No. 21A471

IN THE SUPREME COURT OF THE UNITED STATES

THE WISCONSIN LEGISLATURE, BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS, AND RONALD ZAHN,

Applicants,

v.

MARGE BOSTELMANN, *in her official capacity as Member of the Wisconsin Elections Commission, et al.*,

Respondents.

On Application for Stay and Injunctive Relief and Alternative Petition for Writ of Certiorari to the Supreme Court of Wisconsin

APPENDIX TO HUNTER RESPONDENTS' RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION

John M. Devaney
PERKINS COIE LLP
700 Thirteenth St., NW
Washington, D.C. 20005
(202) 654-6200
JDevaney@perkinscoie.com

Charles G. Curtis, Jr.
PERKINS COIE LLP
33 E. Main St.,
Suite 201
Madison, WI 53703
(608) 663-7460
CCurtis@perkinscoie.com

Abha Khanna
Counsel of Record
ELIAS LAW GROUP LLP
1700 Seventh Avenue,
Suite 2100
Seattle, WA 98101
(206) 656-0177
AKhanna@elias.law

Christina A. Ford
William K. Hancock
Jacob D. Shelly
ELIAS LAW GROUP LLP
10 G. Street NE
Suite 600
Washington, D.C. 200002
(202) 968-4490
CFord@elias.law
WHancock@elias.law
JShelly@elias.law

Counsel for Hunter Respondents

CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29.6, no Hunter Respondent has a parent company or is a publicly held company with a 10 percent or greater ownership interest in it.

TABLE OF CONTENTS

Page(s)

Supreme Court of Wisconsin Order (Filed Nov. 30, 2021) 1

Petition to the Supreme Court of Wisconsin to Take Jurisdiction of an Original Action (Filed Aug. 23, 2021) 76

Memorandum of Law in Support of Motion to Intervene by the Wisconsin Legislature (Filed Oct. 6, 2021) 96

Petition for Writ of Mandamus and Petition for Writ of Prohibition to the United States District Court for the Western District of Wisconsin (Filed Sept. 24, 2021) 110

Brief by Petitioners (Filed Oct. 25, 2021) 159

Response Brief by Petitioners (Filed Nov. 1, 2021) 194

Brief by the Wisconsin Legislature (Filed Oct. 25, 2021) 219

DATED: March 11, 2022

Respectfully submitted,

s/ Abha Khanna

Abha Khanna
Counsel of Record
ELIAS LAW GROUP LLP
1700 Seventh Avenue,
Suite 2100
Seattle, WA 98101
(206) 656-0177
AKhanna@elias.law

Christina A. Ford
William K. Hancock
Jacob D. Shelly
ELIAS LAW GROUP LLP
10 G Street N.E.,
Suite 600
Washington, D.C. 20002
(202) 968-4490
CFord@elias.law
WHancock@elias.law
JShelly@elias.law

John M. Devaney
PERKINS COIE LLP
700 Thirteenth St., NW
Washington, D.C. 20005
(202) 654-6200
JDevaney@perkinscoie.com

Charles G. Curtis, Jr.
PERKINS COIE LLP
33 E. Main St.,
Suite 201
Madison, WI 53703
(608) 663-7460
CCurtis@perkinscoie.com

