again—possibly to a far greater degree than in *Johnson*. *See Clarke*, 2023 WI 79, ¶63. If the Court does not tailor the remedy to the constitutional violation found, election officials will find themselves reassigning hundreds of thousands of voters to new districts across the State with only weeks before election deadlines commence. *See White v. Daniel*, 909 F.2d 99, 104 (4th Cir. 1990) ("two reapportionments within a short period of two years would greatly prejudice the County and its citizens by creating instability and dislocation in the electoral system and by imposing great financial and logistical burdens."). This "would necessarily impose great disruption upon potential candidates, the electorate and the elective process." *Md. Citizens for a Representative Gen. Assembly v. Gov. of Md.*, 429 F.2d 606, 610 (4th Cir. 1970) (citing *Whitcomb v. Chavis*, 396 U.S. 1064 (1970)).

* * *

The Court has no basis to implement a statewide redraw before undertaking the fact-intensive exercise of balancing the equities. Showing a constitutional violation is only the beginning of the analysis. *Pure Milk*, 90 Wis. 2d at 800, 280 N.W.2d at 700. Especially when "an impending election is imminent," "equitable considerations might justify a court in withholding the granting of immediate effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid." *Reynolds v. Sims*, 377

U.S. 533, 585 (1964); *see Sonneborn*, 26 Wis. 2d at 60-61 (withholding injunctive relief after declaration that statute was unconstitutional based on the "procedure … approved in Reynolds v. Sims"); *Diaz v. Silver*, 932 F. Supp. 462, 466-69 (E.D.N.Y. 1996) (three-judge court) (collecting decisions and denying injunction because of "the harm to the public in … changing the rules as they now stand" even after assuming violation and irreparable injury); *see also, e.g.*, *Zimmerman*, 22 Wis. 2d at 549-50 (dismissing suit for malapportionment as too late). Equity aids the vigilant, not those who delayed their lawsuit for rushed proceedings without the normal trappings of litigation on the eve of election deadlines.

II. The Legislature's proposal, or something equivalent, is the only appropriate judicial remedy.

The Legislature's proposed remedy identifies and redresses all noncontiguities.[6] It alters only those districts affected by a contiguity violation. Remedying noncontiguities for state senate districts moves 606 Wisconsinites statewide, while still ensuring no district deviates from ideal population by more than 0.3%. Squires Affidavit ¶7 (beginning at App.6a); LTSB Ex. 7. Remedying noncontiguities for assembly districts moves 4,691 Wisconsinites, while still ensuring no district deviates from ideal population by more than 0.7%. *Id*. There

[6] The appendix accompanying this brief contains all affidavits, maps and other exhibits, and reports in support of the proposed remedy. Volume I contains all LTSB material regarding the Legislature's proposed remedy. Volume II contains the Expert Report of Sean P. Trende.

is no judicial basis to go beyond that proposed remedy to redress the contiguity violation found by this Court.

A. The Legislature's remedy tailors the remedy to the constitutional violation found.

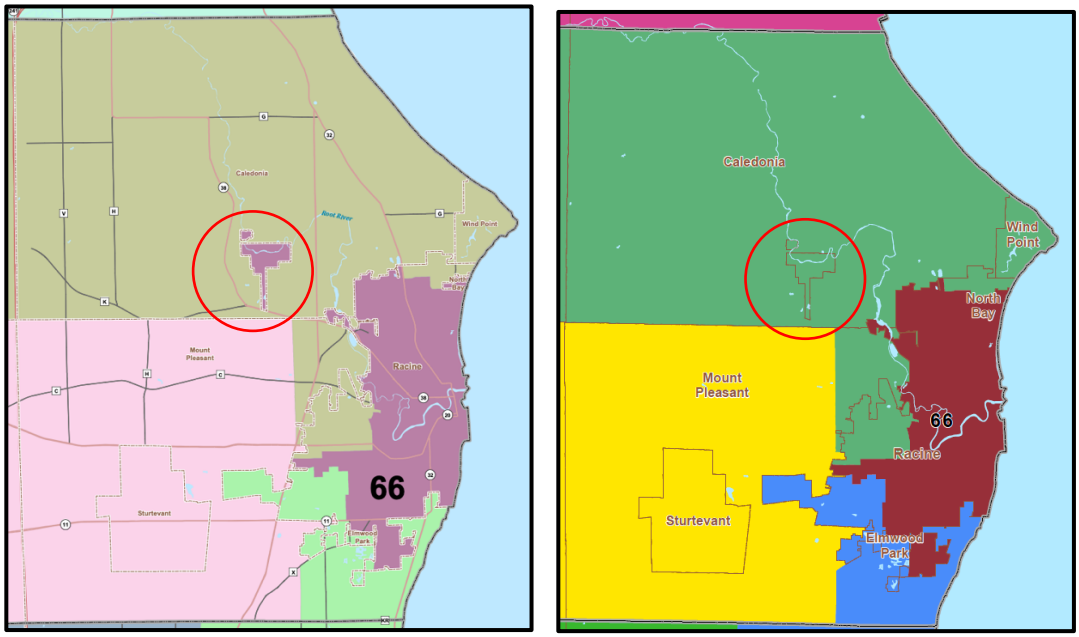
1. For its proposed remedy, the Legislature asked Wisconsin's Legislative Technology and Services Bureau to resolve all detached pieces in the 2022 districts. *See* Ylvisaker Affidavit ¶6. "LTSB is a nonpartisan legislative service agency" that serves all legislative caucuses and "provides GIS services, including redistricting support, to the Wisconsin Legislature." *Id.* ¶¶2-3; Squires Affidavit ¶¶2-5; *see* Wis. Stat. §13.96. They are the architects of Wisconsin's WISE-District redistricting software, they provide redistricting training, they support state and local redistricting, and they are the go-between for the State and the U.S. Census Bureau. Squires Affidavit ¶¶2-5. They are the "logistical and technical experts on Wisconsin local, legislative, and congressional redistricting." *Id.* ¶5.

For the proposed remedy, LTSB identified all detached pieces by census block. *See* LTSB Ex. 5. It then used a set of rules to resolve them, which are reproduced in the affidavit of LTSB GIS specialist Ryan Squires (beginning at App.6a). The rules resolve detached pieces in one of two ways. Pieces are either attached to their assigned districts, or they are dissolved into the districts surrounding them—whichever moves the fewest number of people. Squires Affidavit ¶8.

In some cases, *dissolving* detached pieces into the surrounding assembly district affects the fewest number of people. For example, a

detached piece (an annexed golf course with zero population in the City of Racine) is reassigned from Assembly District 66 to Assembly District 62, thereby resolving the noncontiguity:

