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In the Supreme Court of Wisconsin

Appeal 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 SWEET AND GABRIELLE YOUNG,
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.

AMICUS BRIEF OF WISCONSIN MANUFACTURERS & COMMERCE, INC.

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Introduction

This case is a rerun. Competent parties have already litigated these issues, and this Court has already handed down a decisive decision. Yet the petitioners probe again these issues—and they ask this Court to do the same. Stare decisis strongly discourages that effort. The time to argue the issues presented is past. It ended when this Court decided *Johnson v. Wisconsin Elections Comm'n* (*Johnson I*) in 2021. Since then, reliance interests have mounted high. Out of fidelity to precedent, and sympathy for reliance on this Court's dictates, the Court should adhere to what it stated explicitly in *Johnson I* and refuse to further entertain any efforts to set that opinion aside.

Discussion

I. The existing legislative maps do not violate the Wisconsin Constitution's contiguity requirement.

A. Stare decisis counsels upholding *Johnson I*.

The first question presented requires this Court to decide whether the word "contiguous" in the Wisconsin Constitution must be read literally. But this Court answered that question two years ago. In *Johnson I*, this Court said:

> Article IV, Section 4 of the Wisconsin Constitution [] commands assembly districts be "contiguous," which generally means a district "cannot be made up of two or more pieces of detached territory." If annexation by municipalities creates a municipal "island," however, the district containing detached portions of the municipality is legally contiguous even if the area around the island is part of a different district.

2021 WI 87, ¶ 36, 399 Wis. 2d 623. That passage renders this an open-and-shut case. Yet the petitioners ask this Court to examine that clear

and recent holding. The Court should decline the invitation. Stare decisis strongly favors upholding that portion of *Johnson I*.

Stare decisis is the lifeblood of our common-law judicial system. For centuries, it has sustained judiciaries, allowing them to function from one case to the next and from one generation forward. William Blackstone, one of the doctrine's earliest proponents, took a robust view of it. To him, a prior decision could be overturned only if it could "be found" that it was "manifestly absurd or unjust." 1 William Blackstone, Commentaries *70. This is a high bar—but high for good reason. According to Blackstone, when a case is overturned, "it is declared, not that such a sentence was bad law, but that it was not law." *Id*. Though espoused long ago, this view prevails today. Wisconsin courts adhere to the Blackstonian Doctrine, which is premised on the view that "when a decision is overruled, it does not merely become bad law—it never was the law, and the later pronouncement is regarded as the law from the beginning.'" *Heritage Farms, Inc. v. Markel Ins.,* 2012 WI 26, ¶ 44, 339 Wis. 2d 125, 810 N.W.2d 465 (quoting *State v. Picotte,* 2003 WI 42, ¶ 42, 261 Wis.2d 249, 661 N.W.2d 381). This view dictates, for better or worse, the message this Court sends when it overrules a case. Under it, to overturn a case is not to simply say a previous holding was faulty or undesirable. It is to say the previous decision was never binding. It was never law at all.

That is a significant statement, so this Court—consistent with all appellate courts in the nation—"require[s] a special justification in order to overturn [ ] precedent." *State v. Johnson*, 2023 WI 39, ¶¶ 19-20, 407 Wis. 2d 195, 990 N.W.2d 174 (citing *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257). Given this Court's "scrupulous" fidelity to stare decisis, this Court has

"identified five such special justifications" for overturning a case previously decided. *Id*. (citing *State v. Young*, 2006 WI 98, ¶ 51 n.16, 294 Wis. 2d 1, 717 N.W.2d 729). Those five justifications are:

> (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."

Id. (citing *Johnson Controls*, 264 Wis. 2d 60, ¶¶ 98-99). None of those special justifications exists here.

Since this Court decided *Johnson I* in 2021, the relevant law has not changed. Not a word in Wis. Const. art. IV §§ 4 or 5 is different today than it was then. Along the same lines, no facts have been recently learned that could undermine the Court's *Johnson I* decision. Indeed, no facts could change. Apportionment is based on the results of each decade's census. The last census was complete in 2020. The next will be complete in 2030. Until that time, the facts in any districting case will remain as they were in 2020, thus discouraging this Court from overturning any of the *Johnson* decisions.