Counsel for Hunter Respondents

SUPREME COURT OF WISCONSIN

CASE NO.: 2021AP1450-OA

COMPLETE TITLE: Billie Johnson, Eric O'Keefe, Ed Perkins and Ronald Zahn,
Petitioners,
Black Leaders Organizing for Communities, Voces de la Frontera, League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson, Rebecca Alwin, Congressman Glenn Grothman, Congressman Mike Gallagher, Congressman Bryan Steil, Congressman Tom Tiffany, Congressman Scott Fitzgerald, Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, Kathleen Qualheim, Gary Krenz, Sarah J. Hamilton, Stephen Joseph Wright, Jean-Luc Thiffeault, and Somesh Jha,
Intervenors-Petitioners,
v.
Wisconsin Elections Commission, Marge Bostelmann in her official capacity as a member of the Wisconsin Elections Commission, Julie Glancey in her official capacity as a member of the Wisconsin Elections Commission, Ann Jacobs in her official capacity as a member of the Wisconsin Elections Commission, Dean Knudson in his official capacity as a member of the Wisconsin Elections Commission, Robert Spindell, Jr. in his official capacity as a member of the Wisconsin Elections Commission and Mark Thomsen in his official capacity as a member of the Wisconsin Elections Commission,
Respondents,
The Wisconsin Legislature, Governor Tony Evers, in his official capacity, and Janet Bewley Senate Democratic Minority Leader, on behalf of the Senate Democratic Caucus,
Intervenors-Respondents.

ORIGINAL ACTION

OPINION FILED: November 30, 2021
SUBMITTED ON BRIEFS:
ORAL ARGUMENT:

SOURCE OF APPEAL:
COURT:

COUNTY:
JUDGE:

JUSTICES:
REBECCA GRASSL BRADLEY, J., delivered the majority opinion of the Court with respect to all parts except ¶¶8, 69-72, and 81, in which ZIEGLER, C.J., and ROGGENSACK, and HAGEDORN, JJ., joined, and an opinion with respect to ¶¶8, 69–72, and 81, in which ZIEGLER, C.J., and ROGGENSACK, J., joined. HAGEDORN, J., filed a concurring opinion. DALLET, J., filed a dissenting opinion in which ANN WALSH BRADLEY and KAROFSKY, JJ., joined.
NOT PARTICIPATING:

ATTORNEYS:

For the petitioners, there were briefs filed by *Richard M. Esenberg, Anthony F. LoCoco, Lucas T. Vebber* and *Wisconsin Institute for Law & Liberty,* Milwaukee.

For the intervenors-petitioners Black Leaders Organizing for Communities, Voces de la Frontera, League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson and Rebecca Alwin, briefs, including amicus briefs, were filed by *Douglas M. Poland, Jeffrey A. Mandell, Rachel E. Snyder, Richard A. Manthe, Carly Gerads* and *Stafford Rosenbaum LLP*, Madison; *Mel Barnes* and *Law Forward, Inc*., Madison; *Mark P. Gaber* (pro hac vice), *Christopher Lamar* (pro hac vice)and *Campaign Legal Center*, Washington, D.C.; *Annabelle Harless* (pro hac vice) and *Campaign Legal Center*, Chicago.

For the intervenors-petitioners Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany and Scott Fitzgerald there were briefs, including amicus briefs, filed by *Misha Tseytlin, Kevin M. LeRoy*, and *Troutman Pepper Hamilton Sanders LLP*, Chicago.

For the intervenors-petitioners Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz and Kathleen Qualheim, there were briefs, including amicus briefs filed by *Charles G.*

Curtis, Jr. and *Perkins Coie LLP*, Madison; *Marc Erik Elias* (pro hac vice), *Aria C. Branch* (pro hac vice), *Daniel C. Osher* (pro hac vice), *Jacob D. Shelly* (pro hac vice), *Christina A. Ford* (pro hac vice), *William K. Hancock* (pro hac vice) and *Elias Law Group LLP*, Washington, D.C.

For the intervenors-petitioners Citizens Mathematicians and Scientists Gary Krenz, Sarah J. Hamilton, Stephen Joseph Wright, Jean-Luc Thiffeault and Somesh Jha, briefs were filed by *Michael P. May, Sarah A. Zylstra, Tanner G. Jean-Louis* and *Boardman & Clark LLP*, Madison, and *David J. Bradford* (pro hac vice) and *Jenner & Block LLP*, Chicago.