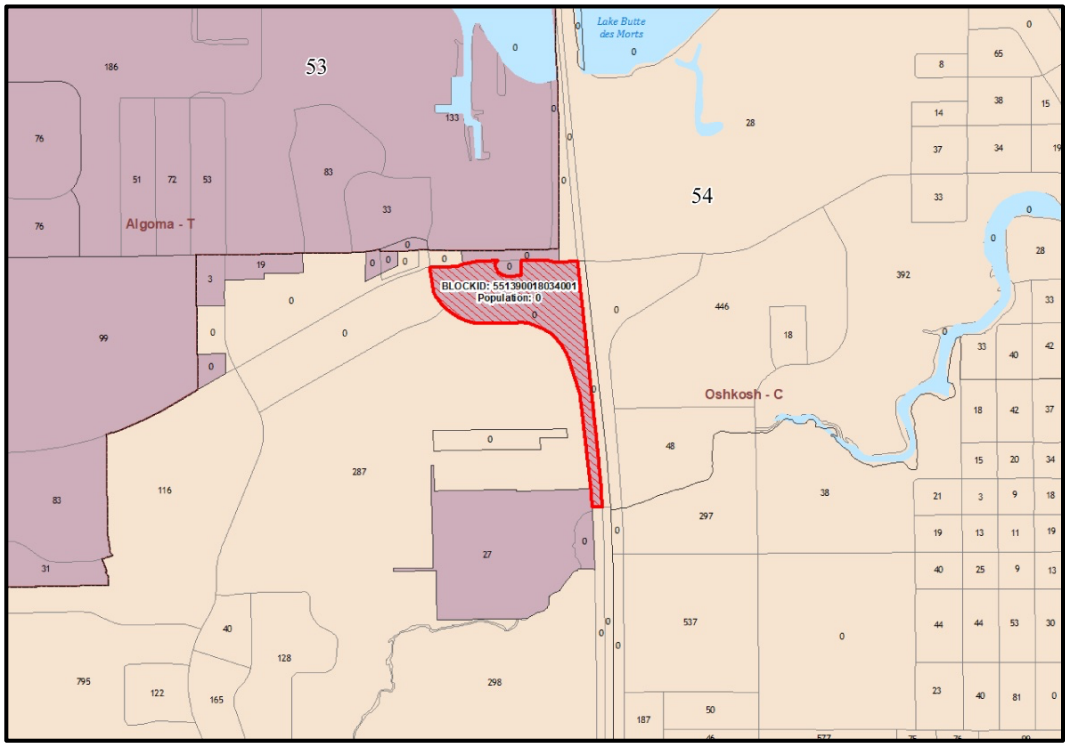
Figure 1. Dissolving AD66 Island



2022 Districts Proposed Remedy

In other cases, *attaching* detached pieces to the rest of the assigned assembly district affects few if any people. For example, a 27-person detached piece in the Town of Algoma in AD53 can be attached to the rest of the town using a 0-population census block:

Figure 2. Attaching AD53 Island



A complete log of how LTSB resolved every detached piece is included at LTSB Exhibit 6.

2. By resolving noncontiguities in a way that does not move people from their districts unnecessarily, the proposed remedy takes care not to go beyond remedying noncontiguities. The Court has only "judicial power," Wis. Const. art. VII, §2, not legislative power to redistrict "anew," art. IV, §3; *see* Legis. Resp. Br.36-44 (collecting cases). Such a remedy is also all that the equities could support. *See supra* Part I.A. It avoids "creating another" constitutional violation, unlike proposed remedies that (unnecessarily) redraw all districts. *See Johnson I*, 2021 WI 87, ¶34; *see, e.g.*, *Wis. Legislature*, 595 U.S. 398 (summarily reversing Governor's proposed remedy). And it keeps the Court out of the "political thicket" of redistricting. *Infra* Part III.C.1.

The Legislature's approach is the remedial approach used in analogous cases. This case is not an impasse case on the heels of a census where changes are required statewide to equalize population. This case is instead a mid-decennial case where the only question is what is required to remedy discrete contiguity violations affecting 0.1% of Wisconsinites. As for other features of the existing lines, this Court has already held that they comply with all state and federal constitutional commands. *See Johnson III*, 2022 WI 19, ¶70. In such cases, courts do not engage in wholesale redraws. Courts are not "enact[ing] maps," *contra Clarke*, 2023 WI 79, ¶70. They do not remedy other alleged deficiencies that are not the subject of the lawsuit. *See Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶46, 393 Wis. 2d 38, 946 N.W.2d 35. A judicial remedy redresses the legal violation found and does not go further. *See Flynn*, 216 Wis. 2d at 528-29; *see, e.g.*, *Baldus v. Mem. of Wis. Gov't Acct. Bd.*, 862 F. Supp. 2d 860, 861-63 (E.D. Wis. 2012) (ordering parties to propose changes only to the two districts affected by VRA violation and ordering the rest of the map to "remain unchanged"); *North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018).

Understood in this way, the Court's repudiation of *Johnson*'s "least change approach" for malapportionment remedies, *Clarke*, 2023 WI 79, ¶63, is neither here nor there for the remedy in this case. The Court cannot repudiate or overrule the constitutional limitations on its judicial power, which extends only to redressing identified legal

violations. A redraw that unnecessarily moves hundreds of thousands or millions of Wisconsinites for reasons having nothing to do with noncontiguity reflects the unwarranted "exercise of arbitrary power." *Linden Land Co. v. Milwaukee Elec. Ry. & Lighting Co.*, 107 Wis. 493, 83 N.W. 851, 856 (1900). What is at issue here is not "the map-making process," *contra Clarke*, 2023 WI 79, ¶62. What is at issue is the exercise of judicial power to confer a judicial remedy. That "judicial power cannot legislate," *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶35, 387 Wis. 2d 511, 929 N.W.2d 209.

B. The Legislature's proposed remedy complies with all constitutional and statutory requirements.

1. Remedying contiguity should affect less than 0.1% of Wisconsinites.

The Legislature's proposed remedy resolves all detached pieces, beginning with identifying them. LTSB Ex. 5. As **Table 1** summarizes, many districts have no detached pieces, and still more have detached pieces containing between 0 and 10 people:

Table 1. Summary of Detached Pieces by Assembly District[7]

No detached pieces		0 people	Between 1 & 10 people	Between 11 & 50 people	Between 51 & 100 people	Between 101 & 500 people	> 1,000 people
AD1	AD51	AD37	AD3	AD2	AD26	AD27	AD47
AD4	AD55	AD39	AD24	AD5	AD30	AD29	*(3747)*
AD7	AD56	AD44	AD25	AD6	AD42	AD31	AD54
AD8	AD57	AD59	AD28	AD15	AD43	AD48	*(1375)*
AD9	AD62	AD66	AD32	AD38	AD63	AD53	AD68
AD10	AD64	AD72	AD33	AD40	AD70	AD58	*(1294)*
AD11	AD65	AD76	AD41	AD45	AD79	AD80	
AD12	AD69	AD81	AD52	AD46		AD88	
AD13	AD71	AD91	AD83	AD60		AD97	
AD14	AD73	AD95	AD93	AD61			
AD16	AD74	AD98		AD67			
AD17	AD75			AD86			
AD18	AD77			AD94			
AD19	AD78			AD99			
AD20	AD82						
AD21	AD84						
AD22	AD85						
AD23	AD87						
AD34	AD89						
AD35	AD90						
AD36	AD92						
AD49	AD96						
AD50							
45 Districts		11 Districts	10 Districts	14 Districts	7 Districts	9 Districts	3 Districts

Because each of Wisconsin's senate districts comprises three nested assembly districts, Wis. Stat. §4.001, senate districts are even less affected by detached pieces. For instance, even though there are detached pieces in AD94 and AD95, *see* LTSB Ex. 5, they are fully within the borders of the corresponding senate district, SD32, such that there are no noncontiguities to resolve in that senate district.

[7] LTSB Ex. 5.

More than half of all contiguity corrections involved assembly districts sharing the same senate district, meaning the senate district could remain unchanged. *See* LTSB Ex. 6.

a. Scope of senate corrections. Across all of Wisconsin's senate districts, only 606 people need to be moved statewide. Squires Affidavit ¶7. More than half are in the Madison area, moved between SD16, SD26, and SD27. Shown in **Table 2**, one-third of Wisconsin's senate districts can remain unchanged or changed in a way that affects zero population. Except for SD26 and SD27—where a few hundred people are moved between 178,000-person districts—no more than a few dozen people are moved in or out of other affected senate districts.

Table 2. Senate District Changes and Population Affected[8]

No Change	0 Population Change	< 20 Population Change	< 200 Population Change	> 200 Population Change
SD3	SD5	SD8	SD1	SD26
SD4	SD19	SD9	SD2	SD27
SD6	SD29	SD13	SD11	
SD7	SD30	SD20	SD14	
SD10	SD32	SD23	SD15	
SD12		SD24	SD16	
SD17		SD25	SD18	
		SD28	SD21	
		SD31	SD22	
		SD33		
7 Districts	5 Districts	10 Districts	9 Districts	2 Districts

b. Scope of assembly corrections. Similarly, one-third of assembly districts can remain completely unchanged. Shown in **Table 3**, another third can be adjusted in a way that affects between zero and twenty people. Statewide, 4,691 Wisconsinites are moved to correct all detached pieces. Squires Affidavit ¶7. Well over half are in Dane County, concentrated in AD47, AD48, and AD80.[9]

[8] LTSB Exs. 6 & 11. Population changes are in the aggregate, where 10 people moved into a district and 10 people moved out of a district would be a 20-person change.

