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IN THE SUPREME COURT OF WISCONSIN

No. 2023AP1399

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

Petitioners,

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

Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION; DON MILLIS, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, AND 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 SANFELLIPO, TERRY MOULTON, ROBERT JENSEN, RON ZAHN, RUTH ELMER, AND RUTH STRECK,

Intervenors-Respondents.

PETITIONERS' RESPONSE BRIEF

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INTRODUCTION

Wisconsin's legislative maps are plainly unconstitutional. The Wisconsin Constitution requires legislative districts to be contiguous, and various parties' attempts to escape the plain meaning of that term are unpersuasive. These specific maps also violate the constitutional principle of the separation of powers.

Intervenor-Respondents the Wisconsin Legislature and Respondent Senators Cabral-Guevara *et al*. (collectively, the "Legislature") and Johnson Intervenors provide no reason why this Court should depart from well-established remedial principles or its institutional role as a non-partisan body. Petitioners also propose a robust and efficient process for this Court to consider remedial plans.

ARGUMENT

I. This Court has authority to hear Petitioners' claims.

The Legislature and Johnson Intervenors advance numerous arguments why this Court should not entertain Petitioners' original action. This Court has already, correctly, accepted jurisdiction over issues 4 and 5, and the contentions that Petitioners lack standing, that their claims are barred by laches and issue preclusion, and that this Court cannot grant relief, all lack merit.

This Court properly exercises jurisdiction here. Petitioners have an injury in fact—their legislative districts flout Wisconsin's Constitution, undermining their representation. Petitioners seek to enforce constitutionally protected interests: contiguous districts that respect the separation of powers. Petitioners exercised diligence in pursuing their claims, which are not precluded by *Johnson* because they

were not litigated in *Johnson* and petitioners were not parties in *Johnson*. And this Court need not reopen *Johnson* to provide relief; Wisconsin has adopted the Uniform Declaratory Judgments Act, and caselaw establishes that a court-imposed map may be enjoined without disturbing the case that adopted it.

A. Petitioners have standing to pursue their contiguity and separation-of-powers claims.

The Legislature asserts that Petitioners lack standing, relying on cases discussing standing to bring *federal* redistricting claims, which are governed by the *federal* Constitution's Article III case-or-controversy requirement. Leg. Br. 19. However, "[f]ederal law on standing is not binding in Wisconsin." *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶17, 402 Wis. 2d 587, 977 N.W.2d 342. Standing under Wisconsin law is "a matter of sound judicial policy," not jurisdiction. *Wisconsin Bankers Ass'n v. Mut. Sav. & Loan Ass'n of Wis.*, 96 Wis. 2d 438, 444 n.1, 291 N.W.2d 869 (1980). And sound judicial policy counsels that a plaintiff with a personal stake in the outcome of the controversy—as little as "a trifling interest" that "give[s] rise to the adverseness necessary to sharpen the presentation of the issues"—has standing. *McConkey v. Van Hollen*, 2010 WI 57, ¶¶15-16, 326 Wis. 2d 1, 783 N.W.2d 855.

A two-pronged test determines standing. *First*, the test requires an "injury in fact" that is sufficiently concrete and "neither hypothetical nor conjectural." *Friends of Black River Forest*, 2022 WI 52, ¶¶18, 21. Second, the adversely affected interest must be "protected, recognized, or regulated by an identified law." *Id.*, ¶31. Under

prong two, this Court recognizes standing for taxpayers to challenge a statute as unconstitutional. *See, e.g.*, *Tooley v. O'Connell*, 77 Wis. 2d 422, 439, 253 N.W.2d 335 (1977). And, the "identified law" protecting Petitioners' interest can be the Wisconsin Constitution itself.

Petitioners plainly have standing to pursue their contiguity claim. The claim stems directly from the "identified law" of the Wisconsin Constitution—Article IV, Sections 4 and 5—which requires that assembly and senate districts be contiguous. Noncontiguous districts also harm Petitioners by rendering the Legislature less responsive and representative. They increase legislators' "travel time and costs," "make it [harder] for candidates for the legislature to campaign for office and once elected to maintain close and continuing contact with the people they represent," and generally increase "the 'agency costs' of representative democracy." *Prosser v. Elections Bd.*, 793 F. Supp. 859, 863 (W.D. Wis. 1992).

Additionally, as the Legislature acknowledges, Petitioners reside in or adjacent to noncontiguous districts, including in stranded municipal islands. Leg. Br. 20. Their injury from noncontiguity is more than an inadequately representative *legislature*; it is also a *legislator* whose capacity to advance constituents' interests is impaired by a fragmented district. And while the Legislature observes that not all Petitioners live in municipal islands, not even federal law, with its more restrictive approach to standing, demands that a redistricting plaintiff be in the right *subsection* of a district: *Any* "plaintiff [who] resides in [an allegedly] racially gerrymandered

district," for example, "has standing to challenge" that district's formation. *United States v. Hays*, 515 U.S. 737, 745 (1995).

Moreover, the Legislature is wrong to contend that the Court is powerless to remedy noncontiguous districts in which no Petitioner resides. Leg. Br. 20. In *Johnson*, the Court did not limit its remedy to balancing population solely in the districts in which the four *Johnson* Petitioners resided. *See Johnson v. Wis. Elections Comm'n*, 2022 WI 19, 410 Wis. 2d 198, 972 N.W.2d 559 (*Johnson III*). Nor did it look to see whether only those four districts satisfied the Constitution. When this Court orders a remedial plan, it must ensure that the entire plan complies with the Constitution. In any event, changes to Petitioners' districts necessarily require changes to other districts—redistricting does not occur in a district-specific vacuum.

Likewise, Petitioners have standing to bring their separation-of-powers claim. In *Bartlett v. Evers*, three taxpayers challenged a series of line-item vetoes on grounds including violations of the separation of powers. 2020 WI 68 ¶¶1-3, 393 Wis. 2d 172, 945 N.W.2d 685 (per curiam). This Court held that several of the vetoes were indeed unconstitutional. *See id.*, ¶9. No Justice doubted there was standing. The same result follows here, where Petitioners also challenge an action of the state government for trespassing the boundaries between the branches.

B. Petitioners' claims are not barred by laches.

The Legislature asks this Court to invent a new laches standard to prevent Petitioners from seeking redress. Leg. Br. 21-22, 41. The Court should decline this request. A party may invoke laches as an affirmative defense to guard against

prejudice caused by unreasonable delay. *Trump v. Biden*, 2020 WI 91, ¶10, 394 Wis. 2d 629, 951 N.W. 2d 568. Laches has three elements: (1) unreasonable delay in bringing a claim; (2) lack of advance knowledge by the adverse party; and (3) prejudice resulting from the delay. *Wisconsin Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶12, 393 Wis. 2d 308, 946 N.W.2d 101. Even if all prongs are established, a court has equitable discretion not to apply laches. *Id*.

The Legislature asserts that Petitioners' claims were unreasonably delayed because they were filed more than a year after *Johnson.* But the Legislature cites no precedent for the proposition that a year constitutes "unreasonable delay[]," Leg. Br. 21, and it's common for redistricting challenges to be filed years after plans are enacted. *See, e.g.*, *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *vacated on other grounds sub nom. Gill v. Whitford*, 138 S. Ct. 1916 (2018) (deciding partisan gerrymandering suit filed four years after plan's enactment). And *Trump* provides no support for the Legislature's unreasonable-delay argument. There, the Court emphasized that the Trump campaign "[w]ait[ed] until *after* an election" to bring its claims, holding that delaying through the election was "plainly unreasonable." 2020 WI 91, ¶16 (emphasis added). Here, Petitioners are challenging the use of the legislative maps in *future* elections.

The Legislature contends it had no advance knowledge of this suit because no party raised noncontiguity as an issue in *Johnson*. Leg. Br. 21-22. But the Legislature's briefing in *Johnson* acknowledged the exact noncontiguity issue Petitioners assert: "annexation by municipalities creates a municipal 'island,'"

causing districts to "contain[] detached portions of the municipality." Leg. Br. 30, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (filed Oct. 25, 2021); *accord* Leg. Br. 31, *Johnson*, No. 2021AP1450-OA (filed Dec. 15, 2021). The Legislature cannot pretend to be surprised by Petitioners' complaints about the noncontiguity to which the Legislature itself repeatedly referred.

The Legislature's claim of undue prejudice is likewise meritless. Prejudice is something "that places the [responding] party in a less favorable position." *Trump*, 2020 WI 91, ¶24. The Legislature says it is prejudiced because it "expended substantial resources to litigate, appeal, and obtain a final judgment and injunction in *Johnson*." Leg. Br. 22. But the Legislature cites no precedent suggesting that past litigation costs qualify as "economic prejudice" supporting laches. *Cf. Wren v. Richardson*, 2019 WI 110, ¶33 & n.26, 389 Wis. 2d 516, 936 N.W.2d 587. Moreover, the Legislature *voluntarily intervened* in both *Johnson* and here. Thus, the Legislature is not in a "less favorable position" because it chose to respond to a *new* challenge, from *new* Petitioners, based on *new* legal claims. This is what happens when district maps comply with some—but flout other—constitutional requirements. This Court held in *Trump* that "[w]aiting until after the election to raise the issue," when election officials have already relied on existing policies, "is highly prejudicial." 2020 WI 91, ¶26. Here, by contrast, there is no undue prejudice because Petitioners challenge district maps only to the extent they will be used in *future* elections.