For the respondents Wisconsin Elections Commission, Marge Bostelmann, Julie Glancey, Ann Jacobs, Dean Knudson, Robert Spindell, Jr. and Mark Thomsen there were letter-briefs filed by *Steven C. Kilpatrick*, assistant attorney general, *Karla Z. Keckhaver*, assistant attorney general, *Thomas C. Bellavia*, assistant attorney general.

For the intervenors-respondents the Wisconsin Legislature there were briefs filed by *Kevin M. St. John* and *Bell Giftos St. John LLC*, Madison; *Jeffrey M. Harris* (pro hac vice), *Taylor A.R. Meehan* (pro hac vice), *James P. McGlone* and *Consovoy McCarthy PLLC*, Arlington, Virginia and *Adam K. Mortara* and *Lawfair LLC*, Chicago.

For the intervenor-respondent Governor Tony Evers there were briefs filed by *Joshua L. Kaul*, attorney general, *Anthony D. Russomanno*, assistant attorney general and *Brian P. Keenan*, assistant attorney general.

For the intervenor-respondent Janet Bewley, State Senate Democratic Minority Leader on behalf of the State Senate Democratic

Caucus there were briefs filed by *Tamara B. Packard*, *Aaron G. Dumas* and *Pines Bach LLP*, Madison.

There was an amicus brief filed by *Daniel R. Suhr*, Thiensville.

2021 WI 87

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2021AP1450-OA

STATE OF WISCONSIN : IN SUPREME COURT

Billie Johnson, Eric O'Keefe, Ed Perkins and Ronald Zahn,

Petitioners,

Black Leaders Organizing for Communities, Voces de la Frontera, League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson, Rebecca Alwin, Congressman Glenn Grothman, Congressman Mike Gallagher, Congressman Bryan Steil, Congressman Tom Tiffany, Congressman Scott Fitzgerald, Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, Kathleen Qualheim, Gary Krenz, Sarah J. Hamilton, Stephen Joseph Wright, Jean-Luc Thiffeault, and Somesh Jha,

Intervenors-Petitioners,

v.

Wisconsin Elections Commission, Marge Bostelmann in her official capacity as a member of the Wisconsin Elections Commission, Julie Glancey in her official capacity as a member of the Wisconsin Elections Commission, Ann Jacobs in her official capacity as a member of the Wisconsin Elections Commission, Dean Knudson in his official capacity as a member of the Wisconsin Elections Commission, Robert Spindell, Jr. in his official capacity as a member of the Wisconsin Elections Commission, and Mark Thomsen in his official capacity as a member of the Wisconsin Elections Commission,

Respondents,

FILED

NOV 30, 2021

Sheila T. Reiff
Clerk of Supreme Court

The Wisconsin Legislature, Governor Tony Evers, in his official capacity, and Janet Bewley Senate Democratic Minority Leader, on behalf of the Senate Democratic Caucus,

Intervenors-Respondents.

REBECCA GRASSL BRADLEY, J., delivered the majority opinion of the Court with respect to all parts except ¶¶8, 69–72, and 81, in which ZIEGLER, C.J., and ROGGENSACK, and HAGEDORN, JJ., joined, and an opinion with respect to ¶¶8, 69–72, and 81, in which ZIEGLER, C.J., and ROGGENSACK, J., joined. HAGEDORN, J., filed a concurring opinion. DALLET, J., filed a dissenting opinion in which ANN WALSH BRADLEY and KAROFSKY, JJ., joined.

ORIGINAL ACTION. *Rights declared.*

¶1 REBECCA GRASSL BRADLEY, J. The Wisconsin Constitution requires the legislature "to apportion and district anew the members of the senate and assembly, according to the number of inhabitants" after each census conducted under the United States Constitution every ten years. Wis. Const. art. IV, § 3. In fulfilling this responsibility, the legislature draws maps reflecting the legislative districts across the state. Every census invariably reveals population changes within legislative districts, and the legislature must thereafter satisfy the constitutional requirement that each district contain approximately equal numbers of people by developing new maps, which are subject to veto by the governor. When this occurs, courts are often asked to step in and draw the maps.

