IN THE SUPREME COURT OF WISCONSIN
NO. 2023AP1399-OA

Rebecca Clarke, Ruben Anthony, Terry Dawson, Dana Glasstein, Ann Groves-Lloyd, Carl Hujet, Jerry Iverson, Tia Johnson, Angie Kirst, Selika Lawton, Fabian Maldonado, Annemarie McClellan, James McNett, Brittany Muriello, Ela Joosten (Pari) Schils, Nathaniel Slack, Mary Smith-Johnson, Denise Sweet and Gabrielle Young,

Petitioners,

Governor Tony Evers, in his official capacity; Nathan Atkinson, Stephen Joseph Wright, Gary Krenz, Sarah J. Hamilton, Jean-Luc Theffeault, 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 Election Commission; Meagan Wolfe, in her official capacity as the Administrator of the Wisconsin Elections Commission; Andre Jacque, Tim Carpenter, Rob Hutton, Chris Larson, Devin LeMahieu, Stephen L. Nass, John Jagler, Mark Spreitzer, Howard Marklein, Rachael Cabral-Guevara, Van H. Wanggaard, Jesse L. James, Romaine Robert Quinn, Dianne H. Hesselbein, Cory Tomczyk, Jeff Smith, and Chris Kapenga, in their official capacities as Members of the Wisconsin Senate,

Respondents,

Wisconsin Legislature; Billie Johnson, Chris Goebel, Ed Perkins, Eric O'Keefe, Joe Sanfelippo, Terry Moulton, Robert Jensen, Ron Zahn, Ruth Elmer and Ruth Steck,
Intervenors-Respondents.

IN AN ORIGINAL ACTION TO THE SUPREME COURT OF WISCONSIN

RESPONSE BRIEF OF SENATORS CARPENTER, LARSON, SPREITZER, HESSELBEIN AND SMITH

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INTRODUCTION

Respondents Senator Tim Carpenter, Senator Chris Larson, Senator Mark Spreitzer, Senator Dianne H. Hesselbein, and Senator Jeff Smith, sued in their official capacities as members of the Wisconsin Senate and collectively referred to as "the Democratic Senator Respondents," by and through their attorneys, Pines Bach LLP, submit this Response Brief on the merits of the issues, and remedies, accepted for consideration in this original action.

As well-demonstrated in the opening briefs filed on October 16, 2023, by the Clarke Petitioners[1] and Intervenors-Petitioners (both Governor Evers[2] and the Atkinson Intervenors[3]), as well as the Democratic Senator Respondents,[4] the current state legislative districts violate the Wisconsin Constitution's clear requirement for all assembly and senate districts to be comprised of contiguous territory. Wis. Const. Art. IV, §§ 4, 5. Likewise, when the *Johnson III* court imposed the very maps that had been vetoed by the Governor, and which the Legislature failed to override, it violated the separation of powers doctrine embodied in the Wisconsin Constitution. Arguments defending the current state legislative districts, made by the Republican Senator Respondents[5] and the Intervenors-

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[1] The Clarke Petitioners' opening brief is referred to herein as "the Petitioners' Opening Brief" or "Pet. Op. Br."

[2] Governor Evers' opening brief is referred to herein as "the Governor's Opening Brief" or "Gov. Op. Br."

[3] The Atkinson Intervenors' opening brief is referred to herein as "the Atkinson Intervenors' Brief" or "Atkinson Op. Br."

[4] The Democratic Senator Respondents' opening brief is referred to herein as "the Democratic Senator Respondents' Brief" or "Dem. Sen. Op. Br."

[5] Republican Senators Andre Jacque, Rob Hutton, Devin LeMahieu, Stephen L. Nass, John Jagler, Howard Marklein, Rachael Cabral-Guevara, Van H. Wanggaard, Jesse L. James, Romaine Robert Quinn, Cory Tomczyk, and Chris Kapenga. The Republican Senator Respondents and the Republican-controlled Wisconsin Legislature, together

Respondents (both the Wisconsin Legislature and the Johnson Intervenors[6]) in their October 16, 2023, opening briefs, must fail as a matter of law.

Similarly, the arguments and methods as to remedies advanced by the Republicans and Johnson Intervenors also must fail. The government of Wisconsin derives all of its power and authority from the people, who, through exercise of their inherent rights, enacted Wisconsin's Constitution and thereby created the government of the State of Wisconsin. They did so in order to secure the blessings of our freedom and protect our inherent rights. Wis. Const. Preamble; Art. I, § 1. Wisconsin's government derives its "just powers from the consent of the governed." Wis. Const. Art I, § 1. The Democratic Senator Respondents wholeheartedly join Governor Evers in his call for this Court to look to democracy as its lodestar in addressing the issues before it, and to aim in any remedy to enhance the powers of voters to choose and create their government anew with every legislative election, in alignment with their collective values and wishes.

ARGUMENT

I. This case is about the preservation of democracy. Those interested go far beyond the Clarke Petitioners and Atkinson Intervenors in this case.

The Republicans and Johnson Intervenors raise in their opening briefs challenges to Clarke Petitioners' and Intervenors-Petitioners' standing to bring and ability to pursue their claims based on several

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referred to herein as "the Republicans," filed a joint opening brief. That brief is referred to herein as "the Republicans' Opening Brief," or "Repub. Op. Br."

[6] The Johnson Intervenors' opening brief is referred to herein as "the Johnson Intervenors' Brief" or "Johnson Op. Br."

equitable doctrines. Those challenges are specific to the characteristics of those parties, the timing of the filing of this case, and supposed commonalities between the claims here and the issues addressed in prior litigation. The Clarke Petitioners and Atkinson Intervenors, as well as Governor Evers, are well-able to respond to and defeat those challenges. The Democratic Senator Respondents therefore defer to them in that regard.

Yet it cannot be emphasized strongly enough that this case involves the rights of so many more than those named parties here. Challenges to legislative districts are the very epitome of *publici juris* litigation, as they go to the heart of democracy. Likewise, the legal issues before this Court, and potential remedies, go far beyond the characteristics and any strategic decisions of those listed above the "v." in this case caption. Put simply, this is not a typical legal dispute.

