IN THE SUPREME COURT OF WISCONSIN

No. 2023AP1399-OA

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

Petitioners,

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

Intervenors-Petitioners,

v.

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

Respondents,

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

Intervenors-Respondents.

RESPONSE BRIEF OF ATKINSON INTERVENORS

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

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

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

* *Appearing pro hac vice*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

INTRODUCTION

Atkinson Intervenors hereby respond to the parties' October 16 Briefs addressing the four questions this Court identified in its October 6 Order.[1]

First, the existing state-legislative maps violate the contiguous-territory requirements in Article IV, Sections 4 and 5 of the Wisconsin Constitution, and no procedural doctrine precludes this Court from remedying the unconstitutional noncontiguity that pervades the maps statewide. *Second*, the adoption of the existing state-legislative maps violated the Wisconsin Constitution's separation of powers, and no procedural doctrine precludes this Court from remedying the ongoing separation-of-powers violation. *Third*, in imposing any remedy, this Court should apply the mandatory districting criteria under Wisconsin and federal law while scrupulously adhering to the principle of judicial neutrality. *Fourth*, even if limited factfinding is needed, the remedial procedures detailed here would allow the Court to select maps from among those proposed by the parties in ample time for the 2024 election cycle.

[1] This Response Brief refers to the parties' October 16 Briefs as "Clarke Br." ("Petitioners"); "Legislature Br." and "Johnson Br." (collectively, "Respondents"); "Atkinson Br." and "Governor Br." (collectively, "Intervenors"); "Senators Br."; and "WEC Resp."

ARGUMENT

I. The Court Should Hold that the Existing Districts Are Unconstitutionally Noncontiguous.

Respondents devote most of their briefing to arguing that this Court should not correct the existing maps' constitutional violations. But none of the procedural objections Respondents raise is valid. And on the merits, the existing state-legislative maps clearly violate the Constitution's contiguous-territory mandates.

A. The Contiguity Claim Is Not Procedurally Barred.

Respondents throw a number of procedural objections at the wall to see if any will stick. None does—not standing, issue preclusion, claim preclusion, estoppel, laches, the Declaratory Judgments Act, or *stare decisis*. And fundamentally, none displaces this Court's jurisdiction and inherent power to answer the questions on which it granted this original action and directed briefing.

1. Standing

Respondents first argue that Petitioners and Atkinson Intervenors lack standing to challenge noncontiguity in districts other than those where they reside. Respondents misunderstand both the nature of the contiguity claim and the law on standing.

The contiguity claim focuses on ensuring that Wisconsin's legislative maps comply with Article IV, Sections 4 and 5, which enshrine a promise to all voters about the criteria legislative maps must meet to ensure responsive democratic functioning statewide. Wisconsin's constitutional framers mandated that legislative districts consist of "contiguous territory" because the alternative—"[i]ndiscriminate districting"—would "be little more than an open invitation to partisan gerrymandering." *Reynolds v. Sims*, 377 U.S. 533, 578–79 (1964).

Not only does every Petitioner and every Atkinson Intervenor reside in a district that either is noncontiguous or borders a noncontiguous district, but *every single Wisconsin voter lives in such a district.* The contiguity claim is thus about an injury to every single Wisconsin voter—including Petitioners and Atkinson Intervenors—in breaking the promise of Article IV.

In these respects, contiguity is akin to the malapportionment claim this Court addressed in *Johnson*. No one argued that Johnson Respondents (who were petitioners in *Johnson*) lacked standing to bring a statewide malapportionment claim unless they had individuals from every overpopulated senate and assembly district in the State. Nor would such a requirement make any sense. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 207

(1962) (holding individual voters have standing to raise statewide malapportionment claims because they "seek relief in order to protect or vindicate an interest of their own, and of those similarly situated"). The malapportionment injury, like the contiguity injury here, affects all voters on a statewide basis because all are deprived of maps that meet the constitutional guarantees designed to ensure a representative government.

To advance their standing arguments, Respondents rely solely on federal precedent in racial-gerrymandering cases. *See* Legislature Br. 19–20; Johnson Br. 30 n.8 (quoting *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015)). But federal courts require racial-gerrymandering claims to proceed "district-by-district" due to "the nature of the harms" underlying those claims. *Ala. Legislative Black Caucus*, 575 U.S. at 262–63. These harms are uniquely "personal" because they depend upon being "personally … subjected to [a] racial classification" or "represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group." *Id.* at 263 (quotation marks omitted). These harms, in other words, "directly threaten a voter who lives in the *district* attacked." *Id.* The opposite is true here. Noncontiguity is *not* about individual discriminatory treatment, but rather the collective composition

of district boundaries to facilitate representative responsiveness—a statewide problem of democratic functioning.

This Court has routinely found standing where voters challenge statewide policies affecting all voters. For example, the Court found voter standing to challenge the placement of multiple proposed amendments on a single ballot rather than separate ballots (as the plaintiff alleged was constitutionally required), even though the plaintiff readily acknowledged that nothing about the putative constitutional violation altered his vote. *See McConkey v. Van Hollen*, 2010 WI 57, ¶2, 326 Wis. 2d 1, 6–7, 783 N.W.2d 855, 857–58. The Court still held that he had "at least a trifling interest in his voting rights," so the "claim [was] fit for adjudication." *Id.* ¶17. The Court also has allowed voters to challenge the statewide use of ballot drop-boxes based on nothing more than an assertion that voters have an interest in ensuring public confidence in election results and guarding against the threat of election interference. *See Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶¶19, 23–24, 30–31, 403 Wis. 2d 607, 625, 627–28, 631–32, 976 N.W.2d 519, 528, 530, 532.

Allowing individual voters to bring constitutional challenges to a statewide problem affecting all voters fits comfortably within Wisconsin standing law, which requires courts to "evaluate standing as a matter of

judicial policy rather than as a jurisdictional prerequisite" and "construe standing broadly in favor of those seeking access." *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶38, 327 Wis. 2d 572, 592, 786 N.W.2d 177, 188; *see Foley-Ciccantelli v. Bishop's Grove Condominium Ass'n*, 2011 WI 36, ¶38, 333 Wis. 2d 402, 420, 797 N.W.2d 789, 798 (standing is not jurisdictional and should be "construed liberally").

The standing inquiry under Wisconsin law focuses on a court's practical ability to adjudicate claims and therefore requires only a minimal showing of injury. *McConkey*, 2010 WI 57, ¶¶16–17; *see State ex rel. First Nat'l Bank of Wis. Rapids v. M&I Peoples Bank of Coloma*, 95 Wis. 2d 303, 308–09, 290 N.W.2d 321, 325–26 (1980) (unlike federal law, Wisconsin does not require that each plaintiff suffer a substantial, concrete injury); *Moedern v. McGinnis*, 70 Wis. 2d 1056, 1064, 236 N.W.2d 240, 244 (1975) (standing assures "adverseness necessary to sharpen the presentation of issues"). Respondents' exclusive reliance on federal standing law and its insistence on substantial, concrete injury is therefore misplaced. *See Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶17, 402 Wis. 2d 587, 604–05, 977 N.W.2d 342, 350–51 (federal standing law is not binding on Wisconsin courts).

Petitioners and Atkinson Intervenors, who all live in districts that either are or abut noncontiguous districts, have more than met the minimal showing of injury required under Wisconsin law. Moreover, "sound judicial policy" supports finding standing here. *McConkey*, 2010 WI 57, ¶15. Petitioners and Atkinson Intervenors "ha[ve] competently framed the issues and zealously argued [their] case." *Id.* ¶18. If their claims "were dismissed on standing grounds," other voters who live in the remaining noncontiguous districts could "bring an identical suit"; but "different [petitioners] would not enhance [the Court's] understanding of the issues in this case." *Id.* And "it [is] prudent that the citizens of Wisconsin have this important issue of constitutional law resolved." *Id.* For all these reasons, this Court's precedents amply support recognizing Petitioners' and Atkinson Intervenors' standing to raise a contiguity claim as to all districts across the current maps.