¶2 This year, the legislature drew maps, the governor vetoed them, and all parties agree the existing maps, enacted into law in 2011, are now unconstitutional because shifts in Wisconsin's population around the state have disturbed the constitutionally guaranteed equality of the people's representation in the state legislature and in the United States House of Representatives. We have been asked to provide a remedy for that inequality. Some parties to this action further complain that the 2011 maps reflect a partisan gerrymander favoring Republican Party candidates at the expense of Democrat Party candidates, and ask us to redraw the maps to allocate districts equally between these dominant parties, although no one asks us to assign districts to any minor parties in proportion to their share of Wisconsin's electoral vote.

¶3 The United States Supreme Court recently declared there are no legal standards by which judges may decide whether maps are politically "fair." Rucho v. Common Cause, 139 S. Ct. 2484, 2499-500 (2019). We agree. The Wisconsin Constitution requires the legislature——a political body——to establish the legislative districts in this state. Just as the laws enacted by the legislature reflect policy choices, so will the maps drawn by that political body. Nothing in the constitution empowers this court to second-guess those policy choices, and nothing in the constitution vests this court with the power of the legislature to enact new maps. Our role in redistricting remains a purely judicial one, which limits us to declaring what the law is and affording the parties a remedy for its violation.

¶4 In this case, the maps drawn in 2011 were enacted by the

legislature and signed into law by the governor. Their lawfulness was challenged in a federal court, which upheld them (subject to a slight adjustment to Assembly Districts 8 and 9 in order to comply with federal law). Baldus v. Members of Wis. Gov't Accountability Bd., 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012). In 2021, those maps no longer comply with the constitutional requirement of an equal number of citizens in each legislative district, due to shifts in population across the state. This court will remedy that malapportionment, while ensuring the maps satisfy all other constitutional and statutory requirements. Claims of political unfairness in the maps present political questions, not legal ones. Such claims have no basis in the constitution or any other law and therefore must be resolved through the political process and not by the judiciary.

I. PROCEDURAL HISTORY AND HOLDING

¶5 Billie Johnson et al., four Wisconsin voters ("Wisconsin voters"), filed a petition for leave to commence an original action in this court following the release of the results of the 2020 census. Claiming to live in malapportioned congressional and state legislative districts, they have asked us to declare the existing maps——codified in Chapters 3 and 4 of the Wisconsin Statutes——violate the "one person, one vote" principle embodied in Article IV, Section 3 of the Wisconsin Constitution. They also have asked us to enjoin the respondents, the Wisconsin Elections Commission (WEC) and its members in their official capacity, from administering congressional and state legislative elections until the political branches adopt redistricting plans meeting the

requirements of Article IV. Because the legislature and the governor reached an impasse, the Wisconsin voters request a mandatory injunction,[1] remedying what all parties agree are unconstitutional plans by making only those changes necessary for the maps to comport with the one person, one vote principle while satisfying other constitutional and statutory mandates (a "least-change" approach).

¶6 We granted the petition and permitted the legislature, the governor, and several other parties to intervene. The intervenors raised numerous issues of federal and state law. In addition to the requirements of Article IV of the Wisconsin Constitution, we have been asked to consider the following laws in shaping any judicial remedy for the malapportioned congressional and state legislative districts: (1) Article I, Section 2 of the United States Constitution; (2) the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; (3) the Voting Rights Act (VRA) of 1965;[2] and (4) multiple provisions of the Wisconsin Constitution's Declaration of Rights.

¶7 In anticipation of implementing a judicial remedy upon

[1] A "mandatory injunction" is "[a]n injunction that orders an affirmative act or mandates a specified course of conduct." Mandatory injunction, Black's Law Dictionary (11th ed. 2019). When a court orders elections be conducted pursuant to modified maps, it is effectively ordering a mandatory injunction. See Reynolds v. Sims, 377 U.S. 533, 541 (1964).