In any event, the public interest supports adjudicating this case. As this Court has recognized, "any reapportionment or redistricting case is, by definition, *publici*

juris, implicating the sovereign rights of the people of this state." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶17, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam).

C. Petitioners' claims are not barred by issue preclusion.

The Legislature argues that Petitioners' contiguity claim is barred by issue preclusion and hints (without elaborating) that Petitioners' separation-of-powers claim is barred for this reason, too. Leg. Br. 22-24, 41. But issue preclusion bars neither claim. A party asserting issue preclusion bears the burden of establishing that it applies. *Dostal v. Strand*, 2023 WI 6, ¶22, 405 Wis. 2d 572, 984 N.W.2d 382. The issue preclusion argument fails at the outset because Petitioners were not parties in *Johnson* and do not share an identity of interest with parties in *Johnson*. Additionally, the Legislature cannot show that "the issue or fact was *actually litigated* and *determined* in the prior proceeding," and that "the determination was essential to the judgment." *Id.*, ¶24 (emphases added). Neither contiguity nor the separation of powers was actually litigated in *Johnson*, let alone decided by the Court.

Because Petitioners were not parties in *Johnson*, "[t]he threshold issue" for issue preclusion is whether they are "in privity or ha[ve] 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). If not, "applying issue preclusion … would violate [Petitioners'] due process rights and the analysis ends. Issue preclusion cannot be invoked." *Id.* Here Petitioners lack "a sufficient identity of interest with" the *Johnson* parties because they are individuals distinct from both

the nonprofit organizations and the individuals who litigated *Johnson*. *Id.* at 226. The Legislature's only contrary argument with respect to Petitioners is that some of their counsel were also counsel in *Johnson*. Leg. Br. 23. But retaining the same lawyer does not create an identity of interest. *See, e.g.*, *Baxter v. Utah Dep't of Transp.*, 705 P.2d 1167, 1169 (Utah 1985) (subsequent litigant's choice to "employ[] the same attorney" as prior litigant does not create privity for issue preclusion).

In any event, neither issue in this case was actually decided in *Johnson*. With respect to contiguity, no party in *Johnson* claimed that any existing or proposed remedial districts were noncontiguous. The Legislature concedes as much. Leg. Br. 21. Lack of contiguity was not an issue presented in the initial petition for an original action. Pet. for Orig. Action 1, *Johnson*, No. 2021AP1450-OA (filed Aug. 23, 2021). Nor was it an issue presented in the subsequent omnibus amended petition. Omnibus Amend. Pet. for Orig. Action 1-5, *Johnson*, No. 2021AP1450-OA (filed Oct. 21, 2021). In their voluminous briefing in *Johnson*, the parties hardly mentioned contiguity, doing so only to cite *Prosser*'s incorrect (and non-precedential) position that this requirement is satisfied by "political," as opposed to actual, contiguity. Leg. Br. 30, *Johnson*, No. 2021AP1450-OA (filed Oct. 25, 2021); Leg. Br. 31, *Johnson*, No. 2021AP1450-OA (filed Dec. 15, 2021). And contiguity was far from "essential" to the Court's decisions in *Johnson*. The Court merely noted *Prosser*'s view that "political" contiguity suffices and stated that all existing and proposed districts were contiguous under that view. The Court never relied on

contiguity, or the lack thereof, to endorse or reject any of the maps advocated by the parties. *See Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶¶36–37, 399 Wis. 2d 623, 967 N.W.2d 469 *(Johnson I*); *Johnson v. Wis. Elections Comm'n*, 2022 WI 14, ¶¶9, 36, 400 Wis. 2d 626, 971 N.W.2d 402 (*Johnson II*); *Johnson III*, 2022 WI 19, ¶¶63, 70.

With respect to the separation of powers, the Legislature fails to explain how the issue could possibly be precluded, Leg. Br. 41, and for good reason. The separation-of-powers issue arose only at the final stage of *Johnson*, when the Court in *Johnson III* adopted the very legislative maps the Governor had vetoed. No party raised the separation-of-powers issue before *Johnson III* because, prior to that decision, no separation-of-powers violation had occurred. Nor did the Court say a word about the separation of powers in *Johnson III*; the issue was addressed only in dissent. *See Johnson III*, 2022 WI 19, ¶187 (Karofsky, J., dissenting).

D. This Court has statutory and equitable authority to provide relief.

The Legislature argues that the Court can neither declare the current legislative maps unconstitutional under the Uniform Declaratory Judgments Act nor provide injunctive relief without reopening *Johnson*. Leg. Br. 49-52. Neither claim has merit. The Act provides that courts "shall have power to declare rights, status, and other legal relations." Wis. Stat. § 806.04(1). The Act "is to be liberally construed and administered" in order "to settle and to afford relief from uncertainty and insecurity with respect to" legal issues. *Id.* at § 806.04(12). This sweeping language is not curtailed by the Act's reference to certain legal instruments that may

be judicially construed, as the Legislature maintains. Leg. Br. 49. The Act makes clear that this "[e]numeration [is] *not* exclusive," and "does *not* limit or restrict the exercise of the general powers conferred." Wis. Stat. § 806.04(5) (emphases added).

The Legislature's position also conflicts with the basic rule that "declaratory judgment is fitting when a controversy is justiciable." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶29, 309 Wis. 2d 365, 749 N.W.2d 211. A controversy is justiciable when a party with a legal interest asserts a claim of right against an adverse defendant and the issue is ripe for decision. *Id.* Here, Petitioners have a legal interest in constitutionally compliant, contiguous districts that respect the separation of powers. The Respondent Senators who oppose the *quo warranto* claim, the Legislature that approved the challenged maps, and the Johnson Intervenors are adverse parties. And Petitioners' claims are ripe for adjudication; there are no material undeveloped facts, nor has any party claimed otherwise. *See Olson*, 2008 WI 51 ¶¶47, 63-70. This Court is therefore empowered to provide declaratory relief.

As for injunctive relief, a court-imposed district plan can be enjoined without reopening the case that adopted the plan in the first place. In fact, this is common in Wisconsin. In the 2010 cycle, a federal court held that two assembly districts in Milwaukee violated Section 2 of the Voting Rights Act. *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 861 (E.D. Wis. 2012). After the Legislature declined to enact a remedial map, the court ordered its own remedy. *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860 (E.D. Wis. 2012). That injunction remained in place at the time of *Johnson II*, but no one,

including this Court, suggested a remedy was unavailable except by reopening *Baldus* in front of the federal court. In prior cycles as well, *Prosser* redrew the legislative maps previously crafted by another federal court in *Wisconsin State AFL-CIO v. Elections Board*, 543 F. Supp. 630 (E.D. Wis. 1982), *see Prosser*, 793 F. Supp. 859, and *Prosser*'s maps were then redrawn by still another federal court in *Baumgart v. Wendelberger*, Nos. 01-C-0121, 02-C-0366, 2002 WL 34127471 (E.D. Wis. May 30, 2002). In none of these cases was any previous injunction reopened.

Indeed, a Wisconsin federal court *expressly rejected* the reopening procedure the Legislature urges. In June 2011, a plaintiff in *Baumgart* moved for relief from the 2002 judgment in order to challenge the districts adopted by that judgment. Plaintiff Judy Robson's Mot. For Relief from Judgment, *Arrington v. Elections Bd.*, No. 01-cv-121-CNC, Dkt. 453-54 (E.D. Wis. (filed June 9, 2011)), Supp. App. 005-018. The Government Accountability Board opposed the motion, arguing, in part, that a separate lawsuit (*Baldus*) had been filed by one of the plaintiffs in *Baumgart* challenging the districts adopted in that case and that the finality of the judgments entered in 2002 should not be disturbed. *Id*., Dkt. 459-4 at 4-5 (filed July 13, 2011), Supp. App. 022-023. The court agreed with GAB, denying the motion to reopen. *Id*., Dkt. 463, Order (E.D. July 28, 2011), Supp. App. 036-037.

II. The current legislative districts are unconstitutionally noncontiguous, and the Legislature and Johnson Intervenors' arguments otherwise are meritless.

The Legislature and Johnson Intervenors argue that the Constitution's text, history, and supposed "conflicts" between Article IV, Section 4's redistricting requirements defeat Petitioners' contiguity claim. Leg. Br. 16-39; Johnson Br. 9-19. These arguments distort the plain text of Article IV's contiguity requirement and lack merit.

A. Petitioners' contiguity claims are consistent with *stare decisis*.

The Legislature and Johnson Intervenors argue that *stare decisis* "forecloses" Petitioners' contiguity claims. Leg. Br. 28. Not so. Longstanding precedent establishes that a plain reading of Article IV's contiguity provision requires *all* parts of a district to physically touch, with no detached pieces. It is the Legislature's and Johnson Intervenors' arguments, which claim to contrive new meaning from the Constitution's plain text and overturn 143 years of precedent, that are squarely precluded by *stare decisis*.

Since at least 1880, this Court has held that "contiguous" means physically touching. *Chicago & N.W. Ry. Co. v. Town of Oconto*, 50 Wis. 189, 192, 196, 6 N.W. 607 (1880). In 1892, the Court reaffirmed this meaning in the redistricting context, holding that Article IV's contiguity requirement (which it recognized as "absolutely binding") means "each assembly district must consist of contiguous territory; that is to say, it cannot be made up of two or more pieces of detached territory." *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 148, 53 N.W. 35 (1892).