2. Issue Preclusion

Respondents next contend that issue preclusion bars Petitioners and Atkinson Intervenors from arguing noncontiguity in light of the *Johnson* litigation. Legislature Br. 22–24; *see* Johnson Br. 22 n.3. Respondents bear the burden of demonstrating issue preclusion, *see Aldrich v. Lab. & Indus. Rev. Comm'n*, 2012 WI 53, ¶88, 341 Wis. 2d 36, 68, 814 N.W.2d 433, 449, and cannot meet it for three reasons.

First, the only claim in *Johnson* was malapportionment. Contiguity arose solely as one of many considerations in the remedial stage, when the Court determined which maps to adopt. *See Johnson v. Wisconsin Elections Commission*, 2021 WI 87, ¶34, 399 Wis. 2d 623, 648, 967 N.W.2d 469, 481 (*Johnson I*). Contiguity therefore was not "actually litigated" in *Johnson* in any meaningful sense. *Dostal v. Strand*, 2023 WI 6, ¶24, 405 Wis. 2d 572, 586, 984 N.W.2d 382, 388 ("An issue is 'actually litigated' when it is 'properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined.'"). Indeed, as Respondents recognize, "[i]t is undisputed that these [contiguity] claims were not brought in *Johnson*." Johnson Br. 21.

Second, *Johnson* cannot have preclusive effect because the parties here lack "sufficient identity of interest" with the *Johnson* litigants. *Paige K.B. ex rel. Peterson v. Steven G.B.*, 226 Wis. 2d 210, 226, 594 N.W.2d 370, 378 (1999). Petitioners and several Atkinson Intervenors—including Professor Atkinson, Dr. Kane, and Ms. Dudley—were never involved in *Johnson*. Applying "issue preclusion to nonparties … runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'" *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) (citation omitted). As to any continuity of counsel, the issue-preclusion inquiry focuses on the *parties' interest*, not which counsel they engage. Indeed, the U.S. Supreme

Court has rejected the argument that a nonparty's having notice of and engaging the same lawyers from a prior suit is sufficient for preclusion. *Id.* at 897–98.

Third, issue preclusion does not apply where, as here, its effect would be "fundamentally unfair." "Wisconsin courts have adopted a flexible approach toward the application of issue preclusion," eschewing "[f]ormalis[m] … in favor of a looser, equities-based" analysis, "consider[ing] an array of factors in deciding whether issue preclusion is equitable in a particular case." *N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 551, 525 N.W.2d 723, 727 (1995).

Under this framework, issue preclusion is not appropriate where there are "differences in the … extensiveness of the proceedings" involving the precise issue in question. *Aldrich*, 2012 WI 53, ¶110; *State ex rel. Flowers v. Dep't of Health & Soc. Servs.*, 81 Wis. 2d 376, 387, 260 N.W.2d 727, 734 (1978) (declining to apply issue preclusion where "paramount considerations" differ between cases). In *Johnson*, the only claim at issue was malapportionment, liability was not contested, and contiguity barely surfaced in the parties' briefing and argument. *See Johnson I*, 2021 WI 87, ¶¶2, 34. By contrast, here liability for violations of Article IV's contiguous-territory mandate is one of only two questions on which this Court granted

the petition to commence this original action. The Court should resolve this important constitutional question.

3. Claim Preclusion

Respondents' claim-preclusion arguments fare no better. Legislature Br. 24–25; *see* Johnson Br. 22 n.3.

First, claim preclusion has a strict "same parties" or privities requirement, *see Bugher*, 189 Wis. 2d at 550, 525 N.W.2d at 727, and Petitioners and several Atkinson Intervenors were not parties (or their privities[2]) in *Johnson*.

Second, claim preclusion bars the relitigation of only claims that "could have been" brought in the earlier case, *Dostal*, 2023 WI 6, ¶24—and, even then, only as to claims where there is an "identity" (a shared set of operative facts) between the first and second case. *See Fed. Nat'l Mortg. Ass'n v. Thompson*, 2018 WI 57, ¶6, 381 Wis. 2d 609, 613, 912 N.W.2d 364, 366. There is no such identity here because the subject of the *Johnson* litigation was the 2011 legislatively enacted maps, whereas the subject of this litigation is the 2022 Court-adopted maps.

[2] "Privity" is narrowly defined. It requires an "absolute identity of interest," such as a successor-in-interest relationship. *Pasko v. City of Milwaukee*, 2002 WI 33, ¶18, 252 Wis. 2d 1, 16, 643 N.W.2d 72, 79. Shared "general[] interest[s]" do not establish privity. *Hull v. Glewwe*, 2019 WI App 27, ¶32, 388 Wis. 2d 90, 111, 931 N.W.2d 266, 276.

4. Judicial Estoppel

The Legislature also urges the Court to apply judicial estoppel against Atkinson Intervenors and the Governor based on their supposedly having adopted an "inconsistent position" in *Johnson*. Legislature Br. 25–26. As an initial matter, Professor Atkinson, Dr. Kane, and Ms. Dudley played no role and took no positions in *Johnson* and therefore cannot be subject to any claim of judicial estoppel. But in any event, for judicial estoppel to apply, "the later position must be clearly inconsistent with the earlier position." *Salveson v. Douglas Cnty.*, 2001 WI 100, ¶38, 245 Wis. 2d 497, 521, 630 N.W.2d 182, 193. That is not the case here. As Atkinson Intervenors explained in their October 16 Brief, a subset of them (known as the Citizen Mathematician and Scientist Intervenors in *Johnson*) argued during the *Johnson* remedial proceedings that the Court should *not* ignore Article IV's strict "contiguous territory" requirement. *See* Atkinson Br. 15 n.6. The Court did not adopt that position. Instead, the Court stated in *Johnson I* that Article IV did not require physical contiguity. Thus, even as to the Atkinson Intervenors who participated in *Johnson*, they cannot be judicially estopped because their position did not prevail. *Salveson*, 2001 WI 100, ¶38 (noting that for judicial estoppel to apply "the party to be estopped must have convinced the first court to adopt its position").

In any event, "it is the prerogative of the … court to invoke judicial estoppel at its discretion." *State v. Petty*, 201 Wis. 337, 346–47, 548 N.W.2d 817, 820 (1996) (quotation marks omitted). This Court should permit all parties to respond to this critical question, as envisioned and directed by the October 6 Order.

5. Laches

Without acknowledging the significant tension with their estoppel arguments, Respondents further argue that the contiguity claim is barred by the doctrine of laches. *See* Legislature Br. 21–22; Johnson Br. 19–22. Not so.

As to laches' first element, unreasonable delay, "what constitutes a reasonable time will vary and depends on the facts of a particular case." *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶14, 393 Wis. 2d 308, 318–19, 946 N.W.2d 101, 106–07. Here, what constitutes a reasonable time turns on the biennial nature of the election cycle. Petitioners and Atkinson Intervenors cannot be criticized for not acting before Election Day 2022 because the whole point of the *Johnson* litigation was to put maps in place by April 15, 2022, so that state and local officials could administer the August and November 2022 elections. *See Johnson v. Wis. Elections Comm'n*, No.

2021AP1450-OA, DOJ Letter Filed on Behalf of WEC (Apr. 12, 2022).[3] The only question relevant to laches, therefore, is whether the claim here was filed in time to allow new, constitutional maps to be put into place prior to the 2024 elections. As shown in Part IV, *infra*, the Court has more than sufficient time to do so.

On the second element, lack of knowledge, *see Wis. Small Bus. United*, 2020 WI 69, ¶1, Respondents were, or should have been, on notice of the noncontiguous districts across the current maps.

As to the third element, prejudice, Respondents must show that *they* were harmed because of Petitioners' putative delay. *See id.* ¶19; *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶38, 389 Wis. 2d 516, 536, 936 N.W.2d 587, 599. Respondents do not even attempt to show harm to *them*. There is none. Nor does the timing of the present litigation prejudice *anyone*, as it was initiated with sufficient time for this Court to enter remedial maps before the next election. *See infra* Part IV.

In any case, laches is not jurisdictional. *State ex rel. Casper v. Bd. of Trustees of Wis. Ret. Fund*, 30 Wis. 2d 170, 175, 140 N.W.2d 301, 303 (1966).

[3] The Wisconsin Elections Commission had informed the Court and the parties that superseding maps had to be "implemented in statewide election databases prior to the April 15, 2022 beginning of the statutory period for candidates to circulate nomination papers for the August 2022 primary election." *Id.*

Rather, its application is "left to the sound discretion of the court," *Wis. Small Bus. United*, 2020 WI 69, ¶12, which should proceed to hear this case.