As for the fourth justification—"unsound in principle"—this justification is about more than subjective incorrectness. As James Madison described it, high courts have the power to overrule their own precedents when a past decision was so egregiously wrong it amounted to an alteration or a veritable repeal of an underlying law or constitutional provision. Letter from Madison to N.P. Trist (Dec. 1831), *in* 9 *Writings of James Madison*, 477. This Court has made clear the same. To be unsound in principle, a decision typically must be not only wrong but also flawed additionally. *See*, *e.g.*, *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 83, 382 Wis. 2d 496, 914

N.W.2d 21 (overturning a case because it "does not respect the separation of powers"). This high bar is appropriate. If mere incorrectness could render a decision unsound in principle, then most of this Court's cases are so unsound, for most are not unanimous.[1] *See*, *e.g.*, Alan Ball, *Wisconsin Supreme Court Decisions, 2022-2023*, SCOWstats, https://scowstats.com/wp-content/uploads/2023/07/decisions-by-vote-split-2022-23.pdf. On top of that, such a low bar would justify overruling a decision because of a change in the Court's composition. If the voters elect a justice who believes a decision to be wrong, that decision will become unsound in at least one justice's mind. *Contra Johnson Controls,* 264 Wis. 2d 60, ¶ 95 (citing *State v. Stevens*, 181 Wis.2d 410, 442, 511 N.W.2d 591 (1994) (Abrahamson, J., concurring)).

Even if this Court believes *Johnson I* was wrongly decided, it should not overrule it. The decision contains none of the extra flaws common to cases unsound in principle.

Militating in favor of sustaining *Johnson I*, reliance interests on this Court's interpretation of "contiguous," as well as the State's maps in general, is strong. *See id.*, ¶ 99. "[W]hen overruling precedent 'would dislodge [individuals'] settled rights and expectations,' *stare decisis* has

[1] Judges of all theoretical stripes agree that a decision cannot be overruled simply because it was "wrong." Justice Kagan made this point well: "Respecting *stare decisis* means sticking to some wrong decisions.… Accordingly, an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a 'special justification'—over and above the belief 'that the precedent was wrongly decided.'" *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455–56 (citing *Halliburton Co. v. Erica P. John Fund, Inc.,* 573 U.S. 258, 266 (2014)). Or "[a]s Justice Scalia put it, the doctrine of *stare decisis* always requires 'reasons that go beyond mere demonstration that the overruled opinion was wrong,' for 'otherwise the doctrine would be no doctrine at all.'" *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring) (quoting *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in judgment)).

'added force.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2343 (2022) (Breyer, Sotomayor, Kagan, JJ., dissenting).

Following this Court's trio of *Johnson* cases, all members of the Wisconsin Assembly were elected under maps this Court chose. That means those representatives have since forged relationships with organizations and businesses within those districts. And more importantly, they have made political vows to the constituents within those districts. In turn, voters have devoted time to learn about the candidates seeking their votes, and they have cast ballots seeking change on issues that affect their lives—often relying on promises made to them by the candidates. These strong reliance interests stem directly from the *Johnson* decisions. As a result, those decisions should stand.

B. This suit is barred by laches.

Not only should *Johnson I* be upheld; the Court should not even reach the contiguity question. This suit is barred by laches. "Laches is an affirmative, equitable defense designed to bar relief when a claimant's failure to promptly bring a claim causes prejudice to the party having to defend against that claim." *Wisconsin Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶ 11, 393 Wis. 2d 308, 946 N.W.2d 101 (citing *Sawyer v. Midelfort*, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999)). Laches works to "aid[] the vigilant," and discourage parties from "sleep[ing] on their rights to the detriment of the opposing party." *Id.* Before applying laches, the proponent of the defense must prove three elements: "(1) a party unreasonably delays in bringing a claim; (2) a second party lacks knowledge that the first party would raise that claim; and (3) the second party is prejudiced by the delay." *Id*, ¶ 12. Yet even after those elements are proven, "application of laches is left to the sound discretion of the court asked to apply this equitable bar." *Id*. This

doctrine is entitled especial reverence in election cases, where "[e]xtreme diligence and promptness are required." *Trump v. Biden*, 2020 WI 91, ¶ 11, 394 Wis. 2d 629, 951 N.W.2d 568 (citing 29 C.J.S. Elections § 459 (2020)).

In fact, this case is deeply analogous to *Trump*, where this Court concluded the Trump campaign's efforts to "invalidate the ballots … of more than 220,000 Wisconsin voters in Dane and Milwaukee Counties" were barred by laches. *Id.*, ¶ 1. There, the Trump campaign brought suit *after* "all votes were counted and canvassing was completed for the 2020 presidential election." *Id.*, ¶ 4. The Court applied laches because all the campaign's claims could have been raised well before the election. *Id.*, ¶ 32. As there, so here. The petitioners could have brought all their claims well before the 2022 assembly elections.[2] The current maps were put into place by this Court in April 2022. Yet the petitioners waited—for years—to challenge the maps. Like the Trump campaign, the petitioners brought this suit *after* votes were cast and representatives were sworn in. Nothing materially distinguishes the petitioners' tardiness here from the Trump campaign's. For consistency of treatment, this Court should hold that the first prong of the analysis favors application of laches.