This plain meaning was confirmed again in *Town of Wilson v. City of Sheboygan*, where this Court held "contiguous" means "some significant degree of physical contact" and rejected the definition of contiguous urged by the Legislature and Johnson Intervenors. 2020 WI 16, ¶¶18-19, 390 Wis. 2d 266, 938 N.W.2d 493.

Brushing this aside, the Legislature and Johnson Intervenors claim that "this Court's contiguity rule" permitting noncontiguous municipal islands from the *Johnson* and *Prosser* cases is "settled law." Leg. Br. 26; Johnson Br. 15. Not true. Neither case creates a "contiguity rule." *Johnson I*'s statement that districts could be noncontiguous to accommodate municipal islands contains no analysis, relies merely on the federal court's decision in *Prosser*, and is nonbinding *dicta*. Pet. Br. 21-22. *Prosser* fares no better—it considered neither this Court's precedent in *Lamb* nor the constitutional text, relied on a statute that has since been repealed, conflicts with the holdings of other state courts, and is a *federal* case that cannot limit this Court on questions of state law. Pet. Br. 22-24. More fundamentally, state *statutes* cannot trump constitutional text, and *Lamb*'s interpretation of Article IV's contiguity requirement is binding on both this Court and federal courts. *See, e.g.*, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1868 (2018).

Given this, the Legislature's assertion that *Petitioners* need a "special justification" to "revisit[] settled contiguity rules" is absurd, as *Lamb* (and *Town of Wilson*) control. Leg. Br. 28. Even if they did not, it is the fundamental unsoundness of the decisions in *Johnson* and *Prosser*, not "the composition of the court," *id.*, that

supports adjusting any "contiguity rule" the Legislature claims this Court set in *Johnson*. *See, e.g.*, *State v. Popenhagen*, 2008 WI 55, ¶70, 309 Wis. 2d 601, 749 N.W.2d 611 ("Mistaken statements of the law should not constitute precedent that binds this court…"); *Bartholomew v. Wis. Patients Comp. Fund*, 2006 WI 91, ¶¶31-34, 293 Wis. 2d 38, 717 N.W.2d 216. As such, *Johnson* and *Prosser* provide no principled basis for flouting 150 years of this Court's precedents (let alone the constitutional text), are not controlling on this or any Court, and do not bar Petitioners' claims.

B. Districts are noncontiguous—and violate the Constitution—if they contain detached pieces of territory.

The plain text of Article IV, Sections 4 and 5 prohibits districts with detached pieces of territory. Section 4 provides "[t]he members of the assembly shall be chosen … by the qualified electors of the several districts, such districts to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable."[1] This sentence requires that assembly districts: (1) have boundaries that follow *either* county, precinct, town, *or* ward lines, (2) consist of contiguous territory (*i.e.*, no detached pieces), and (3) be reasonably compact.

The Legislature resists this plain reading, labeling it "unnatural," and appears to contend that the contiguity requirement is satisfied so long as some *portion* of

[1] Because the Legislature does not separately address Section 5's contiguity requirement for the Senate, Petitioners discuss only Section 4, as "contiguous" should have the same meaning in both Sections.

each municipality included within the district touches a portion of some other municipality within the district. Leg. Br. 29-34. The Legislature suggests that once a mapdrawer has bounded a district by free-floating territory (some up to 40 detached pieces), the "contiguous territory" clause ensures only that "when counties or towns are combined into one district, the different counties or towns are touching." *Id*. at 29. The Court should reject this tortured reading—the only thing it gets right is that "contiguous" means "touching."

Section 4's language provides that its contiguity mandate applies to the shape of the district and not to the proximity of municipalities within the district. This is apparent from the sentence structure: "such districts *to* be bounded…, *to* consist of contiguous territory…." Wis. Const. art. IV, § 4 (emphasis added). The requirement that territory be contiguous, given the construction, refers to the phrase "such districts" and not, as the Legislature suggests, to the phrase "county, precinct, town, or ward lines." *Id.* This is unmistakable from the comma separating the independent requirements and the sentence's syntax. Were the Legislature's reading correct, the compactness requirement would also not refer to the districts but would instead limit the shape of "county, precinct, town, or ward lines." *Id.* That is obviously neither the intent nor the plain meaning of the provision.[2] Indeed, that reading contradicts

[2] Given the meandering shape of most Wisconsin cities and villages, the Legislature's interpretation would render those municipal boundaries constitutionally suspect.

how the Legislature itself has drawn and measured districts.[3] The plain text of Section 4 mandates that no land assigned to a district be disconnected from the rest of the district.

Moreover, the Legislature conflates the contiguity of *municipalities* with the contiguity of *districts*. The Legislature contends that because many Wisconsin municipalities are noncontiguous, Petitioners' plain text reading would "require that 'town or ward lines' be contiguous," Leg. Br. 33, and "would put hundreds of municipal annexations in conflict with the constitutional text," *Id.* at 37. This argument is wrong in several ways.

First, Section 4 does not require that *municipalities* be kept whole. Rather, it requires that "county, precinct, town, *or* ward lines" bound the districts. Wis. Const. art. IV, § 4 (emphasis added). Neither cities nor villages are constitutionally required to be kept whole, as this Court recognized in *Lamb.* 83 Wis. 148 ("the section quoted speaks of 'ward lines,' but contains no other reference to cities. From this it is manifest that the framers of the constitution, even at that early day, contemplated that the necessity was likely to arise for dividing up cities by ward lines in the formation of assembly districts …."); *Wisconsin State AFL-CIO*, 543 F. Supp. at 635 (the Constitution contains no "requirement that city and village boundaries be maintained").

[3] *See, e.g.*, Leg. Br. 29*, Johnson*, No. 2021AP1450-OA (filed Oct. 25, 2021) (citing art. IV, § 4 to state that "[t]he Wisconsin Constitution requires Assembly *districts* to be 'in as compact form as practicable'" (emphasis added)).

Moreover, the word "or" in Section 4's "bounded by" clause means a district must be bounded by just *one* of the enumerated political subdivisions. *Hull v. State Farm Mut. Auto. Ins. Co.*, 222 Wis. 2d 627, 638, 586 N.W.2d 863 (1998) ("The meaning of 'or' is plain: 'or' is a connector of alternative choices in a series."). So long as ward lines bound the district, county or town lines need not. While traditional districting principles favor avoiding the unnecessary splitting of cities, villages, and towns in the configuration of districts—including avoiding splitting off island territory if possible—this is not constitutionally mandated. District contiguity *is* a mandate, and—as explained in Section II.D., *infra*—districts can be drawn that keep all wards whole *and* consist of contiguous territory absent any detached pieces.[4] Indeed, these independent constitutional mandates can be satisfied while minimizing the number of split cities, villages, and towns.

Second, as the Johnson Intervenors note, it was not until 1925—over 75 years after ratification—that the Legislature first authorized noncontiguous municipalities. Johnson Br. 17; *see* 1925 Laws of Wisconsin chs. 314-15. Neither the framers nor the voters who ratified the Constitution could have intended the tortured construction the Legislature advances to accommodate municipal islands when that phenomenon would not exist until three quarters of a century later. Nor

[4] This is so even though some wards are themselves noncontiguous. *See* Wis. Stat. § 5.15(1)(b). The small population of wards relative to assembly districts makes it possible to ensure that legislative districts include all the neighboring wards necessary to create fully contiguous districts throughout the state. *See* Section II.D, *infra*.

can the statutory creation of noncontiguous *municipalities* alter the constitutional requirement for contiguous *districts*.

Third, because the Constitution requires *districts* to be contiguous, Petitioners' reading does not "put hundreds of municipal annexations in conflict with the constitutional text." Leg. Br. 37. Wisconsin's municipalities can retain annexed noncontiguous territory while Wisconsin's legislative districts are configured to consist of contiguous territory. Nothing about the latter affects the former.[5] It is the *Legislature's* proposed reading that would jeopardize municipalities' status, by (mis)applying Section 4's contiguity and compactness requirement to "county, precinct, town or ward lines" rather than to "districts."

C. The Constitution requires actual—not "political"—contiguity in districts.

The Constitution requires that legislative districts contain contiguous, not "politically contiguous," territory. Leg. Br. 34. This phrase—which the Legislature manufactured—appears nowhere in the Constitution. Under this dubious heading, the Legislature and Johnson Intervenors claim that precedent and practice countenance disconnected districts. They do not. *See* Section II.A, *supra*.

[5] Other states allow noncontiguous municipal annexations while simultaneously requiring that legislative districts be contiguous. *See* Rev. Code Wash. § 35.13.180 (permitting noncontiguous annexation); Wash. Const. art. II, § 6 (requiring contiguous districts); Cal. Gov't Code § 56742 (permitting noncontiguous annexation); Cal. Const. art. XXI, § 2(d)(3) (requiring contiguous districts); N.C. Code § 160A-58.1 (permitting noncontiguous annexation); N.C. Const. art. II, §§ 3(2), 5(2) (requiring contiguous districts); Ind. Code § 36-4-3-4(a)(2) (permitting noncontiguous annexation); Ind. Const. art. IV, § 5 (requiring contiguous districts). None of these states have physically noncontiguous districts.

