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10-16-2023
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 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*
*** Pro hac vice motion forthcoming*

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INTRODUCTION

This original action is a collateral attack on the Court's final judgment in *Johnson*. Petitioners filed this action one day after Justice Protasiewicz's investiture and now ask the Court's new majority to transform itself into a super-legislature, overturning *Johnson* and re-districting anew. Petitioners and Intervenors-Petitioners lack standing to demand a statewide redrawing of district lines, and their claims are barred by laches, preclusion, and estoppel. Stare decisis demands adherence to *Johnson* for both the merits and the parameters of any remedy. Petitioners' contiguity claim is contrary to more than 50 years of settled practice, and their separation-of-powers claim ignores what actually happened in *Johnson.* Rather than require further remedial proceedings in search of a problem, the Court should dismiss the petition and reject the invitation to exercise raw political power.

STATEMENT OF THE ISSUES

1. Do the existing state legislative maps violate the contiguity requirements contained in Article IV, §§4-5 of the Wisconsin Constitution?

2. Did the adoption of the existing state legislative maps violate the Wisconsin Constitution's separation of powers?

3. What standards should guide the court in imposing a remedy for the constitutional violation(s)?

4. What fact-finding, if any, will be required if the court determines there is a constitutional violation and what process should be used?

ORAL ARGUMENT & PUBLISHING

Oral argument is scheduled for November 21, 2023. The opinion should be published given the statewide importance of the issues.

STATEMENT OF THE CASE

It was clear after the 2020 census that the State's 2011 electoral districts were malapportioned, but the Legislature and Governor were at an impasse regarding new redistricting maps. A group of voters petitioned this Court to take an original action and issue an injunction modifying the 2011 district lines to "comport with the one person, one vote principle while satisfying other constitutional and statutory mandates." *Johnson v. Wis. Elections Comm'n* (*Johnson I*), 2021 WI 87, ¶5, 399 Wis. 2d 623, 967 N.W.2d 469; *see Johnson v. Wis. Elections Comm'n* (*Johnson III*), 2022 WI 19, ¶73, 401 Wis. 2d 198, 972 N.W.2d 559.

In *Johnson*, the Court first asked what standards governed that malapportionment remedy. Order of Oct. 14, 2021, *Johnson*, No. 2021AP1450-OA. After all parties, including seven groups of intervenors, submitted briefs on that question, this Court issued *Johnson I*, which decides or forecloses every question presented here. *See* 2021 WI 87, ¶36 (deciding contiguity); *id.* ¶3 (describing Court's role as "a purely judicial one"); *id.* ¶¶24-38 (factors within the Court's power to

consider); ¶¶39-63 (factors beyond the Court's power to consider); *accord id.* ¶82 n.4 (Hagedorn, J., concurring).

After *Johnson I*, the parties, including the Governor and Legislature as intervenors, proposed remedies supported by multiple rounds of expert reports. Initially, this Court selected the Governor's proposed remedy for the State's legislative and congressional districts. *Johnson v. Wis. Elections Comm'n* (*Johnson II*), 2022 WI 14, ¶52, 400 Wis. 2d 626, 971 N.W.2d 402. The U.S. Supreme Court summarily reversed *Johnson II* with respect to the state legislative districts. *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 406 (2022) (per curiam). On remand, this Court adopted the *Johnson* Petitioners' and Legislature's proposed remedy for state legislative districts. *Johnson III*, 2022 WI 19, ¶73. And *Johnson*'s judgment became final.

More than a year later, and the day after Justice Protasiewicz's investiture, Petitioners filed this original action collaterally attacking *Johnson*. The lawsuit was invited by Justice Protasiewicz's campaign statements and promised by Petitioners right after election day. *See* Recusal Mot. App.001, 011.

The Legislature asked Justice Protasiewicz to recuse given her campaign statements calling *Johnson III*'s maps "rigged" and *Johnson* wrong, combined with the Democratic Party's outsized campaign donations. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Justice Protasiewicz denied the motion, reasoning that nearly $10 million in Democratic Party campaign donations was "not unusual for a

Wisconsin Supreme Court race" and that her campaign remarks were statements of "personal 'values,' not pledges." *Clarke v. Wis. Elections Comm'n*, 2023 WI 66, ¶¶17, 43 (Protasiewicz, J.).

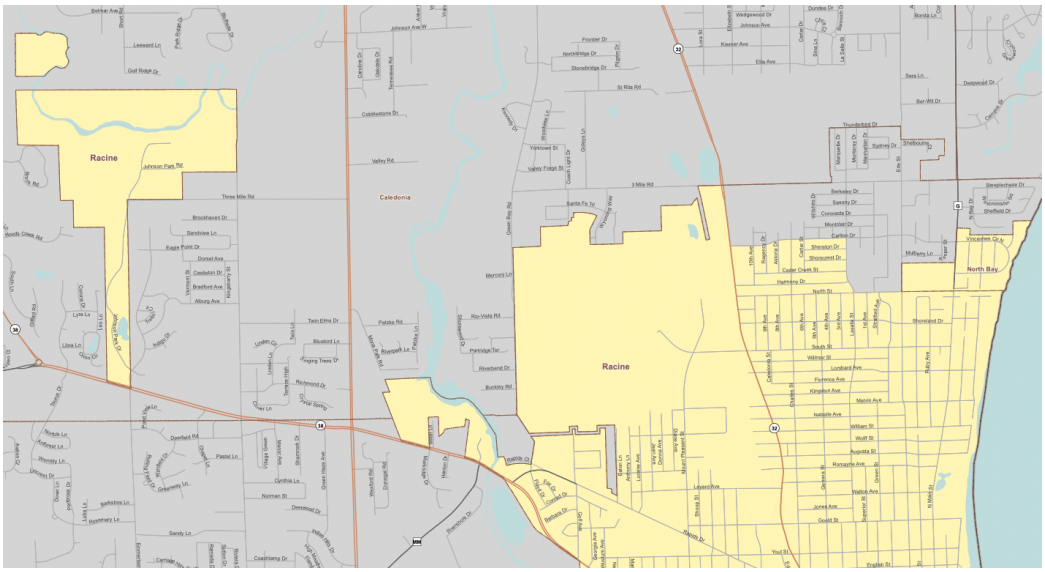
That same day, this Court granted the *Clarke* petition in part and denied a similar petition in *Wright v. Wisconsin Elections Commission*, No. 2023AP1412-OA. Justice Protasiewicz cast the deciding vote, and three Justices dissented. *Clarke v. Wis. Elections Comm'n*, 2023 WI 70. That order gave all parties 10 days—half of them falling on weekends and a federal holiday—to submit briefs on the four questions presented. *Id*.

ARGUMENT

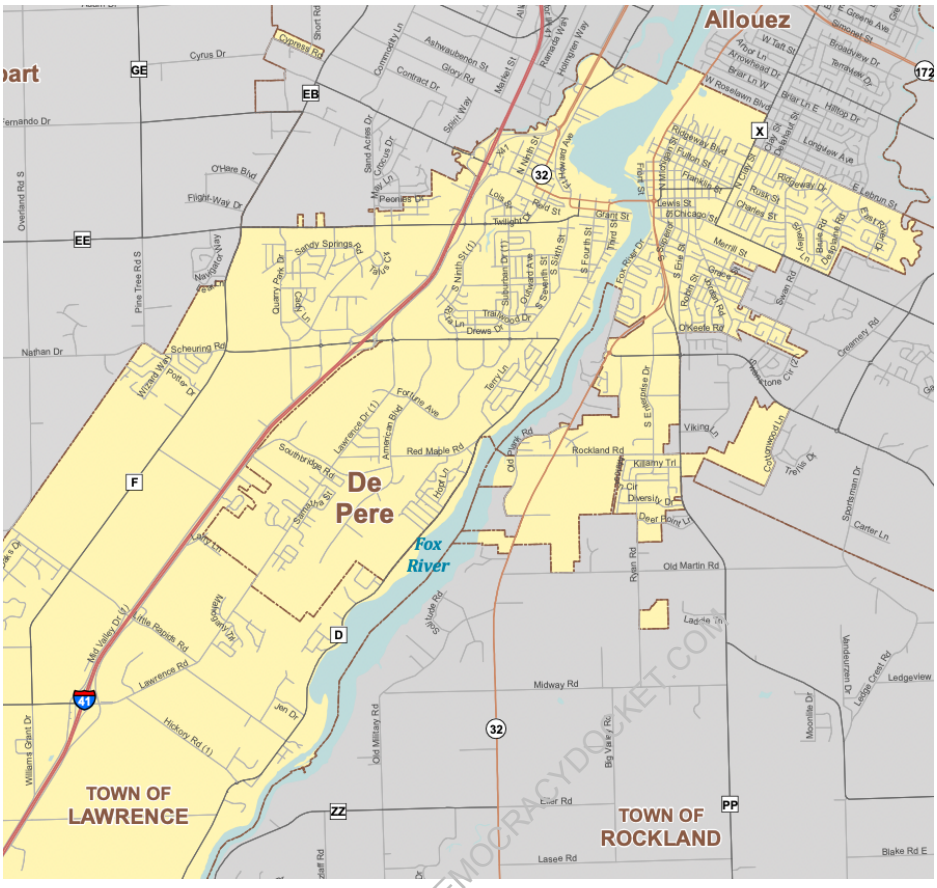
I. *Johnson III*'s districts are constitutionally contiguous.

For more than 50 years, Wisconsin has redistricted municipalities together with "[i]sland territory" resulting from municipal annexations.[1] *See* Wis. Stat. §4.001(2) (1971). For instance, a golf course annexed by the City of Racine—no one lives there—is included with the remainder of its Racine city ward in AD66.

[1] A legislative report regarding these municipal "islands" and some water islands begins at App.4.



AD66, Wis. Legis. Tech. Servs. Bureau (LTSB), https://perma.cc/G7H5-64QD; *see* App.8. Similarly, a small annexation by the City of De Pere—no one lives there either—is included in the southeast of AD2, thereby keeping the City of De Pere whole. *See* App.4. The same district includes a small island in the northwest portion of the Town of Lawrence—only 20 people live there—to keep that town whole too.



AD2, LTSB, https://perma.cc/WN5B-C79H; *see* App.4.