[9] *Id*.

Table 3. Assembly District Changes and Population Affected[10]

No Change		0 Population Change	< 20 Population Change	< 200 Population Change		> 200 Population Change
AD1	AD23	AD15	AD3	AD2	AD77	AD29
AD4	AD34	AD32	AD6	AD5	AD78	AD30
AD7	AD35	AD37	AD24	AD26	AD79	AD47
AD8	AD36	AD39	AD25	AD27	AD85	AD48
AD9	AD49	AD56	AD33	AD28	AD86	AD53
AD10	AD50	AD61	AD38	AD31	AD97	AD54
AD11	AD51	AD62	AD40	AD42	AD98	AD80
AD12	AD55	AD66	AD41	AD43		
AD13	AD57	AD69	AD46	AD44		
AD14	AD65	AD70	AD52	AD45		
AD16	AD73	AD71	AD72	AD58		
AD17	AD74	AD76	AD75	AD59		
AD18	AD82	AD84	AD81	AD60		
AD19	AD87	AD88	AD83	AD63		
AD20	AD89	AD93	AD91	AD64		
AD21	AD90	AD96	AD94	AD67		
AD22	AD92	AD99	AD95	AD68		
34 Districts		17 Districts	17 Districts	24 Districts		7 Districts

c. Resulting senate and assembly districts. The resulting districts satisfy the Court's contiguity rule. Squires Affidavit ¶18. Beyond that, they resemble the districts that this Court already deemed

[10] *Id.*

constitutional in all other respects two years ago. *See Johnson III*, 2022 WI 19, ¶70.

Table 4. Summary of Corrected Senate & Assembly Districts[11]

	Pop. Dev.	Subdivision Splits	Compact. Scores	Sen. Dis.	VRA Districts	Partisan Impact
Senate Districts	0.49%	42 *counties* 15 *towns* 24 *wards* 30 *cities/vill.*	0.374 *(R)* 0.228 *(PP)* 0.466 *(S)* 0.714 *(CH)*	141	No changes	No changes
Assembly Districts	1.10%	53 *counties* 35 *towns* 51 *wards* 43 *cities/vill.*	0.366 *(R)* 0.247 *(PP)* 0.485 *(S)* 0.724 *(CH)*	N/A	No changes	No changes

2. Population equality

Districts in the Legislature's proposed remedy have minimal population deviation. Aggregate population deviation of senate districts is 0.49%, with no district deviating more than 0.26%.[12] Aggregate population deviation of assembly districts is 1.10%, with no district deviating more than 0.64%.[13] Indeed, only two assembly districts

[11] *See infra* Part II.B.2-8. Population deviation is aggregate population deviation. Squires Affidavit ¶7; LTSB Ex. 7. Political subdivision splits exclude 0-population splits and ward-split stipulation. LTSB Ex.8a, 8b; Dataset Stipulation App. A (Dec. 30, 2023). Compactness scores are statewide averages. LTSB Ex.10. Senate disenfranchisement is total population moved from even-numbered senate districts (2024 elections) to odd-numbered senate districts (2026 elections). LTSB Ex.12. VRA districts are AD8, AD9, AD10, AD11, AD12, AD16, AD17, AD18, SD3, SD4, SD6 and are unchanged. LTSB Ex.6. With less than 0.1% of Wisconsinites moved, there is no material impact on elections. LTSB Ex. 13.

[12] *See* Squires Affidavit ¶¶7, 16; LTSB Ex. 7. Ideal population for senate districts is 178,598.

[13] *Id*. Ideal population for assembly districts is 59,533.

exceed 0.50% deviation from ideal population.[14] The population deviation of each district is listed in LTSB Exhibit 7.

After correcting all noncontiguities, LTSB was instructed to adjust districts as necessary to ensure all districts were within +/-1% of ideal population pursuant to fixed rules. Squires Affidavit ¶8. Only one such adjustment was required—moving one ward from AD48 to AD47 in the Madison area. *See* LTSB Ex. 6.

The resulting *de minimis* population deviation of the Legislature's proposed remedy complies with state and federal law. In *Johnson II*, this Court held that aggregate deviations of 1.88% (Assembly) and 1.20% (Senate) in the Governor's proposal were "well under" deviations adopted by the state legislature and this Court and "well within" federal population requirements. 2022 WI 14, ¶36. Previously, state and federal courts accepted remedies with the same or greater deviations. *See State ex rel. Reynolds v. Zimmerman* (*Zimmerman III*), 23 Wis. 2d 606, 619, 128 N.W.2d 16 (1964) (accepting deviations exceeding 20%); *Baumgart*, 2002 WL 34127471, at *7 (accepting "maximum population deviation of 1.48%"); *Prosser v. Elec. Bd.*, 793 F. Supp. 859, 866 (W.D. Wis. 1992) ("All deviations are well below 1 percent," below which "there are no legally or politically relevant degrees of perfection."); *Wis. AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 637 (E.D. Wis. 1982) (accepting aggregate deviation of "a scant 1.74%," with no district "more than 0.87%" from ideal); *see also* Wis.

[14] LTSB Ex. 7 (AD27, AD54).

Stat. §4.001(1) (1971-72) (aggregate deviation of 2% in 1972 maps with no district deviating "from the state-wide average for districts of its type by more than one per cent").

3. Contiguity

This Court has determined that contiguity requires "physically intact" districts "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. Water contiguity and "[t]ouch-point contiguity" are permissible. *Id.* ¶¶27-29. The Legislature's proposal meets that definition. The only census blocks appearing on LTSB's contiguity report are water-related. Squires Affidavit ¶18; LTSB Ex. 9.

4. Compactness

Assembly districts must "be in as compact form as practicable," and Senate districts must comprise "convenient contiguous territory." Wis. Const. art. IV, §§4-5. The Court "has never adopted a particular measure of compactness." *Clarke*, 2023 WI 79, ¶66. Shown in **Table 3** above, the Legislature's proposed assembly and senate plans have generally the same compactness averages as those approved in *Johnson*, which this Court deemed to comply with all state constitutional requirements. *See Johnson III*, 2022 WI 19, ¶70; *Johnson II*, 2022 WI 14, ¶36.[15] Different compactness measures are listed in LTSB Exhibit 10.

[15] Features of the *Johnson II* and *Johnson III* remedies, including compactness, are available on the publicly available docket in *Johnson v. Wis. Elections Comm'n*,

5. Political subdivision splits

Districts are to be "bounded by county, precinct,[16] town or ward lines." Wis. Const. art. IV, §4. The clause is not inviolable: the Court "no longer interpret[s] the requirement to entirely prohibit any splitting of the enumerated political subdivisions." *Clarke*, 2023 WI 79, ¶66. And it is specific to Wisconsin's "counties," "towns," and "wards," *not* cities and villages. *Id.* ¶¶66, 68 n.29; *see Cunningham*, 51 N.W. at 741-42 (Lyon, C.J., concurring) (districts cannot simultaneously be bounded by county or town lines and also follow city or village lines because cities and villages cross county and town lines). Accordingly, consideration of city and village splits "does not derive from our constitution." *Clarke*, 2023 WI 79, ¶68 n.29.

a. Counties. Excluding county splits with zero population, the Legislature's proposed remedy contains the same 53 county splits in assembly districts and 42 county splits in senate districts.[17] This Court deemed that number of county splits constitutionally acceptable in

---

No. 2021AP1450-OA. *See* Legislature's Expert Report of Thomas Bryan at App.3 (filed Dec. 15, 2021) (*Johnson III* assembly districts: 0.39 Reock; 0.23 Polsby-Popper; 0.47 Schwartzberg); Governor's Supp. Expert Report of Jeanne Clelland at 4 (filed Jan. 5, 2022) (*Johnson II* assembly districts: 0.397 Reock; 0.250 Polsby-Popper).