[2] One intervenor invoked the Fifteenth Amendment of the United States Constitution, but did not develop an argument distinguishable from the intervenor's VRA argument. See Hunter et al. Br. at 20, 30. Accordingly, we do not address the Fifteenth Amendment further.

the expected impasse the political branches have now reached, we ordered the parties to address four issues:

> (1) Under the relevant state and federal laws, what factors should we consider in evaluating or creating new maps?
>
> (2) Is the partisan makeup of districts a valid factor for us to consider in evaluating or creating new maps?
>
> (3) The petitioners ask us to modify existing maps using a "least-change" approach. Should we do so, and if not, what approach should we use?
>
> (4) As we evaluate or create new maps, what litigation process should we use to determine a constitutionally sufficient map?[3]

We addressed the fourth question, at least preliminarily, in a prior order.

¶8 We hold: (1) redistricting disputes may be judicially resolved only to the extent necessary to remedy the violation of a justiciable and cognizable right protected under the United States Constitution, the VRA, or Article IV, Sections 3, 4, or 5 of the Wisconsin Constitution; (2) the partisan makeup of districts does not implicate any justiciable or cognizable right; and (3) this court will confine any judicial remedy to making the minimum changes necessary in order to conform the existing congressional and state legislative redistricting plans to constitutional and statutory requirements. The existing maps were passed by the legislature and signed by the governor. They

[3] Johnson v. WEC, No. 2021AP1450-OA, unpublished order (Wis. Oct. 14, 2021) (per curiam) (ordering supplemental briefing).

survived judicial review in federal court. Revisions are now necessary only to remedy malapportionment produced by population shifts made apparent by the decennial census. Because the judiciary lacks the lawmaking power constitutionally conferred on the legislature, we will limit our remedy to achieving compliance with the law rather than imposing policy choices.

II. BACKGROUND

A. Legal Context

¶9 Historical context helps frame the Petitioners' claims by illustrating the one person, one vote principle. The phrase "one person, one vote" is a relatively modern expression, but the concept of equal representation by population, as well as its alternatives, were familiar at the founding. In eighteenth-century England, over half of the members of the House of Commons were elected from sparsely populated districts, later branded the "rotten boroughs." Such a system of representation undermined popular sovereignty. 5 T.H.B. Oldfield, The Representative History of Great Britain and Ireland 219 (1816) ("The great Earl of Chatham called these boroughs the excrescences, the rotten part of the constitution, which must be amputated to save the body from a mortification.").

¶10 In contrast, representation by population gives an area with a larger population more influence in the legislative body than an area with a smaller population. Our nation's founders enshrined this principle in Article I, Section 2 of the United States Constitution. Its third clause specifies that the House of Representatives, unlike its predecessor, the House of Commons,

must be apportioned "among the several States . . . according to their respective Numbers[.]" To account for population shifts, it requires the federal government to conduct a census every ten years and then reapportion representatives. U.S. Const. art. I, § 2, cl. 3.

¶11 The Framers established a bicameral legislature. They viewed per capita representation in the House of Representatives as essential to the preservation of the people's liberty. The Federalist No. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961). With respect to the Senate, the Framers enshrined the concept of state sovereignty by allocating senators equally among the states, regardless of population size. See U.S. Const. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State."). Accordingly, Senate seats are unaffected by redistricting.

¶12 Redistricting involves many political choices, and the United States Constitution does not substantially constrain state legislatures' discretion to decide how congressional elections are conducted. See U.S. Const. art. I, § 4. Nevertheless, redistricting must comply with the one person, one vote principle. Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964). Even if a state does not gain or lose congressional seats, redistricting is often a constitutional imperative after each census due to geographic population shifts.

¶13 Wisconsin's founders also guaranteed equal representation by population in our state constitution, which places an affirmative duty on the legislature to implement

redistricting plans for the state legislature every ten years, after the federal census, to account for population shifts. Wis. Const. art. IV, § 3. No provision of the Wisconsin Constitution requires the legislature to apportion or district anew the state's congressional districts.[4] Other federal and state laws, discussed in more detail in the remainder of this opinion, place further limitations on the legislature's discretion when implementing redistricting plans.