As to the second element of laches (lack of knowledge), no one knew the petitioners planned to bring these claims. If anything, the defendants had every reason to believe they would not rise up. In *Johnson I*, this Court stated, in what can be described only as very clear terms, that the current maps do not violate the Wisconsin Constitution's contiguity requirements or its separation-of-powers principles. It was only reasonable, then, for the defendants to believe that *Johnson I*, *II*,

[2] The intervenors, too, have unduly waited. Although they, unlike the petitioners, were involved in the *Johnson* cases, they did not bring then the specific claims they bring now. And more to it, they had no reasonable basis to bring the current claims so late.

and *III* were clearly established law. Plus, nothing in the record shows these claims were imminent anytime before the petitioners brought them. This all is enough to satisfy—if not to soar beyond—what is required to prove lack of knowledge. *See id*., ¶ 23; *Brennan*, 393 Wis. 2d 308, ¶18.

Last of all, prejudice is apparent here. Prejudice (always a fact-specific inquiry) refers to "anything that places [respondents] in a less favorable position." *Trump*, 394 Wis. 2d 629, ¶ 24 (quoting *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 32, 389 Wis. 2d 516, 936 N.W.2d 587). If petitioners are granted the remedies they seek, all citizens who voted in the November 2022 Assembly and Senate elections will effectively have their votes tossed out. Not just that, all candidates who were elected in November 2022 will have their hard-earned victories snatched away. And still more, all bills that were passed since those officials assumed office will—well, who knows what will be made of them. Are otherwise valid laws binding if the representatives who voted on them were unlawfully elected? That's a question this Court invites if it rules for the petitioners. The scale of prejudice here is astounding. It might be so great it causes crisis. The prejudice prong of laches is satisfied.

From a base equity standpoint, laches is appropriate. This Court said why in *Trump*: "Parties bringing election-related claims have a special duty to bring their claims in a timely manner. Unreasonable delay in the election context poses a particular danger—not just to municipalities, candidates, and voters, but to the entire administration of justice." *Id*., ¶ 30. The petitioners' delay here was even more serious than the Trump campaign's. The Trump campaign initiated the one and only lawsuit challenging votes cast in Dane and Milwaukee Counties.

The same cannot be said of the petitioners here, who a year and a half ago passed up a square-on, highly publicized challenge to exactly the same maps. Equity favors laches.

Because all three elements of laches are met here, and because equity counsels application of the doctrine, this Court should hold the petitioners' claims are barred by laches.

II. The adoption of the current legislative maps did not violate the separation of powers.

"The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, is implicit in the division of governmental powers among the judicial, legislative and executive branches." *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999) (quoting *Friedrich,* 192 Wis.2d at 13).

To determine whether an action violates the separation of powers, courts must go through two analytical steps. First, they must ask whether the power involved is a shared power or a core power. *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 35, 393 Wis. 2d 38, 946 N.W.2d 35. Then, they must ask whether a violation of the separation of powers has occurred.

Core powers pertain to those "zones of authority constitutionally established for each branch of government." *State ex rel. Fiedler v. Wis. Senate*, 155 Wis.2d 94, 100, 454 N.W.2d 770 (1990). Otherwise put, they are "the powers conferred to a single branch by the constitution." *Serv. Emps.*, 393 Wis. 2d 38, ¶35.

Shared powers are different; they "lie at the intersections of [ ] exclusive core constitutional powers." *Horn*, 226 Wis.2d at 643. This means that, as their name implies, shared powers are exercised by two or all three branches. *Id*.

A violation of the separation-of-powers doctrine occurs when one branch engages in "*any* exercise of authority" that constitutes a core power belonging to another branch. *Gabler*, 376 Wis. 2d 147, ¶31 (quoting *Fiedler*, 155 Wis. 2d at 100). Shared powers, meanwhile, are less intensely protected. "While each branch jealously guards its exclusive powers, our system of government envisions the branches sharing the powers found in these great borderlands. Ours is a system of separateness but interdependence, autonomy but reciprocity." *Flynn v. Department of Admin.,* 216 Wis.2d 521, 546, 576 N.W.2d 245 (1998). Consequently, "[t]he branches may exercise power within these borderlands but no branch may unduly burden or substantially interfere with another branch." *Horn*, 226 Wis. 2d at 644 (citing *Friedrich,* 192 Wis.2d at 14,).