To put Petitioners' challenge in context—roughly one-third of the municipal islands they challenge as discontiguous have 0 population; more than 80% have 20 or fewer people; and only a handful (roughly 5%) have more than 100 people. App.4-11. Unsurprisingly, every party in *Johnson* agreed that the *political* contiguity of these municipal islands was constitutionally sound. This Court agreed too, holding that "[i]f annexation by municipalities creates a municipal 'island,'" then "the district containing detached portions of the municipality is legally contiguous even if the area around the island is part of a different district." *Johnson I*, 2021 WI 87, ¶36.

Standing, laches, preclusion, and estoppel bar Petitioners' collateral attack on that holding. No special circumstances compel departing from it, especially since Wisconsin redistricting statutes have permitted political contiguity for over 50 years, an interpretation endorsed by federal and state courts alike. Petitioners' contiguity claim provides no reason to disturb the current maps. Even if it did, any remedy would be limited to dissolving allegedly noncontiguous areas; that claim would not justify upending existing district lines. *See infra* Part III.B-D & IV.

A. Petitioners' contiguity claim is barred by standing, laches, preclusion, and estoppel.

1. This Court "has largely embraced federal standing requirements, and [it] 'look[s] to federal law as persuasive authority regarding standing questions.'" *Friends of the Black River Forest v. Kohler Co.*, 2022 WI 52, ¶17, 402 Wis. 2d 587, 977 N.W.2d 342. For redistricting claimants, "a voter who lives in the *district* attacked" has standing to assert a voting-rights claim, but the harm from the alleged violation does "not so keenly threaten a voter who lives elsewhere in the State." *See Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015). For that reason, "[a] plaintiff who complains of [redistricting practices], but who does not live in [an affected] district, asserts only a generalized grievance." *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (cleaned up). And even an affected plaintiff "cannot sue to invalidate the whole State's legislative districting map; such complaints must proceed 'district-by-district.'" *Id.*

Here, Petitioners have not established standing to raise a contiguity claim, let alone standing to seek a statewide remedy. *See id.* The following voters allege that they live in districts with municipal islands: Petitioners Clarke (AD26, SD9), Anthony (AD80, SD27), Glasstein (AD24, SD8), Groves-Lloyd (AD42, SD14), Johnson (AD31, SD11), Kirst (AD80, SD27), Lawton (AD91, SD31), Maldonado (AD66, SD22), McClellan (AD29, SD10), Muriello (SD5), Schils (AD93, SD31), and Young (AD47, SD16), Pet. ¶¶6-7, 9-10, 13-17, 19-20, 24, and Citizen Mathematicians Krenz (SD8) and Jha (AD79, SD27), Citizen Mathematicians Pet. ¶¶3, 6. But none has articulated a concrete injury. For instance, municipal islands in Petitioners Lawton's and Maldonado's districts have 0 population, App.8, while the municipal islands in Petitioners Schils's, Krenz's, and Glasstein's districts have 1 to 4 residents, App.4, 11. And the islands allow these residents to be kept together in the same district with the rest of their municipality or ward. *Infra* Part.I.B.2-4; App.4-11. As for the remaining Petitioners or Citizen Mathematicians, none claims to live in districts with municipal islands, and no voter challenging districts claims to live in AD2-AD3, AD5-AD6, AD15, AD25, AD27-AD28, AD30, AD32-AD33, AD37-AD41, AD43-AD46, AD48, AD52-AD54, AD58-AD61, AD63, AD67-AD68, AD70, AD72, AD76, AD81, AD83, AD86, AD88-AD89, AD94-AD95, AD97-AD99 (and corresponding SD1-SD2, SD13, SD15, SD20-SD21, SD23-SD24, SD28-SD30, and SD33) on Petitioners' list of allegedly noncontiguous districts. Memo. ISO Pet. 72 nn.21-22.

2. Laches bars Petitioners' "unreasonably delayed" claim. *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶14, 393 Wis. 2d 308, 946 N.W.2d 101. Two years ago, this Court invited "any prospective intervenor" to move to participate in *Johnson* and granted every timely intervention motion. *See* Orders of Sept. 22 & Oct. 14, 2021, *Johnson*, No. 2021AP1450-OA. Petitioners did not intervene. They waited more than a year after *Johnson* ended to file this case, and only once the Court's membership changed. For the same reason this Court rebukes requests to overturn precedent because of changed membership, *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶95, 264 Wis. 2d 60, 665 N.W.2d 257, this Court must reject Petitioners' "sleep[ing] on their rights" until that change in membership, *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶14, 389 Wis. 2d 516, 936 N.W.2d 587.

Petitioners' delay is compounded by the failure of any party to argue during *Johnson* or soon after that districts with municipal islands do not comply with Article IV, §§4-5. No party in *Johnson* challenged any proposed remedy as noncontiguous, and all agreed that municipal islands were constitutional.[2] Respondents and Intervenors-Respondents thus lacked knowledge that these new claims would be

[2] *E.g.*, Bewley Br. 12-13, *Johnson*, No. 2021AP1450-OA (Oct. 25, 2021); BLOC Br. 13 (Oct. 25, 2021); Citizen Mathematicians Br. 13 (Oct. 25, 2021); Evers Br. 6 (Oct. 25, 2021); Hunter Br. 23 (Oct. 25, 2021); Bewley Br. 10 (Dec. 15, 2021); Evers Br. 17 (Dec. 15, 2021); Citizen Mathematicians Br. 27-28 (Dec. 15, 2021); BLOC Br. 50 (Dec. 15, 2021); *see also* Joint Stip. of Facts & Law 15 (Nov. 4, 2021) (agreeing that "[m]unicipal 'islands' are legally contiguous with the municipality to which the 'island' belongs").

brought. *See Brennan*, 2020 WI 69, ¶18 (finding "sufficient to satisfy this element of a laches defense" that "the respondents had no advance knowledge or warning of this particular claim"); *see also Trump v. Biden*, 2020 WI 91, ¶23, 394 Wis. 2d 629, 951 N.W.2d 568 (finding lack-of-knowledge element satisfied because "respondents all assert[ed] they were unaware that the Campaign would challenge various election procedures after the election").

Finally, Petitioners' delay creates substantial prejudice. More than two dozen individual voters, organizations, public officials, and both political branches expended substantial resources to litigate, appeal, and obtain a final judgment and injunction in *Johnson*. *See Wren*, 2019 WI 110, ¶33 & n.26 (discussing economic prejudice). Petitioners now ask to start from square one—mere months before 2024 election deadlines commence. Faithful adherence to, and evenhanded application of, laches bars Petitioners' contiguity claims. *Trump*, 2020 WI 91, ¶32; *see also Clarke*, 2023 WI 66, ¶1 (Protasiewicz, J.) ("I promised—above all else—to decide cases based only on the rule of law," not "personal opinions.").

3. All parties are also precluded from relitigating contiguity because the issue "was actually litigated and determined" in *Johnson*, and "the determination was essential to the judgment" prescribing a malapportionment remedy. *Dostal v. Strand*, 2023 WI 6, ¶24, 405 Wis. 2d 572, 984 N.W.2d 382. All parties identified contiguity as a remedial requirement, and all parties defined contiguity to allow *politically*

contiguous municipal "islands." *Supra* n.2. This Court agreed three times over. *Johnson I*, 2021 WI 87, ¶36; *Johnson II*, 2022 WI 14, ¶36; *Johnson III*, 2022 WI 19, ¶70.

That holding precludes Petitioners from relitigating the contiguity issue here, so long as they have "sufficient identity of interests to comport with due process." *Paige K.B. ex rel. Peterson v. Steven G.B.*, 226 Wis. 2d 210, 224, 594 N.W.2d 370 (1999). They do. *Johnson* was litigated by the legislative and executive branches, along with any other voter who timely intervened. Petitioners here are Democratic supporters, no different from *Johnson* litigants. *Compare* Pet. ¶¶1, 4-24, *with* Hunter Compl. ¶15, *Johnson*, No. 2021AP1450-OA (Oct. 6, 2021) (expressing intent "to advocate and vote for Democratic candidates"), *and* Bewley Mot. Intervene 1 (Oct. 6, 2021) (intervening "on behalf of the Senate Democratic Caucus"). Indeed, Petitioners and Intervenors-Petitioners are represented by the same attorneys from *Johnson*. *Compare* Pet. (Campaign Legal Center, Law Forward, Stafford Rosenbaum), *and* Citizen Mathematicians Pet. (Boardman Clark, Jenner & Block), *and* Evers Mot. Intervene (attorney Mel Barnes), *with* BLOC Mot. Intervene, *Johnson*, No. 2021AP1450-OA (Sept. 24, 2021) (Campaign Legal Center, Law Forward, including attorney Mel Barnes, Stafford Rosenbaum), *and* Citizen Mathematicians Mot. Intervene (Oct. 6, 2021) (Boardman Clark, Jenner & Block). Petitioners "all along, . . . have been aligned in interest and pursuing a common legal strategy through the same counsel." *Burton v. Am. Cyanamid Co.*, 588

F. Supp. 3d 890, 910 (E.D. Wis. 2022) (applying issue preclusion against nonparty under Wisconsin law); *see Jensen v. Milwaukee Mut. Ins.*, 204 Wis. 2d 231, 239-40, 554 N.W.2d 232 (Ct. App. 1996) (same, noting nonparty's "choice of the same counsel . . . in the prior action indicates that she approves of the tactics and strategy employed").

For similar reasons, Petitioners and Intervenors-Petitioners cannot collaterally attack *Johnson*, which would "disrupt the finality of prior judgments," "undermine confidence in the integrity of our procedures," and "delay and impair the orderly administration of justice." *Oneida Cnty. Dep't of Soc. Servs. v. Nicole W.*, 2007 WI 30, ¶28, 299 Wis. 2d 637, 728 N.W.2d 652; *see also infra* III.A.2. An "order or judgment, however erroneous, . . . is not subject to collateral attack merely because it is erroneous, nor is it void for that reason." *Stimson v. Munsen*, 251 Wis. 41, 44, 27 N.W.2d 896 (1947). Whatever Petitioners and Intervenors-Petitioners think about *Johnson*'s contiguity holding, they cannot challenge the *Johnson* Court's jurisdiction and the judgment is final. *See Kriesel v. Kriesel*, 35 Wis. 2d 134, 139, 150 N.W.2d 416 (1967) (recognizing the "settled law that a judgment of a court which had jurisdiction . . . cannot be impeached and is immune from and not subject to collateral attack," even if "patently erroneous"); *see also Beck v. State*, 196 Wis. 242, 219 N.W. 197, 200 (1928).