[16] Wisconsin "precincts" became obsolete not long after the State's founding. *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 741 (1892) (Lyon, C.J., concurring).

[17] LTSB Exhibit 8 lists political subdivision splits by assembly districts. Political subdivision splits between senate districts are only those political subdivisions split between assembly districts not part of the same senate district. For instance, Brown County is split between AD2 (SD1), AD5 (SD2), and AD88 (SD30), which means Brown County is also split between senate districts. But portions of Chippewa County are split between AD67 (SD23) and AD68 (SD23), meaning it is *not* split between senate districts.

both *Johnson*. *See Johnson III*, 2022 WI 19, ¶70; *Johnson II*, 2022 WI 14, ¶36.[18]

b. Towns. Excluding town splits with zero population, the Legislature's proposed remedy splits 35 towns between assembly districts and 15 between senate districts.[19] That number is far fewer than town splits in the Governor's assembly plan (50) and senate plan (32) that that this Court deemed constitutional in *Johnson II*, 2022 WI 14, ¶36.[20]

To be sure, the Legislature's proposed remedy contains more town splits than existing districts.[21] That is a function of prioritizing contiguity. The lion's share of noncontiguous municipal islands are pieces of towns that have been severed due to incorporation and annexation. Nearly 100 years of redistricting plans have kept those towns together, including their pieces. *Supra*, p.9 n.4. In 2022, the towns of Blooming Grove and Middleton in Dane County—reduced to archipelagos of islands by 2020 due to annexation by surrounding cities—were kept whole, including their municipal islands.[22] But now,

---

[18] *See* Legislature's Expert Report of Thomas Bryan ¶57 (filed Dec. 15, 2021) (*Johnson III* districts with 53 county splits in assembly, 42 in senate); Legislature's Response Expert Report of Thomas Bryan ¶9 (filed Dec. 30, 2021) (showing Governor's *Johnson II* districts with 53 county splits in assembly, 45 in senate); *see* Governor's Supp. Expert Report of Jeanne Clelland (filed Jan. 6, 2022) (noting no changes to county splits).

[19] LTSB Ex. 8a.

[20] *See* Governor's Supp. Expert Report of Jeanne Clelland 5 (filed Jan. 5, 2022).

[21] *See* Legislature's Expert Report of Thomas Bryan ¶¶53-60 (filed Dec. 15, 2021) (*Johnson III* districts with 16 town splits in assembly, 8 in senate).

[22] *See* LTSB Ex. 8c.

to ensure that districts containing these towns are "physically intact 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, the islands are split between districts.

The Wisconsin Constitution does not "entirely prohibit any splitting of the enumerated political subdivisions." *Id.* ¶66. And the Legislature's proposed remedy, splitting a handful of Wisconsin's more than 1,200 towns, is constitutionally sound.[23]

c. Villages and cities. The Court has stated it will consider split cities and villages while acknowledging that the Wisconsin Constitution prioritizes keeping towns together over cities and villages. *Id.* ¶¶66, 68 & n.29. Excluding splits with zero population, the Legislature's proposed senate districts split only 30 cities and villages, and proposed assembly districts split only 43 cities and villages.[24] Those splits resemble the city and village splits deemed constitutionally permissible in *Johnson*. *See Johnson II*, 2022 WI 14, ¶36 (adopting Governor's proposed 2022 remedy with 65 city and village splits in assembly districts); *Johnson III*, 2022 WI 19, ¶70 (adopting Legislature's proposed remedy with 36 city and village splits in assembly districts).[25]

---

[23] "Wisconsin," *Minor Civil Divisions: 2020 to 2022*, U.S. Census, https://www.census.gov/data/tables/time-series/demo/popest/2020s-total-cities-and-towns.html.

[24] *See* LTSB Exs. 8b, 8d.

[25] *See* Governor's Supp. Expert Report of Jeanne Clelland at 5 (filed Jan. 5, 2022); Legislature's Expert Report of Thomas Bryan ¶57 (filed Dec. 15, 2021).

6. Ward splits

The 2021 wards split in the Legislature's proposed remedy are detailed in the "ward" tab of LTSB Exhibit 8a.[26] Excluding ward splits with zero population, the Legislature's proposed remedy splits 24 wards between senate districts and 51 wards between assembly districts (or less than 1% of Wisconsin's more than 7,000 wards)—*if one were to assume that the 2021 ward lines are the ward lines today*.[27] But the 2021 ward lines are not the ward lines today.

In Wisconsin, the redrawing of ward lines follows not only the delivery of census data but also legislative redistricting—meaning ward lines are updated after redistricting, as necessary, to conform to new district lines. *See* Wis. Stat. §5.15; Squires Affidavit ¶17 ("wards have since been redefined by local governments during the local redistricting process of late 2021, and may have been further modified over time"). In *Johnson*, for example, parties proposed remedies using ward lines as they existed around the time of the census, but local

[26] The parties have agreed to use 2021 TIGER census data and contemporaneous 2021 ward designations, save for a corrected ward assignment in the City of Franklin (Milwaukee). *See* Dataset Stipulation ¶5 (Dec. 30, 2023).

[27] *See* LTSB Ex. 8a (excluding per stipulation Madison C-001, Buchanan T-002, and Sheboyan C-001 from ward split counts, Dataset Stipulation App.A (Dec. 30, 2023)). There are an additional 67 wards splits between assembly districts affecting 0 population, about half of which are also split between senate districts. For these splits, census data reflect that all constituents of a ward live in the same district, but nonpopulated territory in the ward is in the neighboring district. *See* LTSB Ex. 8a (excluding per stipulation DeForest V-010, Madison C-003, Madison C-004, Middleton C-003, Middleton T-107, Eau Claire C-001, Eau Claire C-003, Eau Claire C-004, Union T-004, Jefferson C-002, , Stevens Point C-001, Turtle T-024, Sheboygan C-002, Sheboygan C-004, *see* Dataset Stipulation App.A).

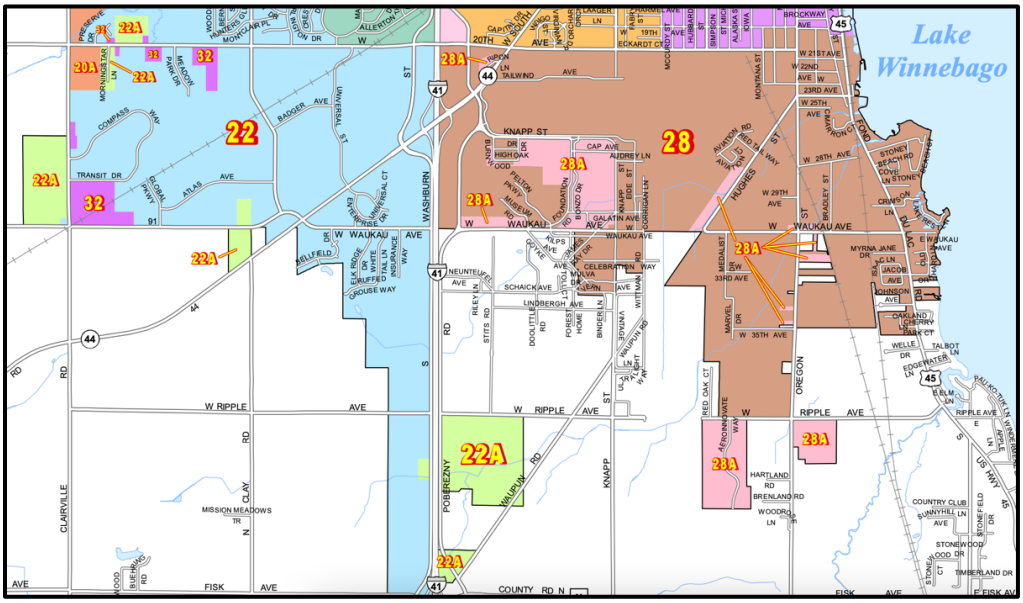
governments were concurrently amending those ward lines after census data arrived and while *Johnson* was pending.[28] The Wisconsin Elections Commission then instructed local governments to change ward lines again, as necessary, after the Court's *Johnson* decision.[29] Ward lines are still changing today, adjusting for annexation and boundary changes. Squires Affidavit ¶17.