The contiguity challenge involves the rights of people in communities, people with common interests in part derived from their geographical proximity to one another, to select and send representatives to Madison to advance their collective interests through legislation and other legislative activities. The separation of powers challenge involves the function (and failure) of checks and balances among the branches of government. When a legislature enacts a bill and the governor vetoes it, democratic principles dictate that if the topic is to be addressed by statute, the political bodies must engage in compromise and find common ground to enact such a statute. That is the nature of checks and balances between the legislative and executive branches.

Importantly, when it comes to redistricting, the Wisconsin Constitution requires legislation to be passed. Wis. Const. Art. IV, § 3.

Only when the political process fails to produce a law should the courts get involved. Unfortunately, here, the separation of powers violation occurred when the Wisconsin Supreme Court stepped into the midst of the political process to complete it for the Legislature, in the process abdicating its role as the only nonpartisan branch of government, tasked with acting in equity and with independence from politics. It failed to "check" the partisan Legislature by equitably resolving the apparent impasse over how the people choose their representatives, instead acting as a super-legislature (or usurping the approval role of the Governor) to impose the very legislative maps that the Governor had vetoed.

The Court must reject calls to not reach the merits of the claims before it, find that the current maps are unconstitutional, and identify proper remedies based in equity and fairness as is fitting for the judicial branch.

II. This Court should find that the current apportionment maps violate the contiguity requirement of Art. IV, § 4.

A. Stare decisis is not implicated in this case because the *Johnson* court did not squarely address the contiguity standard.

The Republicans and Johnson Intervenors all contend that the *Johnson* court "settled" the contiguity rule and that the map it imposed is constitutionally compliant. This is hardly so.

The *Johnson* trilogy's discussion of the contiguity standard was practically nonexistent. The *Johnson I* explanation of contiguity standard was limited to a single paragraph. *See Johnson v. Wisconsin Elections Commission*, 2021 WI 87, ¶ 36, 399 Wis. 2d 623, 967 N.W.2d 469 ("*Johnson I*"). *Johnson I* simply stated that municipal islands were "legally

contiguous," relying upon a non-authoritative federal trial court decision. *Id.* (citing *Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992). The *Johnson II* and *Johnson III* decisions, without any analysis, found that maps that contained municipal islands were constitutionally "contiguous." *Johnson v. Wisconsin Elections Commission*, 2022 WI 14, ¶¶ 9, 36, 400 Wis. 2d 626, 971 N.W.2d 402 ("*Johnson II*"); *Johnson v. Wisconsin Elections Commission*, 2022 WI 19, ¶ 70, 401 Wis.2d 198, 972 N.W.2d 559 ("*Johnson III*").

But since the 19th century, Wisconsin courts have interpreted "contiguous" to preclude territory from being "made up of two or more pieces of detached territory." *See e.g., State* ex rel. *Lamb v. Cunningham*, 83 Wis. 90, 148, 53 N.W. 35 (1892); *Town of Wilson v. City of Sheboygan*, 2020 WI 16, ¶¶ 18-19, 390 Wis. 2d 266, 938 N.W.2d 493 (rejecting "the adoption of a broader definition of contiguous that includes territory near to, but not actually touching, a municipality"). Without any explanation, the *Johnson* court seemingly jettisoned this well-established jurisprudence in favor of apparently following a federal court's nonbinding interpretation of the Wisconsin Constitution.

This is particularly troublesome because Wisconsin Supreme Court decisions interpreting the Wisconsin Constitution hold the greatest authoritative value, while federal precedent is merely persuasive at best. *See Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶ 25, 249 Wis. 2d 706, 721, 639 N.W.2d 537 ("[The Wisconsin Supreme Court] is the final arbiter of questions arising under the Wisconsin Constitution.") Indeed, as Judge Posner of the Seventh Circuit noted, when a court chooses to adopt the reasoning of persuasive precedent, it does not "discharge its judicial responsibilities adequately by merely citing [the persuasive authority] and

following it without so much as indicating agreement with it, let alone analyzing its merits." *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987); *see also Friends of Frame Park, U.A. v. City of Waukesha*, 2022 WI 57, ¶ 60, 403 Wis. 2d 1, 976 N.W.2d 263 ("[The Wisconsin Supreme Court] must not slight [its] law-stating function.") (J. Bradley, concurring) (internal citations and quotations omitted).

This is precisely what occurred in the *Johnson* cases. When a court has not "squarely addressed" an issue of law, and "at most assumed the applicability" of a legal standard, later courts are not bound by stare decisis and are "free to address the issue on the merits." *Brecht v. Abrahamson*, 507 U.S. 619, 631, 113 S. Ct. 1710 (1993); *see also Wis. Just. Initiative*, 2023 WI 38, ¶ 142, 407 Wis. 2d 87, 990 N.W.2d 122 (Hagedorn, J., concurring) (noting that this Court need not follow "tangential matters not central to the question presented") (internal citations and quotations omitted). At most, the *Johnson* court assumed the constitutionality of municipal islands. But without more, its analysis was insufficient to implicate the doctrine of stare decisis and need not be followed. What's more, the *Johnson* court "failed to discharge its judicial responsibilities adequately" by failing to acknowledge, much less explain, why a nonbinding federal authority should overrule well-established Wisconsin precedent. In sum, the *Johnson* court never "squarely addressed" the constitutionality of municipal islands, and therefore, this Court may reach the merits of the Petitioners' contiguity claim.[7]

[7] It does not matter that no party raised this issue in *Johnson*; stare decisis is still not implicated. *Gately v. Com. of Mass.*, 2 F.3d 1221, 1226 (1st Cir. 1993) ("If an issue is not argued, or though argued is ignored by the court…the decision does not constitute a precedent to be followed.").

B. "Special justifications" warrant not following stare decisis.

Even if this Court determines that municipal islands were found to not be in violation of the Constitution's contiguity requirements in the *Johnson* decisions, this Court may still reach the merits of the contiguity issue. "Stare decisis is neither a straightjacket nor an immutable rule." *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶ 100, 264 Wis. 2d 60, 665 N.W.2d 257 (citing *Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co.,* 215 F.3d 136, 142 (1st Cir. 2000)). This Court will "do more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision." *Id.*

"[T]here are particular circumstances in which a jurisdiction's highest court should not be barred from pursuing a sound and prudent course for the sake of upholding its prior precedent." *Id.*, ¶ 96. "Special justifications" can be "divined in appropriate circumstances to overturn a prior decision." *Id.* A special justification for overruling precedent exists when: (1) the law has changed in a way that undermines the prior decision's rationale; (2) there is a "need to make a decision correspond to newly ascertained facts;" (3) our precedent "has become detrimental to coherence and consistency in the law;" (4) the decision is "unsound in principle;" or (5) it is "unworkable in practice." *State v. Johnson*, 2023 WI 39, ¶ 20, 407 Wis. 2d 195, 990 N.W.2d 174 (citing *State v. Young*, 2006 WI 98, ¶ 51 n.16, 294 Wis. 2d 1, 717 N.W. 2d 729). Any one of these special justifications is sufficient to justify overruling precedent. *Id.*[8]

[8] Both the Republicans and Johnson Intervenors go out of their way to emphasize that a "change in composition" of this Court is not a "special justification" warranting overturning prior precedent. However, legal scholars have advocated that precedent should be overturned when a "watershed judicial election" leaves no doubt that the people desire a "correction of what they deem to be erroneous…decisions." Daniel R.