6. Reopening *Johnson* and the Declaratory Judgments Act

The Legislature alternatively suggests that to find a constitutional flaw in the existing maps and to order into effect maps curing those defects, this Court would need to "reopen" the *Johnson* judgment and that a Declaratory Judgments Act claim is not appropriate. Legislature Br. 48–52. This argument fails.

First, the nature of the relief this Court entered in *Johnson* is specific to its role when the political branches reach an impasse in redistricting. In that context, courts must be able to adjudicate the illegality of prior maps—for example, after a new Census—and order into effect new ones. *See Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶10, 249 Wis. 2d 706, 713, 639 N.W.2d 537, 540 (per curiam). For instance, the three-judge federal district court in *Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992) (three-judge court), replaced the maps ordered into effect by *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982) (three-judge court); and the court in *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (three-judge court), *amended*, No. 01-C-0121, 2002 WL 34127473 (E.D. Wis. July 11, 2002), replaced the maps ordered into effect by *Prosser*. According to the Legislature, these courts could not have

proceeded without reopening prior judgments—even though the intervening Census results rendered the earlier maps clearly unlawful.

Second, the Legislature claims that this Court cannot issue even a declaratory judgment because the maps are not a "statute." Legislature Br. 49. But as just discussed, when a court confronted with a redistricting impasse orders maps into place, they stand in for the law the political branches failed to enact. *See Jensen*, 2002 WI 13, ¶10. It is therefore entirely appropriate to treat the existing maps as equally subject to a declaratory judgment. That is particularly true here because, as discussed below, *see infra* Part II-B, one of the chief constitutional flaws with the existing maps is that they *were* a proposed statutory enactment that failed the legislative process. By ordering SB 621 into effect—effectively overriding the Governor's veto—the *Johnson* Court forced the failed statute into operation. *See* Legislature Br. 44. If Atkinson Intervenors cannot seek a judgment declaring this unconstitutionally adopted legislation invalid, the separation of powers will be a dead letter.

Third, though there is no need for this Court to "reopen" the *Johnson* judgment, this Court may—if it wishes—treat the request for relief from those Atkinson Intervenors who participated in *Johnson* "as invoking the familiar power of courts of equity to relieve against judgments whose

enforcement would be inequitable," including in cases of judicial "overreaching." *Welfare Bldg. & Loan Ass'n v. Hennessey*, 2 Wis. 2d 123, 128, 86 N.W.2d 1, 4 (1957).

Respondents claim that this relief is limited to motions brought within a year. Legislature Br. 51–52. That is wrong. The "one year" limitation in Wis. Stat. § 806.07(2) does not apply to subsections (g) and (h), which provide for relief from judgment where "[i]t is no longer equitable that the judgment should have prospective application," or "[a]ny other reasons justifying relief from the operation of the judgment." Wis. Stat. § 806.07(1)(g), (h). These provisions confirm the Court's "broad discretionary authority," invoke its "pure equity power," and "must be liberally construed to allow relief from judgments 'whenever such action is appropriate to accomplish justice.'" *Mullen v. Coolong*, 153 Wis. 2d 401, 407, 451 N.W.2d 412, 414 (1990) (citing, *inter alia*, *Klapprott v. United States*, 335 U.S. 601, 615 (1949)). Though there is no need for this Court to use its equitable authority to reopen the judgment, it certainly may do so to set aside the unconstitutional maps *Johnson III* put into effect.

7. *Stare Decisis*

Finally, Respondents contend that *stare decisis* demands deference to the Court's one-sentence observation in *Johnson I* that districts with

municipal "islands" should be considered legally contiguous.[4] *See* Legislature Br. 26–29; Johnson Br. 22. But "*stare decisis* does not require [the Court] to retain constitutional interpretations that," as here, "were objectively wrong when made." *Koschkee v. Taylor*, 2019 WI 76, ¶8 n.5, 387 Wis. 2d 552, 560 n.5, 929 N.W.2d 600, 604 n.5; *see* Atkinson Br. 10–11 (detailing how *Johnson*'s treatment of contiguity conflicts with text, history, precedent, and purpose).

The justifications for *stare decisis* are especially weak given that the parties barely touched this important question of constitutional law and the Court afforded it only a single sentence in *Johnson I*. As this Court has recognized, limited mention of an issue in a prior case counsels in favor of full reconsideration with the benefit of parties' briefing—and against the application of *stare decisis*. *See, e.g.*, *Bartholomew v. Wis. Patients Comp. Fund & Compcare Health Servs. Ins. Corp.*, 2006 WI 91, ¶36, 293 Wis. 2d 38, 53, 717 N.W.2d 216, 224.

Johnson I's one-sentence mention of this issue also had the unfortunate result of creating a "contradictory" state of precedent and a direct conflict with the Constitution's plain text. *Johnson Controls, Inc. v.*

[4] *See* 2021 WI 87, ¶36, 399 Wis. 2d 623, 648, 967 N.W.2d 469, 481 ("If annexation by municipalities creates a municipal 'island,' however, the district containing detached portions of the municipality is legally contiguous even if the area around the island is part of a different district." (citing *Prosser*, 793 F. Supp. at 866)).

Emps. Ins. of Wausau, 2003 WI 108, ¶106, 264 Wis. 2d 60, 124, 665 N.W.2d 257, 289–90; *see* Atkinson Br. 11–15; Clarke Br. 20–25; Governor Br. 6–8, 12–13. That leaves the Court "free to repudiate the less desirable rulings," liberated "from the obligation to determine this case solely on the basis of *stare decisis*." *Id.* (quotation marks omitted); *see also Bartholomew*, 2006 WI 91, ¶36.

B. The Maps Clearly Violate the Constitution's Contiguous-Territory Mandate.

Beyond their procedural objections, Respondents have little to say on the merits of the contiguity claim. Respondents first try to argue that contiguity must be subordinated to *other* elements enumerated in Sections 4 and 5. *See* Legislature Br. 34–40; Johnson Br. 10–19. But the plain text of the Constitution says otherwise. There is no mandate to keep wards or municipalities intact that could trump the constitutional contiguity requirements. And Respondents' suggestion that municipal "islands" should be treated as constructively intact, or intact enough, Johnson Br. 19, would read the term "contiguous territory" out of the Constitution.

Respondents' main complaint appears to be that a "literal approach" to Article IV's contiguity requirements would work too much change to the existing maps. Legislature Br. 34; *see id.* at 34–39. But that is precisely the point: The constitutional defects in the current maps must be remedied on a

statewide basis because noncontiguity is so pervasive. The answer to an extensive constitutional violation is not to ignore it, but to remedy it.

Respondents also attempt to narrowly construe this Court's pre-*Prosser* precedents to support their theory of constructive contiguity. *See* Legislature Br. 39–40; Johnson Br. 10–11, 18. But a careful reading of those cases shows that until *Johnson I*, this Court consistently found that Article IV means what it says: Contiguity requires physically intact districts. That is why Respondents eventually concede—as they must—that, until the mid-twentieth century, the State maintained physically intact districts, consistent with constitutional constraints. *See* Johnson Br. 16.

Finally, Respondents make an appeal to practicalities, arguing that if the contiguity requirement is enforced, "separating municipal islands" "could require residents of municipal islands to vote in two locations for special assembly or senate elections falling on the same day as municipal elections." Legislature Br. 40. Even if the Court chose to remedy the contiguity problem by separating municipal islands, that would hardly be a significant concern, given the rarity of special elections. In the last decade, of the 19 million ballots that Wisconsinites have cast for state-legislative candidates, fewer than 100 were cast by voters residing in noncontiguous districts' municipal "islands" in special elections. That's less than 0.0006%.

II. The Court Should Hold that the Existing Maps' Adoption Violates the Separation of Powers.

This Court can and should address the separation-of-powers claim and hold that the adoption of the existing maps violated the separation of powers by ordering into effect the precise maps that the Governor vetoed.

A. The Separation-of-Powers Claim Is Not Procedurally Barred.

Respondents first suggest that many of the same doctrines—standing, issue preclusion, claim preclusion, laches, and the Declaratory Judgments Act—bar the Court's consideration of the separation-of-powers claim. These arguments fail for the reasons explained above. *See supra* Part I-A. And they fail for additional reasons as to preclusion and standing.