Ward splits are not a basis for rejecting the Legislature's proposed remedy. Not only will they be eliminated by local redistricting, they are also a natural consequence of *Clarke*'s contiguity holding. Disconnected wards exist throughout Wisconsin. *See* Wis. Stat. §5.15(1)(b). They were kept together in the 2022 districts. But the newly proposed remedies cannot be "bounded by" these existing disconnected "ward lines," Wis. Const. art. IV, §4, and still comply with the Court's contiguity rule. Consider these disconnected Oshkosh wards:

[28] *See, e.g.*, Winnebago County, Municipal Ward Maps, https://www.co.winnebago.wi.us/county-clerk/election-information/municipal-ward-maps.

[29] "Redistricting Update," WEC (Apr. 18, 2022), https://elections.wi.gov/news/redistricting-update ("The selected state Assembly and Senate maps will inevitably split some existing wards. Municipalities and counties, as they did during the implementation of the congressional maps, will need to meet to rename and approve new ward lines and names for the newly split wards as soon as possible.").

Figure 3. City of Oshkosh Disconnected Wards[30]



However, once this Court selects a remedy, the Legislature expects that the Wisconsin Elections Commission will again instruct affected municipalities to adjust ward lines as necessary to conform to revised district lines.[31] Once that occurs, the districts will be "bounded by … ward lines," Wis. Const. art. IV, §4.

Finally, Petitioners have raised concerns about elections administration arising from ward splits. *See* Petr. Resp. Br.42 n.11. They speculate that "[n]ew wards—many with 20 or fewer people—would have to be created because wards cannot cross legislative district lines," and "[v]oter privacy would be seriously and needlessly

[30] "Ward Plan-City of Oshkosh," Winnebago County Municipal Ward Maps (adopted Oct. 26, 2021; amended May 10, 2022), https://www.co.winnebago.wi.us/sites/default/files/uploaded-files/2021%20City%20of%20Oshkosh%20Ward%20Plan.pdf.

[31] *See, e.g.*, "Redistricting Update," WEC (Apr. 18, 2022), https://elections.wi.gov/news/redistricting-update.

compromised" because "ward level election returns would likely reveal the candidate choices of individual voters in wards." *Id.* (citation omitted). Those concerns are already addressed by Wisconsin's existing processes for aggregating ward-level election results for sparsely populated areas. *See* Wis. Stat. §5.15(6)(b) (combined reporting procedures); *see also id.* §§7.51(4)(c), 7.60 (reporting election results).[32] Moreover, concerns about election administration accompany any redraw, particularly one so close to an election. While section 5.15(6)(b) makes Petitioners' "small wards" objection illusory, those broader concerns concede that any mandatory injunction causes harm and must be considered before an injunction may issue. *Supra* Part I.B.

7. Senate disenfranchisement

Wisconsin senate elections are staggered, where elections in even-numbered senate districts last occurred in 2020 and will next occur in 2024; elections in odd-numbered districts last occurred in 2022 and will next occur in 2026. *See* Wis. Const. art. IV, §5. So-called "senate disenfranchisement" can result when voters in even-numbered districts, who last voted in 2020, are moved to odd-numbered districts, and so won't vote again until 2026. *See Prosser*, 793 F. Supp. at 864. If voters are "unnecessarily" disenfranchised or targeted for disenfranchisement, that could raise constitutional concerns. *Baldus*, 2011 WL 5040666, at *3-4; *see supra* Part I.B.

[32] *See, e.g.*, "Ward by Ward Report_Governor," 2022 General Election Results, WEC, https://elections.wi.gov/elections/election-results#accordion-5601 (combined reporting).

The Legislature's proposed remedy resolves all noncontiguities by moving a mere 141 people from even- to odd-numbered senate districts.[33] (By comparison, the Legislature's and Governor's proposed *Johnson* remedies moved roughly 140,000 people.[34]) Given the specific instances of noncontiguity in senate districts, no remedy should cause substantial senate disenfranchisement. *See* Leg. Resp. Br.53-54.

8. Voting Rights Act and racial gerrymandering

There are no instances of noncontiguity in the Milwaukee-area districts that have been the subject of Voting Rights Act litigation or claims of racial gerrymandering (AD8, AD9, AD10, AD11, AD12, AD16, AD17, and AD18, and corresponding SD3, SD4, and SD6).[35] Because the Legislature's proposed remedy is tailored to the noncontiguity violation, it makes no changes to any VRA district in Milwaukee County and thus creates no risk of violating the VRA or the Equal Protection Clause. The *only* noncontiguity in all of Milwaukee County is one zero-population census block in the City of West Allis in AD15, which is dissolved into the surrounding AD84. LTSB Ex. 6.

No further changes are necessary to the entire county. Altering Milwaukee County districts creates tremendous risk of "creating another" violation of federal law, *Johnson I*, 2021 WI 87, ¶34, just as the

[33] Squires Affidavit ¶¶7, 21; LTSB Ex. 12.

[34] Legislature's Response Expert Report of Thomas Bryan ¶9 (filed Dec. 30, 2021).

[35] *See generally Baldus*, 849 F. Supp. 2d 840; *Wis. Legislature*, 595 U.S. 398.

Governor's racially gerrymandered proposal did in *Johnson*, *see Wis. Legislature*, 595 U.S. at 403-06. That proposal redrew Milwaukee's majority-minority districts to extend beyond Milwaukee County lines, dialing down the Black voting age population of such districts to "all cluster between 50.1% and 51.4%, compared to the current six districts' range of 51% to 62%." *Id*. at 400 n.1. As Milwaukee representatives explained then, there is no basis for "dilut[ing] minority communities" all "to create more Democratic seats."[36] Even more so here, where the Court has not found any contiguity violation in those Milwaukee districts.

9. Communities of interest

"Communities of interest are notoriously difficult to precisely define."[37] Easier-to-define communities are cities and other political subdivisions, which "can readily be viewed as themselves communities of interest in that residents of such units have interests in common."[38] In Wisconsin, redistricting plans have long kept nearly all

---

[36] Wis. State Assembly Floor Session at 2:18:00-2:18:15 (Nov. 11, 2021), https://wiseye.org/2021/11/11/wisconsin-state-assembly-floor-session-42/ (Rep. Ortiz-Velez); *id.* at 2:46:00-2:48:45 (Rep. Myers) ("There is no way that people who live at the lake, in [Milwaukee's] 53206, on Good Hope Road, and at Ernie Von Schledorn [in Menomenee Falls] have all the same interests…Why? That's going across the county line. Doesn't make sense.…That's not going to stick when it comes to thinking you're going to elect people that look like me.").

[37] *See* Report of Special Master Jonathan Cervas at 15, *Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct. May 20, 2022), https://jonathancervas.com/2022/NY/CERVAS-SM-NY-2022.pdf; *see also* Sandra Chen, et al., *Turning Communities of Interest into a Rigorous Standard for Fair Districting*, 18 Stan. J. Civ. Rights & Civ. Liberties 101, 109-112 (2022) (acknowledging "difficulty of defining COIs," describing "political process" involved in doing so).

[38] Cervas, *supra*, at 15.