Here, two "special justifications" warrant overturning *Johnson*'s statements on contiguity.

1. *Johnson* is unsound in principle because it relied upon a nonbinding federal decision to overrule long held Wisconsin jurisprudence.

"A decision is unsound in principle when it…misapplies the Wisconsin Constitution because the misunderstanding and faulty application risk[ ] perpetuating erroneous declarations of the law." *State v. Roberson*, 2019 WI 102, ¶ 51, 389 Wis. 2d 190, 935 N.W.2d 813 (citing *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 83, 382 Wis. 2d 496, 914 N.W.2d 21). "Stare decisis does not require [the Wisconsin Supreme Court] to retain constitutional interpretations that were objectively wrong when made." *Koschkee v. Taylor*, 2019 WI 76, ¶ 8 n.5, 387 Wis. 2d 552, 929 N.W.2d 600 (citing *Wenke v. Gehl Co.*, 2004 WI 103, ¶ 21, 274 Wis. 2d 220, 682 N.W.2d 405). "[S]uch interpretations are unsound in principle." *Id.* (citing *State v. Luedtke*, 2015 WI 42, ¶ 40, 362 Wis. 2d 1, 863 N.W.2d 592).

Here, *Johnson I* was an objectively wrong interpretation of Art. IV, § 4. As the Democratic Senator Respondents and all other Petitioners discussed at length in their opening briefs, the plain and historical meaning of Art. IV § 4 and Wisconsin jurisprudence have all interpreted "contiguous" to mean that districts must be "[t]ouching; meeting or joining at the surface or border" and may not be "lands separated and detached." *See e.g.*, Noah Webster, *An American Dictionary of the English*

Suhr and Kevin LeRoy, *The Past and Present: Stare Decisis in Wisconsin Law*, 102 Marq. L. Rev. 839, 864 (2019) (citing Antonin Scalia, *Scalia Speaks: Reflections on Law, Faith and Life Well Lived* 281 (Christopher J. Scalia & Edward Whelan eds., 2017)). It can hardly be disputed that the election of Justice Protasiewicz to the Court, winning by a stunning 11 points, was a "watershed judicial election" in which the public expressed a desire for a change in direction, particularly on issue of state legislative districts.

Language (1848) (Pet'rs. App. 005-008); *Chicago & N.W. Ry. Co. v. Town of Oconto*, 50 Wis. 189, 6 N.W. 607 (1880); *Lamb*, 53 N.W. at 56-57. *Johnson I* directly contravened this unambiguous authority by relying on *Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992). *Prosser* is not only nonbinding precedent that *Johnson I* seemingly adopted with no explanation, but *Prosser* is further dubious because it relied upon a since repealed statute to justify the allowance of municipal islands. *Id.* at 866 (citing Wis. Stat. §§ 4.001(3) (1972)). *Johnson I*'s interpretation was objectively wrong when made and should not be followed by this Court.

2. *Johnson* has become detrimental to coherence and consistency in the law.

As described above, the *Johnson* court's interpretation of "contiguous" was a recent and marked departure from well-established Wisconsin jurisprudence, with no reasoning provided. When a prior precedent conflicts with the same or related body of law, Wisconsin courts are willing to overturn such precedent for the sake of "coherence and consistency." *See State v. Denny*, 2017 WI 17, ¶ 70, 373 Wis. 2d 390, 891 N.W.2d 144 (overturning prior precedent interpreting a statute that was in tension with other provisions of the same statute); *see also State v. Johnson*, 2023 WI 39, ¶ 43, 407 Wis. 2d 195, 990 N.W.2d 174 (overturning prior precedent that conflicted with statutory and constitutional rights for sexual assault and domestic violence survivors).

Johnson has created an irreconcilable conflict in Art. IV, § 4 jurisprudence. Prior Wisconsin courts held that territory "made up of two or more pieces of detached territory" is not contiguous; *Johnson* said such districts were contiguous. Under Wisconsin's stare decisis doctrine, this

Court is empowered to overrule *Johnson* to ensure that the constitutional commands of Art. IV, § 4 are followed as its framers intended: with contiguous districts that do not include municipal islands.

For these reasons, this Court is not precluded by the doctrine of stare decisis from reaching the merits of Petitioners contiguity violation claims. [9]

C. Art. IV, § 4 prohibits municipal islands; the Republicans and Johnson Intervenors offer little to refute this.

Because the Court is not precluded from considering the merits, it should find that the existing state legislative districts violate the contiguity requirement of Art. IV, § 4. The Republicans and Johnson Intervenors offer no persuasive support for their contention that municipal island districts are permitted under the Wisconsin Constitution.

1. The Republicans' strained interpretation of Art. IV, § 4 flouts basic principles of textual interpretation.

The Republicans attempt to conjure textual support for the use of municipal islands by arguing that municipal islands are constitutionally permissible because the requirement of "contiguous territory" is not its own distinct requirement, but instead, the language modifies the clause "to be bounded by county, precinct, town or ward lines." (Repub. Op. Br. at 29-34). They fault the Clarke Petitioners for purportedly "isolating" the term "contiguous" in Art. IV, §§ 4-5. (Repub. Op. Br. at 29). However, under the most basic principles of grammar and punctuation, it is a

[9] The Johnson Intervenors make a half-hearted argument that the separation of powers claim is barred by stare decisis. (Johnson Op. Br. at 28). This Court does not consider undeveloped arguments. *State v. Grandberry*, 2018 WI 29, ¶ 30 n.19, 380 Wis. 2d 541, 910 N.W.2d 214. Even so, the separation of powers issue was not addressed by the *Johnson III* majority, and therefore, not subject to stare decisis.

discrete constitutional requirement that assembly and senate districts be made up of "contiguous territory."