1. Preclusion

Preclusion doctrines are particularly inapposite because the separation-of-powers claim did not ripen and could not have been brought until the conclusion of the *Johnson* litigation. *See* Atkinson Br. 21–23. It was not until the Court ordered into effect the exact legislative maps the Governor had vetoed that the separation-of-powers claim even arose.

2. Standing

Respondents also argue that Petitioners and Atkinson Intervenors lack standing to bring a separation-of-powers claim, which they say belongs only to the Governor or the Legislature. But, as the U.S. Supreme Court

has repeatedly explained, the separation of powers is designed to protect not only the structural roles of the government's coordinate branches, but also the individual liberty of the governed. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 181 (1992); *Mistretta v. United States*, 488 U.S. 361, 380 (1989); *Bowsher v. Synar*, 478 U.S. 714, 721–22 (1986). Thus, even under the heightened standing requirements of federal law, *see Friends of Black River Forest*, 2022 WI 52, ¶17, when a challenged governmental action has caused some injury (here, by affecting the constitutionality of voters' districts), an individual can challenge that action based on the separation of powers. *See Bond v. United States*, 564 U.S. 211, 223 (2011) (noting that "the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers" (collecting cases)); *see also Raines v. Byrd*, 521 U.S. 811, 829–30 (1997) (holding that legislators were the wrong plaintiffs to bring a separation-of-powers claim). Given the injury to voters, Wisconsin law amply supports Petitioners' and Atkinson Intervenors' standing.

B. The Maps Clearly Violate the Constitution's Separation of Powers.

Respondents next urge the Court not to correct the separation-of-powers problem because it would have all manner of "absurd results." Legislature Br. 45. Not true.

Contrary to Respondents' suggestions, the separation of powers does not disable the Legislature from participating actively in redistricting litigation. But it does prevent the Legislature from circumventing the political process by *re*-proposing in litigation the precise legislation that the Governor has vetoed and that the Legislature lacks the votes to enact by override. If that seems like a unique burden on the Legislature as litigant, it reflects only that the Wisconsin Constitution charges the Legislature with the duty to provide for "districts by the enactment of statutes with the participation of the Governor." *Smiley v. Holm*, 285 U.S. 355, 370 (1932).

That ordering maps into place is a "'judicial function,'" Legislature Br. 43 (citation omitted), is no answer to the specific violation of ordering into place vetoed legislation. To be sure, when the political branches reach an impasse in redistricting, it is the proper role of the judicial branch to impose remedial maps. *See Jensen*, 2002 WI 13, ¶17. But the separation-of-powers guarantees of the Wisconsin Constitution mean that all maps are not created equal for purposes of exercising that judicial function. Where the political branches have failed to carry out their constitutional duties to enact compromise maps in the interest of the people, it makes sense that the Court should look primarily to the people—the voters who brought and intervened

in the impasse litigation in the interest of having a functioning democracy—as the best source of remedial maps for this Court to consider.

In any event, calling the adoption of SB 621 a "judicial function" does not transform the Court's powers. The Court does not suddenly obtain the ability to override the Governor's veto and usurp the legislative minority's exclusive prerogative to prevent override. *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 558–59, 126 N.W.2d 551, 599 (1964).

III. Clear, Judicially Neutral Standards Should Guide This Court's Remedy.

Although the parties fundamentally disagree about whether the existing legislative maps violate the Wisconsin Constitution, all appear to agree that, if the Court invalidates the existing state-legislative maps, new maps established to replace them must not only fully cure any constitutional violations but also fully comply with all districting criteria mandated by Wisconsin and federal law.

That would be true whether the newly established maps were adopted through legislative passage and gubernatorial approval, through a legislative override, or by order of this Court. If, however, new maps are established by this Court, then, consistent with the Wisconsin Judiciary's role as an independent and nonpartisan institution, any maps adopted must scrupulously adhere to the principle of judicial neutrality. Specifically, any

Court-ordered maps should minimize the risk of partisan skew, whether intended or not.

A. Remedial Maps Must Satisfy All State and Federal Mandatory Districting Criteria.

Though there is some disagreement as to how each criterion should be implemented, the parties agree that Wisconsin and federal law mandate the following six districting criteria: (1) population equality; (2) numbering and nesting; (3) contiguous territory; (4) respect for political-subdivision lines; (5) compact form and convenient territory; and (6) minority electoral opportunity. Set forth below, drawing on the parties' arguments and the law and facts, Atkinson Intervenors propose precise rules that the Court should require remedial maps to follow.

1. Population Equality

Each assembly district shall have between 58,938 and 60,127 residents according to the 2020 Census Redistricting Data.

All parties appear to recognize that, although federal law would allow maximum population deviations of up to 10%, courts in Wisconsin redistricting cases have generally attempted to constrain maximum population deviations in legislative districts to 2%, with no district deviating from the ideal by more than 1%. *See* Atkinson Br. 27 (collecting cases);

Johnson Br. 33 (noting that this Court recently "deemed acceptable" a 1.88% maximum deviation).

Tolerating deviations up to plus-or-minus 1% "'accommodate[s] traditional districting objectives,'" including those that Article IV expressly mandates. Clarke Br. 35 (quoting *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016)); *see* Governor Br. 26 n.5 (citing *Baumgart*, 2002 WL 341217471, at *3).

According to the 2020 Census Redistricting Data, Wisconsin's population on April 1, 2020, was 5,893,718. Dividing that figure by 99 (the number of assembly districts in Wisconsin) sets the average, or "ideal," assembly-district population at 59,532.5 persons. To keep all deviations below 1%, each district must have between 58,938 and 60,127 residents—just above 99% and just below 101% of the ideal population. Because each senate district contains three whole assembly districts, so long as assembly districts fall within this plus-or-minus-1% range, so too will senate districts. Specifically, each senate district will have between 176,814 and 180,381 residents, as compared with an average, or ideal, population of 178,597.5.

As to the relevant set of population data, the Court should order all parties once again to use the U.S. Bureau of the Census's 2020 Census Redistricting Data. As the Legislature correctly explained, even when redrawn later in the decade, "districts depend on the state of things as of

the census," which was taken on April 1, 2020. Legislature Br. 38 n.5; *see LULAC v. Perry*, 548 U.S. 399, 421 (2006) (mandating decade-long use of Census data).

2. Numbering and Nesting

> ***Wisconsin shall be divided into 33 single-member senate districts, each composed of three undivided single-member assembly districts, with districts numbered in a regular series.***

These requirements are not disputed by any party. They flow directly from the plain text of Wisconsin's Constitution and statutes. Wis. Const. art. IV, §§ 2, 4, 5; Wis. Stat. §§ 4.001, 4.009.

3. Contiguous Territory

> ***Every point in a state-legislative district shall be reachable from every other point without crossing the district boundary and entering another district's territory.***

Article IV, Sections 4 and 5 mandate that assembly and senate districts consist of "contiguous territory." Wis. Const. art. IV, §§ 4, 5. A district that contains a municipal "island" surrounded by another district's territory violates the Wisconsin Constitution's contiguous-territory mandates. *See* Atkinson Br. 7–18, 29; Clarke Br. 28 n.13 ("Contiguity is absent … when a portion of a district is separated from the remainder of the district …." (quotation marks omitted)). And Article IV likewise prohibits a district with two pieces of territory that touch only at a single point, like the

red squares on a checkerboard. *See* Ltr. from Att'y Gen John W. Reynolds to Wis. Senate, 1962 J. OF THE SENATE 69 (July 2, 1962).

4. Respect for Political-Subdivision Lines

Assembly districts shall be bounded entirely by the county, town, or ward lines shown in the LTSB ward shapefile that all parties and the Court used in the* Johnson *litigation.

Section 4 of Article IV mandates that assembly districts "be bounded by county, … town or ward lines." Wis. Const. art. IV, § 4. Today, the lines defining every county and every town (as well as every city and village) coincide with ward lines.[5] This requirement raises four issues implicated by the parties' October 16 Briefs.