The Legislature attempts to refute the plain meaning of "contiguous" with citations to "loose" secondary or tertiary dictionary definitions. Leg. Br. 36 n.4. Webster's Dictionary, contemporary to the Constitution's ratification, rejected uses of "contiguous" to simply mean "near" as a use "not with strict propriety." Noah Webster, *An American Dictionary of the English Language* 258 (1848), Pet. App. 007. Contemporary uses of "contiguous" in redistricting bolster the literal, not the "loose," definition. *See, e.g.*, *National Conference of State Legislatures*, "Redistricting Criteria," https://www.ncsl.org/redistricting-and-census/redistricting-criteria defining "contiguity" as "[a]ll parts of a district being connected at some point with the rest of the district). Most importantly, this Court has rejected loose definitions of the word. *See Town of Wilson*, 2020 WI 16, ¶¶18-19.

After introducing alternative meanings for "contiguous," or alternate bodies that should be contiguous beyond legislative districts, the Legislature tries to refute two arguments Petitioners have not made.

First, they bring up water. Leg. Br. 35. Courts consistently hold that where water separates parts of a district, contiguity is not disrupted. Pet. Br. 24 n.3. Literal islands may be separate from the rest of a legislative district as a function of geographic reality, not "municipal boundaries." Leg. Br. 35. The special attention paid in Wisconsin and elsewhere to the necessary water exception underscores the rule: landlocked district fragments are not permitted. *See, e.g.*, *Wilkins v. West*, 571

S.E.2d 100, 109 (Va. 2002) (two sections of a district "completely severed" by intervening land "clearly" violate constitutional contiguity requirement).

Second, the Legislature asserts that requiring district contiguity is at odds with noncontiguous municipal annexation, which they defend at length. Leg. Br. 37-38. But Petitioners are not challenging the permissibility of noncontiguous municipalities. Putting aside the fact that, in a conflict between a since-repealed 1971 statute and the Wisconsin Constitution, the Constitution must prevail, the more important point is this: *there is no conflict.* As explained above and illustrated below, noncontiguous municipalities neither necessitate noncontiguous legislative districts nor materially affect the quantity of municipal splits when contiguous districts are drawn.

The Johnson Intervenors echo many of these misguided arguments. *See* Johnson Br. 9-19. They also recount how Wisconsin's previously "inviolable" county-line requirement in redistricting could no longer be followed after the U.S. Supreme Court's one-person-one vote decision in *Reynolds v. Sims*, 377 U.S. 533 (1964). Johnson Br. 16-17. But it does not follow that the contiguity requirement could be ignored. Indeed, the Attorney General Opinion they cite makes clear that, notwithstanding the county-line adjustments necessary to comply with one-person-one-vote, redistricting should otherwise be done in accordance with the state constitution. *See* 58 Op. Atty. Gen. 91 (1969). And the Johnson Intervenors' other cited case does not suggest otherwise.

D. Article VI, Section 4's political subdivision boundary and contiguity requirements do not require balancing because they do not conflict.

Districts can—and must—be drawn that are both bounded by county, town, or ward lines *and* contiguous. The Legislature and Johnson Intervenors contend that these requirements are "competing," must be "balanced against each other," and that enforcing the Constitution's contiguity requirement would cause a substantial increase in municipal splits. Leg. Br. 39-40; Johnson Br. 17 (characterizing constitutional requirements as "inconsistent once municipal islands exist"). Not so.

Wards are the smallest unit of Wisconsin political geography. By statute, the maximum population of a ward is 4,000. Wis. Stat. § 5.15(2)(b)(1). Following the 2020 Census, the ideal population of an assembly district is 59,533. As the maps submitted during the remedial process will show, there is not a single place in Wisconsin where the requirements to (1) bound assembly districts by counties, towns, *or* wards and (2) create contiguous districts are in conflict. Every assembly district can be bounded by county, town, or ward lines *and* consist of contiguous territory. And this would not multiply municipal splits. Joining affected municipalities into the same assembly district resolves the contiguity violation while respecting municipal boundaries. Indeed, it is the Legislature and the Johnson Intervenors who would drastically multiply split municipalities—and create substantial population deviations, *see infra* Section IV.B.1[6]—with their remedial

[6] *Contra Johnson II*, 2022 WI 14, ¶¶222-25 (Grassl Bradley, J., dissenting) (contending that even a 2% population deviation violates Wisconsin's Constitution, likening that deviation to England's

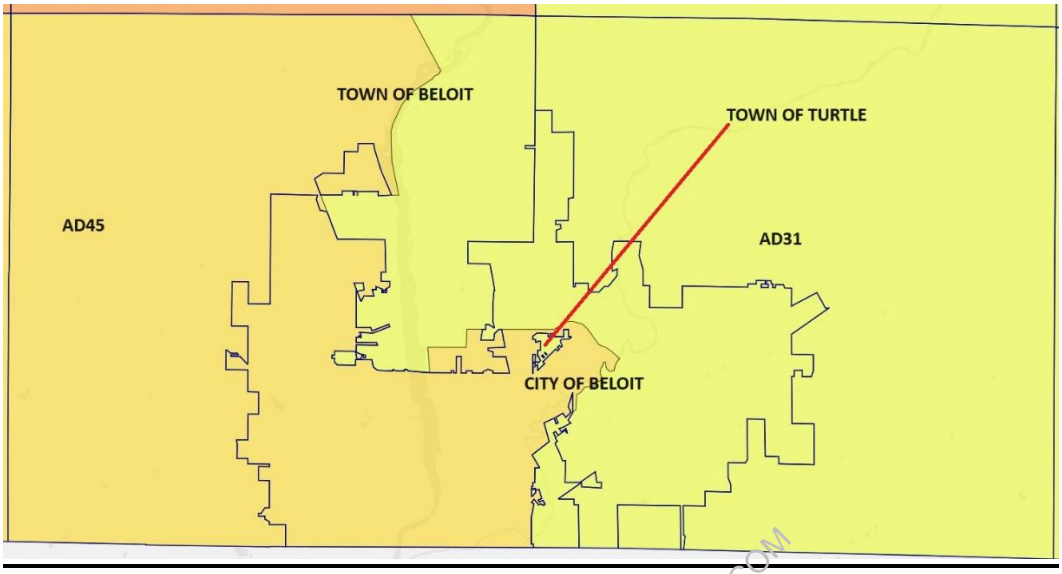
proposal to merely dissolve municipal islands into their surrounding districts. Johnson Br. 32; Leg. Br. 60. This Court should not impose a remedy that needlessly splits hundreds of municipalities when the districts can be reconfigured to achieve both contiguity and minimize split municipalities. *See Johnson II*, 2022 WI 14, ¶151 (Ziegler, C.J., dissenting) ("The state has strived to minimize divisions of local communities."); *id.* ¶232 (Grassl Bradley, J., dissenting) (same).

Some examples help illustrate the flaw in the Legislature's contention. The current map splits both the City of Beloit (population 36,657) and the Town of Beloit (population 7,721) between AD31 and AD45. The neighboring Town of Turtle (population 2,393) has island territory (populated by 207 people) in the City of Beloit. The current configuration, shown below (with city and town boundaries shown by blue line), splits two municipalities and yields two noncontiguous districts. This is unnecessary. These three municipalities can instead be joined together in a single district, as shown below. Doing so *eliminates* two municipal splits in the current plan and resolves the noncontiguity. Nearby municipalities can be added to reach near-ideal population.[7]

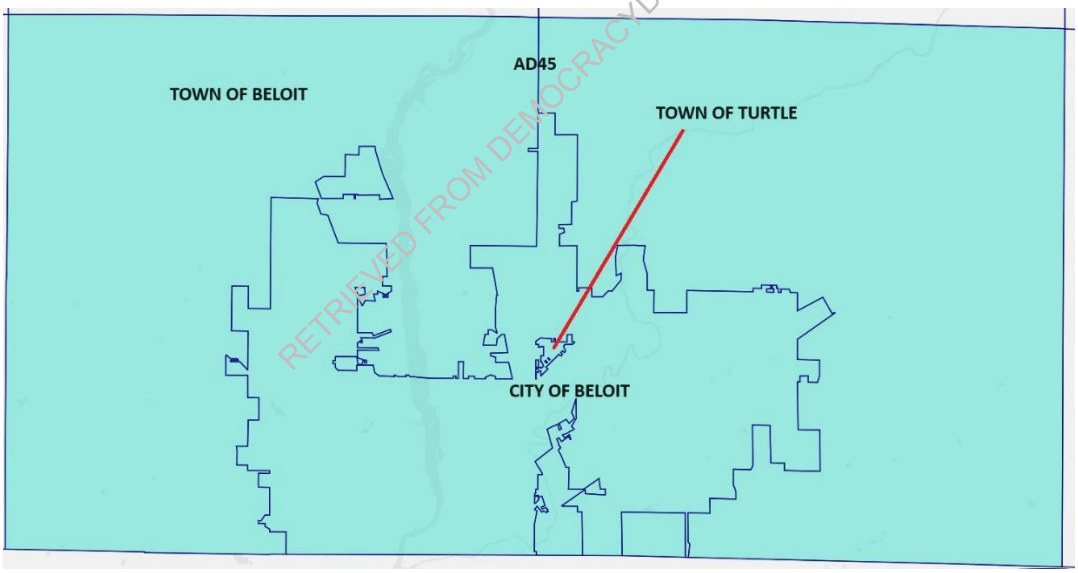
rotten boroughs, and contending that a 2% population deviation would "rais[e] serious concerns that the people, as a whole, have lost control over their own government").