4. Claim preclusion also bars both the Governor and Citizen Mathematicians as Intervenors-Petitioners from relitigating *Johnson*. *See Lindas v. Cady*, 183 Wis. 2d 547, 558, 515 N.W.2d 458 (1994)

(judgment "conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings"). Those parties fully litigated *Johnson*, argued the contiguity issue the other way, and then became subject to *Johnson*'s judgment that existing districts are contiguous. *See N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995). As for the few new individuals added to the Citizen Mathematicians' group (Atkinson, Kane, and Dudley), parties cannot evade preclusion with such gamesmanship; those individuals "have sufficient identity of interest" with their fellow Citizen Mathematicians who already litigated *Johnson*. *Paige K.B.*, 226 Wis. 2d at 224-26; *see also* Mot. Intervene, *Hunter v. Bostelmann*, No. 3:21-cv-512 (W.D. Wis. Sept. 20, 2021), ECF 65 (Kane and Dudley moving to intervene as part of "Citizen Data Scientists" in related federal litigation).

5. The Governor and Citizen Mathematicians are also judicially estopped from pressing contiguity arguments inconsistent with *Johnson*. "Judicial estoppel precludes a party from asserting one position in a legal proceeding and then subsequently asserting an inconsistent position." *Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶22, 281 Wis. 2d 448, 699 N.W.2d 54. It applies here because (1) those parties' "earlier position" in *Johnson* that political contiguity satisfies Article IV is "clearly inconsistent" with the contiguity claims here, (2) "the facts at issue [are] the same," and (3) the parties "convinced" this Court "to adopt

[their] position" in *Johnson*, *supra*, n.2. *State v. Petty*, 201 Wis. 2d 337, 348, 548 N.W.2d 817 (1996).

B. Petitioners' contiguity claim fails on the merits.

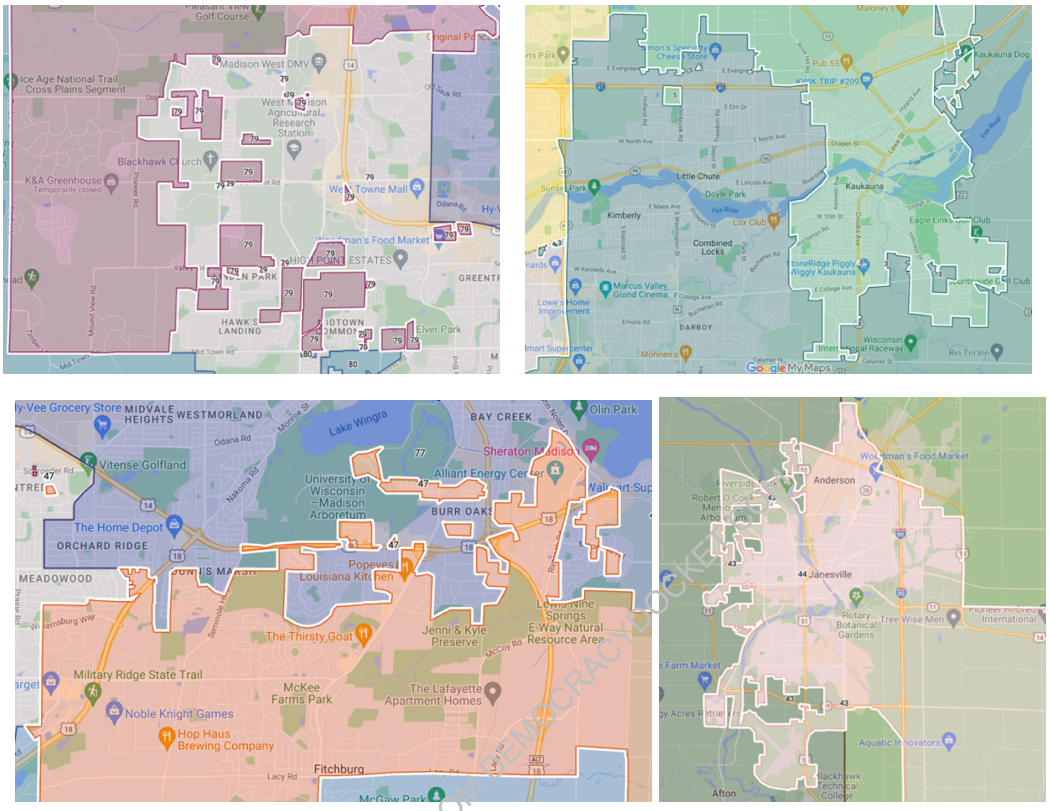
Assembly districts are "to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable," Wis. Const. art. IV, §4, and nested into senate districts "of convenient contiguous territory," *id.* §5. Petitioners claim that *Johnson III* violates these provisions because districts contain annexed municipal islands that do not "physically touch" any other part of the district. Memo. ISO Pet. 66. Petitioners' contiguity claim requires ignoring this Court's precedents, constitutional text, and longstanding annexation and redistricting practice.

1. Petitioners cannot overcome stare decisis.

This Court's contiguity rule—a holding of *Johnson I* applied in both *Johnson II* and *Johnson III*—is settled law. In *Johnson* I, this Court interpreted "contiguous" to "generally mean[] a district 'cannot be made up of two or more pieces of detached territory.'" 2021 WI 87, ¶36 (quoting *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 148, 53 N.W. 35 (1892)). But as for municipal islands, those detached portions of municipalities are "legally contiguous even if the area around the island is part of a different district." *Id*.

The Court applied this contiguity rule in adopting the Governor's proposed maps in *Johnson II*. The Governor touted his remedial

proposal—with many districts containing municipal islands, shown below—as constitutionally contiguous.



Governor's Remedial Proposal, http://bit.ly/45tcpRL; *see also* Evers Districts Map, LTSB, https://bit.ly/3Fmc4UB. The Court, in an opinion joined by Justices Ann Walsh Bradley, Dallet, and Karofsky, held that the Governor's maps "f[e]ll comfortably within the relevant constitutional requirements," including being "contiguous." *Johnson II*, 2022 WI 14, ¶¶9, 36 ("all districts are contiguous"), *rev'd on other grounds*, *Wis. Legislature*, 595 U.S. 398.

Then again in *Johnson III*, municipal islands were considered contiguous. The Court held that remedial maps proposed by the *Johnson* Petitioners and the Legislature "comply with the Wisconsin

Constitution," including because they "are contiguous and sufficiently compact." *Johnson III*, 2022 WI 19, ¶70.

Stare decisis forecloses Petitioners' contiguity claims. This Court "scrupulously" follows "the doctrine of stare decisis" as part of its "abiding respect for the rule of law." *Johnson Controls*, 2003 WI 108, ¶94; *cf. Clarke*, 2023 WI 66, ¶3 (Protasiewicz, J.) ("Respect for the law must always prevail."). "Failing to abide by stare decisis raises serious concerns as to whether the court is implementing principles founded in the law rather than in the proclivities of individuals." *Progressive N. Ins. v. Romanshek*, 2005 WI 67, ¶42, 281 Wis. 2d 300, 697 N.W.2d 417 (cleaned up); *cf. Clarke*, 2023 WI 66, ¶18 (Protasiewicz, J.) ("I will set aside my opinions and decide cases based on the law.").

Petitioners identify no "special justification" for revisiting settled contiguity rules. *State v. Johnson*, 2023 WI 39, ¶19, 407 Wis. 2d 195, 990 N.W.2d 174. There have been no "change[s]" in the law that "undermine[]" *Johnson*'s "rationale," nor any "newly ascertained facts," nor any intervening precedents. *Id.* ¶20. As explained below, the rule for municipal annexations has proven workable for over 50 years. *Id.* This Court reaffirmed it three times in *Johnson*, with *all* Justices agreeing on contiguity. And Petitioners' unstated justification that "the composition of the court has changed" is not enough. *Romanshek*, 2005 WI 67, ¶44; *see also Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶110, 383 Wis. 2d 1, 914 N.W.2d 678 (Ann Walsh Bradley, J., dissenting) ("The decision to overturn a prior case must not be

undertaken merely because the composition of the court has changed."); *State v. Roberson*, 2019 WI 102, ¶97, 389 Wis. 2d 190, 935 N.W.2d 813 (Dallet, J., dissenting) (similar).

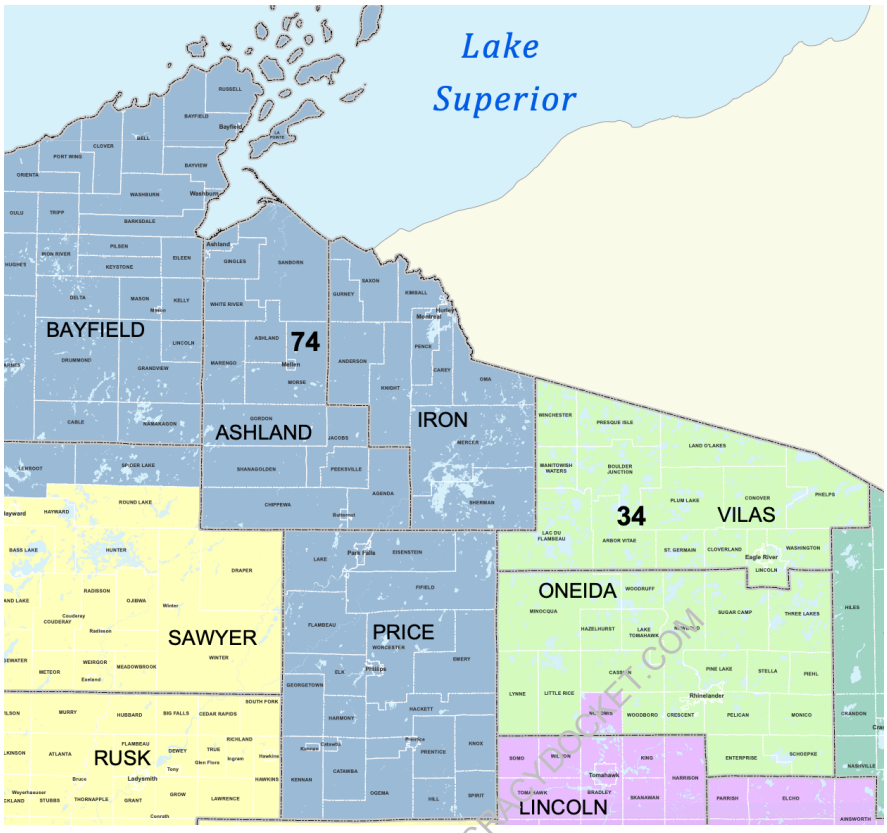
2. Settled contiguity rules for municipal islands comport with the whole text of Article IV, §§4-5.