"[I]n a series of three or more, a comma shall appear after the first term or category listed." *Peterson v. Midwest Sec. Ins. Co.*, 2001 WI 131, ¶ 51, 248 Wis. 2d 567, 636 N.W.2d 727 (A.W. Bradley, J., dissenting) (citing *The Gregg Reference Manual* 15 (9th ed. 2001)); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 161 (2012) ("Punctuation in a legal text…will often determine whether a modifying phrase or clause applies to all that preceded it or only to a part."). Further, "in a series of three or more, no comma is used preceding the final conjunction." *Peterson*, 2011 WI 131, ¶ 52.

Wis. Const. Art. IV, § 4, states:

> The members of the assembly shall be chosen biennially, by single districts, on the Tuesday succeeding the first Monday of November in even-numbered years, 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.**

(emphasis added).

The drafters of Art IV, § 4, consistent with the serial comma rule, created three distinct requirements for assembly districts. The first requirement, that such districts are "to be bounded by county, town or ward lines" is indicated by the "first comma" rule of the canon. *Peterson,* 2001 WI 131, ¶ 51 (A.W. Bradley, J., dissenting). Because there is "no comma used preceding the final conjunction" –which in § 4 is the use of the term "and"—the final two requirements arise: that such districts are "to consist of contiguous territory" and, also, "be in as compact a form as possible." *See id.* ¶ 52. (A.W. Bradley, J., dissenting). Each descriptive prepositional phrase also contains a different adjectival infinitive: "to be

bound," "to consist," and to "be in as compact form as practicable," further evidencing that each of these clauses distinct requirements for a constitutional assembly district.

The Republicans strain under a tortured application of the "whole-text canon" to maintain that "contiguous territory" is not its own constitutional requirement, but instead, modifies the requirement that districts "be bounded by county, precinct, town or ward lines." (Repub. Op. Br. at 29-34). But in invoking the "whole-text" canon for their position, they are the ones misapplying the canon. The Republicans make no mention, let alone attempt to explain the significance, of the final clause "and be in as compact form as practicable." *Id.* By ignoring this portion of the text, they fail to recognize that the "contiguous territory" requirement comes about in a list of distinct features for assembly districts, and thus, is an unalienable requirement. Therefore, the plain language of the provision does not permit "municipal islands" within assembly districts.

2. Appeals to historical practice do not justify continued violation of the plain text of Art. IV, § 4.

Without any basis in the text of Art. IV, § 4 for permitting municipal islands, the Republicans, as well as the Johnson Intervenors, attempt to ground the practice of municipal islands in historical practice. (Repub. Op. Br. at 34-39; Johnson Op. Br. at 15-19).

First, the Republicans claim that contiguity does not require "[t]ouching, meeting or joining at the surface or border" because early reapportionments created "rowboat" districts—districts that were made up of counties separated by bodies of water. (Repub. Op. Br. at 36). However, the legal boundaries of such counties extend to the center, and ultimately touch, at the middle of the body of water. H. Rupert Theobald,

Equal Representation: A Study of Legislative and Congressional Apportionment in Wisconsin, Wis. Blue Book 200-01 (1970); *see also* Wis. Stat. 2.01 ("County Boundaries"). Consequently, the past practice of rowboat districts further supports that the boundaries of such districts were contiguous.

Second, as has been briefed at length by the Clarke Petitioners, the past practice of crafting districts with municipal islands rests on shaky legal ground. The past reapportionment statutes that permitted "municipal contiguity" have since been repealed. 2011 Wisconsin Act 43, § 2 (repealing Wis. Stat. § 4.001(2)-(5)). The only authority that the *Johnson I* court relied upon for the use of municipal islands was a federal court ruling, which was a flawed decision and contravened Wisconsin jurisprudence. That authority does not offer compelling support for the continued use of municipal islands.

Third, this "historical" practice of municipal island districts is not found anywhere else in the United States. There are only three other states that include *any* districts that are noncontiguous. (Pet. Op. Br. at 28). And, numerous other state supreme courts have interpreted contiguity to require territory that "touches, adjoins, or is in actual contact. *See e.g.*, *Below v. Gardner*, 963 A.3d 785, 791 (N.H. 2002); *In re Senate Joint Resol. Of Legislative Apportionment 1176*, 83 So. 3d 597, 628 (Fla. 2012).

But most importantly, these past constitutional violations and a non-authoritative federal court ruling do not permit continued violations of the Wisconsin Constitution. *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 67 n.2, 391 Wis. 2d 497, 942 N.W.2d 900 (Grassl Bradley, J., concurring) ("[An unlawful action] should never issue in the first place, and it should not remain in effect for any period past the time a court ascertains its unlawfulness.") As this Court stated over 130 years ago, the contiguity

requirement is "plain and unambiguous, and hence are not to be regarded as abrogated by any number of legislative violations of them." *State* ex rel. *Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35, 59 (1892). These historical practices neither justify the continued use of municipal island districts nor save the existing state legislative maps from a constitutional violation.

3. Both *Town of Oconto*, *Lamb*, and *Zimmerman* stand for Art. IV, § 4 prohibiting municipal island districts.

The Johnson Intervenors attempt, though unpersuasively, to distinguish three cases relied upon by the Clarke Petitioners to support their contiguity claim. (Johnson Op. Br. at 12-15). They first argue that the holding of *Chicago & N.W.R. Co v. Town of Oconto*, 50 Wis. 189, 192, 6 N.W. 607 (1880) was narrowed by *Town of Blooming Grove v. City of Madison*, 275 Wis. 342, 81 N.W. 2d 712 (1957). To be clear, the Johnson Intervenors concede that *Town of Oconto* interpreted Art. IV, § 4 to require "literal contiguity." (Johnson Op. Br. at 12). But then, they misleadingly claim that *Blooming Grove* "approved of municipal contiguity for apportionment implicitly, if not expressly, by endorsing and relying upon [the reapportionment statute permitting municipal islands]." (Johnson Op. Br. at 13). That is not what *Blooming Grove* said. Rather, *Blooming Grove* explicitly acknowledged that in relying upon the reapportionment statute, "[q]uestions as to the validity or effect of [the statute] and other questions which may arise concerning the composition of the assembly and senate districts are not now before the court." *Blooming Grove*, 275 Wis. at 348. If anything, *Blooming Grove* acknowledged that permitting municipal islands could conflict with Art IV, § 4, but declined to address the issue as no party had raised it.