First, which town and ward lines should bound assembly districts? Due to annexations, municipal and ward lines change over time. However, the same rationale for mandating decade-long use of the population totals from the most recent Census—taken on April 1, 2020—requires decade-long use of the municipal and ward lines from that same date. As the Legislature correctly explained, a "redistricting map takes those municipal lines as it finds them," and "districts depend on the state of things as of the census." Legislature Br. 38 & n.5.

[5] Although Wis. Stat. § 5.15(2)(a) permits very small municipalities not to divide themselves into wards, the LTSB ward shapefile refers to those municipalities as consisting of a single "ward."

Wisconsin law generally recognizes that when delineating state-legislative districts, "reference to any county or municipality means that county or municipality as its boundaries exist on April 1 of the year of the federal decennial census on which the districting plans … are based." Wis. Stat. § 4.002. And likewise, the term "ward" means "a ward prescribed by a municipality based upon municipal boundaries in effect on April 1 of the year of the federal decennial census." *Id.* § 4.006(2).

In the *Johnson* litigation, all parties and this Court relied on the electronic "shapefiles" produced in August 2021 by the Legislative Technology Services Bureau, or LTSB, which presumably used county, municipal, and ward boundaries as they existed on Census Day, April 1, 2020 (LTSB's "2020 Redistricting Data for Wisconsin at the Block and Ward Levels"). It would invite needless chaos and extended battles of experts if the Court were to allow conflicting datasets to be used in proposing or evaluating remedial maps in this litigation. If the parties do not all use common shapefiles, it will be nearly impossible for the Court to compare the parties' remedial proposals to one another—or even to determine whether districts consist of contiguous territory. The Court therefore should expressly order that the municipal and ward lines reflected in the LTSB ward shapefile on which all parties and the Court relied in the *Johnson*

litigation remain the relevant municipal and ward lines for any remedial proceedings in this action.[6]

Second, does mandating that districts be bounded by county, town, and ward lines mean that counties, towns, and wards may not be divided in forming assembly districts? Here, the answer is clearly no. Counties have been divided into multiple districts in every assembly map since the State was founded. And given the plus-or-minus-1% population constraint, it would be difficult for any constitutionally compliant map today to avoid dividing towns. When dividing counties or towns, however, mapmakers must track ward lines.

The Wisconsin Constitution's plain text does not speak to keeping counties, towns, or wards undivided. It speaks instead to a different issue: the relationship between district "bound[s]" and "county, … town or ward lines." Wis. Const. art. IV, § 4. Had the framers wished to say that no county,

[6] Whichever ward lines the Court chooses must respect Census blocks both to ensure accurate population totals and to facilitate precisely delineating districts—and the LTSB's above-cited 2020 redistricting dataset appears to be the most recent statewide ward file to do so. Many wards in this file themselves consist of noncontiguous territories, but several contain tiny, remote ward fragments that are so far from the main ward cores that they inhibit district contiguity. Because these ward fragments appear in neither prior nor subsequent ward files, their appearance in LTSB's 2020 redistricting dataset may have been accidental. Taking advantage of the weeks-long period before this Court rules on the validity of the existing state-legislative maps, LTSB should review all noncontiguous wards and develop and publicly release a revised version of its dataset that repairs any unintentional ward fragments.

town, or ward shall be divided in the formation of an assembly district, they certainly knew how to do it. *Compare id. with id.* § 5 ("no assembly district shall be divided in the formation of a senate district").[7] Although keeping political subdivisions intact traditionally has been considered desirable, it is not actually required by the Wisconsin Constitution or federal law.

Third, to ensure that assembly districts "consist of contiguous territory," as mandated by Article IV, Section 4, may a ward be divided into two new wards? Here, the October 16 Briefs are illuminating. Respondents suggest that if the Court adheres to its strict construction of the term "contiguous territory," which dates to the nineteenth century, it would be permissible to break off a noncontiguous ward's municipal "island" and "dissolve" it into the surrounding district. *See* Johnson Br. 29 (commending "a very simple remedy": "absorb[ing municipal islands] into the districts surrounding them"); *id.* at 37 ("attach[ing] islands to their containing districts"); Legislature Br. 60–61 (likewise commending a "limited" and "straightforward" remedy: "dissolving municipal islands" into "surrounding districts"). Thus, one ward would be replaced by two, as the noncontiguous

[7] The framers likewise did not mandate that, in forming assembly (or senate) districts, as few counties, towns, and wards shall be divided as practicable. *Cf.* Wis. Const. art. IV, § 4 (requiring assembly districts to be in as compact form "as practicable").

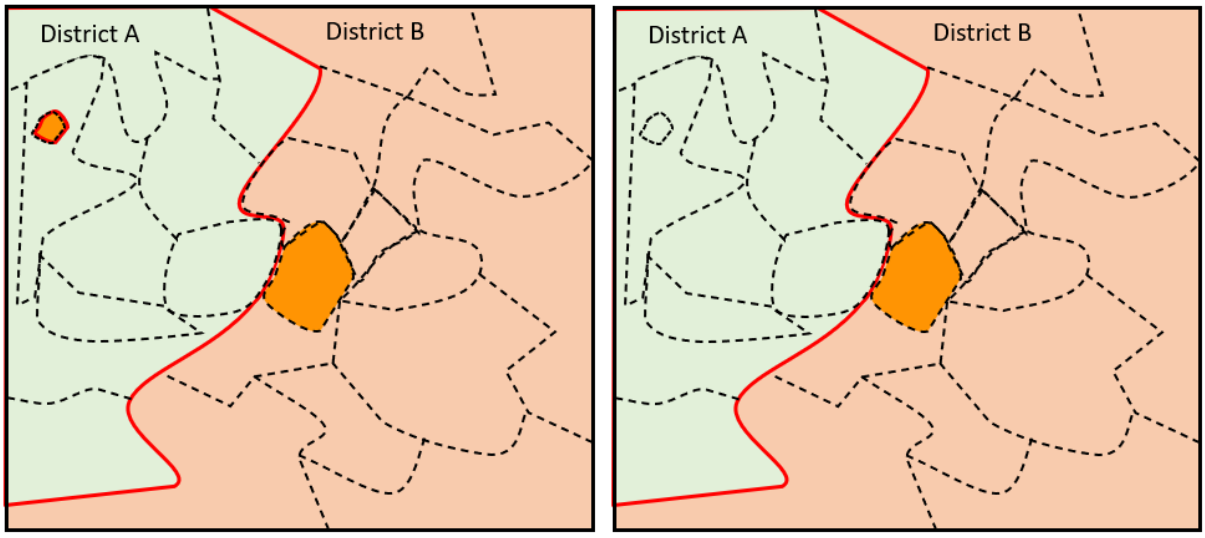
municipal "island" would become its own, new ward (because each ward must be nested in a single assembly district).[8]

Figure 1 illustrates this relatively simple remedy. Figure 2 depicts an alternative approach that involves more disruption to districts and may make it harder to minimize maps' partisan skew, but would avoid replacing one previously noncontiguous ward with two contiguous wards.

The left-hand map in Figure 1 depicts a bright orange ward in District B that contains a noncontiguous municipal "island" surrounded by green wards in District A. The thick red line marks the boundary between Districts A and B. The red district boundary follows ward lines, but District B is not contiguous. In the right-hand map, the noncontiguity has been cured. The municipal-island part of the old orange ward has been "dissolved" into District A, while the rest of the old orange ward remains in District B. Now, both districts consist of contiguous territory, and the district boundary continues to follow ward lines. So splitting the bright orange ward into two wards and then dissolving the "island" into District A provides a simple means to both comply with the ward-line mandate and cure the prior map's violation of the contiguous-territory mandate.