Petitioners isolate the word "contiguous" while ignoring the whole text of Article IV, §§4-5. *See, e.g.*, *Sanders v. State Claims Bd.*, 2023 WI 60, ¶19, 408 Wis. 2d 370, 992 N.W.2d 126 ("The 'whole-text canon' instructs 'interpreter[s] to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.'"). Section 4 says assembly districts should "be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable." Wis. Const. art. IV, §4. Senate districts also should be "of convenient contiguous territory." *Id.* §5. Read in context, municipal islands are permissible because they are a way to ensure districts are "bounded by county, precinct, town or ward lines." They do not simultaneously violate the next clause, "contiguous territory." Rather, that clause ensures something different—that when counties or towns are combined into one district, the different counties or towns are touching—"contiguous territory." *See Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 2023 WI 38, ¶21, 407 Wis. 2d 87, 990 N.W.2d 122 ("constitutional text" should be read "reasonably, in context").

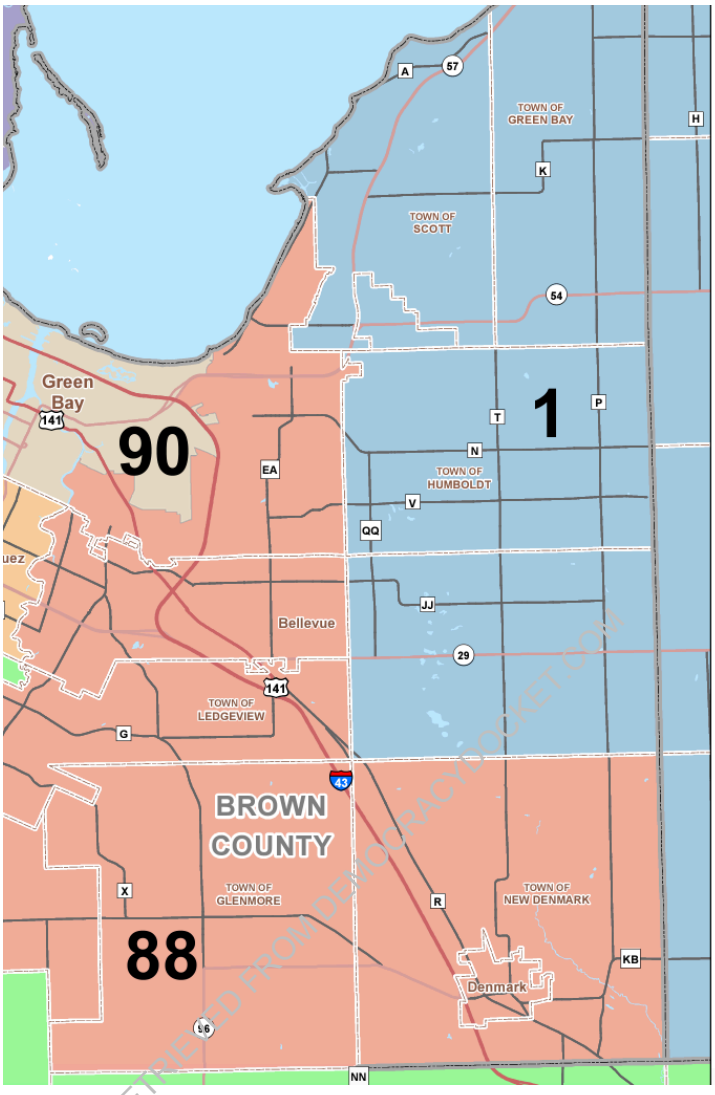
In particular, the word "territory" in the contiguity clause is distinct from the words "county, precinct, town, or ward lines" and

is thus "presume[d] . . . to have distinct meaning[]." *Milwaukee Dist. Council 48 v. Milwaukee County*, 2019 WI 24, ¶29, 385 Wis. 2d 748, 924 N.W.2d 153. The distinct meanings of the two clauses here are these: The first clause of §4 ("to be bounded by county, precinct, town or ward lines") ensures that districts follow the preexisting lines of particular units of government, which includes municipal islands.[3] The second clause of §4 ("contiguous territory") ensures that when districts combine those units of government together—for example, combining two counties or two towns—they still form "contiguous territory." For instance, shown below, combining Vilas and Oneida Counties in AD34 results in "contiguous territory," while the combination of Vilas and Ashland Counties would not.

[3] Other federal and state constitutional requirements at times supersede this "bounded by" clause. *Infra* Part I.B.3. A single district cannot be bounded by Milwaukee County lines, lest it be severely overpopulated; likewise, a district cannot be bounded by only Pepin County lines, lest it be severely underpopulated.

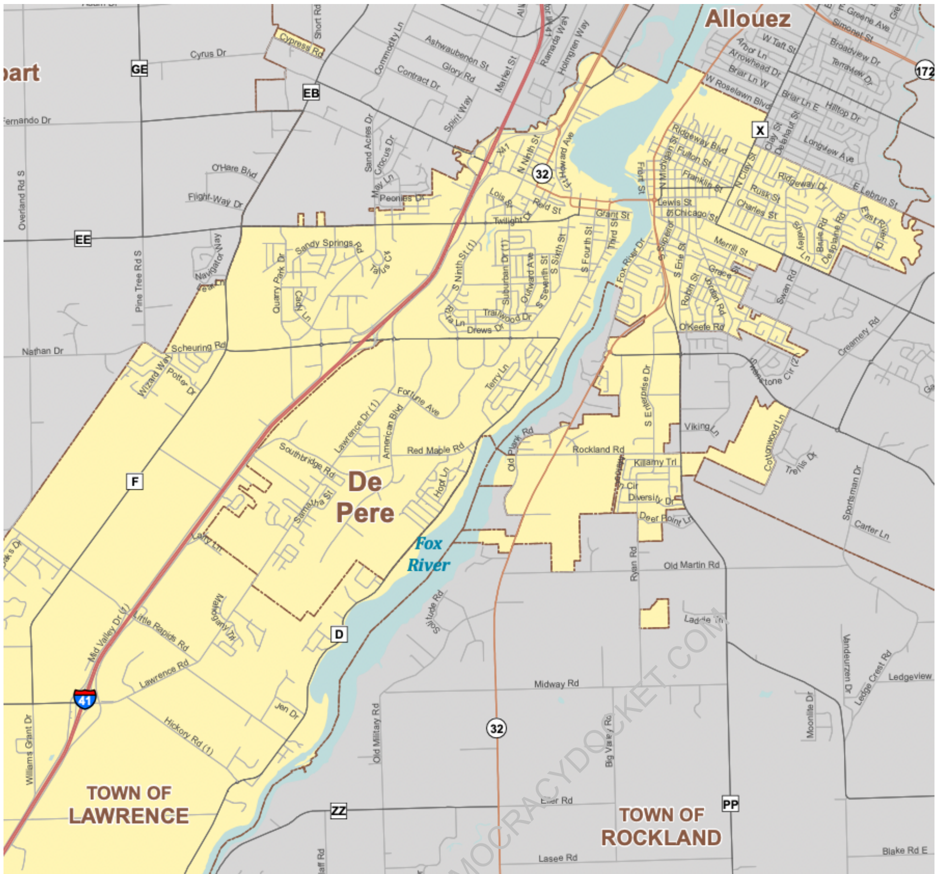


Assembly Districts 2023, LTSB, https://perma.cc/R7KS-4M6S. Likewise, the Towns of Ledgeview, Glenmore, and New Denmark can be combined as "contiguous territory" in AD88, but the Towns of Ledgeview (in AD88) and Scott (in AD1) could not.



Fox Valley Region Assembly Districts 2022, LTSB, https://perma.cc/Z4UU-PTFD.

To give meaning to the whole text for municipal islands, the following must be true: A district containing a municipal island is "bounded by" the town and ward lines. For example, AD2 discussed above follows preexisting lines for the Town of Lawrence and City of De Pere, both of which include municipal islands.



AD2, LTSB, https://perma.cc/WN5B-C79H. That satisfies the first clause of §4—"to be bounded by . . . town or ward lines." As for the second clause, the combination of the Town of Lawrence and the City of De Pere into one district results in "contiguous territory" because those municipalities are touching one another.

Contrary to Petitioners' arguments, it is unnatural to collapse §4's separate clauses and read the "contiguous territory" clause to require that "town or ward lines" be contiguous. Section 4 does not speak of a "contiguous town" or a "contiguous ward." It instead asks whether districts are "bounded by county . . . town or ward lines." And as to that question, island territories' boundaries are indisputably part of municipal ward lines because of annexation—*e.g.*, a city

has either annexed the island territory and, *vice versa*, part of a town might become island territory as a result of annexation by a city. *See, e.g.*, H. Rupert Theobald, *Equal Representation: A Study of Legislative and Congressional Apportionment in Wisconsin*, Wis. Blue Book 71, 200 (1970) (discussing islands resulting from annexations in Madison area). The resulting districts including municipal islands are thus bounded by "town or ward lines." *See, e.g.*, Noah Webster, *An American Dictionary of the English Language* 140 (1828) ("BOUND'ED, *pp.* Limited; confined; restrained.").

3. "Contiguous" encompasses politically contiguous municipal islands.

Petitioners' arguments still fail on the merits looking only at the "contiguous territory" clause. The word "contiguous" encompasses *politically* contiguous municipalities. For over 50 years, every branch of Wisconsin government has understood Article IV, §§4-5 to permit *political* contiguity, not just physical touching, where annexed municipal islands are at issue. *See Johnson I*, 2021 WI 87, ¶36; *see, e.g.*, *Prosser v. Elections Bd.*, 793 F. Supp. 859, 866 (W.D. Wis. 1992) (per curiam) (rejecting argument that Wisconsin Constitution requires "literal" touching, and noting "that it has been the practice of the Wisconsin legislature to treat [municipal] islands as contiguous with the cities or villages to which they belong"); Wis. Stat. §4.001(2) (1971).