Second, the Johnson Intervenors contend that the interpretation of the contiguity requirement in *State* ex rel. *Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35 (1892) was no more than dicta. (Johnson Op. Br. at 13). This is not a fair characterization. The pertinent passage comes in the *Lamb* court's statement of law about the constitutional requirements set forth in Art. IV, § 4. *Id.* at 57. Further, *Lamb* imparted a critical command for future courts to follow: the requirements of Art. IV, § 4 may not be "simply disregarded" and failure of the Legislature to adhere to these requirements does not negate the fact that it must be followed. *Id.* at 59.

Finally, the Johnson Intervenors point to *State* ex rel. *Thomson v. Zimmerman*, 264 Wis. 644, 61 N.W. 2d 300 (1953), as being unsupportive of the contiguity claim and quote a portion of the ruling in an effort to explain it away. (Johnson Op. Br. at 14-15). However, the full quote, with the emphasized portions reflecting what was omitted from the Johnson Intervenors' brief, states:

> In support of the present motion plaintiff states that the Rosenberry Act established a few assembly districts, naming them, which are not created entirely of contiguous territory. In such cases ch. 550, Laws of 1953 is alleged to have repaired this error by joining isolated areas to the districts to which they are actually contiguous**. <u>In the case of some other districts in whose creation no constitutional principle was violated</u>, we are told that ch. 550 has made certain modifications in the boundaries designed to be improvements on those designated in the Rosenberry Act.**

Zimmerman, 264 Wis. 644 at 663-64 (underlined emphasis added).

As the full quote suggests, the *Zimmerman* court noted that having noncontiguous territory was an "error" and at least implied that the noncontiguous territory "violated" a "constitutional principle." Accordingly, all cases support finding that the existing state legislative maps violate the contiguity requirement of Art. IV, § 4.

4. The "delicate balancing" of redistricting factors does not permit municipal island districts.

The Republicans make one final attempt to salvage the existing map by claiming that the "delicate balancing" of competing factors in redistricting permits the use of municipal islands. (Repub. Op. Br. at 39-40) (citing *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178 (2017)). But the Republicans do not provide any authority—other than *Prosser*—for the proposition that this constitutionally mandated requirement of contiguity can be subservient to other redistricting factors. That is because there is none. *Johnson I*, 2021 WI 87, ¶ 100. ("No where does the Constitution relegate to 'secondary importance' the requirement[ ] [of]…contiguity… found in Article IV, § 4.") (Dallet, J., dissenting). Contiguity is a constitutional requirement that must be adhered to.

III. This Court should find that the existing state legislative maps are a violation of the separation of powers doctrine.

A. The exercise of judicial power is not a trojan horse for the judiciary to enter the legislative process or exercise legislative power.

The Republicans and Johnson Intervenors all claim that the map imposed by the *Johnson III* court was nothing more than the crafting of a judicial remedy to resolve a constitutional violation, and therefore, was a proper exercise of judicial power. (Repub. Op. Br. at 42; Johnson Op. Br. at 25). But Wisconsin courts have repeatedly recognized that a judicial remedy may still transgress the powers of the other branches. *See e.g.*, *Goodland v. Zimmerman*, 243 Wis. 459, 472 10 N.W.2d 180 (1943) (vacating an injunction preventing the Secretary of State from publishing an enacted

bill); *Ozanne v. Fitzgerald,* 2011 WI 43, ¶ 9, 334 Wis. 2d 70, 798 N.W.2d 436 (vacating an injunction enjoining publication and implementation of an enacted bill). Indeed, the *Johnson I* court itself even warned that a judicial remedy could not take the form of legislation. *Johnson I*, 2021 WI 87, ¶ 70.

Simply claiming that the map imposed by the *Johnson III* court is a judicial remedy does not prevent scrutiny of whether it was a proper exercise of judicial power. Upon closer examination, the *Johnson III* court violated the separation of powers doctrine in two ways. First, the *Johnson III* court interfered with the reapportionment legislative process before the legislative redistricting process was complete. *See Goodland*, 243 Wis. at 466 ("The judicial department has no jurisdiction or right to interfere with the legislative process."). "[T]he legislative process is not complete unless and until an enactment has been published" following approval by the Governor or passage by the Legislature over his veto. *Id.* Here, the *Johnson III* court acted before the Legislature even attempted to override the Governor's veto. Probably aware that an override could not be accomplished, and apparently not interested in returning to the drawing board and doing the hard work of compromise called for in the political process, the Republican-controlled Legislature was more than happy to invite the *Johnson* court into the legislative process to accomplish what it could not. Because the legislative process was not completed by the political bodies before the court acted, the Republicans are incorrect when they state that "[t]he lawmaking process ended" when the judicial remedy was imposed. (Repub. Op. Br. at 43). Rather, the judicial branch stepped in and took over the lawmaking process, just as the Legislature bid it to, when it decided *Johnson III* in the way that it did.

Second, by putting into law SB 621, the *Johnson III* court assumed powers reserved to the other branches by overriding the Governor's veto of SB 621 (or, alternatively, by "signing" SB 621 in the Governor's place). *State* ex rel. *Friedrich v. Cir. Ct. for Dane Cnty.*, 192 Wis. 2d 1, 13, 531 N.W.2d 32 (1995) ("[N]o branch may exercise the power committed by the constitution to another.").

More specifically, the Republicans and Johnson Intervenors all claim that the Clarke Petitioners' separation of powers claim "fundamentally misunderstands the Court's judicial role in selecting remedial maps in redistricting cases." (Repub. Op. Br. at 42; Johnson Op. Br. at 25) (The Legislature "had the same right as the other parties to submit proposed maps for the Court's consideration."). It is they who fundamentally misunderstand what happened in *Johnson III* in the remedy phase. To illustrate how the *Johnson III* court did not craft a proper judicial remedy, consider in contrast how the court resolved the redistricting impasse in *State* ex rel. *Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W. 2d 551 (1964).