[7] The municipal boundaries and their populations are judicially noticeable. *See* Wis. Stat. § 902.01(2); Wis. Leg. Tech. Serv's Bureau, https://www.arcgis.com/home/item.html?id=d9c8b35a45f8445d9e6dbcc4b13d0270 (municipal boundaries); U.S. Census Bureau, Quick Facts, https://www.census.gov/quickfacts/ (population).

Beloit Assembly Districts

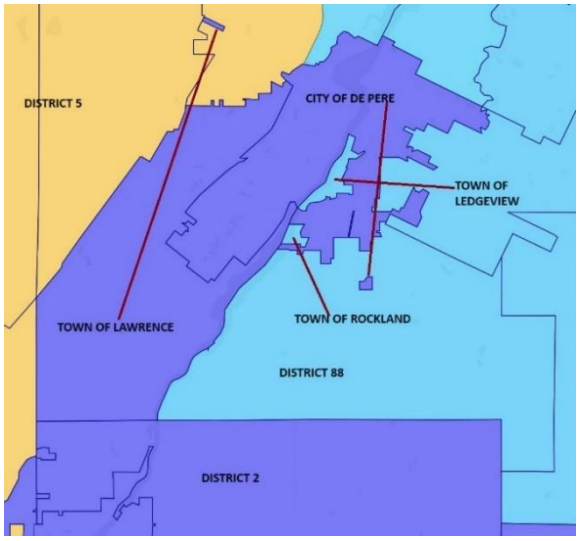


Possible Alternative District

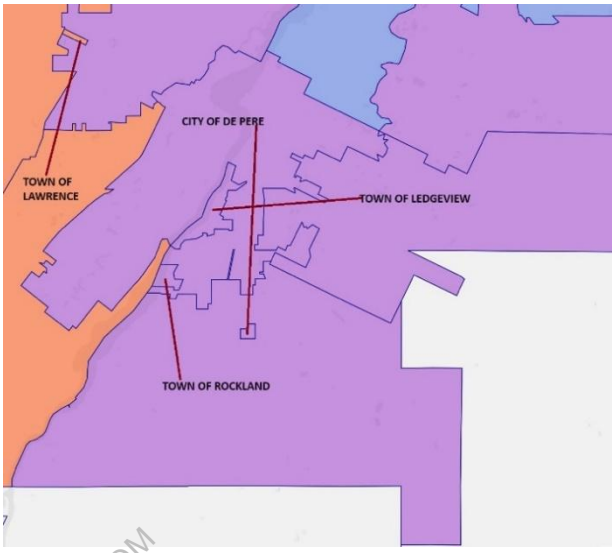


Consider De Pere and Lawrence, highlighted in the Legislature's Brief (at 17). The current map combines them into noncontiguous AD2, as shown below. These districts can be redrawn to keep De Pere, Lawrence, Rockland, and Ledgeview whole while remedying the noncontiguity. One possible configuration is shown below.

De Pere Area Assembly Districts

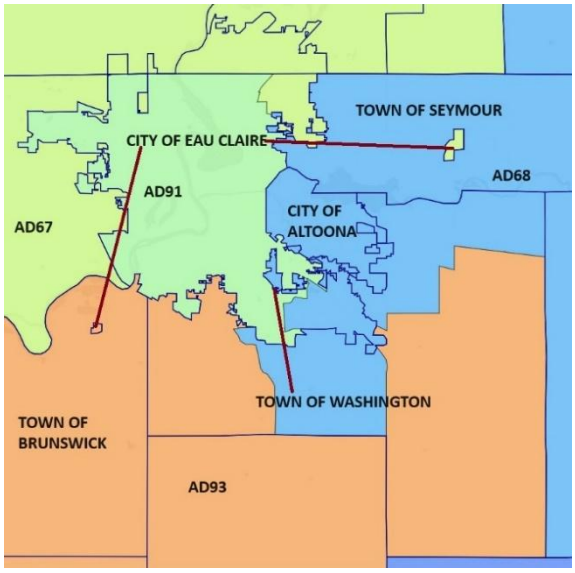


Possible Alternative Districts



Eau Claire is another example. The City of Eau Claire's population exceeds that of an assembly district, so it must be split. The current map splits it four ways, among AD67, AD68, AD91, and AD93. The current map also splits the Town of Washington between AD68 and AD93 and creates noncontiguous districts—with one detached piece of the Town of Washington containing 1,234 residents. These districts can be drawn to reduce the number of splits of the City of Eau Claire, eliminate the split of the Town of Washington, and eliminate the noncontiguity. One potential configuration (among many such possibilities) is shown below.

Eau Claire Area Assembly Districts



Possible Alternative Districts

As these examples illustrate, districts can be drawn that are both bounded by county, town, or ward lines *and* contiguous. Doing so will not multiply the number of municipal splits—indeed, in many instances creating contiguous districts *eliminates* existing municipal splits. The Legislature's contention that Section 4's mandatory requirements conflict and must be balanced is flat wrong. Each requirement of Section 4 can—and must—be followed.

III. The judicial adoption of the very maps the Legislature approved but the Governor vetoed violates separation-of-powers principles.

Petitioners' opening brief explained that this Court's adoption in *Johnson III* of the same maps the Legislature approved and the Governor vetoed violated the separation-of-powers principle fundamental to the Wisconsin Constitution. Pet. Br. 73-76. This Court displaced the Governor's exclusive authority to veto bills and usurped the Legislature's sole power—never exercised here—to override vetoes. In

response, the Legislature implausibly asserts that its maps were nothing more than a remedial proposal by a litigating party. In fact, they were a failed bill that the Legislature pushed this Court to embrace, thus obtaining through litigation what the Legislature could not achieve through bicameralism and presentment.

The Legislature originally proposed its maps as 2021 Senate Bill 621 via the legislative process, but the Governor vetoed the bill. The Legislature could have tried to override this veto, *see* Wis. Const. art. V, § 10, or developed alternative proposals to submit to the Governor, *see State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 557-58, 126 N.W.2d 551 (1964). But the Legislature chose neither option. Instead, it turned to this Court to impose *the very same maps*. In so doing, the Legislature pressed this Court to override the Governor's veto and install the maps despite their failure to survive the legislative process.

The Legislature now claims that it proposed the maps as a mere party to the litigation. Leg. Br. 44. To the contrary, the Legislature repeatedly advocated for its maps on the ground that they were more legitimate and authoritative *because* of their legislative approval. In *Johnson I*, the Legislature asserted that "[t]he Legislature's redistricting plans are the presumptive remedial plans." Leg. Br. 18, *Johnson*, No. 2021AP1450-OA (filed Oct. 25, 2021). The maps supposedly enjoyed this status because they were "passed by both houses," allegedly rendering them "an expression of the policies and preferences of the State voted upon by the duly elected representatives of the State." *Id.* at 19 (internal quotation marks omitted). In *Johnson II*, the Legislature similarly claimed that, because "the Legislature passed [the]

plans," "[t]he Legislature's plans are the true people's maps," and "[t]hey are the natural remedy for this reapportionment dispute." Leg. Br. 6-7, *Johnson*, No. 2021AP1450-OA (filed Dec. 15, 2021).

In any event, Petitioners' separation-of-powers argument does not turn on how the Legislature portrayed its maps or why the Court accepted them. The critical point, instead, is that the Governor vetoed the maps, meaning that judicial adoption impermissibly circumvented that veto. The Legislature's only response seems to be that the Court did not actually enact the vetoed maps *via statute*. But that is far too narrow a view of the separation of powers, a principle whose preservation does not turn on technicalities. The separation of powers is equally violated when one branch takes action that negates another branch's constitutional prerogative. A transgression does not require one branch literally to exercise another branch's constitutional powers.

Petitioners' position does not, as the Legislature complains, "exclud[e] the Legislature from redistricting remedies." Leg. Br. 46. It prevents only manipulation of the litigation process to have the Court override the Governor's veto. There is a constitutionally prescribed path for a vetoed bill to become law: a legislative override by a two-thirds vote of each house. *See* Wis. Const. art. V, § 10(2). But "nothing in the constitution vests this court with the power of the legislature." *Johnson I*, 2021 WI 87, ¶3. To the contrary, judicial endorsement of the same failed bill "judicially overrides the Governor's veto" even though "no judicial override

textually exists," "thus nullifying the will of the Wisconsin voters who elected that governor into office." *Johnson III*, 2022 WI 19, ¶187 (Karofsky, J., dissenting).

To avoid this separation-of-powers violation, the Legislature could have offered *different* maps as a remedy—that is, maps not previously vetoed by the Governor. Had the Legislature done so, its maps would *actually* have been the proposal of a party in litigation. They would not have been a failed bill sought to be converted judicially into law.

The Legislature's maps' unsuccessful legislative history is also what distinguishes them from the maps the Governor suggested and this Court selected in *Johnson II*. The Governor's maps, unlike the Legislature's, *were* introduced for the first and only time in court, pursuant to the criteria specified in *Johnson I*. They were never considered by legislative committees, debated on the legislative floor, or voted on by the Assembly or Senate. Consequently, the Legislature is wrong when it states that, under the logic of Petitioners' separation-of-powers theory, "the Court could not select the Governor's remedial proposal...because that would exclude the Legislature." Leg. Br. 47. *If* the Governor's remedial proposal had been a failed bill, *then* the Court could not have chosen it without usurping the Legislature's power to approve legislation. But the Governor's remedial proposal was entirely divorced from the legislative process—nothing more, and nothing less, than a litigation document.