Wisconsin towns together, reflective of the Constitution's prioritization of districts "bounded by … town … lines." Wis. Const. art. IV, §4. The Legislature's proposed remedy does the same, keeping all but a handful of 1,200-plus towns whole, as well as its villages and cities. *See supra* Part II.B.5. Political subdivisions kept together in the 2022 districts generally remain together, save for a handful of new splits necessitated by the Court's contiguity holding.[39]

Beyond that, the political branches are best positioned to address communities of interest. By correcting only the contiguity violation, the Legislature's proposed remedy avoids drawing this Court into the "political thicket" of deciding which communities should be kept together and which should be split. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).[40]

C. The Legislature's proposed remedy has no "partisan impact" and is "neutral."

The Court will "consider partisan impact when evaluating remedial maps" to ensure "political neutrality," *Clarke*, 2023 WI 79, ¶¶69-70, but has not defined those metrics, *id.* ¶161 (Ziegler, C.J., dissenting); *id.* ¶216 (Grassl Bradley, J., dissenting); *id.* ¶294 (Hagedorn,

[39] *Compare* LTSB Exs. 8a & 8b (proposed remedy), *with* LTSB Exs. 8c & 8d (2022 districts).

[40] *See, e.g.*, Bernard Grofman & Sean Trende, Special Masters' Mem. at 7 (Va. Sup. Ct. Dec. 27, 2021), https://www.vacourts.gov/courts/scv/districting/2021_virginia_redistricting_memo.pdf ("We are wary of allowing ourselves to be used as cat's paws by those who might have seen the comment period as an opportunity to guide us toward a partisan gerrymander under the guise of preserving communities of interest or drawing compact districts.").

J., dissenting). The only way to ensure political neutrality is to stay out of politics altogether. The Legislature's proposed remedy does so. It corrects all noncontiguities by moving less than 0.1% of Wisconsinites with no conceivable "partisan impact." This remedy ensures that the Court exercises only judicial power and spares the Court the burden of inventing new "neutrality" standards. This "neutrality" standard is one that keeps the Court out of the political thicket of redistricting.

1. The Legislature's remedy avoids plunging the Court into the political thicket of redistricting.

Redistricting is "root-and-branch a matter of politics." *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality op.). When courts get involved, they must not act "as a redistricting commission" and make "'political judgment[s] about how much representation particular political parties deserve.'" *Johnson I*, 2021 WI 87, ¶45 (citation and emphasis omitted). Partisan fairness "is quintessentially a political question" that falls "'outside the courts' competence.'" *Id.* ¶40 (citation omitted). Any judicial effort to impose "a 'fair' partisan divide" through a remedial plan would "encroach on the constitutional prerogatives of the political branches." *Id.* ¶45. Courts are limited to exercising "judicial power." Wis. Const. art. VII, §2.

Setting out to achieve partisan "balance" is decidedly not neutral; it expressly pursues a partisan goal. A "neutral" remedy resolves the identified constitutional violation and goes no further. That approach ensures "[b]oth the appearance and reality of impartial

justice." *Williams v. Pennsylvania*, 579 U.S. 1, 16 (2016). The public would understandably question the impartiality of a Court that instead sets out to rebalance the political composition of Wisconsin's Legislature in a lawsuit filed one day after the Court's membership changed. *See* Memo. ISO Mot. to Recuse 16-38; *see also Clarke*, 2023 WI 79, ¶¶174-83 (Ziegler, C.J., dissenting).

Applying those ground rules here, the Legislature's proposed remedy is "neutral" because it does not go beyond remedying the contiguity violation. Here, for example, LTSB has provided a complete log of changes made to every census block pursuant to a set of fixed rules that paid no mind to political outcomes in correcting non-contiguities. *See* Squires Affidavit ¶¶7-8; LTSB Ex. 6. The Legislature's resulting remedy pairs no incumbents and moves just 606 people between senate districts and 4,691 people between assembly districts. Squires Affidavit ¶¶7, 23. Moving so few people creates no "partisan impact."

The overall makeup of districts in the Legislature's plan should remain largely the same. Extensive past election data projected onto the proposed remedy is provided in LTSB Exhibit 13. As with any election data, it is based on estimates upon estimates. Squires Affidavit ¶22. It cannot predict the future, especially when one-third of Wisconsinites identify as independents, *Johnson I*, 2021 WI 87, ¶43. But using past election results, the senate plan will not differ materially from the existing plan and can thus be estimated to yield about 16

Republican-leaning districts, 9 Democratic-leaning districts, and 8 competitive districts (between 45-55%).[41] For the Assembly, about 51 Republican-leaning districts, 32 Democratic-leaning districts, and 16 competitive districts.[42] And candidates matter a great deal to those predictions. If U.S. Senator Tammy Baldwin (D) were the candidate in the Legislature's proposed assembly districts, she would win 55 of them. *See* LTSB Exhibit 13 ("USSDEM18%). If this Court's newest Justice were the candidate, she would win 47, and be within 2% striking distance in another 12, while Governor Evers would win only 38. *Id.* ("WSCJPR23%," "GOVDEM22%").

The Legislature's remedy is neutral because it does not "seek[] to change the ground rules" to advantage one party or another. *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶12, 249 Wis. 2d 706, 639 N.W.2d 537 (citation omitted); *see also, e.g.*, *Prosser*, 793 F. Supp. at 867, 871 (faulting plan "designed to decapitate the Democratic leadership in the senate" and choosing plan "creat[ing] the least perturbation in the political balance of the state"). It instead ensures this Court's political neutrality by keeping the Court out of politics entirely. A more sweeping redraw to attain a political goal is unnecessary, unconstitutional, and inherently partisan.

---

[41] *See WI 2022 State Senate*, Dave's Redistricting, https://davesredistricting.org/maps#stats::cb8ed0b5-013f-4b1a-ba49-1b03445416c9.

[42] *See WI 2022 State House*, Dave's Redistricting, https://davesredistricting.org/maps#stats::6a8a362d-0c59-4d81-aea3-28cba004b502.

2. The Wisconsin Constitution does not prescribe a standard for "partisan neutrality."

"The Wisconsin Constitution contains 'no plausible grant of authority' to the judiciary to determine whether maps are fair to the major parties," and courts accordingly have "'no license to reallocate political power between'" them. *Johnson I*, 2021 WI 87, ¶52 (citation omitted). Nor is there any manageable standard for determining which districts are "politically neutral" and which "privilege one political party over another." *Clarke*, 2023 WI 79, ¶70.

For starters, predicting politics is notoriously difficult. *Johnson I*, 2021 WI 87, ¶43. "Political affiliation is not an immutable characteristic." *Vieth*, 541 U.S. at 287 (plurality op.). "[V]oters can—and often do—move from one party to the other or support candidates from both parties." *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring in the judgment). And "even within a given election, not all voters follow the party line." *Vieth*, 541 U.S. at 287 (plurality op.). Candidates matter. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2503 (2019); Trende Report 16 ("Note that we shouldn't confuse a Biden-won district with a Democratic district."). Noted above, if Senator Baldwin is the Democratic candidate in the Legislature's proposed assembly districts, she wins 55 seats, while Governor Evers wins only 37 seats based on election returns from the same election.[43]

[43] *See* LTSB Ex. 13 ("GovDem18%," "USSDem18%"). Similarly, there is a 7-seat difference between 2022 Republican candidates for governor and U.S. Senate. *Id.* ("GovRep22%," "USSRep22%").

Predicting future elections based on past results may work for pollsters. But in a State with no party registration and a sizeable fraction of independents, *Johnson I*, 2021 WI 87, ¶43, it is not good enough for a Court fashioning a judicial remedy. *See* Leg. Resp. Br.44-52; *see, e.g.*, *Harper v. Hall*, 886 S.E.2d 393, 424-27 (N.C. 2023) (rejecting test as unworkable after "no one—not even the four justices who created it—could apply it to achieve consistent results").