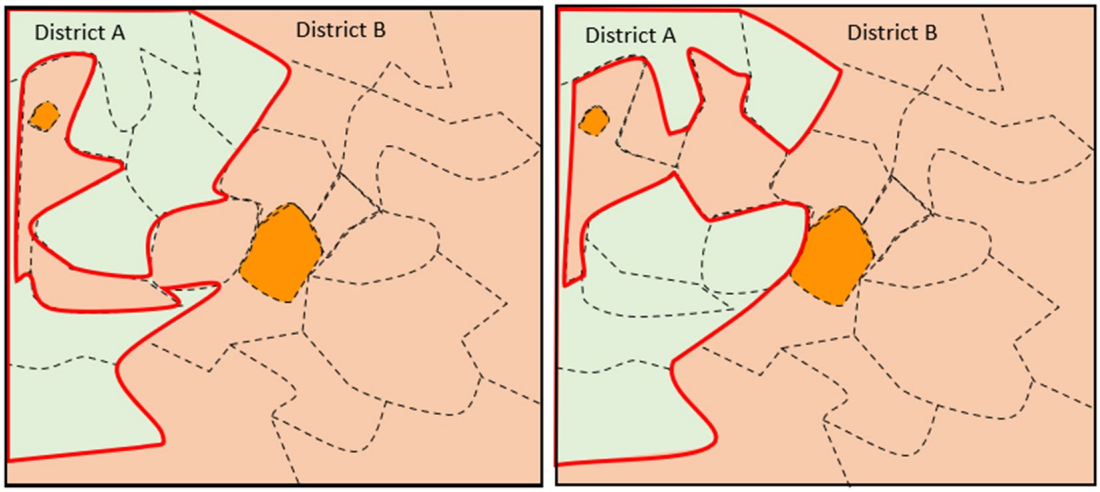
[8] If necessary to protect voter privacy, the Court then could order that state-legislative election returns for any newly defined ward having a very small population (say, 20 residents or fewer) be combined with returns for an adjacent ward.

Figure 1



The alternative illustrated in Figure 2 would join the noncontiguous orange "island" with its orange "mainland" municipality, which would also require joining the green "ocean" ward that surrounds the "island" and often an indeterminate chain of intervening green wards needed to connect the "island" to the "mainland." Figure 2 illustrates two examples of this remedy because, unlike the approach depicted in Figure 1, this approach often will not generate a single unique solution to the noncontiguity problem.

Figure 2



In either case—making a ward's municipal "island" a separate ward and then placing it in the assembly district with its surrounding "ocean" (Figure 1) or joining the "island," its "mainland," and some portion of the intervening "ocean" together in a single district (Figure 2)—the remedy would continue to comply with the constitutional mandate that districts be bounded by county, town, or ward lines, while curing the prior map's violation of the contiguous-territory mandate.

It is important for the Court to announce in advance whether it will permit the first remedy, the second remedy, or both. Otherwise, the parties will not know what is, or is not, permissible when designing their remedial proposals. Regardless of how the Court resolves this question, it should state its answer clearly at the outset of any remedial proceedings.

Fourth, how does Wisconsin law protect communities of interest? Petitioners note that some federal courts consider "preserving communities of interest," while not legally mandated, to be "a traditional districting principle." Clarke Br. 42. With 72 counties, nearly 2,000 municipalities, and about 7,000 wards, Wisconsin's political-subdivision lines provide redistricters with significant guidance regarding the contours of the State's actual communities. Wisconsin's local governments are generally required by statute to "observe the community of interest of existing neighborhoods and other settlements" when drawing ward boundaries. Wis. Stat. § 5.15(1)(b); *see id.* § 5.02(25). Thus, respect for communities of interest is primarily achieved by ensuring adherence to the Constitution's mandate to bound assembly districts "by county, … town or ward lines." Wis. Const. art. IV, § 4.

5. Compact Form and Convenient Territory

No district in a new assembly (or senate) map shall be less compact, based on both the Polsby-Popper and Reock compactness scores, than the least compact district in the existing assembly (or senate) map.

Article IV, Section 4 mandates that assembly districts "be in as compact form as practicable"; and Article IV, Section 5 mandates that senate districts consist of "convenient … territory." Wis. Const. art. IV, §§ 4, 5. Article IV does not define "compact" form or "convenient" territory.

However, the compact-form requirement, with its "as practicable" qualifier, comes after, and carries less weight than, Article IV's express mandates regarding population equality, political-subdivision lines, and contiguous territory. *See* Wis. Const. art. IV, §§ 3, 4.

Mirroring the observation that "[r]edistricting caselaw in Wisconsin and elsewhere routinely looks to just a few well-settled metrics of compactness," Atkinson Br. 44 (citing *Baumgart*, 2002 WL 34127471, at *4, *7), Petitioners point to the Polsby-Popper and Reock compactness measures as "[t]wo accepted metrics," Clarke Br. 36; *see*, *e.g.*, *Cooper v. Harris*, 581 U.S. 285, 311 (2017) (relying on these metrics); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 818 (Pa. 2018) (same).

Both metrics are grounded in plane geometry. The Polsby-Popper score focuses on a district's *jaggedness* by comparing its area to the length of its perimeter. The Reock score focuses on a district's *elongation* by comparing its area to the area of the smallest circle that could circumscribe the district. For each metric, a circle, being neither jagged nor elongated, receives a perfect score.

Both metrics depend on various factors, such as the shape of the State's exterior boundary, that are unavoidable and thus irrelevant to the compactness mandate's anti-gerrymandering purpose. A State-specific

benchmark is needed. Atkinson Intervenors therefore suggest that the Court look to Wisconsin's prior maps to assess what levels of compactness are "practicable." *See* Atkinson Br. 44. Specifically, if an assembly district in a proposed remedial map is both more jagged (according to Polsby-Popper scores) and more elongated (according to Reock scores) than any district in the existing assembly map, the district is likely not "in as compact form as practicable," so should be deemed presumptively unconstitutional. Similar benchmarking principles would apply to a proposed senate district, when compared to districts in the existing senate map. *See* Wis. Const. art. IV, § 5 (mandating "convenient … territory," to avoid having to cover extraordinarily long distances).

6. Minority Electoral Opportunity

Unless justified by compliance with Section 2 of the Voting Rights Act, race shall not be the predominant factor motivating the decision to place a significant number of voters within or without an assembly or senate district. Section 2 of the Voting Rights Act, however, may in some circumstances require a certain number of assembly and senate districts in which members of a particular racial or language-minority group can nominate and elect their preferred candidates.

All parties agree that remedial maps must comply with the Fourteenth and Fifteenth Amendments to the U.S. Constitution and Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. *See, e.g.*, Atkinson Br. 30–32; Clarke Br. 41–43; Governor Br. 26. And no parties currently contend

that the existing state-legislative maps violate these federal laws. *See, e.g.*, Clarke Br. 42, 50 n.17; Governor Br. 26.

Petitioners suggest it may be possible to devise a proper remedy for the existing state-legislative maps' constitutional violations that would leave some districts substantially or wholly untouched. *See* Clarke Br. 49. And they further suggest that if those districts include, among others, the districts whose federal-law compliance was litigated in this Court in 2022 and in the U.S. Supreme Court in *Wisconsin Legislature v. Wisconsin Elections Commission*, 595 U.S. 398 (2022) (per curiam), there might be no need for renewed consideration of federal-law issues focusing on race and minority electoral opportunity. *See* Clarke Br. 49.

B. This Court Should Maximize Neutrality and Minimize Partisan Skew in Any Court-Ordered Maps.

If the existing maps are invalidated and remedial maps are enacted through normal legislation, the Court's evaluation of the newly enacted remedial maps would start and end with the districting criteria mandated by Wisconsin and federal law, as discussed above. But if the Legislature and Governor fail to adopt lawful remedial maps, this Court should adopt new maps before the 2024 elections. In that scenario, it is essential that the Court scrupulously adhere to the principle of judicial neutrality.

If the parties, collectively, propose more than one remedy that complies with the above-listed state and federal mandatory criteria, then the Court's application of the principle of judicial neutrality should determine which of those lawful remedial proposals will be chosen. While the mandatory criteria are ultimately binary—a remedial proposal either does or does not comply—the principle of judicial neutrality is not.

The *Johnson* Court recognized as much. As Justice Hagedorn's opinion for the Court explained, "[p]roposed maps are either lawful or they are not," but he then sought to identify from among the parties' lawful proposed maps the one that, by maximizing core retention, minimized "change." *Johnson v. Wisconsin Elections Commission*, 2022 WI 14, ¶¶8, 26–35, 400 Wis. 2d 626, 644–49, 971 N.W.2d 402, 411–14 (*Johnson II*). That was a matter of degree, not a binary choice. This search flowed from the Court's opinion in *Johnson I*, which (erroneously, in Atkinson Intervenors' view) elevated the notion of "least change" while barring the parties from presenting evidence about, and thus barring the Court from openly considering, the partisan makeup of districts. *See Johnson I*, 2021 WI 87, ¶¶39–68, 73–80; *see also id.* ¶87 (Hagedorn, J., concurring).

