

**Elections
Redistricting – Legislative Maps –
Contiguity Requirement**

Clarke v. Wisconsin Elections Comm’n, 2023 WI 79 (filed Dec. 22, 2023)

HOLDING: Wisconsin’s current legislative maps contain noncontiguous districts and thus violate article IV, sections 4 and 5 of the Wisconsin Constitution.

SUMMARY: Wisconsin Constitution article IV, sections 4 and 5 require that state legislative districts consist of “contiguous territory.” In this original action, the petitioners contended that the current districts are noncontiguous and they sought to enjoin the use of the current maps in future elections. In a majority opinion authored by Justice Karofsky and joined in by Justice A.W. Bradley, Justice Dallet, and Justice Protasiewicz, the supreme court agreed.

The court concluded that “the contiguity requirements in Article IV, Sections 4 and 5 mean what they say: Wisconsin’s state legislative districts must be composed of physically adjoining territory” (¶ 3). Under current maps, at least 50 of 99 assembly districts and at least 20 of 33 senate districts include separate, detached parts (see ¶ 77). The court held that the noncontiguous legislative districts violate the Wisconsin Constitution (see ¶ 34), and it enjoined the Wisconsin Elections Commission from using the current legislative maps in future elections (see ¶ 3).

Remedial maps must therefore be drawn before the 2024 elections. The Wisconsin Legislature has the primary authority and responsibility to draw new maps, and the court urged the legislature to pass legislation creating new maps that satisfy all requirements of state and federal law. However, said the majority, “[w]e are mindful ... that the legislature may decline to pass legislation creating new maps, or that the governor may exercise his veto power. Consequently, to ensure maps are adopted in time for the 2024 election, we will proceed toward adopting remedial maps unless and until new maps are enacted through the legislative process” (¶ 4).

The majority identified, in paragraphs 64-71, the principles that will guide the court’s process in adopting remedial maps: 1) The remedial maps must comply with population equality requirements. 2) The legislative districts must meet the basic requirements of the Wisconsin Constitution. 3) Remedial maps must comply with all applicable federal laws. 4) The court will consider other traditional districting criteria that are not specifically outlined in the Wisconsin Constitution or the U.S. Constitution but that are commonly considered by courts tasked with formulating maps (for example, reducing municipal splits and preserving communities of interest). 5) The court will consider partisan impact when evaluating remedial maps.

When adopting remedial maps, the court will not use the “least change approach” that was articulated in *Johnson v. Wisconsin Elections Comm’n*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 (¶ 60). It overruled those portions of *Johnson* and its progeny of the same name that mandate a least-change approach (see ¶ 63).

The respondents moved to dismiss this case, arguing that the petitioners lacked standing to challenge the contiguity of the current legislative districts and that their claims are barred by laches, issue preclusion, and estoppel. Additionally, they contended that this case is an impermissible collateral attack on the court’s most recent redistricting decision (*Johnson v. Wisconsin Elections Comm’n*, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559) and that, as a result, neither the declaratory nor the injunctive relief sought by the petitioners is available. The majority denied the motion to dismiss, concluding that the respondents’ defenses “do not apply, and that declaratory and injunctive relief are available” (¶ 37).

Lastly, the court declined the petitioners’ request that it issue a writ *quo warranto* declaring the November 2022 state senate elections unlawful and ordering special elections for these offices that would otherwise not be on the ballot until November 2026 (see ¶¶ 72-74).

Chief Justice Ziegler and Justice R.G. Bradley and Justice Hagedorn each authored dissenting opinions. **WL**

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In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize all decisions of the Wisconsin Supreme Court (except those involving lawyer or judicial discipline).

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