Petitioners' "hyper-literal approach"—claiming "all parts of a district must physically touch such that a district may not have detached pieces," Memo. ISO Pet. 66—flouts precedent and plain

meaning and is absurd and unworkable. *Brey v. State Farm Mut. Auto. Ins.*, 2022 WI 7, ¶13, 400 Wis. 2d 417, 970 N.W.2d 1; *see also Becker v. Dane County*, 2022 WI 63, ¶30, 403 Wis. 2d 424, 977 N.W.2d 390 (Court "has never interpreted" Article IV, §1 "in a literal sense"); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 355-58 (2012) (describing "false notion that words should be strictly construed"). Petitioners' reading would mean a district is noncontiguous even if separated by water. Apparently, AD1 is unconstitutionally noncontiguous because Door County's Washington Island—surrounded by Lake Michigan—does not "physically touch" the rest of the district. Indeed, on their list of allegedly noncontiguous districts, Petitioners appear to include AD89's islands surrounded by Lake Michigan's Green Bay arm. Memo. ISO Pet. 72 nn.21; *see* App.10; AD89, LTSB, https://perma.cc/WMQ9-KFFE.

Petitioners' reading is wrong. Literal islands are "contiguous" because they are joined together by municipal boundaries; so too, municipal islands are contiguous because they are, by definition, joined together by municipal boundaries.

That longstanding understanding of "contiguous" as not requiring physical touching is consistent with dictionary definitions contemporaneous with Article IV's ratification and early legislative actions. While definitions varied, many dictionaries at the time defined "contiguous" to mean not only physical contact but also "close"

or "near" to.[4] Those definitions evidence the original meaning of the term. *See Parsons v. Associated Banc-Corp*, 2017 WI 37, ¶25 n.4, 374 Wis. 2d 513, 893 N.W.2d 212 (consulting contemporaneous dictionary definitions); *accord, e.g.*, *Hennessy v. Douglas County*, 99 Wis. 129, 74 N.W. 983, 985 (1898) (interpretating "adjacent" to mean "lying near, close to, or contiguous, but not actually touching"). That early understanding is confirmed by "early legislative actions," which likewise "reveal how a constitutional provision was understood at the time of adoption." *Wis. Just. Initiative*, 2023 WI 38, ¶32. In 1861, just 13 years after ratification, the Legislature joined together "[t]he counties of Door, Oconto, and Shawanaw" into an assembly district, §2, Ch. 216, Laws of 1861, creating "the first 'rowboat' district in Wisconsin legislative apportionment, " Theobald, *supra*, at 241. And in 1876, the Legislature joined together "[t]he counties of Door, Kewaunee, Oconto, and

[4] *See* Nathan Bailey, *An Universal Etymological English Dictionary* (1775) (Contiguous: "that touches, or is next; very near, close, adjoining"); Samuel Johnson & John Walker, *A Dictionary of the English Language* 153 (1828) (Contiguity: "Actual contact; nearness of situation"; Contiguousness: "Close connection"); John Ogilvie & Charles Annandale, *The Imperial Dictionary of the English Language* 571 (1885) (Contiguity: "Actual contact of bodies; a touching; nearness of situation or place; a linking together, as a series of objects; a continuity."; Contiguous: "Touching; meeting or joining at the surface or border; close together; neighbouring; bordering or adjoining"); *Contiguity*, Black's Law Dictionary (1st ed. 1891) ("In close proximity; in actual close contact."); James A.H. Murray, *A New English Dictionary on Historical Principles* 903 (1893) (Contiguity: "*loosely*. Close proximity, without actual contact"; Contiguous: "*loosely*. Neighbouring, situated in close proximity (though not in contact)"); Robert Hunter & Charles Morris, *Universal Dictionary of the English Language* 1238 (1897) (Contiguity: "*Ordinary language:* (1) Contact with, or (more loosely) immediate proximity to, nearness in place"; Contiguous: "*Ordinary language:* 1. Meeting so as to touch; adjoining, touching, close together, connected. . . . 2. Used more loosely in the sense of neighbouring, close, near.").

Shawano" into a senate district, §1, Ch. 343, Laws of 1876, "creat[ing] a rowboat district which was to continue, in some form, for 45 years," Theobald, *supra*, at 243. While such "rowboat districts" were not physically touching in all respects, "legally there has been no question of a lack of 'contiguity.'" *Id.* at 200-01.

Petitioners' contrary arguments would put hundreds of municipal annexations in conflict with the constitutional text. Municipal islands arise when a municipality takes territory from another municipality that is deemed sufficiently "contiguous" to the annexing municipality under Wisconsin annexation laws, *see* Wis. Stat. §§66.0217(2)-(3), 66.0219, long understood "to mean 'near to but not touching,'" *Town of Lyons v. City of Lake Geneva*, 56 Wis. 2d 331, 336-37, 202 N.W.2d 228 (1972) (quoting *N. Pac. Ry. Co. v. Douglas County*, 145 Wis. 288, 130 N.W. 246 (1911)); *supra* n.4. And while recent decisions have interpreted annexation laws more strictly, even those decisions "acknowledge that there can be situations where contiguous 'does not always mean the land must be touching.'" *Town of Wilson v. City of Sheboygan*, 2020 WI 16, ¶19, 390 Wis. 2d 266, 938 N.W.2d 493; *see also Town of Delavan v. City of Delavan*, 176 Wis. 2d 516, 529-30, 500 N.W.2d 268 (1993) (declining to "expand the definition of 'contiguous' as to place distant lakeshore property owners at risk of being annexed by neighboring municipalities" but acknowledging that "unique facts of th[e] particular case" might require something other than absolute physical contiguity). What's resulted are myriad

municipal islands, which are near to but not always physically touching municipalities of which they are a part.

A redistricting map takes those municipal lines as it finds them, including any parts considered sufficiently "contiguous" for annexation.[5] Those municipalities and wards are the building blocks of redistricting, Wis. Const. art. IV, §4 ("to be bounded by"), and redistricting statutes have long contemplated that they might have municipal islands. The 1971 and 1983 reapportionment statutes provided that "[i]sland territory (territory belonging to a city, town or village but not contiguous to the main part thereof)" is "a contiguous part of its municipality." Wis. Stat. §4.001(2) (1971); Wis. Stat. §4.001(3) (1983). The most recent 2011 redistricting also contained municipal islands. 2011 Wis. Act 43. The Act's appendix visibly shows myriad districts with municipal islands, following municipal lines. *See generally* App'x to 2011 Wis. Act 43, https://perma.cc/DM9Z-MQL6. And in 2021, no one—not the Governor, not the Legislature, not the Elections Commission, not voters—contended that "contiguous" meant something different from what it had long been understood to mean. *Supra* n.2.

[5] Petitioners argue that "the Town of Madison ceased to exist" after the 2020 census and "the Town of Blooming Grove [will be] absorbed into the City of Madison in 2027." Memo. ISO Pet. 72-73. But districts depend on the state of things as of the census. *See* Wis. Const. art. IV, §3 (census triggers redistricting); *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35, 54 (1892) (rejecting malapportionment challenge claiming census data was wrong); Wis. Stat. §4.002 ("boundaries" as they "exist on April 1 of the year" of census); *accord Reynolds v. Sims*, 377 U.S. 533, 583 (1964). As *Reynolds* observed, even though a State's population is not static, there is no requirement for "daily, monthly, annual, or biennial reapportionment" even if populations are changing. 377 U.S. at 583.

The same is true today: a district is constitutionally contiguous when municipal islands are included in districts containing other parts of the municipality.

4. Even if the Court reads the word "contiguous" to require physical touching, §4's competing criteria are permissibly balanced.

Even if this Court overturns *Johnson*, Petitioners' contiguity claim still fails. Article IV's text does not, and cannot, mandate absolute compliance with all §4 criteria at all times. Rather, §4's criteria (*e.g.*, keeping towns whole, territory "contiguous," and districts compact) must be balanced against each other as well as population equality. *See, e.g.*, *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 565-66, 126 N.W.2d 551 (1964); *State ex rel. Bowman v. Dammann*, 209 Wis. 21, 243 N.W. 481, 484 (1932).

Redistricting "requir[es] a delicate balancing of competing considerations." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 187 (2017). In Wisconsin, Article IV, §4's own requirements will inevitably conflict. "[T]he achievement of perfect contiguity and compactness would imply ruthless disregard for other elements of homogeneity; would require breaking up counties, towns, villages, wards, even neighborhoods." *Prosser*, 793 F. Supp. at 863; *see also* 58 Wis. Att'y Gen. Op. 88, 91 (1969) (opining "Wisconsin Constitution no longer may be considered as prohibiting assembly districts from crossing county lines" given federal proportional representation requirement).

Here, that "delicate balancing," *Bethune-Hill*, 580 U.S. at 187, permits placing municipal islands in districts with the rest of the municipality. Doing so permits districts "to be bounded by" municipal or ward lines as Article IV, §4 contemplates. On the other hand, separating municipal islands will increase municipal splits; it 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; and most fundamentally, it needlessly separates residents from their own municipalities where they attend school, receive municipal services, and are locally governed. *See generally* League of Wis. Municipalities, *A Citizen's Guide to Wisconsin Cities and Villages*, https://perma.cc/8Y8P-E42D. No such reading of Article IV's "contiguous territory" clause, contrary to *Johnson* and longstanding practice, is required.

II. *Johnson III* did not violate the separation of powers any more than *Johnson II* did by selecting the Governor's maps.

This Court in *Johnson* ordered a judicial remedy—a mandatory injunction—in response to the *Johnson* Petitioners' malapportionment claim. *Johnson I*, 2021 WI 87, ¶5 & n.1. It was acting not "as a 'superlegislature' by inserting [itself] into the actual lawmaking function" but as an "apolitical and neutral arbiter[] of the law," *id.* ¶¶71-72 (plurality op.), discharging its judicial "duty to remedy a constitutional deficiency," *id.* ¶66 (majority op.). In deciding what that judicial remedy would be, the Court invited all parties—including the Legislature, the Governor, Democratic legislators, and voters—to propose

remedies supported by expert reports. Selecting from those proposed remedies, the Court went no "further than necessary to remedy the[] current legal deficiencies" so as not to "intrude upon the constitutional prerogatives of the political branches." *Id.* ¶64. When the Court adopted remedial maps advanced by both the *Johnson* Petitioners and the Legislature, it did so as part of a *judicial* remedy through the *judicial* process under *judicial* parameters. Nothing about *Johnson III* violated the separation of powers. Petitioners' contrary arguments are barred, meritless, and, if adopted, would create a real separation-of-powers violation by inviting this Court to exercise legislative power.