B. The 2020 Census

¶14 The legislature enacted the current maps in 2011. 2011 Wis. Act 44; 2011 Wis. Act 43. Wisconsin's eight congressional districts are mapped in Wis. Stat. §§ 3.11 to 3.18 (2019–20).[5] See also Wis. Stat. § 3.001 ("This state is divided into 8 congressional districts."). The state's 99 assembly districts are mapped in Wis. Stat. §§ 4.01 to 4.99, although a federal district court made a slight adjustment to Assembly Districts 8 and 9 after concluding the map violated the VRA. Baldus, 862 F. Supp. 2d at 863. The state's 33 senate districts are mapped in Wis. Stat. § 4.009. See also Wis. Stat. § 4.001 ("This state is divided into 33 senate districts, each composed of 3 assembly districts.").

¶15 In August 2021, the United States Census Bureau delivered redistricting data to the State of Wisconsin based upon

[4] The Petitioners agree this court has never held any provision of the Wisconsin Constitution imposes a one person, one vote requirement on congressional districts. Omnibus Am. Pet., ¶1 n.2.

[5] All subsequent references to the Wisconsin Statutes are to the 2019–20 version.

the 2020 census. According to census data, the population of Wisconsin grew from 5,686,986 to 5,893,718. In order to realize equal legislative representation across districts, the ideal congressional district should have 736,715 people, the ideal assembly district should have 59,533, and the ideal senate district should have 178,598. While the ideal size of each district has changed, the number of districts remains the same. Wisconsin has not lost or gained any congressional seats, and the number of assembly and senate districts is set by Wisconsin statutes. Wis. Stat. §§ 3.001, 4.001.

¶16 The Wisconsin voters and many intervenors live in malapportioned districts, meaning they live in districts that are overpopulated. For example, one Wisconsin voter, Johnson, lives in Assembly District 78, which has a population of 66,838——7,305 more than ideal. If the districts are not reapportioned, Johnson's vote will be diluted in the ensuing elections.

C. The Impasse

¶17 On November 11, 2021, the legislature passed redistricting plans. One week later, the governor vetoed the legislation. The legislature has failed to override his veto.

¶18 At this point, the political branches have reached an impasse, and our involvement in redistricting has become appropriate. See Johnson v. WEC, No. 2021AP1450-OA, unpublished order, at 2 (Wis. Sept. 22, 2021, amended Sept. 24) (per curiam) (granting the petition for leave to commence an original action) ("[J]udicial relief becomes appropriate in reapportionment cases only when a legislature fails to reapportion according to

constitutional requisites in a timely fashion after having had an adequate opportunity to do so." (citation omitted)). The parties present diametrically opposed views regarding the manner in which this court should remedy what all parties agree is an unconstitutional malapportionment of congressional and state legislative districts.

¶19 Notwithstanding a history of judicial involvement in redistricting, in our constitutional order it remains the legislature's duty. State ex rel. Reynolds v. Zimmerman (Zimmerman I), 22 Wis. 2d 544, 569–70, 126 N.W.2d 551 (1964). Article IV, Section 3 of the Wisconsin Constitution commands, "[a]t its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." "The Framers in their wisdom entrusted this decennial exercise to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other." Jensen v. Wis. Elections Bd., 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam). The political process failed this year, necessitating our involvement. As should be self-evident from this court's lack of legislative power, any remedy we may impose would be in effect only "until such time as the legislature and governor have enacted a valid legislative apportionment plan." State ex rel. Reynolds v. Zimmerman (Zimmerman II), 23 Wis. 2d 606, 606, 128 N.W.2d 16 (1964) (per curiam).