There, just as in *Johnson,* the Governor had vetoed the apportionment bill proposed by the Legislature. *Id.* at 550. The Legislature did hold an override vote, but was unsuccessful. *Id.* After the Legislature attempted to simply pass the rejected apportionment bill as a joint resolution in the Legislature, the *Reynolds* court invalidated the joint resolution. *Id.* at 559. When the Wisconsin Supreme Court was called upon to select a remedial map, it did not implement the map reflected in the apportionment bill that was vetoed by the Governor, nor did it select the map reflected in the joint resolution that attempted to circumvent the Governor's veto. Instead, the *Reynolds* court steered clear of the products of the legislative process entirely: in crafting a remedy, it exercised its own

judgment, selecting an entirely different map than either offered by the Legislature during the political process. *Cf. State* ex rel. *Reynolds v. Zimmerman*, 23 Wis. 2d 606, 128 N.W.2d 16 (the remedial map selected by the *Reynolds* court), *with* 1963 Wis. S.B. 575 (Dem Senators App. 008-019) *and* 1963 Wis. J. Res. No. 49 (Dem Senators App. 020-026).

By contrast, in *Johnson III,* the court did the very thing that it warned itself against in *Johnson I*. It inserted itself into the legislative process before it was complete and completed it for the Legislature. The *Johnson III* court never exercised its own independent judgment over the proper judicial remedy. Instead, it adopted the very same apportionment map that was proposed by the Legislature, and which had been vetoed by the Governor. Indeed, the Legislature did not even attempt to disguise that it was asking the court to impose the maps that failed the political process. *See* Br. of the Wisconsin Legislature Intervenor-Resp., 2021 WL 6140759 *6 (Dec. 15, 2021), *Johnson v. Wisconsin Election Commission*, 2022 WI 14, 971 N.W. 2d 402, 400 Wis. 2d 626. ("The Legislature submits [SB 621, 622] here…They are the appropriate 'judicial remedy.'). When compared to the court's approach in *Reynolds*, the *Johnson III* court was not carrying out judicial powers. Instead, it was exercising powers reserved for the other branches and in the institutional interest of the Legislature.

B. Finding a separation of powers violation will not upend the judiciary's role in resolving impasses in the redistricting processes.

The Republicans and Johnson Intervenors all portend the end of the judiciary's involvement in redistricting if the Court here finds a separation of powers violation by the *Johnson III* court. They also foresee such a finding as precluding the Governor and Legislature from ever

participating in redistricting litigation. (Repub. Op. Br. at 46-47; Johnson Op. Br. at 26-27). The sky is not falling. What was violative of the Wisconsin Constitution in *Johnson III* was not the identity of the **party** whose map was selected, but the identity of the **map itself**: it was the very map that was vetoed by the Governor and whose veto the Legislature did not even try to override. The *Johnson III* court invaded and usurped the other branches' powers by accepting and imposing SB 621 as the remedial map.

IV. The remedies phase should not be overcomplicated and should be focused on an equitable solution that advances and supports democracy.

A. The Court should not pause these proceedings to defer the solution to the Legislature and Governor.

The Republicans urge that the political branches be given an "opportunity" to enact replacement maps. The Court should reject that approach for several reasons. ***First***, both the Legislature and the Governor are parties to this lawsuit. They have full opportunity to propose replacement maps according to Court guidelines and under the supervision of this Court. It is even possible that in collaboration with the other parties, they could reach a proposed stipulated judgement or consent decree for the Court to consider.

Second, the Republican-controlled Legislature and Governor failed in the assignment to enact new constitutional maps in 2021, despite having many months to reach a compromise. The Legislature continues to be Republican-controlled, and the Governor remains the same, too. There is no reason to think the political approach will work any better this session than last. After the Governor vetoed SB 621 on November 18, 2021, nothing

prevented the Legislature from attempting to override that veto or passing other bills proposing other state legislative district maps for the Governor's consideration. Yet it did nothing. Instead, it simply asked the Court to impose its vetoed maps, without compromise. The Court obliged. The legislative session ended May 17, 2022, without any new bill from the Republican-controlled Legislature. The current maps were imposed by the *Johnson III* court; they are a judicial problem that was created because the political approach to redistricting did not work. The Court should retain responsibility to identify the appropriate solution, acting in equity and with a focus on advancing democracy and empowering voters.

Third, the delay attendant to pausing this litigation to "allow" the political branches to enact a replacement act is untenable. The Republican-controlled Legislature cannot be trusted to attempt a legitimate solution; its aim is simply to delay a resolution, so as to preserve its vise-like control of the Legislative branch beyond the 2024 election and well into the future. The Republicans even acknowledge that any solution involving a detour for legislative redistricting efforts could not be accomplished before the 2024 elections, implicitly admitting that its approach would allow that control to remain in place until at least 2026. (Repub. Op. Br. at 61).

Fourth, and most importantly, an unconstitutionally seated legislature cannot provide a constitutional remedy. If this Court agrees that the current maps are unconstitutional, that means that the current legislature is unconstitutionally composed: all current Assembly members were elected under those maps, as were half the members of the Senate (all of whom are Respondents in this litigation). An unconstitutionally composed legislature does not legitimately represent the voices of the voters. It should not be handed the opportunity to enact maps that (1)

immunize those unconstitutionally-elected legislators "from democratic accountability going forward," or (2) "perpetuate the continued exclusion of a category of voters from the democratic process." *See North Carolina State Conference of the National Association for the Advancement of Colored People v. Moore,* 876 S.E.2d 513, 519 (N.C. 2022).

"Under our constitutional order, government derives its power solely from the people." *Serv. Emps. Int'l Union, Loc. 1 v. Vos,* 2020 WI 67, ¶ 1, 393 Wis. 2d 38, 946 N.W.2d 35. The Preamble to our Constitution, in particular, "reflects the foundational assumption of our system of government: all authority resides with the people, and it is the people alone who have the authority to establish the terms and methods by which they will be governed. The constitution is that foundational charter in which the people determine their fundamental law, and by which they consent to be governed." *Wisconsin Just. Initiative, Inc. v. Wisconsin Elections Comm'n*, 2023 WI 38, ¶ 15, 407 Wis. 2d 87, 990 N.W.2d 122. To allow an unconstitutionally composed body a chance to shelter its unconstitutionally elected members from democratic accountability and continue to disenfranchise certain voters would threaten the fundamental principle at the heart of democracy, which is "that all political power resides with and flows from the people" of the state. *See* 876 S.E.2d at 519. Just as in North Carolina, "popular sovereignty and democratic self-rule" are "the beating heart" of Wisconsin's system of government. *See* 876 S.E.2d at 527; *see also* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 919–20 (2021) (both the Wisconsin and North Carolina Constitutions proclaim popular sovereignty). To allow this unconstitutionally composed body to

derail this litigation and "solve" the constitutional violation that it benefits from would surely stop the beating heart of democracy in Wisconsin.