The elevation of "least change" and the banning of all discussions of electoral data were mistaken in a malapportionment case like *Johnson* and

would be even more misguided in the present case. *See, e.g.*, Atkinson Br. 33–42; Clarke Br. 43–49; Governor Br. 25–35; Senators Br. 25–28.

In service of the principle of judicial neutrality, if the Court receives two or more proposed remedies that it deems otherwise lawful under the state and federal mandatory districting criteria, the Court should choose from among those lawful proposed remedies by posing this question:

> **Which proposed remedy is *least* likely to thwart the fundamental democratic principle of majority rule?**
>
> **That is, based on the totality of circumstances, which proposed remedy is *least* likely to award a majority of seats, in either or both houses of the Legislature, to a political party whose legislative candidates in the 2024 general election receive *fewer* votes than the other major political party's candidates receive?**[9]

The essence of neutrality in districting is that the will of the people should not be distorted, either intentionally or unintentionally, by the placement of district lines. But distortion occurs when—in an extraordinarily competitive State like Wisconsin—one political party is guaranteed a legislative majority regardless of whether it earns a popular majority at the polls in

[9] In assessing this question, the Court should assume that both major political parties will field candidates in every assembly and senate district. *Cf.* Clarke Br. 45, 56 (asking the Court to order special senate elections in November 2024 so that all Wisconsinites can elect candidates to both houses under lawful maps); Governor Br. 35 (same).

any particular election cycle. This Court should avoid establishing maps that systematically skew the neutral translation of votes into seats and thus thwart majority rule. *See* Atkinson Br. 40–41; Senators Br. 27.

To be sure, it will never be possible to design maps that entirely eliminate the risk of a "wrong winner"—with one party gaining (or retaining) control of the Legislature even though its legislative candidates receive *fewer* votes statewide than do the other party's legislative candidates. But as between two otherwise lawful proposed remedies that satisfy all mandatory districting criteria, the Court should choose the proposed maps that minimize this risk. Anything else would put a judicial thumb on the scale for one political party over the other. *See Jensen*, 2002 WI 13, ¶12 (when "'comparing submitted plans with a view to picking the one … most consistent with judicial neutrality,'" courts "'should not select a plan that seeks partisan advantage'") (citation omitted). *See generally Carter v. Chapman*, 270 A.3d 444, 458–59, 461–62, 470–71 (Pa.), *cert. denied*, 143 S. Ct. 102 (2022); *Harper v. Hall*, 868 S.E.2d 499, 515–23, 535–60 (N.C. 2022), *aff'd sub nom. Moore v. Harper*, 600 U.S. 1 (2003).

Finally, this approach will have a significant additional benefit: responsiveness to the electorate. The "core purpose of redistricting," after all, is "to promote democracy." Governor Br. 1. And achieving that purpose,

in turn, requires responsiveness to shifts in public opinion and voters' behavior. Responsiveness thus requires maps to have a reasonable number of tightly competitive districts, where the outcome is not preordained. Otherwise, elections lose their meaning. *See Maestas v. Hall*, 274 P.3d 66, 80 (N.M. 2012) ("competitive districts allow for the ability of voters to express changed political opinions and preferences"); *Hall v. Moreno*, 270 P.3d 961, 973 (Colo. 2012) (en banc) (holding that "consideration of competitiveness is consistent with the ultimate goal of maximizing fair and effective representation"); *see also West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) ("There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and … [a]uthority here is to be controlled by public opinion, not public opinion by authority.").

A map that minimizes partisan skew and the risk of a "wrong winner" almost inevitably will foster responsiveness, as well. Maps that are likely both to convert a 52%-to-48% voting majority for the Democrats into Democratic control of the Legislature and to convert the same voting majority for the Republicans into Republican control typically will feature districts that can change hands depending on the parties' fortunes in a given election cycle. And being responsive to the vote helps ensure that the

Wisconsin Senate and Assembly "deriv[e] their just powers from the consent of the governed." Wis. Const. art. I, § 1.

IV. The Court Should Adopt a Streamlined Process for Resolving Factual Questions and Selecting the Best Remedial Maps.

If the Court adopts the clear districting rules and judicially neutral approach outlined in Part III to guide its remedial proceedings, there should be little, if any, need for factfinding. *See* Atkinson Br. 42–45. To the extent the Court may determine that limited factfinding is necessary, however, it can refer such finding to a panel of circuit-court judges. There is no need for a referee with mapmaking experience. The Court can simply select the best remedial maps from among the parties' proposals, and it can do so under procedures that allow maps to be adopted before the 2024 elections.

A. The Court Should Select, Not "Develop," Remedial Maps.

This Court should select rather than attempt to draw any remedial maps. All parties agree that the Court should give them an opportunity to submit either one or two proposed remedies (each proposal consisting of 33 senate and 99 assembly districts). *See, e.g.*, Atkinson Br. 49; Clarke Br. 51; Governor Br. 35; Senators Br. 30–31; *see also* Legislature Br. 61. The parties likewise suggest that the Court could pick from among those proposals after rounds of briefing and expert reports. *See, e.g.*, Atkinson Br. 49–50; Clarke Br. 51–53; Governor Br. 35; *see also* Legislature Br. 61–62.

Petitioners, however, suggest that the Court should engage a referee "who brings map-drawing experience and expertise," so that the Court could "develop[]" its own map. Clarke Br. 14, 49–51; *see also* Senators Br. 22, 25. While federal and state courts have sometimes taken that path, it is not necessary or desirable here. As its October 6 Order suggested, the Court may need assistance with factfinding—not with mapmaking.

Court-ordered maps are routine in redistricting litigation, but court-*drawn* maps should be a last resort. Selecting among the parties' competing proposals based on written submissions (briefs and expert reports) comports with the traditional judicial function. By contrast, overseeing the drawing of maps using redistricting software falls far outside the ordinary judicial role. No doubt, some courts have taken this leap—and it is indisputably lawful to do so when the circumstances so require. But crafting 132 legislative districts inevitably would pull this Court deeper into the political thicket than is necessary. It should be avoided.

Instead, the Court should look to the parties for remedial proposals. If the Court is inclined to adopt a remedial map proposed by a party but is concerned about some of its discrete features, the Court can simply direct the party to revise those features and resubmit. *See* Governor Br. 35; *cf.*

Clarke Br. 52. That process could take 48 or 72 hours and save the Court the time and complexity of selecting and overseeing a map-drawing referee.

There is also an important policy reason not to appoint a map-drawing referee. If the Court does so, parties who believe the Court is ultimately going to draw its own map may be incentivized to submit extreme proposals. By contrast, announcing that the Court will choose the most neutral lawful map submitted to it will encourage the parties to moderate their positions from the outset.

In any event, it may be difficult, perhaps impossible, for a referee to improve on the best lawful maps that the parties will present in this case. Atkinson Intervenors will submit maps drawn with the assistance of algorithms designed to optimally comply with Wisconsin and federal law and with the principle of neutrality. A referee who starts with such a map and seeks to improve it incrementally will soon discover that taking a step forward with one criterion will likely set the map two steps back on other criteria. After all, the algorithm is designed to seek out all incremental improvements that take one step forward and zero steps back. So the argument for a map-drawing referee may be especially weak in this case.

B. The Court Should Adopt a Streamlined Remedial Process Combining the Best Features Proposed by the Parties.

The Court should adopt a speedy, efficient remedial process that draws on the best of what the parties have proposed. Other than the suggestion of a referee, the parties are largely aligned in their proposals for a remedial process. The central features are: limited factfinding; party submission of maps; and rounds of expedited briefing and expert reports, followed by oral argument. *See* Atkinson Br. 42–53; Clarke Br. 49–53; Governor Br. 35; Senators Br. 30–31; *see also* Legislature Br. 61–62.