Redistricting is a shared power. *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 557-59, 126 N.W.2d 551 (1964). Under the Wisconsin Constitution, the legislature must propose a map, and the governor must then either sign or veto that map. While each branch's specific role in this process is a core power, the broader power to redistrict cannot be rightly described as a core power of any one branch or another. Put differently, the legislature's core power to present a map and the governor's core power to veto that map constitute, when taken together, the shared power to redistrict.

The judiciary also has an indispensable role to play. When the legislature and the governor reach an impasse, the courts must intervene to resolve that tension. Sometimes, this Court must even "formulate a valid redistricting plan" on its own. *Scott v. Germano*, 381 U.S. 407, 409 (1965). Judicial involvement at this point is necessary. Without it, the state could go into an election mapless, creating a

constitutional crisis. This integral role has been repeatedly recognized both by this Court and by the United States Supreme Court. Indeed, the Supreme Court has in certain cases "specifically encouraged" state courts to take "appropriate action." *Id*.

When this Court draws a map during an impasse, the Court does not substantially interfere with the exercise of another branch's power. It could not. The very definition of an impasse is a joint *failure* to act. For this Court to interfere with the exercise of another branch's power, that other branch first needs to act. Here, the Governor and the legislative branch did not pass a map. They therefore did not exercise the power to redistrict, and this Court in the *Johnson* cases did not interfere with either of the other branches' powers. It was simply doing its part of the shared redistricting process.

The governor seemingly disagrees with this mainstream evaluation of this issue. In his apparent view, there is no shared power at play in redistricting. Instead, he effectively argues the only powers exercised in the redistricting process are core powers: the power to present and the power to veto. This is like saying two plus two does not make four; it simply makes two and two together. The Court should reject the governor's framing of this case and ask whether this Court interfered with the political branches' shared redistricting power.

On top of its theoretical deficiencies, the governor's position raises practical, precedential concerns. If adopted, this Court would set a flawed example for analyzing separation-of-powers violations. For the Governor to succeed on this issue, the Court will need to determine that the relevant power is not the redistricting power but the Governor's veto power. This too-narrow view would effectively dispel the concept of shared powers. After all, every shared power is the sum of two or more

core powers. The power to redistrict is, as already explained, the sum of the power to present a map and the power to sign off on or veto a map. The power to legislate, too, is a shared power: "It is beyond doubt that lawmaking was a power to be shared by both Houses and the President." *I.N.S. v. Chadha*, 462 U.S. 919, 947 (1983). That power, once again, is the sum of the power of presentment and executive permission. The Governor's separation-of-powers argument is fundamentally antithetical to the concept of shared powers—and by extension with a long line of this Court's constitutional cases. If the Court explicitly overrules *Johnson I* while implicitly overruling its many shared-power cases, citizens of this state will be only left to wonder, "what ever happened to stare decisis?" *Phelps v. Physicians Ins. Co. of Wisconsin*, 2009 WI 74, ¶ 74, 319 Wis. 2d 1, 768 N.W.2d 615 (Ann Walsh Bradley, J., dissenting).

III. Remedy

A. If the Court reaches the remedy stage, it should use a least-change method to draw maps rather than doing so anew.

If the Court concludes the legislative maps violate the contiguity requirement or separation-of-powers principles, this Court should use a least-change approach in crafting a remedy. It is the only method that maintains the separation of powers.

Drawing new maps from a blank canvas "amount[s] to a judicial replacement of the law enacted by the people's elected representatives with the policy preferences of unelected interest groups, an act totally inconsistent with our republican form of democracy." *Johnson I*, 399 Wis. 2d 623, ¶ 78. The making of a legislative map involves myriad political decisions. As a result, mapmaking is generally a political

function. This Court's role in the mapmaking process is limited—to remedying legal violations within *existing* maps. That way, this Court does not exercise legislative power; it merely ensures the legislature has wielded its power within the confines of the law (the quintessential judicial power). To scrap a map and draw a wholly new one, however, would be to exercise legislative power. Indeed, doing so would be like using judicial review not only to strike down a statute but to then also rewrite the statute. By applying the least-change method, the Court avoids these structural conflicts. With least change, the Court maintains the thrust of the maps enacted by the legislature and stops short of replacing legislative political decisions with judicial ones. *Id*.