IV. The Court has the power to remedy the constitutional violations at issue without reopening *Johnson* and must impose new maps consistent with constitutional requirements and traditional redistricting criteria.

Both the Legislature and Johnson Intervenors minimize the remedy required if the Court determines the existing legislative maps violate the Wisconsin Constitution. Leg. Br. 54-57; Johnson Br. 28-37. But in remedying the constitutional violations, the Court must act as a neutral, nonpartisan body, which means it cannot order new maps that favor certain Wisconsin voters over others based on their political viewpoints.

The Wisconsin Constitution's redistricting requirements govern this Court's task. The Constitution requires that legislative districts be contiguous and that assembly districts also be compact and consistent with county, precinct, town, *or* ward lines. Wis. Const. art. IV, § 4. These criteria, along with the Court's nonpartisan role, establish the Court's responsibilities in developing a remedy when maps are unconstitutional. The Legislature's and Johnson Intervenors' suggestion that the Court ignore those responsibilities in favor of making tweaks would instead generate further constitutional violations. *See Johnson I*, 2021 WI 87, ¶98 (Dallet, J., dissenting) (in adopting new maps, this Court should "ensure that the maps we adopt are the 'best that c[an] be managed' under all relevant criteria"). Selecting maps that comply with the Constitution and traditional redistricting criteria is precisely how courts properly craft an appropriate remedy for unconstitutional maps. *Prosser*, 793 F. Supp. at 865.

A. This Court has authority to remedy constitutional violations in the existing legislative maps.

The fact that the current maps resulted from this Court's *Johnson III* decision does not prevent the Court from reviewing their constitutionality. *Contra* Leg. Br. 48-52. The Legislature raised identical objections in response to the Petition, Leg. Amicus Br. 18-19; Rep. Sen. Br. 25-26, after which this Court took jurisdiction.

This Court holds superintending authority over all Wisconsin courts and "may hear original actions and proceedings." Wis. Const. art. VII, § 3. The Legislature cites no source limiting this Court's authority to determine whether the current legislative maps were imposed in error, regardless of whether that error is the result of the legislative or the judicial process. *Hunt v. McDonald*, which involved a repeated attempt to foreclose on a mechanic's lien, is inapposite. 124 Wis. 82, 83-84, 102 N.W. 318 (1905). In more recent and relevant caselaw, this Court has made clear that it retains the ability to review prior mandates.

In *Koschkee v. Taylor*, also an original action, this Court reviewed a prior injunction invalidating a requirement that the Superintendent of Public Instruction submit scope statements to the Governor for approval. 2019 WI 76, ¶8, 387 Wis. 2d 552, 929 N.W.2d 600.[8] The Court rejected the proposition that it could not revisit its prior determination: "stare decisis does not require us to retain constitutional interpretations that were objectively wrong when made. This is so because such

[8] The Legislature's attempt to distinguish *Koschkee* is misleading. The Legislature indicates that *Koschkee* involved a "new statute." Leg. Br. 48. But both the petitioners in that case and the Court made clear that *Koschkee* was a direct challenge to the prior injunction and that the intervening legislation had not changed the issues in that case. 2019 WI 76, ¶7-8.

interpretations are unsound in principle." *Id.*, ¶8 n.5 (internal citations omitted). Additionally, unlike in *Koschkee*, the Court here has permitted the Johnson Intervenors to intervene and advocate for the injunction issued in *Johnson*. *Compare* Order at 2 (Oct. 13, 2023) *with Koschkee v. Taylor*, No. 2017AP2278-OA, Order (Wis. Nov. 13, 2018), Supp. App. 038-039. Furthermore, as explained in prior briefing, significant portions of *Johnson I* are not binding or are distinguishable here. Specifically, the least-change approach discussed in *Johnson I* has no effect because a majority of this Court neither agreed that the approach should apply, nor what it meant, if it did apply. Pet. Mem. of Law 76-79.

Moreover, if the Legislature were correct, it is unclear when the *Johnson III* injunction could ever be challenged.[9] Would the Legislature itself be required to come to this Court and ask to reopen *Johnson III* following the next decennial census? Would another party alleging malapportionment be required to do the same? Wisconsin has had court-imposed legislative maps before, but the Legislature points to no case in which a party could not challenge maps for this reason. *See* Section I.D, *supra*. The same applies here.

B. The Court should apply traditional redistricting criteria and cannot create additional constitutional infirmities in imposing a remedy.

Other than the Legislature's meritless process objections, the parties generally agree that the Court must consider the traditional criteria for redistricting

[9] The Legislature's recitation of the obvious, that an injunction cannot be "ignore[d]," is inapposite. Leg. Br. 50. Petitioners do not ask WEC to ignore an injunction but rather seek relief to ensure any maps WEC enforces meet constitutional requirements.

with three exceptions. First, the Legislature and Johnson Intervenors propose a remedy that would create other constitutional problems, including splitting wards and exacerbating municipal splits. Second, the Legislature and Johnson Intervenors ask this Court to ignore its commitment to neutrality and risk conferring a significant electoral advantage to voters of one political party. Third, both request that the Court apply a least-change approach, which is inapplicable here.

1. The Court cannot absorb noncontiguous areas into existing districts without creating other constitutional defects.

The Legislature and Johnson Intervenors suggest that this Court can simply impose maps that absorb noncontiguous areas into existing districts without creating other constitutional defects. Leg. Br. 60; Johnson Br. 29. But they fail to support that assertion and it is incorrect.

First, as the Legislature and Johnson Intervenors concede, this proposal would increase population deviation across the districts. They contend that the new deviation would be almost 10%. Leg. Br. 60; Johnson Br. 32. But a court-ordered remedial map cannot exceed *de minimis* population deviations. *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 484, 51 N.W. 724 (1892); *Connor v. Finch*, 431 U.S. 407, 414 (1977) (citation omitted). This proposal fails on that basis alone.

Second, this proposal would require splitting a large number of wards—the smallest political subdivision enumerated in Article IV, § 4—because most municipal islands are assigned to wards based primarily in the main territory of the municipality. *See* Wis. Stat. § 5.15(1)(b) (permitting noncontiguous wards to

include municipal islands).[10] The Legislature's suggestion that the municipal islands can just be dissolved into the surrounding districts cannot be squared with its own interpretation of Article IV, § 4 as requiring adherence to ward lines. Leg. Br. 30-34. Nor can it be squared with precedent and statutory command. *See, e.g.*, *Baumgart*, 2002 WL 34127471, at *3 ("Although avoiding the division of counties is no longer an inviolable principle, respect for the prerogatives of the Wisconsin Constitution dictate that wards and municipalities be kept whole where possible."); *see also Johnson II*, 2022 WI 14 ¶219 (Grassl Bradley, J., dissenting) (stating that the unnecessary splitting of wards in service of minimizing changes to existing districts would be "gut[ting] state constitutional mandates"); Wis. Stat. § 5.15(1)(a)(1) (requiring that ward boundaries be "as permanent as possible").[11]

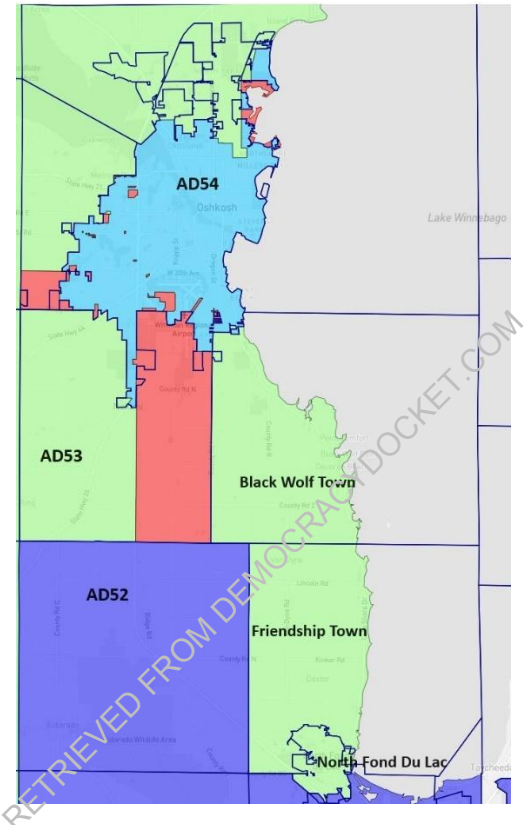
But if the wards assigned to the municipal islands are likewise shifted to the neighboring districts, the population deviation of the map will skyrocket beyond 10%—far above what the state and federal constitutions permit. An example illustrates the problem. In the Oshkosh area, AD53 has substantial island territory

[10] Wisconsin's municipal ward boundaries are judicially noticeable. *See* Wis. Leg. Tech. Serv's Bureau, WI Municipal Wards (July 2023), https://data-ltsb.opendata.arcgis.com/datasets/6c47a9611de6459eacab363c14e8a2b3_0/explore?location=44.004833%2C-88.637105%2C12.37.