B. Remedial maps should be drawn from scratch.

1. Adopting remedial maps that make slight changes to the existing maps would be an abdication of the Court's equitable and non-partisan role.

The Republicans and Johnson Intervenors all advocate for remedial maps that would retain the stench of extreme partisan gerrymandering and entrench the anti-democratic system that it represents.[10] The Court should reject such an approach, as discussed in the Democratic Senator Respondents' opening brief at pages 23 to 28. For instance, the Republicans and Johnson Intervenors advocate for the "simple" solution to the contiguity violation of "dissolving" or "absorbing" municipal islands into the surrounding districts, rather than keeping them tied to their municipalities. (Repub. Op. Br. at 60; Johnson Op. Br. at 8 and 29). Of course, the Republicans acknowledge that in doing so, this would create a different problem not aligned with traditional mapmaking principles: it would increase municipal splits. (Repub. Op. Br. at 40). And as the Johnson Petitioners further illustrate, this "simple" solution is just not so simple, as one change to the composition of one district has a domino effect on the surrounding districts. (*See, e.g.,* Johnson Op. Br. at 32-33).

[10] The facts supporting the conclusion that the current maps represent an extreme partisan gerrymander that is patently undemocratic are set forth in the Clarke Petitioners' Petition for Original Action at paragraphs 56 through 76. Recognizing that the constitutionality of an extreme partisan gerrymander is not currently before the Court, adopting the Republicans' and Johnson Intervenors' approach to remedies would simply cue up the next set of maps for such a challenge. Adopting a map that aligns with the criteria advanced by the Clarke Petitioners, Governor Evers, the Atkinson Intervenors, and these Democratic Senator Respondents would avoid that issue entirely.

Fortunately, skilled mapmakers can walk and chew gum at the same time. Drawing legislative district maps from scratch, it is possible to comply with the Constitution's contiguity requirement, minimize municipal splits, and accomplish all other legal and prudent mapmaking goals.

Should the Court reject retaining extreme partisan gerrymandering, the Republicans and Johnson Intervenors seek an overly complicated remedies process that would slow resolution of the litigation and allow an unconstitutionally composed Legislature to continue to exert power over the people of Wisconsin. Those proposals should be rejected. Instead, the Democratic Senator Respondents join Governor Evers' call for the parties to submit proposed maps (according to criteria set by the Court), provide feedback on one another's proposals, and then for this Court to evaluate the proposals with a focus on promoting responsiveness to the vote and avoiding political bias, while also meeting legal requirements and following traditional mapmaking practices. It should then independently choose a new, constitutional map. (*See* Gov. Op. Br. at PDF pages 36-46 (at brief pages 25-35)).

The focus on promoting responsiveness to the vote and avoiding political bias is entirely appropriate for the Court to take, in light of its roles to (1) act in equity, and (2) be independent and non-partisan. In addition to a declaration of the law, the remedy sought in this litigation is an injunction: an equitable remedy, the form of which is committed to the sound discretion of the court, "to be used in accordance with well-settled equitable principles and in light of all the facts and circumstances of the case." *Forest Cnty. v. Goode*, 219 Wis. 2d 654, 670, 579 N.W.2d 715 (1998). In the absence of a statute limiting the court's equitable jurisdiction, its "comprehensiveness" "is not to be denied or limited." *Id.* at 676. In

exercising its equity jurisdiction, the court "has the full scope of equitable remedies available to it to fashion relief…" *Id.* (*quoting State v. Excel Mgmt. Servs., Inc.*, 111 Wis. 2d 479, 490, 331 N.W.2d 312 (1983)) Indeed, "[o]nce a court of equity obtains jurisdiction over a matter, it will exercise its jurisdictions in an effort to do complete justice between the parties to the action." *State v. Excel Mgmt. Servs., Inc.*, 111 Wis. 2d 479, 491, 331 N.W.2d 312, 318 (1983). This concept holds true with regard to the relief ordered in redistricting cases. *Reynolds v. Sims,* 377 U.S. 533, 585 (1964) (relief is to be "fashioned in the light of well-known principles of equity.")

Moreover, as discussed in the Democratic Senator Respondents' Opening Brief, when called upon to redistrict, courts have a particular duty to select a redistricting plan that does not advantage one party over another. (Dem. Sen. Op. Br. at 25-27; *see also* Atkinson Op. Br. at PDF page 45-53 , brief page 33-41). Rather, in crafting a remedy, they are to take account of "what is necessary, what is **fair**, and what is workable." *North Carolina v. Covington,* 581 U.S. 486, 488 (2018) (emphasis added). The Wisconsin Supreme Court previously recognized that when courts are charged with redistricting, they "should not select a plan that seeks partisan advantage—that seeks to change the ground rules so that one party can do better than it would under a plan drawn up by persons having no political agenda." *Jensen v. Wisconsin Elections Board,* 2002 WI 13, ¶ 12, 249 Wis. 2d 706, 639 N.W.2d 537. Moreover, a "politically mindless" approach may produce a grossly gerrymandered map; for this reason, awareness of political effect of a potential remedy is appropriate. *Gaffney v. Cummings,* 412 U.S. 735, 753-54 (1973).

The *Johnson* court abdicated its responsibility to act in equity and as an independent non-partisan body, with an eye toward fairness and an

awareness of the political effects of any potential remedy. This Court should not repeat that error.

2. Competition within districts and for statewide control of legislative bodies promotes democracy.

As candidates and legislators, the Democratic Senator Respondents have particular interest in promoting maps that are responsive to the vote and avoid political bias. They also have a unique perspective on the effects of such an approach, as well as the effects of maps that embody an extreme partisan gerrymander like those for which the Republicans and Johnson Intervenors advocate. The Democratic Senator Respondents realize that competitive districts and statewide maps that make it possible for either party to control one or both houses may mean they have to work harder to win their elections. But they also realize that competition will make them far more effective representatives and advocates for their constituents as well. Maps competitively composed are only appropriate in a state like Wisconsin, where statewide partisan elections are routinely won or lost by single digit percentages.