A. Petitioners' separation-of-powers claim is barred.

To begin, laches, preclusion, and estoppel bar Petitioners' separation-of-powers claim just as they bar their contiguity claims. *Supra* Part I.A.2-5. Petitioners also lack standing to assert a claim that this Court usurped the powers of the lawmaking branches. *Supra* Part.I.A.1. Petitioners "must have suffered an actual injury to a legally protected interest" to advance their constitutional claim. *McConkey v. Van Hollen*, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855. They must have "a personal stake in the outcome of the controversy," *State ex rel. First Nat'l Bank v. M & I People's Bank*, 95 Wis. 2d 303, 308-09, 290 N.W.2d 321 (1980), not merely "generalized grievances," *Cornwell Pers. Assocs. v. DILHR*, 92 Wis. 2d 53, 62, 284 N.W.2d 706 (Ct. App. 1979); *see Moedern v. McGinnis,* 70 Wis. 2d 1056, 1064, 236 N.W.2d 240 (1975). Petitioners have no personal stake in their separation-of-

powers claim and no basis to demand a statewide remedy. While government branches may have a stake in guarding their powers against encroachment, "no one outside the legislature would have an equivalent stake in the issue." *Panzer v. Doyle*, 2004 WI 52, ¶42, 271 Wis. 2d 295, 680 N.W.2d 666, *abrogated on other grounds*, *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408. Petitioners' "generalized grievances" about this Court's decision in *Johnson* do not suffice. *Cornwell*, 92 Wis. 2d at 62.

B. Petitioners' separation-of-powers claim fails on the merits.

Even if this Court could entertain Petitioners' separation-of-powers claim, the claim fails on the merits. Petitioners argue that this Court "violated separation of powers in two ways"—(1) by "usurp[ing] the exclusive gubernatorial power to approve (or reject) a law passed by the Legislature" and (2) by "exercis[ing] the exclusive legislative power to override the Governor's veto." Memo. ISO Pet. 75. Petitioners contend that the "legislative maps"—by which they mean the judgment in *Johnson III*—"must be enjoined" for "transgress[ing] the Constitution's separation of powers." *Id.*

This argument fundamentally misunderstands the Court's judicial role in selecting remedial maps in redistricting cases. Wisconsin's system, of course, is one of separated powers. Both the Legislature and the Governor play a role in enacting legislation: the Legislature's making legislation, Wis. Const. art. IV, §§1, 17, and the Governor's approving (or vetoing) it, *id.* art. V, §10.

But *Johnson* was an exercise of judicial power. *Id.* art. VII, §2. The courts have the sole authority to "administ[er] . . . remedies for remedial rights," to issue "judicial determination[s]," and to enforce those decisions. *State ex rel. Milwaukee Med. Coll. v. Chittenden*, 127 Wis. 468, 107 N.W. 500, 511-12 (1906) (a court "necessarily acts in a judicial capacity and its judgment or decree is the product of judicial power"); *see also State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 736 (1892) (Pinney, J., concurring) ("[I]t is to be borne in mind that the writ of injunction under our constitution is . . . of a strictly judicial nature," ensuring that the Court's equitable power does not become "the exercise of political power.").

That holds true even in redistricting litigation. As Petitioners readily concede, "[i]ssuing a mandatory injunction to impose a remedial plan in redistricting litigation is a judicial function." Memo. ISO Pet. 75. When a court acts with the limited goal of remedying constitutional defects in an existing legislative map, it acts not "as a 'super-legislature' by inserting [itself] into the actual lawmaking function" but as a court "provid[ing] a judicial remedy." *Johnson I*, 2021 WI 87, ¶71 (plurality op.); *id.* ¶85 (Hagedorn, J., concurring) (noting Court's "limited judicial power to remedy the constitutional violations").

That is precisely what happened in *Johnson*. The lawmaking process ended when the Legislature and the Governor "reached an impasse." *Johnson I*, 2021 WI 87, ¶¶17-19. Voters turned to the courts to provide a "judicial remedy" for malapportioned 2011 redistricting

legislation. *Id.* ¶6. From among the remedies proposed by the parties, the Court selected maps that did "not tread 'further than necessary to remedy . . . deficiencies'" of that 2011 legislation. *Johnson III*, 2022 WI 19, ¶71 (quoting *Johnson I*, 2021 WI 87, ¶64). In other words, the 2011 legislation remains on the books, and *Johnson*'s mandatory injunction merely prescribed how the Elections Commission was to enforce it with modifications to correct malapportionment.

Petitioners suggest that somehow the *Johnson* remedy ceased to be judicial in nature because the Court "impos[ed] the *precise* bill the Governor vetoed with its mandatory injunction." Memo. ISO Pet. 75; *see also* Pet. ¶131. But that argument again misunderstands *Johnson*. This Court did not purport to enact the Legislature's vetoed legislation as a statute in *Johnson.* Instead, *both* the *Johnson* Petitioners and the Legislature acting as parties to the litigation proposed the bill's districts as a permissible judicial remedy, *see* Johnson Petrs. Letter Br., *Johnson*, No. 2021AP1450-OA (Dec. 30, 2021), just as the Governor acting as a party to the litigation proposed his own districts—never approved by the Legislature. As parties to the litigation, they were entitled to stand on at least the same footing as others in proposing remedies.

The Governor and the Legislature—like the other parties—briefed the issues to the Court and supported their proposals with expert reports. And the Court—treating the Governor and Legislature as parties—selected among proposals as an appropriate least-changes

judicial remedy. This Court adopted that least-change approach to "confine[] [its] role to its proper adjudicative function, ensuring [it] fulfill[s] [its] role as [an] apolitical and neutral arbiter[] of law." *Johnson I*, 2021 WI 87, ¶72 n.8 (plurality op.); *accord id.* ¶85 (Hagedorn, J., concurring) (noting "least-change approach is the most consistent, neutral, and appropriate use of our limited judicial power"). That approach, this Court explained, "limit[s] the solution to the problem," *id.* ¶68 (majority op.), and "implement[s] only those remedies necessary to resolve constitutional or statutory deficiencies," *id.* ¶72 (plurality op.); *id.* ¶85 (Hagedorn, J., concurring) (noting Court "rightly focused on making only necessary modifications to accord with legal requirements"). Applying the least-change approach, this Court adopted the Legislature's proposed maps not because of any "policy choices," *id.* ¶78 (majority op.), but because they "exhibit minimal changes to the existing maps" that the lawmaking branches enacted, *Johnson III*, 2022 WI 19, ¶3; *cf. Perry v. Perez*, 565 U.S. 388, 393 (2012) (per curiam) ("To avoid being compelled to make such otherwise standardless decisions, a district court should take guidance from the State's recently enacted plan in drafting an interim plan.").

Petitioners' argument, taken to its logical endpoint, would lead to absurd results. Under Petitioners' theory, the Governor's rejection of a legislatively enacted plan in another context (lawmaking) would bar this Court from considering that plan in the judicial context even if it were an appropriate judicial remedy. The Governor has no such

power "to compel a co-ordinate branch to perform functions of judgment and discretion that are lawfully delegated to it by the constitution." *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶32, 376 Wis. 2d 147, 897 N.W.2d 384. The gubernatorial veto is a part of the lawmaking process, not the judicial process. The Governor has no power to limit the exercise of judicial power by fencing out the Legislature's proposed judicial remedy. *See State v. Zimmerman*, 202 Wis. 69, 231 N.W. 590, 592 (1930) ("The Governor as head of the executive department can exercise none of the judicial powers vested in the courts by the Constitution.").

Petitioners' view would have the perverse effect of excluding the Legislature from redistricting remedies. That cannot be justified by any constitutional theory, least of all separation of powers. The Constitution vests the Legislature with the power to redistrict. *See* Wis. Const. art. IV, §3; *cf. id.* art. IV, §1; *see also Johnson I*, 2021 WI 87, ¶19; *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam). Petitioners cannot gloss over the Legislature's redistricting authority by framing their argument solely in terms of veto powers. *See* Memo. ISO Pet. at 73-76; Pet. ¶130. Only the Legislature has the constitutional authority to make redistricting policy. The courts cannot ignore those policy judgments even when remedying alleged legal defects. *See Johnson I*, 2021 WI 87, ¶81 (plurality op.) ("[T]he constitution precludes the judiciary from interfering with the lawful policy choices of the legislature."); *id.* ¶85 (Hagedorn, J.,

concurring); *infra* Part III.B-C. It is Petitioners' theory that would upend that constitutional design and create a true separation-of-powers problem.

Petitioners' argument would leave this Court between a rock and a hard place. On Petitioners' theory, this Court could not have selected any remedial map without violating the separation of powers. By their logic, the Court could not select the Legislature's remedial proposal (as *Johnson III* did for Wisconsin's legislative districts) because that would exclude the Governor. But the Court could not select the Governor's remedial proposal (as *Johnson II* did for Wisconsin's congressional *and* legislative districts) because that would exclude the Legislature. Nor could the Court select a voter's remedial map because that would exclude both the Legislature and the Governor.

Wisconsin law has not backed this Court into such a predicament. Courts in redistricting cases do not replace the Legislature or Governor; they adjudicate legal claims. As Petitioners recognize, when "the legislature and the governor reach an impasse, . . . [j]udicial action becomes appropriate to prevent a constitutional crisis." *Johnson I*, 2021 WI 87, ¶68. That principle holds equally true where—as will often be the case in redistricting litigation—the political branches are parties. *See, e.g.*, *Clarke*, 2023 WI 70 (explaining how the Legislature has "an interest relating to" redistricting that may be impaired in such cases). Even when proposed by the Legislature, a

proposed remedy is a proposed remedy—not a law. And when this Court adopts a proposed remedy—even one proposed by the Legislature—the Court is deciding a case and carrying out its "duty to remedy a constitutional deficiency," not "mak[ing] law." *Johnson I*, 2021 WI 87, ¶66. There is no separation-of-powers problem in *Johnson III*'s judicial remedy, but there would be in one that "'intrude[s] upon state policy any more than necessary'" should this Court abandon *Johnson*'s approach to limited judicial remedies. *Upham v. Seamon*, 456 U.S. 37, 40-42 (1982) (per curiam).

III. Remedying any alleged constitutional violation requires reopening *Johnson*, and *Johnson* already decided what is and is not allowed in a redistricting remedy.

Petitioners seek a declaration that "[t]he current maps" violate the Wisconsin Constitution and ask the Court to enjoin their use. Pet. ¶¶122-32. But those "current maps" are not legislatively enacted law. They exist because of the mandatory injunction issued in *Johnson*. *See Johnson I*, 2021 WI 87, ¶5 & n.1; *Johnson III*, 2022 WI 19, ¶73. This action is a collateral attack on that *judgment*. There is no new statute to scrutinize or enjoin, only this Court's prior judgment. *Cf., e.g.*, *Koschkee v. Taylor*, 2019 WI 76, 387 Wis. 2d 552, 929 N.W.2d 600 (challenging 2017 statute, not judgment alone). This Court has no remedial powers to confer that collateral remedy.