B. If this Court does not use a least-change method, it should not consider the partisan makeup of possible districts.

As this Court said in *Johnson I*, "there are no 'judicially discoverable and manageable standards' by which to judge partisan fairness." *Johnson I*, 399 Wis. 2d 623, ¶ 40 (citing Baker *v. Carr*, 369 U.S. 186, 217 (1962)). Stare decisis demands that decision be followed. Stare decisis aside, considering the partisan makeup of districts is still improper. "Partisan gerrymandering claims invariably sound in a desire for proportional representation." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019). But whether representation is proportional is not a justiciable question. To see why, suppose our State's electorate were perfectly split: exactly half votes Republican while half votes Democratic. If, under one set of maps, Democrats yield 51% of Assembly seats, and Republicans yield 49%, is that representation "fair"? Most would probably say so; it is roughly proportional. But now assume Democrats yield 55% of the Assembly seats. Is that fair? Maybe. What if Democrats receive 100% of Assembly seats despite receiving 50% of

the vote? That, surely, is *un*fair. So at some point between half the seats and all the seats the maps give Democrats an unfair advantage. Yet where exactly is that point? In truth, the answer to that question eludes articulation, and that is why this issue eludes judicial management.

Even if a threshold were discernable such that this Court *could* make maps politically fair, that effort would soon prove impractical. Our constitution elevates certain redistricting criteria above others. Explicit in the Wisconsin Constitution are the requirements that maps be "bounded by county, precinct, town or ward lines"; be formed from "contiguous territory"; and "be in as compact form as practicable." Wis. Const art. IV, §§ 3–5. Our federal constitution similarly elevates some criteria. The Supreme Court has recognized all districts must contain roughly the same number of people. *Wesberry v. Sanders,* 376 U.S. 1, 7, (1964). The Fourteenth Amendment and the Voting Rights Act prohibit maps that are racially gerrymandered. *Shaw v. Hunt,* 517 U.S. 899, 907–908 (1996).

As this Court has explained, "Democrats tend to live close together in urban areas, whereas Republicans tend to disperse into suburban and rural areas." *Johnson v. Wisconsin Elections Comm'n*, 399 Wis. 2d 623, ¶ 48 (citing *Baumgart v. Wendelberger,* No. 01-C-0121, 2002 WL 34127471, at *6 (E.D. Wis. May 30, 2002)). "As a result, drawing contiguous and compact single-member districts of approximately equal population often leads to grouping large numbers of Democrats in a few districts and dispersing rural Republicans among several. These requirements tend to preserve communities of interest, but the resulting districts may not be politically competitive." *Id*. Therefore, "proportional party representation requirement would effectively force the two dominant parties to create a 'bipartisan' gerrymander to ensure the

'right' outcome—obliterating many traditional redistricting criteria mandated by federal law and Article IV of the Wisconsin Constitution." *Johnson I*, 399 Wis. 2d 623, ¶ 48. These impracticalities are unavoidable. To create politically "fair" maps, this Court would doubtless need to fashion districts to look far more exotic than Gerry's salamander. But that would likely violate the Wisconsin Constitution and established federal law.

This all assumes, however, that it is feasible at all to accurately label some voters Democrats and others Republicans. For many, voting means more than checking a box beside a particular partisan label. Indeed, "more than one-third of Wisconsinites self-identify as independents, affiliating themselves with no party at all." *Id.*, ¶ 43. For these voters in particular, electoral choice turns on several factors: the character and fitness and general qualifications of each candidate, the beneficence and workability of each's proposals, the verve with which each speaks. These are not "unsupported and out-of-date musings about the unpredictability of the American voter." *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting). They are considerations that dictate the electoral decisions of many Wisconsinites. To assume voting depends only on supposed party affiliation demeans the act of voting—the exercise of the "most fundamental of [our] constitutional rights," *Id.* at 2509 (Kagan, J., dissenting)—and reduces it to a sort of peer pressure.

IV. The level of factfinding, if any, depends on the remedy imposed.

The level of factfinding this case will require depends largely on remedy. If this Court uses a least-change approach, then minimal factfinding will be necessary. On the other hand, if this Court decides to draw maps anew, then significant factfinding will be required to account

for all of the traditional districting criteria. Because this Court reserves its "original jurisdiction for rare cases that involve purely legal questions," this Court should dismiss this case if it decides a least-change approach is not appropriate. *Gahl on behalf of Zingsheim v. Aurora Health Care, Inc.*, 2023 WI 35, 23 Wis. 2d 35, 989 N.W.2d 561, 603 (App. D) (Dallet, J., dissenting from order granting leave to commence an original action).

Conclusion

This Court should dismiss this case as improvidently granted because the issues are squarely addressed by *Johnson I*.

Dated this 8th day of November 2023.

Respectfully Submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,377 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 809.19(12).

Dated this 8th day of November 2023.

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