[11] Splitting wards in the manner suggested by the Legislature and Johnson Intervenors would also cause a host of electoral administration problems. New wards—many with 20 or fewer people, Leg. Br. 18—would have to be created because wards cannot cross legislative district lines, Wis. Stat. § 5.15(6)(a). Voter privacy would be seriously and needlessly compromised by this proposal—ward level election returns would likely reveal the candidate choices of individual voters in wards containing so few people.

in AD54. The red area in the image below is the corresponding ward territory for those islands, using 2022 ward boundaries.

Oshkosh Area Noncontiguous Territory/Corresponding Wards

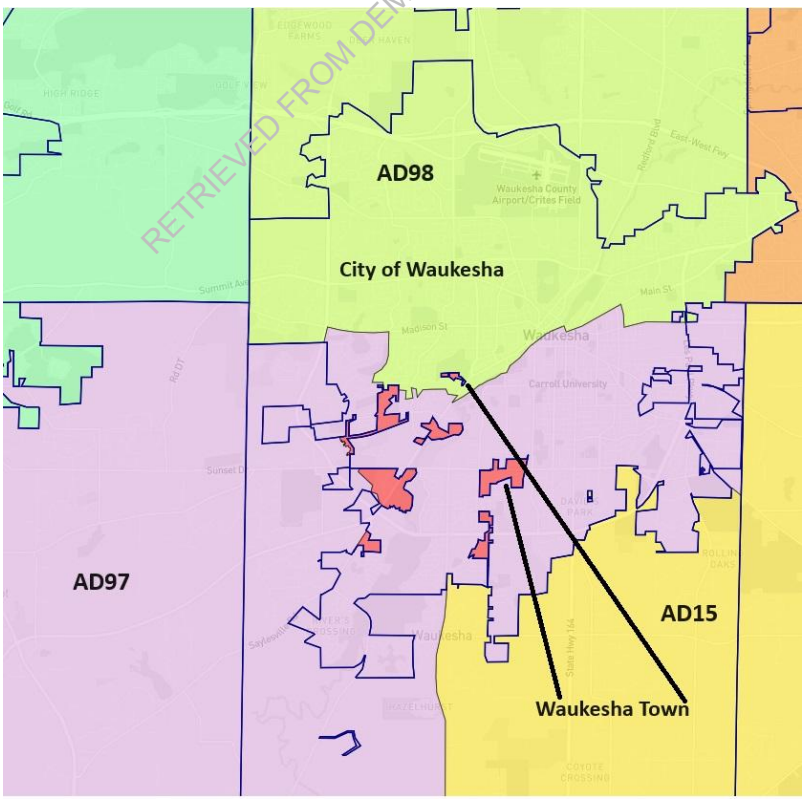


The wards in red contain 1,192 people. "Dissolving" those wards into AD54 would create a new noncontiguity—stranding portions of Black Wolf, Friendship, and North Fond Du Lac from the rest of AD53. If those areas are moved to AD54—required for contiguity—wards currently assigned to AD52 with island territory in North Fond Du Lac would also have to be shifted from AD52 to AD54. All these changes would add an additional 12,028 people to AD54—making AD54's

population 22.3% above ideal and AD53's population 19.7% below ideal—causing a total population deviation of over 40%.

The Milwaukee suburbs provide another example. Part of the Town of Waukesha is in AD97 but has island territory in AD98 surrounded by the City of Waukesha. Its corresponding ward is shown in red below. Obviously, "dissolving" the municipal island and its corresponding ward would be insufficient because doing so would simply multiply the contiguity violation. The domino effect of attempting to preserve the existing district configuration while "dissolving" wards into AD98 to make the territory contiguous would add over *30,000* people to AD98, making its population deviation 54.8% above ideal.

Waukesha Area Noncontiguous Territory



These are just two examples. Retaining existing district borders while reassigning wards that contain island territory would bring the maps wildly outside permissible population deviations and would violate both the state and federal constitutions.

Third, this proposal would radically increase municipal splits. Each municipal island that is "dissolved" into its surrounding district would add a new municipal split. The severity of that split would be deepened by moving the corresponding ward—intruding the split into the municipality's central territory. Given how endemic noncontiguity is—with many districts containing municipal islands of several municipalities—the result would be an extreme multiplication of municipal splits.

Fourth, this proposal would result in the Court imposing a judicial gerrymander that favors certain voters over others based on their political views. *See Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶12; *see also, infra* Section IV.B.2.

Accordingly, the remedy for noncontiguity cannot be "dissolving" municipal islands into their surrounding districts or a similar least change approach. The ripple effect of fixing each noncontiguity—and there are *many* of them—is so large as to render the existing districts wholly useless as a starting point. Rather, the maps must be drawn from scratch, with attention paid to combining wards, municipalities, and counties in such a way that (1) maintains, at the very least, whole wards, (2) yields contiguous territory, and (3) minimizes municipal splits. This can be done, and Petitioners will submit remedial proposals that do just that. But it cannot be done

while attempting to maintain the existing districts' configurations. The widespread noncontiguity in the current maps interacts with the ward and municipal boundaries in such a way as to create a domino effect that unravels the maps into a morass of constitutional violations.

Additionally, because the current legislative maps violate both the Constitution's contiguity requirement and the separation of powers, any remedial criteria or process must address both deficiencies, each of which requires the Court to follow traditional redistricting criteria in implementing a remedy. The Johnson Intervenors suggest the same remedy to the separation-of-powers violation that they propose for the contiguity violations, but such a remedy fails for the same reasons and must be rejected.

2. The Court must ensure that a remedial map neither favors nor disfavors certain voters based on their political viewpoints.

In slightly different ways, the Legislature and Johnson Intervenors ask this Court to disregard whether any remedy favors certain Wisconsin voters over others based on political viewpoints. Leg. Br. 54-57, Johnson Br. 35-37. In doing so, the Legislature and Johnson Intervenors would have this Court pick sides on a political basis in determining a remedy. This Court should consider the effect of remedial plans on the relative ability of voters to convert votes into legislative seats, in order to uphold the longstanding and uncontroversial principle that courts should remain neutral and not impose maps that benefit voters of one party over another. Pet. Br. 37-41. This is especially important here where, unlike in *Johnson*, the existing map

failed the political process and is thus due no deference. With no plausible map from which to make "least changes," the Court must ensure it does not skew Wisconsin's elections.

3. The Court should not apply a least-change approach.

For the reasons stated in Petitioners' opening brief and as discussed in Section IV.A *supra*, this Court should not apply a least-change approach to any remedy. Pet. Br. 45-49.

C. The Court should not anonymize proposals.

The Johnson Intervenors state that the Court should review proposed maps without knowing who submitted them, relying instead on an "independent third party" to review. Johnson Br. 34-35. This suggestion has no apparent precedent.[12] Petitioners trust the Court, with the assistance of a referee, to fairly evaluate maps submitted regardless of authorship. Should the Court choose to rely on a third party for an initial analysis of the maps, that third party should conduct the full analysis proposed by Petitioners, and the Court would retain its responsibility to do the same.

V. The Court should order parties to submit proposed remedial maps to a referee, and the Court should adopt remedial maps without first deferring to the legislative process.

Many of the parties agree on key features of a remedial process: parties should have the opportunity to propose remedial maps, supported by expert analyses if they so choose, and respond to the submissions of other parties. *See generally*

[12] This proposal would create logistical problems that the Johnson Intervenors do not address. For example, it is difficult to see how this could comply with Wisconsin's open records law or requirements for submissions to the Court. *See* Wis. Stat. §§ 19.31, 802.05(1).

Evers Br.; Atkinson Br. Petitioners agree, and now address two disputed aspects of the remedial process.

First, the Court should engage a referee to assist it to resolve any factual disputes and, if needed, adjust the proposed remedial maps. The Court should not refer factual disputes to a panel of circuit-court judges. Atkinson Br. 42. As the Atkinson Intervenors concede, Wis. Stat. § 751.035's discussion of three-judge panels applies to redistricting actions in *circuit court*, not those in which this Court has accepted original jurisdiction. Referral to a three-judge panel offers no practical advantages, would cause unnecessary delay, and might not obviate the need for a referee.

A referee with expertise in redistricting would assist this Court in analyzing the parties' expert submissions and making factual and technical judgments that rely on specialized knowledge. A three-judge panel will lack that expertise and might need to engage its own referee to assist it in resolving factual disputes. Three-judge trial courts frequently engage special masters in remedial phases of redistricting lawsuits. *See* Pet. Br. 50 (citing examples).

Appointing a three-judge panel would cause significant delay—including the time to choose judges and for those judges to get up to speed—without any obvious benefit. The Atkinson Intervenors note that judges are well-equipped to make credibility findings at hearings, Atkinson Br. 48, but there is no need for an evidentiary hearing here, and courts routinely decide remedial redistricting issues without such a hearing. Nor are the Atkinson Intervenors correct that an evidentiary

hearing would likely last no more than two days. *Id.* Excluding WEC, there are six parties, each of which may propose its own map and offer its own experts. A hearing in which those experts address all proposed maps (which could be a total of twelve if Petitioners' recommendation is adopted), and then are cross-examined by five other parties would surely exceed two days. If not, it would only be because most of the work was done in the experts' written submissions, rendering the hearing superfluous. Although not unheard of, such a hearing is not the norm in remedial map proceedings.