To modify the injunction in *Johnson*, the Court must reopen *Johnson*. As for the remedial requirements and constraints that would apply, those were already decided in *Johnson*. Nothing has changed

in the Wisconsin Constitution since then; there are no legal bases for revisiting *Johnson*'s remedial framework, only political ones.

A. Any remedy requires reopening *Johnson*.

There is no path to remedying the alleged constitutional violations without reopening the judgment in *Johnson*. There is no declaratory relief available for declaring one of this Court's prior judgments unconstitutional; nor can the Court issue a conflicting injunction here.

1. No remedy is available under the Declaratory Judgments Act.

The Declaratory Judgments Act does not empower this Court to declare *Johnson*'s remedy unconstitutional. Declarations about this Court's earlier judgments are missing from the Act:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Wis. Stat. §806.04(2). There is thus no basis for issuing a declaration that this Court's earlier injunction is unconstitutional. And even if there were, Petitioners did not even attempt to name all parties with "interests[] which would be affected by the declaration"—namely, the parties in *Johnson*. *Id.* §806.04(11). The only action this Court can take with respect to Petitioners' requested declaratory relief is *dismissal*. *See, e.g.*, *Rudolph v. Indian Hills Ests., Inc.*, 68 Wis. 2d 768, 773-75, 229

N.W.2d 671 (1975) (rejecting declaratory relief sought for dissolution of company); *PRN Assocs. v. State Dep't of Admin.*, 2009 WI 53, ¶56, 317 Wis. 2d 656, 766 N.W.2d 559 (rejecting declaratory relief for agency's past actions).

2. The only injunctive relief available is reopening and modifying *Johnson*, not issuing a conflicting injunction.

Petitioners and Intervenors-Petitioners also cannot obtain an injunction here that enjoins the injunction in *Johnson*. Rather, *Johnson* would have to be reopened and the injunction modified. There can be only one set of districts, *cf. Growe v. Emison*, 507 U.S. 25, 36 (1993), and they are prescribed by *Johnson III*'s mandatory injunction. The Elections Commission cannot simply ignore it. *See Cline v. Whitaker*, 144 Wis. 439, 129 N.W. 400, 400-01 (1911) ("An injunctional order, within the power of the court, must be implicitly obeyed so long as it stands . . . .unless there is a want of jurisdiction."); *In re Terrell*, 39 F.4th 888, 890 (7th Cir. 2022) ("All judgments are binding" and "an injunction must be obeyed unless stayed, modified, or reversed."); *see also, e.g.*, *Feller v. Brock*, 802 F.2d 722, 724 (4th Cir. 1986); *Fund For Animals v. Norton*, 323 F. Supp. 2d 7, 10 (D.D.C. 2004). At the very least, any remedy must entail reopening *Johnson* to modify its injunction "[o]n motion" by "a party or legal representative." *See* Wis. Stat. §806.07.

a. Because Petitioners sat out *Johnson*, they cannot move to reopen it. They had a "full opportunity to make application to be made

a party" to *Johnson* and failed to do so; they cannot now wage a collateral attack on that final judgment. *Hunt v. McDonald*, 124 Wis. 82, 102 N.W. 318, 319 (1905). Petitioners do not allege that the *Johnson* Court was without jurisdiction, or that the injunction was procured by fraud. *See State v. Campbell*, 2006 WI 99, ¶¶51-55, 294 Wis. 2d 100, 718 N.W.2d 649; *State v. Madison*, 120 Wis. 2d 150, 154, 353 N.W.2d 835 (Ct. App. 1984). Nor have Petitioners acted with reasonable diligence—for instance by moving to intervene in *Johnson* to reopen the judgment or ask for reconsideration within a reasonable time. *See, e.g.*, *Sewerage Comm'n of Milwaukee v. State Dep't of Nat. Res.*, 104 Wis. 2d 182, 187-89, 311 N.W.2d 677 (Ct. App. 1981) (discussing post-judgment intervention when "concerned only with the remedial aspects of the case" so long as intervenor establishes "entitlement" and "justification" for delay); *see also* Restatement (Second) Judgments §§74, 76 (nonparties cannot attack judgment if they fail to exercise reasonable diligence). Petitioners instead waited for the Court's membership to change. Those defects should preclude this collateral attack altogether.

b. As for the Intervenors-Petitioners who were parties in *Johnson*, the time has passed for them to reopen *Johnson.* If they believed *Johnson III* violated separation of powers, then they needed to move "not more than one year after the judgment was entered" to set aside *Johnson III*. Wis. Stat. §806.07(1)-(2); *see Walker v. Tobin*, 209 Wis. 2d 72, 78, 568 N.W.2d 303 (Ct. App. 1997) (describing history of §806.07).

They did not do so, leaving only a limited exception for courts "to entertain an independent action to relieve a party from judgment" that is inapplicable here. Wis. Stat. §806.07(2). That exception traces the common-law rule permitting parties to file a new action in equity to set aside a judgment, ordinarily because it was procured by fraud. *See Walker*, 209 Wis. 2d at 79 (listing common-law elements). This case is in no way analogous to those "'exceptional cases,'" *Dunn v. Dunn*, 258 Wis. 188, 192, 45 N.W.2d 727 (1951) (quoting 49 C.J.S., Judgments §341)—"approaching at least the unconscionable," *Doheny v. Kohler*, 78 Wis. 2d 560, 564, 254 N.W.2d 482 (1977); *see, e.g.*, *Welfare Bldg. & Loan Ass'n v. Hennessey*, 2 Wis. 2d 123, 126, 86 N.W.2d 1 (1957) (refusing to reopen final judgment where "[n]o fraud is asserted, no sharp practice on plaintiff's part, no overreaching").

B. The political branches must have the first opportunity to redistrict.

If the Court disagrees with the above arguments, then the Legislature must be given a reasonable opportunity to redistrict in accordance with any new constitutional standards. "[I]n our constitutional order [redistricting] remains the legislature's duty." *Johnson I*, 2021 WI 87, ¶19 (citing *Zimmerman*, 22 Wis. 2d at 569-70); *Jensen*, 2002 WI 13, ¶10; *accord Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (White, J.) (after "declar[ing] an existing apportionment scheme unconstitutional," it is "appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements"); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416

(2006) (Kennedy, J.) ("legislatively enacted plan should be preferable to one drawn by the courts"). Indeed, redistricting legislation is pending at this moment that could moot all claims. Assembly Bill 415 would adopt an Iowa-style redistricting commission and direct the Legislative Reference Bureau, alongside a newly established bipartisan redistricting advisory commission, to redistrict by January 1, 2024, which would then be the law for the 2024 elections. *See* A.B. 415, 2023-24 Session (Wis. 2023), https://perma.cc/33PL-Y6L2.

Should the Court decide any claims in Petitioners' favor, even if Assembly Bill 415 is not enacted, the Legislature must be afforded the same reasonable opportunity to redistrict given in *Zimmerman*. There, this Court did not issue a judicial remedy for meritorious malapportionment claims; it instead decided that the Petitioner was not entitled an injunction before the 1962 elections. 22 Wis. 2d at 549. It then gave the State's political branches two months to enact a properly apportioned redistricting plan before the 1964 elections. *Id.* at 569-71.

If the Court allows Petitioners' claims to proceed, it cannot rush the case to resolution before the 2024 elections, especially considering Petitioners' delay.[6] To do so will deny the political branches a

[6] By comparison, redistricting litigants whose complaints sought relief in advance of the 2024 elections initiated their lawsuits more than a year ago, while other redistricting litigants who waited to file their cases until this year (like Petitioners) are not attempting to seek relief before the 2024 elections. *See, e.g.*, Third Amended Compl., *S.C. State Conf. of the NAACP v. Alexander*, No. 3:21-cv-3302 (D.S.C. May 6, 2022); *see also, e.g.*, Compl. *League of Women Voters v. Utah Legislature*,

reasonable opportunity to redistrict, contrary to *Zimmerman*. Worse, it risks "work[ing] a needlessly 'chaotic and disruptive effect upon the electoral process,'" *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curiam), and runs headlong into serious concerns that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). Petitioners' delay, "without good reason," would prejudice the parties if they must defend against Petitioners' claims on a severely expedited basis. *See Brennan*, 2020 WI 69, ¶¶11-12; *Wren*, 2019 WI 110, ¶14 (rebuking litigants' "sleep[ing] on their rights" and stating "equity aids the vigilant"); *Trump*, 2020 WI 91, ¶11 ("party seeking extraordinary relief in an election-related matter" must "exercise the requisite diligence"). Any remedial proceedings should target the 2026 elections, not the 2024 elections with deadlines only months away.

C. If the Court modifies the injunction in *Johnson*, there is no basis for revisiting *Johnson*'s holdings about redistricting remedies.

Johnson I already decided the factors to be considered for a judicial remedy in a redistricting case, and those that are beyond the Court's power to consider. *See* 2021 WI 87, ¶¶24-68, 73-80; *id.* ¶¶69-72

No. 220901712 (Utah 3d D. Ct.) (Mar. 17, 2022); Compl., *Tenn. State Conf. of the NAACP v. Lee*, No. 3:23-cv-00832 (M.D. Tenn. Aug. 9, 2023) (seeking relief before 2026 elections).

(plurality op.); *id.* ¶¶82-86 (Hagedorn, J., concurring). A change in this Court's membership cannot justify overturning that precedent. *Supra* Part I.B.1 (discussing *Romanshek*, 2005 WI 67, and other authorities). The Court must follow stare decisis "scrupulously because of [its] abiding respect for the rule of law." *Johnson Controls*, 2003 WI 108, ¶94; *see also Clarke*, 2023 WI 66, ¶17 (Protasiewicz, J.) ("Nothing is prejudged."); *id.* ¶61 ("I would follow the law where it leads me . . . ."); *id.* ¶78 (claiming that campaign statement that "[p]recedent changes when things need to change to be fair" was about *Plessy v. Ferguson*, not *Johnson*).

The same remedial rules in *Johnson* apply here. "Treading further than necessary to remedy [the maps'] current legal deficiencies . . . would intrude upon the constitutional prerogatives of the political branches and unsettle the constitutional allocation of power." *Johnson I*, 2021 WI 87, ¶64. Because the Court's remedial power "does not encompass rewriting duly enacted law," any judicial remedy must "reflect the least change necessary for the maps to comport with relevant legal requirements." *Id.* ¶72 (plurality op.) (quotation marks omitted); *accord id.* ¶82 (Hagedorn, J., concurring) (describing Court's remedial power as "limited to altering current district boundaries only as needed to comply with legal requirements").