Even if the Court could reliably measure partisanship, there is no manageable way to measure how much "partisan impact" renders a plan not "politically neutral." *Clarke*, 2023 WI 79, ¶70. This is "an entirely subjective question with no governing standards grounded in law." *Johnson I*, 2021 WI 87, ¶44.

Every proposed remedy arguably has a "partisan impact" when the "neutral" benchmark is a moving target. *Vieth*, 541 U.S. at 308-09 (Kennedy, J., concurring in the judgment). So what sort of "partisan impact" is permissible? How does a court compare the partisan impact of one plan against another? Is a plan more "neutral" when it apportions safe districts between likely Democrats and Republicans, or when districts are competitive? *See Rucho*, 139 S. Ct. at 2500. And why limit the consideration of neutrality and "partisan impact" to the major parties? How are Wisconsin's many independents best represented in a "neutral" plan? *See Johnson I*, 2021 WI 87, ¶49. Such questions can and should be avoided where, as here, the only question before the Court is contiguity—not political "fairness."

The lack of "legal standards to limit and direct" judicial decisionmaking in this "most intensely partisan aspect[] of American political life" is not for lack trying. *Rucho*, 139 S. Ct. at 2507. For more than 50 years, the U.S. Supreme Court searched in vain for a "limited and precise" standard to measure partisan "fairness" in redistricting. *Vieth*, 541 U.S. at 306-07 (Kennedy, J., concurring in judgment). The failed experiment finally ended in *Rucho* when the Supreme Court finally held that no judicially manageable standard exists. 139 S. Ct. at 2506-07.

This Court and other state courts have likewise refused to enter that political thicket without any standards. *See Johnson I*, 2021 WI 87, ¶52; *Rivera v. Schwab*, 512 P.3d 168, 187 (Kan. 2022) ("[N]either the Kansas Constitution, state statutes, nor [the] existing body of caselaw suppl[ied] judicially discoverable and manageable standards" for measuring partisan fairness.); *Harper*, 886 S.E.2d at 423 (The North Carolina Constitution "does not provide judicially discernible or manageable standards for adjudicating partisan gerrymandering claims."). Wisconsin has no constitutionally prescribed neutrality standard, unlike other States. *Compare, e.g.*, Ohio Const. art. XI, §9(D)(3)(c)(ii) (requiring "statewide proportion of districts" favoring each major party to "correspond closely to the statewide preferences of the voters of Ohio"); Mo. Const. art. III, §3 (similar); Mich. Const. art. IV, §6 (requiring districts "not provide a disproportionate advantage to any political party").

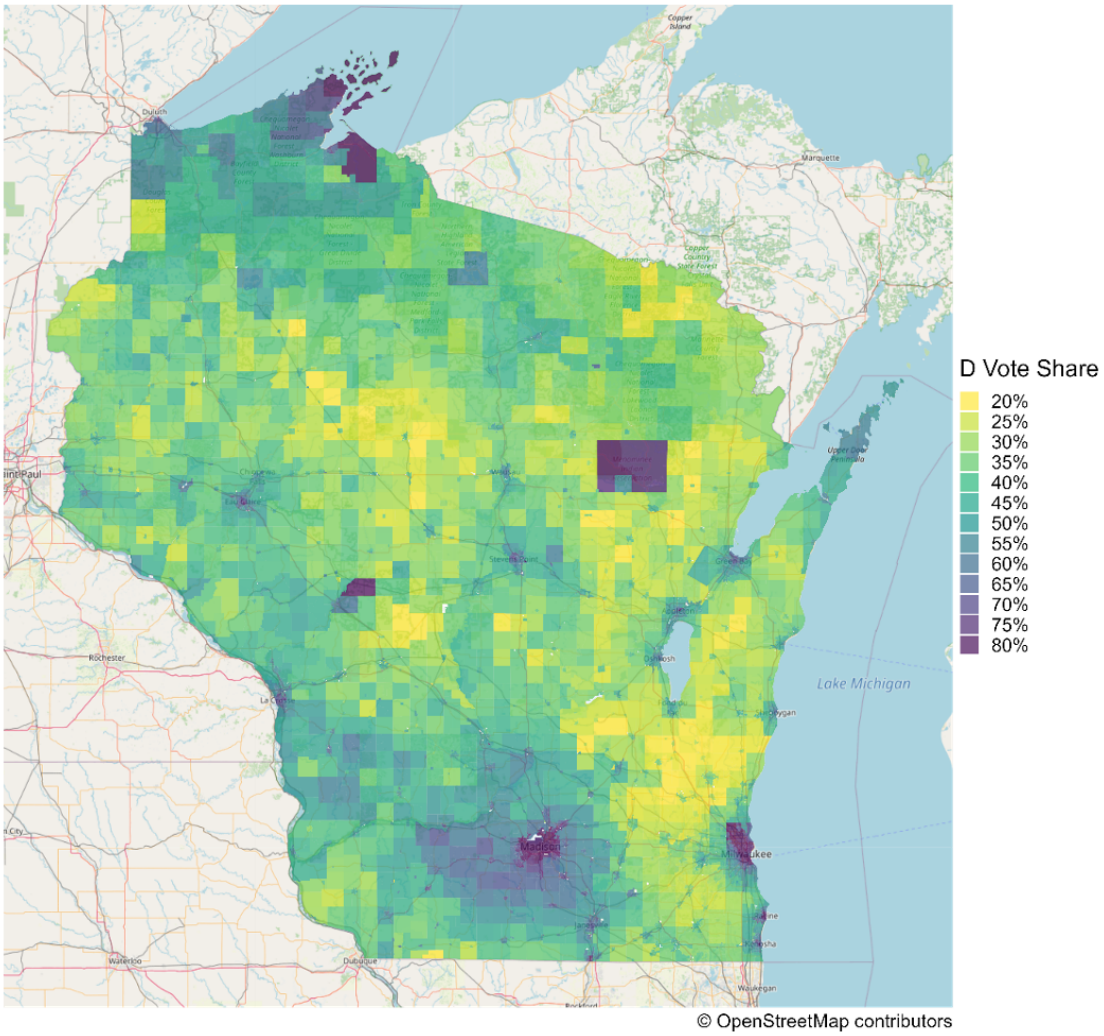
The Court's own cited authorities confirm that "neutrality" means staying out of the political thicket. None purported to embark on a statewide rebalancing of political power. *See Jensen*, 2002 WI 13, ¶¶12, 22 (declining to commence original action); *Baumgart*, 2002 WL 34127471, at *3-7 (rejecting plans with political aims and drafting plan that went no further than necessary to remedy the constitutional defect by "adjusting [the former plan] for population deviations"); *Burling v. Chandler*, 804 A.2d 471, 483 (N.H. 2002) (drafting plan without "calculated partisan political consequences"); *Prosser*, 793 F. Supp. at 867 (rejecting plan targeting Democratic leadership). Likewise here, the "neutral" remedy is the one that does not aspire to anything other than remedying the contiguity violation.

3. A plan that recasts the partisan balance of the Legislature will not be neutral.

Some parties have suggested that the test for a "neutral" remedy should be proportionality, whereby the number of Democratic districts is proportionate to the number of statewide votes for Democrats (which would mean about half the districts using some statewide races). *See, e.g.*, Citizen-Math. Op. Br.41;Clarke Op. Br.40; *see also* Evers Op. Br.25. Even if election outcomes were capable of accurate prediction, *but see supra* Part II.C.2, proportionality cannot be the rule for Wisconsin's single-member districts. In single-member districting schemes, "the voting strength of less evenly distributed groups will invariably be diminished,"*Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring in the judgment), resulting in a "'natural'

packing effect," even where the only redistricting criteria are "compactness and respect for the lines of political subdivisions," *Vieth*, 541 U.S. at 290 (plurality op.). In Wisconsin, single-member districts naturally favor Republicans because of where Wisconsinites live. *See generally* Expert Report of Sean P. Trende (App. Vol. II). A "proportionality" rule forcing a 50-50 split between Democratic- and Republican-leaning seats would *itself* be inherently partisan. *See id.* at 57; Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77, 158-59 (1985) ("To repeat a point that cannot be too strongly emphasized, plurality-based districts cannot be expected to give rise to proportional representation. This statistical fact cannot be changed by court fiat.").