The issue of preserving and promoting representative democracy is far more important to the Democratic Senator Respondents than the ease with which they may keep their jobs. Having been elected under unconstitutional maps, they are happy to stand for re-election from fairly drawn districts as soon as possible, in a special election in 2024, rather than in 2026 as would normally be the case, should the Court grant that remedy here to avoid Senate disenfranchisement under remedial maps. Should they win those elections, they are ready, willing, and able to serve their constituents from fairly drawn districts, and to participate in the Legislature's lawmaking function with other senators similarly chosen.

Indeed, if the constituents of their new, fairly drawn districts prefer a different representative, they are prepared to step aside and defer to the will of the voters. The Wisconsin Legislature will better serve the people of the State of Wisconsin, and more faithfully fulfill its Constitutional role as the branch most responsive to the needs of the citizens as a whole, if elections are based on maps that promote responsiveness to the vote and avoid political bias.

Promotion of the power of the people of the State of Wisconsin in a judicially-chosen map encourages elected representatives to be leaders within their communities and respond to their whole constituency, regardless of political persuasion and based on issues common within the district. Citizens then reciprocate with more robust civic engagement. Competitive districts, as well as competition for statewide control of the Assembly and Senate, encourage elected representatives to listen to all voices across their districts, not just the most passionate and not just the small minority who vote in partisan primaries, to work together to reach compromise and think creatively to solve problems in a bipartisan or nonpartisan manner. In this way, the houses more faithfully fulfill the Legislature's constitutional role as the popular branch of the government.

On the other hand, maps that "pack" and "crack" voters by political party in order to achieve partisan advantage, such as those promoted by the Republicans and Johnson Intervenors, subvert the cardinal rule of serving as a representative of the people of a district by incentivizing elected representatives to respond only to their "base" voters. Daryl L. Levinson & Richard J. Pildes, *Separation of Parties, Not Powers,* 119 Harv. L. Rev. 2311, 2335 (2006); Alan G. Tarr & Robert F. Williams, *Introduction*, 37 Rutgers L.J. 877, 878 (2006); Samuel Issacharoff & Pamela S. Karlan, *Where*

to Draw the Line? Judicial Review of Political Gerrymanders, 153 U. Pa. L. Rev. 541, 574 (2004). They produce candidates at the extremes of the political spectrum. They discourage compromise and problem-solving for the benefit of the people of the district or state as a whole. Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting,* 7 U. Pa. J. Const. L. 1001, 1068 (2005). Voters lose control over their representatives, and the political party benefiting from the maps gain that control. Voters also lose faith in the electoral process, recognizing that election outcomes are foreordained, and come to see their exercise of the franchise as a hollow gesture. Trevor Potter & Marianne H. Viray, *Election Reform: Barriers to Participation,* 36 U. Mich. J.L. Reform 547, 575 (2003); Issacharoff & Karlan, *Where to Draw*, 153 U. Pa. L. Rev. at 574. All of these circumstances weaken, and can even destroy, functional democracy: "'[P]artisan gerrymanders"…'[are incompatible] with democratic principles.'" *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n.,* 576 U.S. 787, 791 (2015) (quoting *Vieth v. Jubelirer,* 541 U.S. 267, 292 (Scalia, J.) (plurality opinion) and citing *id.* at 316 (Kennedy, J., concurring in judgment)). As a non-partisan body, acting in equity, the Court must reject endorsing such an approach.

3. Population counts should be adjusted to account for those incarcerated away from their home communities.

With respect to legislative districts in the Milwaukee area in particular, the Court should be cognizant of the problematic way that prisoner populations are counted in the U.S. Census. Namely, the U.S. Census counts prisoners as residents of where they are incarcerated, not as residents of the communities they are from and intend to return to

following release. *Residence Criteria and Residence Situations for the 2020 Census*, U.S. Census Bureau, https://www.census.gov/content/dam/Census/programs- surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf. This disproportionately affects members of the Black and Brown communities of Milwaukee, which make up a disproportionately large share of Wisconsin's prison population. *See Johnson III,* 2022 WI 19, ¶ 171 (Karofsky, dissenting) (noting the racial disparities in the criminal justice system and Wisconsin's disproportionate rates of incarceration of Black residents).[11] This both reduces the counted population of Milwaukee and increases the counted population of the areas where correctional institutions are located. The practical effect of this is the voting population in the areas with correctional institutions have outsized political influence, and the communities from whence the prisoners come, and will return to, are underrepresented.[12]

This also raises a potential issue under the Wisconsin Constitution's apportionment provision, which calls for state legislative apportionment to be accomplished "according to the number of inhabitants." Wis. Const. Art. IV, § 3. Chapter 4, § 1, 1849 Revised Statutes defined "inhabitant" to mean "a resident in the particular locality in reference to which that word is used." This suggests that the terms "inhabitant" and "resident" are similes under Wisconsin law. Further, Wis. Stat. § 6.10(1) defines a

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[11] For more information about this problem, *see* Natasha Haverty, *By counting prisoners where they're incarcerated, Wisconsin shifts voter clout from cities to small towns,* Milwaukee Journal Sentinel, Oct. 15, 2021, available at: https://www.jsonline.com/in-depth/news/2021/10/15/when-new-political-districts-drawn-power-skewed-areas-prisons-through-prison-gerrymandering/5950103001/.

[12] A 1980 Attorney General Opinion provided that prisoners cannot be excluded altogether from the population count, but remained ambiguous as to whether they must be counted as residents of their home communities or the communities where they are incarcerated. *OAG 22-81.*

residence as "the place where the person's habitation is fixed, without any present intent to move, **and to which, when absent, the person intends to return.**" (emphasis added). Consequently, in its exercise of equitably remedying unconstitutional state legislative maps, the Court should consider adjusting population numbers from the U.S. Census to count prisoners as residents of their home communities, rather than in the communities where they are incarcerated.

CONCLUSION

For the reasons stated in both this Response Brief as well as the Democratic Senator Respondents' Opening Brief, the Court should hold that the existing legislative maps are unconstitutional and order a process and schedule for the remedies phase. In ordering the remedies here, the Court should place at the forefront the goal of advancing democracy and serving in equity, to protect the pre-constitutional, fundamental right of voters to elect their representatives in the state legislature, and reject processes and remedies that would allow further entrenchment of existing non-democratic maps.

Respectfully submitted this 30th day of October 2023.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a response brief. The length of this brief is 8,701 words.

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