That principle is firmly rooted in law. It is a fundamental tenet of remedies that "[i]njunctive relief should be tailored to the necessities of the particular case." *Bubolz v. Dane County*, 159 Wis. 2d 284, 296,

464 N.W.2d 67 (Ct. App. 1990); *see State v. Seigel*, 163 Wis. 2d 871, 890, 472 N.W.2d 584 (Ct. App. 1991) ("[B]ecause injunctive relief is preventive, not punitive, the relief ordered may not be broader than equitably necessary."). Courts must "limit the solution to the problem." *Johnson I*, 2021 WI 87, ¶68 (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006)).

It applies doubly in the redistricting context—a "political thicket," *Gaffney v. Cummings*, 412 U.S. 735, 749-50 (1973), that is "one of the most intensely partisan aspects of American political life," *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). When a court meddles with district lines more than necessary, it becomes "no more than a super-legislature," *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 528-29, 576 N.W.2d 245 (1998), taking on the Legislature's constitutionally assigned duty to redistrict. "In fashioning a remedy in redistricting cases," then, "courts are generally limited to correcting only those unconstitutional aspects of a state's plan." *Johnson v. Miller*, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995), *aff'd sub nom.*, *Abrams v. Johnson*, 521 U.S. 74, 79 (1997) ("When faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying the existing plan, to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act."); *see also, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 2548, 2554-55 (2018) (per curiam) (partially reversing remedy for going beyond eliminating racial gerrymander); *Perry*, 565 U.S. at 393

(courts "should take guidance from the State's recently enacted plan in drafting an interim plan" to "avoid being compelled to make such otherwise standardless decisions"); *White v. Weiser*, 412 U.S. 783, 795 (1973) (courts "should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary'"); *Upham*, 456 U.S. at 42 (court "erred in fashioning a court-ordered plan that rejected state policy choices more than was necessary to meet the specific constitutional violations involved").

For similar reasons, *Johnson I*'s holding that a redistricting remedy does *not* include considerations about the partisan fairness of districts would also limit the Court's remedial power here. 2021 WI 87, ¶52; *accord id.* ¶82 n.4 (Hagedorn, J., concurring). Nothing about the Wisconsin Constitution has changed since *Johnson* to enlarge that power. "Adjudicating claims of 'too much' partisanship," including any such claims raised as an objection to a redistricting remedy, "would recast this court as a policymaking body rather than a law-declaring one." *Id.* ¶52 (majority op.). There are "no legal standards" for deciding such claims—only political ones. *Id.* A retreat from those rules not only offends stare decisis; it inflicts a new constitutional violation by exceeding the judicial power of this Court.

D. Any remedy must leave the Milwaukee districts in place.

The Milwaukee-area districts have been the subject of Voting Rights Act and racial gerrymandering claims, including at the U.S. Supreme Court. *See Wis. Legislature*, 595 U.S. 398; *Baldus v. Members of*

Wis. Gov't Accountability Bd., 849 F. Supp. 2d 840 (E.D. Wis. 2012) (per curiam). Neither of Petitioners' claims could justify a remedy that disturbs the existing lines of the Milwaukee districts. The Milwaukee districts contain no populated municipal islands within county lines.[7] And there is no basis for exposing the region to further allegations of vote dilution only to achieve Petitioners' admittedly political goals. *See* Pet. ¶5; *see also* Wis. State Assembly Floor Session at 2:18:05-2:18:13 (Nov. 11, 2021), https://wiseye.org/2021/11/11/wisconsin-state-assembly-floor-session-42/ (Rep. Ortiz-Velez (D., Milwaukee – AD8) describing Governor's 2021 People's Maps Commission plans as part of a "national effort to dilute minority communities to create more Democratic seats").

E. Modifying or disregarding the *Johnson* injunction will violate the U.S. Constitution's Due Process Clause.

The Legislature and Respondents Senators preserve for appeal all constitutional arguments that modifying, dissolving, or ignoring the *Johnson* injunction here, without recusal by Justice Protasiewicz, violates due process, contrary to the Fourteenth Amendment. After Petitioners waited an extraordinary 15 months after the final judgment in *Johnson*, the parties have had 10 days—with half of those days falling on weekends and a federal holiday—to brief this case on the merits. The case is rushing to judgment before the next elections,

[7] AD15 contains a municipal island within Milwaukee County with 0 population and two additional municipal islands within Waukesha County with fewer than 30 people. *See* App.4.

despite a "serious risk" of both "actual bias" and "prejudgment." *Caperton*, 556 U.S. at 884 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

The full Court should determine whether it can adjudicate this case consistent with due process. To be sure, this Court permits single-justice recusal orders. *See State v. Henley*, 2011 WI 67, ¶2, 338 Wis. 2d 610, 802 N.W.2d 175. *But see State v. Allen*, 2010 WI 10, ¶¶91-92, 322 Wis. 2d 372, 778 N.W.2d 863 (Abrahamson, C.J.) (noting a split of authority on this issue and discussing Mich. Ct. R. 2.003(D)(3)(b)). But as for the due process issues here, and whether modifying or ignoring *Johnson* would comply with due process, the Supreme Court has explained that due process cannot be satisfied by "exclusive reliance on [a judge's] personal inquiry" into her own bias. *Caperton*, 556 U.S. at 883.

Only Justice Protasiewicz has decided that the Fourteenth Amendment does not require her to recuse. *Clarke*, 2023 WI 66. Justice Protasiewicz's opinion states recusal is not constitutionally required because, among other reasons, "there was no pending or imminent case for [her] to review," *id.* ¶47, when she made campaign statements about *Johnson* and took nearly $10 million from the Democratic Party, *see* Recusal Mot. App.078-087. But there is a serious "risk of . . . prejudgment," even if the case is (like this one) "imminent" but not yet filed, and even if (unlike this case) the judge has made no public statements. *Caperton*, 556 U.S. at 883-84.

Those campaign statements and outsized contributions, combined with the petition's timing and Petitioners' self-described interest of "achiev[ing] a Democratic majority in the state legislature," Pet. ¶5, are a ready-made Due Process violation. *Caperton*, 556 U.S. at 877. The objective risk of prejudgment and bias is constitutionally intolerable—and will be confirmed if this Court departs from black-letter procedural rules to reach the judgment endorsed in Justice Protasiewicz's campaign statements. *See* Memo. ISO Recusal 16-38.

IV. What additional factfinding is required depends on the nature of this Court's ruling.

A. ***As for Petitioners' contiguity claims,*** Petitioners still must prove districts are not "contiguous" as that term is used in the Wisconsin Constitution, and they must prove they have standing, which would entail fact discovery regarding where Petitioners live and their alleged injury.

B. ***As for remedying any contiguity claims,*** all municipal islands can be dissolved into surrounding districts if this Court overturns *Johnson* and deems them noncontiguous. The municipal islands are so sparsely populated that all districts would still be well within presumptively permissible population deviations except for AD47, which may be slightly underpopulated. *See* App.6, 13; *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983) (collecting cases for general rule that "maximum population deviation under 10%" is permissible). Assuming there would be no factual dispute about population contained in

municipal islands, any such remedy should be straightforward and require only limited remedial-stage briefing for a limited remedy.

C. ***As for any remedy that goes beyond dissolving municipal islands,*** there is not sufficient time to give the Legislature a reasonable opportunity to redistrict and then, if necessary, litigate remedies before the 2024 election deadlines. *Supra* Part III.B. If, for example, the Court concludes that Petitioners' claims require vacating the *Johnson* injunction entirely and overturning *Johnson*'s holding about least-changes remedies, significant remedial-stage proceedings would be required. Likewise, factfinding and expert discovery for remedial-stage issues would be substantial if the Court overturns *Johnson* and referees the partisan fairness of remedial proposals.[8] Remedial-stage proceedings would require:

- A reasonable opportunity to redistrict;
- Failing redistricting legislation, party briefs with remedial proposals accompanied by expert reports;
- Response briefs to remedial proposals accompanied by expert reports;
- Reply briefs in support of remedial proposals accompanied by expert reports;

[8] Any attempt to assess partisanship would entail multiple experts by each party in fields ranging from demography to political science to mathematics, sometimes with millions of simulated maps. *E.g., Harper v. Hall*, 868 S.E.2d 499, 516-22 (N.C. 2022) (describing plaintiffs' 5 experts and defendants' 3 experts); *see also Rivera v. Schwab*, 512 P.3d 168, 175-76 (Kan. 2022) (summarizing experts).

- Remedial-stage discovery, including fact discovery and expert depositions;
- Remedial-stage hearing before a special master, where each party may cross-examine all witnesses live;
- Special master's report and recommendation;
- Parties' opening briefs and response briefs regarding report and recommendation with supplemental expert reports as necessary; and
- Oral argument before this Court as necessary.

The forthcoming election deadlines are too near to accomplish the above on any reasonable schedule that allows the political branches an opportunity to redistrict and, failing that, allows the parties to litigate remedies. Petitioners waited until August 2023 to file their petition—nearly two years after their chance to intervene in *Johnson* and more than one year after *Johnson*'s final judgment. They cannot now demand that their case begin and end in mere months. Petitioners' delay is cause for dismissal—not justification to compromise parties' rights to fully and fairly litigate Petitioners' claims.

CONCLUSION

The Court should reject Petitioners' constitutional claims and dismiss the petition.

Dated this 16th day of October, 2023.

Respectfully submitted,

Electronically Signed by
Jessie Augustyn

AUGUSTYN LAW LLC
JESSIE AUGUSTYN, SBN 1098680
1835 E. Edgewood Dr., Ste. 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, & Wanggaard

LEHOTSKY KELLER COHN LLP
SCOTT A. KELLER*
SHANNON GRAMMEL*
GABRIELA GONZALEZ-ARAIZA*
200 Massachusetts Ave., NW, Ste. 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, & Wanggaard

Electronically Signed by
Kevin M. St. John

BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Ste. 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., Ste. 700
Arlington, VA 22209
703.243.9423
taylor@consovoymccarthy.com

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

Counsel for Wisconsin Legislature

* *Admitted pro hac vice*
** *Pro hac vice motion forthcoming*

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 10,988 words as calculated by Microsoft Word.

Dated this 16th day of October, 2023.

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