If the Court authorizes any remedial-stage discovery, it should be limited to the exchange of the data and inputs that the experts used in their remedial analyses. There is no need, for example, for expert depositions—these would also delay proceedings, and the Legislature cites no instance where a court has allowed for such extended fact-finding at the remedial stage. Nor is there any need for remedial "discovery" on where petitioners live, as the Legislature proposes, Leg. Br. 60; if the existing maps are unconstitutional, the remedy is to redraw them. Indeed, this is the precise approach the Legislature and *Johnson* Intervenors endorsed in *Johnson*. *See* Proposed Joint Discovery Plan, *Johnson*, No. 2021AP1450-OA (filed Dec. 3, 2021), Supp. App. 040-057.

Second, there is no need to defer to the legislative process before this Court's remedial process begins. Contrary to the Legislature's argument, Leg. Br. 52-54, that is not the standard approach in this situation. The Wisconsin Constitution does not entitle the Legislature to redistrict now; the deference principles that apply to

federal courts ordering remedial districts do not apply here; and the Legislature cites no case where a court has afforded a legislature and governor an opportunity to remedy the constitutional defects in a map imposed by a court. Given the political realities and the tight timing necessary to ensure that a remedial map is in place for the 2024 elections,[13] such a process is unnecessary and would be futile. There is no reason the replacement of one court-drawn map with another should trigger a special, additional opportunity.

VI. The Court's adjudication of the Petitioners' claims based on the Wisconsin Constitution does not violate the Due Process Clause.

The Court's consideration of this case over the course of, at a minimum, 111 days, does not violate due process, nor would the Court's inquiry to ensure that its remedial map does not disfavor certain Wisconsinites based on their political viewpoints. And the Legislature's attempt to relitigate its recusal motion is both improper and incorrect.

A. The briefing schedule does not violate the Due Process Clause.

Both the Legislature and the Johnson Intervenors complain that the Court's briefing schedule violates their rights to due process. Leg. Br. 58-60; Johnson Br. 38. Both parties misstate the relevant timeframe. Petitioners filed this case on August 2, 2023, over 70 days ago. The Petition and accompanying memorandum included expansive argument on each of the questions raised by the Court's October

[13] Respondent WEC states that to properly administer the 2024 elections it would need maps in place by March 15, 2024. WEC Br. 3. That deadline is consistent with Petitioners' proposal for the remedial process. Pet. Br. 49-55.

6, 2023 Order. Pet. Mem. of Law. The parties, including the Legislature, have been apprised of the issues in this case for months, and the Legislature filed a 19-page amicus brief responding to the Petition. Similarly, nothing prohibited the Johnson Intervenors from appearing earlier, either as intervenors or as amici.

Moreover, the current briefing schedule is well within the normal bounds for redistricting cases, including past cases before this Court. *See Johnson*, No. 2021AP1450-OA, Order (Wis. Jan. 4, 2022) (requiring motion responses by 4:00 P.M. the next day); *id.*, Order (Wis. Jan. 31, 2022) (requiring motion responses by noon on February 2, 2022); *id.*, Order (Wis. Mar. 7, 2022) (requiring responses to motion for a stay by 11:00 A.M. on March 9, 2022). Supp. App. 058-089. The *Johnson* proceedings in the U.S. Supreme Court proceeded at breakneck pace, with Respondents provided only *four days* to respond to the Legislature's application for a stay, which the Supreme Court treated as a petition for certiorari, granted, and resolved on the merits *without allowing merits briefing. See Wisconsin Leg. v. Wis. Elections Comm'n*, No. 21A471 (U.S. 2022). In fact, this Court adjudicated *Johnson* in a *shorter* time than would be required to resolve this case.[14] This is consistent with other courts hearing redistricting challenges. *See, e.g.*, *Singleton v. Merrill*, No. 2:21-cv-01530, Order (N.D. Ala. Nov. 23, 2023) (ordering, *inter alia*, an evidentiary hearing on plaintiffs' motion for preliminary injunctive relief to occur within 49 days of the filing of the complaint), Supp. App. 090-102.

[14] Johnson Intervenors filed their Petition on August 23, 2021. Petition, *Johnson*, No. 2021AP1450-OA (Wis. Aug. 23, 2021). Petitioners filed this case on August 2, 2023.

The schedule is also consistent with—or more forgiving than—other cases in which this Court has ordered expedited briefing. *See Trump v. Biden*, No. 2020AP2038, Order (Wis. Dec. 11, 2020) (supplemental briefs to be filed by 10:00 P.M. that night); *see also Fabick v. Palm*, No. 2020AP828-OA, Order (Wis. May 5, 2020) (responses to be filed no later than May 8, 2020 and replies by May 11), Supp. App. 103-107. This history includes cases that the Legislature initiated.[15] *Wisconsin Leg. v. Palm*, No. 2020AP765-OA, Order (Wis. Apr. 21, 2020) (responses to be filed no later than April 28, 2020 and replies by April 30); *Wisconsin Leg. v. Evers*, No. 2020AP608-OA, Order (Wis. Apr. 6, 2020) (responses to be filed by 3:30 that afternoon), Supp. App. 108-110. When the constitutionality of a state's legislative districts is at issue, parties expect prompt resolution. This Court has properly balanced that expectation with affording the opportunity for all parties to be heard.

B. The Court's responsibility to ensure it does not disfavor certain voters based upon their political viewpoints does not violate the Due Process Clause.

Ensuring that remedial maps do not disfavor certain Wisconsinites based upon their political viewpoints will not violate any party's due process rights. The Johnson Intervenors' reliance on *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), is misplaced. Johnson Br. 36. In *Rucho*, federal law governed justiciability. The Supreme Court was concerned with standards for determining whether maps would violate the U.S. Constitution. 139 S. Ct. at 2502–06. In light of the Court's limitation

[15] The Legislature is represented by five law firms. Not only has the Legislature complied with the Court's briefing schedule, but it was also able to file a separate, if repetitive, motion to dismiss.

of the issues in this case, Petitioners are not asking the Court to devise a test for when a partisan gerrymander violates the state Constitution, although doing so is certainly possible. At issue is only the remedial process once the Court determines the current maps are unconstitutional—an entirely different posture from *Rucho*. Petitioners *do* ask the Court to act with judicial neutrality in selecting a map that will not favor or disfavor voters based upon their political viewpoints. Pet. Br. 37-41. The Johnson Intervenors claim to agree that the Court should remain neutral and nonpartisan, even citing Justice Dallet's dissent in *Johnson* for this proposition, but claim neutrality requires willful blindness to the partisan effects of proposed maps. Johnson Br. 36. Petitioners have explained why these arguments are incorrect and led the Court to entrench a partisan advantage, an error it should not repeat. Pet. Br. 37–38.

C. Justice Protasiewicz's participation in this case is not a due process violation and has been fully adjudicated.

Justice Protasiewicz's participation in this case is not a cause for due process concern. Leg. Br. 58–60; Johnson Br. 37. Substantively, Petitioners incorporate their arguments against the motion for her recusal. Pet. Resp. (filed Aug. 29, 2023); Pet. Supp. Resp. (filed Sept. 18, 2023). The Legislature's argument is even more frivolous now that the issues before the Court are solely about contiguity and separation of powers; they identify no campaign statements from Justice Protasiewicz about these topics. Notwithstanding the Legislature's reliance on *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), state courts have

uniformly declined to rely upon that precedent to require recusal in circumstances involving financial contributions less extreme than the ones underlying that case. *See* Aman McLeod, *Caperton v. A.T. Massey Coal Co.: A Ten-Year Retrospective on Its Impact on Law and the Judiciary*, 124 W. Va. L. Rev. 67 (2021), available at: https://researchrepository.wvu.edu/wvlr/vol124/iss1/5.[16]

Furthermore, Justice Protasiewicz's decision of October 6, 2023 adjudicated these issues pursuant to Wisconsin law. This Court has determined these issues are properly, and fully, resolved by the individual Justice involved. *State v. Henley*, 2011 WI 67, ¶¶2, 25, 338 Wis. 2d 610, 802 N.W.2d 175. Justice Protasiewicz's decision was not merely "personal inquiry," Leg. Br. 59, but a considered opinion addressing, *inter alia*, whether there was a "serious risk of actual bias." *Clarke v. Wis. Elections Comm'n*, 2023 WI 66, ¶¶34, 51, 74. This Court has rejected the argument that due process requires, or that the Wisconsin Constitution permits, this Court to revisit that decision. *Henley*, 2011 WI 67, ¶31.

[16] McLeod cites only one case in which a court relied on *Caperton* to find an impermissible risk of bias: "In *Williams v. Pennsylvania* [136 S. Ct. 1899, 1910 (2016)], the [U.S. Supreme] Court overturned a death sentence because one of the Pennsylvania Supreme Court justices that heard the case on appeal had been the head of the prosecutor's office that sought the imposition of the death penalty on the petitioner. The Court applied *Caperton*'s objective test and found an unacceptable risk of bias in this situation." McLeod, 84–85. McLeod analyzed judicial opinions published through the end of 2019. Petitioners' counsel reviewed the 49 published state-court opinions issued between January 1, 2020, and October 23, 2023, which cite *Caperton*, using Westlaw's "KeyCite" tool. None of these opinions found a due process violation based on campaign contributions or statements.

CONCLUSION

For the reasons stated herein and in Petitioners' opening brief, Petitioners respectfully request that this Honorable Court enter a decision and order granting the relief sought.

Respectfully submitted this 30th day of October, 2023.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 10,913 words.

Dated this 30th day of October, 2023.

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