Below is a potential schedule demonstrating that, using this process, the case could be fully resolved in about four months, leaving Wisconsin's state and local election administrators ample time to prepare for the August 13 and November 5, 2024 primary and general elections. The dates shown here are merely illustrative, but Atkinson Intervenors urge the Court to include certain specifications in its orders—whenever they issue—as more fully set forth below:

- **Tuesday, November 21, 2023**: The Court hears oral argument on the four questions briefed in October.
- **Tuesday, December 12, 2023**: The Court issues an opinion deciding whether the existing maps violate the Wisconsin

Constitution. If the Court invalidates the maps, it also issues an order:

- enjoining the maps' use in future elections;[10]
- announcing that it will not impose a remedial map before February 2024 and will not do so if the Legislature and Governor first enact lawful replacement maps;[11]
- announcing that the Court will reject any proposed remedial maps that violate Wisconsin or federal law;[12]
- announcing that, consistent with the principle of judicial neutrality, the Court will choose among lawful proposed maps by evaluating, based on the totality of circumstances, which proposed remedy is *least* likely to award a majority of seats, in either or both houses of the

[10] Atkinson Br. 49; Clarke Br. 55.

[11] Although this Court may not be required to afford the political branches another opportunity to enact maps and certainly should not delay its remedial proceedings for that reason (*see* Clarke Br. 53, 55), Atkinson Intervenors see no reason for this Court to foreclose any prospect, however remote, that the Legislature and Governor might reach a bipartisan compromise and enact lawful remedial maps through the ordinary legislative process. *See Jensen*, 2002 WI 13, ¶¶22–23. The schedule presented here would give the political branches more than two months—simultaneous with the Court's remedial process—to attempt to enact maps. Two months surely is a "reasonable opportunity to redistrict." Legislature Br. 61; *see Zimmerman*, 22 Wis. 2d at 572, 126 N.W.2d at 567 (providing 63 days for legislative action).

[12] *See supra* Part III-A.

Legislature, to a political party whose legislative candidates in the 2024 general election receive *fewer* votes than the other major political party's candidates receive;[13]

- announcing whether a ward containing a municipal "island" can be divided into two new wards to ensure that assembly districts consist of contiguous territory;[14]
- announcing that the Court will use the same demographic and geographic datasets that the 2021 Legislature, the *Johnson* Court, and all parties to *Johnson* used, reflecting population and municipal and ward lines as of Census Day, April 1, 2020;[15]
- ordering the Legislature's Technology Services Bureau (LTSB) to produce, within three days, those datasets as well as geocoded addresses for all state legislators;[16]
- inviting all parties to submit one or two proposed maps (each containing 33 senate and 99 assembly districts),

[13] *See supra* Part III-B.
[14] *See supra* Part III-A-4.
[15] *See supra* Parts III-A-1, III-A-4; *see also* note 6 (explaining why the dataset might need to be revised to repair unintentional ward fragments).
[16] Clarke Br. 41, 51.

along with certain data described below, within three weeks;[17] and

- setting a detailed schedule for the remainder of the remedial process.[18]

- **Tuesday, January 2, 2024**: Parties file and serve proposed remedial maps (including a high-resolution image of the proposed plan, Census-block equivalency files in CSV file format, and ESRI shapefiles),[19] with supporting briefs and expert reports, supplemented by a copy of the replication data for each expert report (including replication code, source data, input parameters, software libraries with version numbers, map projections used for geometric measurements, and output data).[20]
- **Tuesday, January 16, 2024**: Parties file and serve response briefs and expert reports, with supplemental data.[21]

[17] Atkinson Br. 49; Clarke Br. 51, 55; Senators Br. 30; *see also* Legislature Br. 61.
[18] Atkinson Br. 49–50; Clarke Br. 50–53; Senators Br. 30.
[19] Atkinson Br. 49; Clarke Br. 51, 54; *see also* Legislature Br. 61.
[20] *See* Clarke Br. 51, 54 (providing a slightly less detailed list of materials to accompany expert reports).
[21] Atkinson Br. 49; Clarke Br.; *see also* Johnson Br. 37; Legislature Br. 61; Governor Br. 35 (suggesting that parties who do not propose maps could submit responsive briefs and reports).

- **Tuesday, January 23, 2024**: Parties file and serve reply briefs and expert reports, with supplemental data.[22]
- **Tuesday, February 6, 2024**: The Court hears oral argument on proposed remedies.[23]
- **Tuesday, February 20, 2024**: The Court issues an opinion making factual findings, stating conclusions of law, and (most likely) establishing new state-legislative maps.

At this point the case is, most likely, done—nearly two months earlier in the election year than *Johnson* was decided and within four months of the filing of the October 30 Response Briefs. However, if the Court determines that questions of material fact remain, it could take additional steps (again, dates are merely illustrative):

- **Tuesday, February 20, 2024**: The Court issues an Order of Reference:
    - specifying the material factual questions that remain genuinely disputed;
    - appointing a panel of three circuit judges, one from each of three circuits;

[22] Atkinson Br. 50; *see* Legislature Br. 61. In 2022, the *Johnson* Court gave parties five days for reply briefs and expert reports.
[23] *See Johnson II*, 2022 WI 14, ¶5 (argument held 15 days after deadline for reply briefs and reports).

- ordering the panel to conduct an expedited evidentiary hearing;
- assigning the venue for the hearing;
- limiting the panel's powers to holding the evidentiary hearing, making an evidentiary record, preparing a report making findings of fact (but not conclusions of law), and filing with this Court the panel's report, the hearing transcript, and original exhibits;
- prohibiting all discovery;[24] and
- setting a deadline for the panel to complete its work within about three weeks.[25]

- **Monday & Tuesday, March 4–5, 2024**: The three-judge panel conducts its evidentiary hearing.[26]
- **Monday, March 11, 2024**: The three-judge panel files its report, the hearing transcript, and original exhibits with this Court.[27]

[24] Atkinson Br. 51. *But see* Legislature Br. 62 (asserting that "[r]emedial-stage discovery, including fact discovery and expert depositions" would be required).
[25] Atkinson Br. 45–48, 50–52.
[26] Atkinson Br. 48, 51; *see also* Legislature Br. 62.
[27] Atkinson Br. 51; *cf.* Legislature Br. 62.

- **Friday, March 15, 2024**: Parties and *amici curiae* may file objections to the panel's report.[28]

At this point the Court could hear oral argument (or not) and then issue its final opinion with full findings of fact, conclusions of law, and an injunction establishing new state-legislative maps. Even with that extra factfinding step and the appointment of a three-judge panel, the entire process could end earlier than redistricting litigation ended in *Johnson* in 2022 (on April 15) or in *Baldus* in 2012 (on April 11). *See Johnson v. Wisconsin Elections Commission*, 2022 WI 19, ¶¶3, 73, 401 Wis. 2d 198, 210, 254, 972 N.W.2d 559, 560, 565, 586 (*Johnson III*); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860 (E.D. Wis. 2012) (three-judge court).[29]

Respondents assert that remedial proceedings designed to provide full relief for Wisconsin voters in time for the 2024 elections would "compromise parties' rights to fully and fairly litigate" this case, Legislature

[28] Atkinson Br. 52; *cf.* Legislature Br. 62 (requesting two more rounds of briefs and supplemental expert reports at this late stage).

[29] Respondent Wisconsin Elections Commission would like maps to be in place by March 15, 2024 (WEC Resp. 3), and Petitioners suggest a target four days later, on March 19 (Clarke Br. 50 & n.18 (citing Wis. Stat. § 10.06(1)(f)). But Petitioners correctly note that courts in Wisconsin adopted legislative districts in mid-*April* in both 2012 and 2022 (Clarke Mot. for Scheduling Order 8 n.2), and in 2002 the districts were adopted on *May 30*—all without deleterious effects on election administration.

Br. 62, and may violate "a 'basic requirement of due process,'" Johnson Br. 38 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).[30] The schedule outlined here shows those concerns are unwarranted.

CONCLUSION

This Court should hold Wisconsin's existing state-legislative maps unconstitutional and institute remedial proceedings in accordance with the principles and procedures set forth in this Brief.

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Electronically signed by Sarah A. Zylstra

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

Respectfully submitted,

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

*Appearing *pro hac vice*

[30] For the reasons explained in the August 29 and September 18, 2023 filings in *Wright v. Wisconsin Elections Commission*, No. 2023AP1412-OA, there is likewise no due-process issue with the participation of Justice Protasiewicz in this case, and Respondents' arguments to the contrary are meritless.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 10,950 words.

Electronically signed by Sarah A. Zylstra

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