Figure 4. Wisconsin Political Geography[44]



As **Figure 4** illustrates, that "natural packing effect" is particularly stark in Wisconsin. Likely Democratic voters are not uniformly distributed and tend to cluster around Milwaukee and Dane Counties. Indeed, more than one-third of the total Democratic votes cast in statewide elections between 2016 and 2022 have come from Milwaukee and Dane Counties *alone*. *See* Trende Report 11. That doesn't matter in statewide elections, but it makes all the difference for single-

[44] Trende Report 12.

member districts. While tens of thousands of Democratic voters in Madison can pool their votes with Democrats statewide for a Democratic gubernatorial candidate, those Madison voters cannot lend their votes to overwhelmingly Republican areas in Wisconsin's Northwoods to elect assembly or senate candidates there. They must instead vote in their own assembly and senate districts. And those areas are very concentrated: "Democrats have over 500 precincts where their vote share tops 75%, while Republicans have just 300 where their vote share is under 25%." *Id.* at 13; *see also id.* at 11 ("Democrats have won the majority of the vote in 15 counties" in statewide races between 2016-2022, while "Republicans have carried the remaining 57.").

Wisconsin's political geography can thus be expected to "distort the traditional relationship between a party's vote share and their seats." Trende Report 10. As the Governor's expert for his 2021 People's Map Commission explained, even though "Wisconsin is very close to 50/50 in terms of the votes," legislative maps can be expected to have "a lean towards Republicans" because they "are more spread out across rural areas."[45] Put simply by others who have studied Wisconsin, "it is not reasonable to expect that 50% of the vote leads to 50% of the seats." Gregory Herschlag, et al., *Evaluating Partisan*

[45] *People's Map Commission | Informational Hearing on Draft Maps*, YouTube, at 21:00-21:29 (Sept. 30, 2021), https://www.youtube.com/watch?v=aYA10DECIdc.

Gerrymandering in Wisconsin at 4, arXiv (Sept. 7, 2017), https://arxiv.org/pdf/1709.01596.pdf.

Tens of thousands of computer-simulated maps generated by Mr. Trende bear this out. As he shows, there is a substantial Republican lean in maps drawn without any consideration of partisanship. Trende Report 15-54. And while no computer-generated map can replicate all actual redistricting constraints, tens of thousands of them are useful for showing that even "politics-neutral draws don't produce maps where Democrats have won a majority of the districts." *Id.* at 21. With very few redistricting constraints (*e.g.*, population equality), tens of thousands of simulations draw senate maps with 20 to 22 likely Republican seats (and around 57 to 58 likely Republican assembly seats). *Id.* at 16-27. The Republican lean is as or more pronounced for computer-generated maps drawn to respect county and town lines, as Wisconsin's Constitution requires. *Id.* at 27-54. A set of simulations that keep towns intact with minimal county splits and no considerations of partisanship range from 19 to 24 likely Republican senate seats (and 55 to 59 likely Republican assembly seats). *Id.* at 38-47.

Bottom line: A remedial plan that is politically neutral and drawn to comply with the Wisconsin Constitution will favor Republicans at a level substantially disproportionate with their statewide vote share.

* * *

The Legislature's proposed remedy is neutral because it keeps the Court out of politics. Any remedy that goes further—forcing 50-50 proportionality on a State where single-member districts are inherently disproportionate—would be a gerrymandered remedy and assuredly not "neutral."

III. These remedial proceedings must comply with due process, which requires more time than the Court has.

An appropriate judicial remedy tailored to the contiguity violation should raise few, if any, material factual disputes. Other proposals, however, could raise myriad factual disputes about "partisan impact" and other considerations that must be resolved before this Court can enter the extraordinary remedy of a mandatory injunction prescribing new redistricting lines. For example, were certain existing lines jettisoned for political reasons? Why are certain towns kept whole but others split? Did race or other impermissible factors predominate in the drawing of lines? What standard(s) of "partisan impact" or "political neutrality" were used, and were the data used to determine "partisan impact" reliable? What is the baseline for politically "fair" districts in Wisconsin? Have experts failed to consider other data? *Cf. Whitford v. Nichol*, 180 F. Supp. 3d 583, 592-93 (W.D. Wis. 2016) (objections to the political assumptions and data "raised factual disputes requiring a trial").

Such material factual issues cannot be resolved on the papers alone. *See* Memo. ISO Mot. Recon.46-49. Due process 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). In cases like this, "where important decisions turn on questions of fact, due process requires an opportunity to confront and examine adverse witnesses." *Goldberg*, 397 U.S. at 269. "And, of course, an impartial decision maker is essential." *Id.* at 271.

Despite all that, and the parties' other statutory rights to cross-examine Court-appointed experts or subpoena witnesses, *see* Memo. ISO Mot. Recon.49-51, the Court has ordered that "[n]o further discovery shall be permitted" beyond the exchange of expert reports and supporting data. Scheduling Order 4 (Dec. 22, 2023). Why? Because there is no time. The Court has already acknowledged that there is no time for "for extensive fact-finding (if not a full-scale trial)" to transpire. *Clarke*, 995 N.W.2d at 781. That is no less true at this remedial stage.

This remedial process is not "like the one the Court adopted in *Johnson*." Petr. Resp. Mot. Recon.13-16; *see* Evers Br.20-22. After *Johnson I*, all parties agreed that no discovery was needed beyond expert reports and stipulated to the authenticity and admissibility of myriad facts and data. *See* Joint Discovery Plan, *Johnson*, No. 2021AP1450-OA. No party meaningfully disputed the metrics of the proposed remedial plans; rather, disputes were how to apply the Court's legal standards to those undisputed metrics. *See Johnson II*, 2022 WI 14, ¶¶28-33 (identifying disagreement about how much weight to give undipsuted facts).

There have been no such stipulations here. Unlike *Johnson*, the Court has invited parties to submit statewide redraws. *See Clarke*, 2023 WI 79, ¶63. It has told parties to make arguments about "partisan impact" and whether maps "privilege one political party over another." *Id.* ¶70. And it has appointed consultants to choose between them. *Id.* ¶75. The remedial stage here has none of the guardrails that *Johnson* did.

What the parties will deem a politically "neutral" remedy will be hotly contested. When those facts are "conflicting," the "'opportunity to be heard'" requires an evidentiary hearing "'on the … issues of fact'" before entry of even a *preliminary* injunction. *Medeco Sec. Locks, Inc. v. Swiderek*, 680 F.2d 37, 38-39 (7th Cir. 1981) (per curiam). The Court cannot simply order a mandatory injunction without resolving factual disputes. Doing so would "violate[] well-established notions of due process." *Anderson v. Davila*, 125 F.3d 148, 158 (3d Cir. 1997).

CONCLUSION

For the foregoing reasons, the only conceivable judicial remedy is the Legislature's proposal or something like it. Before imposing any such remedy, the Court must balance the equities, resolve disputed material facts, and determine whether injunctive relief of any sort is warranted before the 2024 elections. It is not.

Dated this 12th day of January, 2024.

Respectfully submitted,

Electronically Signed by
Jessie Augustyn

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

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

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

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

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

Electronically Signed by
Kevin M. St. John

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

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

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

Counsel for Wisconsin Legislature
* *Admitted pro hac vice*

CERTIFICATION REGARDING LENGTH AND FORM

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c) for a brief. Excluding the portions of this brief that may be excluded, the length of this brief is 10,854 words as calculated by Microsoft Word.

Dated this 12th day of January, 2024.

Respectfully submitted,

Electronically Signed by
Kevin M. St. John

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