III. OUR REVIEW

A. Exercising Our Original Jurisdiction

¶20 We review this case under our original jurisdiction conferred by Article VII, Section 3(2) of the Wisconsin Constitution, pursuant to which "[t]he supreme court . . . may hear original actions and proceedings." Generally, we exercise our original jurisdiction when the case concerns "the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." Petition of Heil, 230 Wis. 428, 436, 284 N.W. 42 (1938) (per curiam) (quoting Att'y Gen. v. Chi. & N.W. Ry., 35 Wis. 425, 518 (1874)). We granted the petition in this case because "[t]here is no question . . . that this matter warrants this court's original jurisdiction; any reapportionment or redistricting case is, by definition publici juris, implicating the sovereign rights of the people of this state." Jensen, 249 Wis. 2d 706, ¶17 (citing Heil, 230 Wis. at 443).

B. Principles of Interpretation

¶21 This case requires us to interpret the United States Constitution and the Wisconsin Constitution. "Issues of constitutional interpretation . . . are questions of law." James v. Heinrich, 2021 WI 58, ¶15, __ Wis. 2d __, 960 N.W.2d 350 (citation omitted). We are bound by United States Supreme Court precedent interpreting the United States Constitution. State v. Jennings, 2002 WI 44, ¶18, 252 Wis. 2d 228, 647 N.W.2d 142 (citation omitted). As the state's highest court, we are "the final arbiter of questions arising under the Wisconsin Constitution[.]" Jensen, 249 Wis. 2d 706, ¶25.

¶22 Our goal when we interpret the Wisconsin Constitution is "to give effect to the intent of the framers and of the people who adopted it[.]" State v. Cole, 2003 WI 112, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328 (quotation marks and citations omitted). "[W]e focus on the language of the adopted text and historical evidence [of its meaning] including 'the practices at the time the constitution was adopted, debates over adoption of a given provision, and early legislative interpretation as evidenced by the first laws passed following the adoption.'" State v. Halverson, 2021 WI 7, ¶22, 395 Wis. 2d 385, 953 N.W.2d 847 (quoting Serv. Emps. Int'l Union, Loc. 1 v. Vos, 2020 WI 67, ¶28 n.10, 393 Wis. 2d 38, 946 N.W.2d 35).

¶23 This case also requires interpretation of statutory provisions governing redistricting. "Issues of statutory interpretation and application present questions of law." James, __ Wis. 2d __, ¶15 (citation omitted).

IV. DISCUSSION

A. Relevant Considerations Under Federal and State Law

1. Federal Constitutional Requirements

¶24 Both federal and state laws regulate redistricting. Article I, Section 2 of the United States Constitution requires members of the House of Representatives to be chosen "by the People of the several states." The United States Supreme Court construed this section to mean "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." Wesberry, 376 U.S. at 7–8. Similarly, the United States Supreme Court held, "the Equal Protection Clause requires

that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as practicable." Reynolds v. Sims, 377 U.S. 533, 577 (1964); see also Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656, 674–75 (1964) (holding even state senate districts must comply with the one person, one vote principle).

¶25 As a matter of federal constitutional law, the one person, one vote principle applies more forcefully to congressional districts than to state legislative districts. The United States Supreme Court declared: "[There is] no excuse for the failure to meet the objective of equal representation for equal numbers of people in congressional districting other than the practical impossibility of drawing equal districts with mathematical precision." Mahan v. Howell, 410 U.S. 315, 322 (1973). "[P]opulation alone" is the "sole criterion of constitutionality in congressional redistricting under Art. I, § 2[.]" Id. For congressional districts, even less than a one percent difference between the population of the largest and smallest districts is constitutionally suspect. Karcher v. Dagget, 462 U.S. 725, 727 (1983). "[A]bsolute population equality" is "the paramount objective." Abrams v. Johnson, 521 U.S. 74, 98 (1997) (quoting Karcher, 462 U.S. at 732).

¶26 In contrast, the Equal Protection Clause, as applied to state legislative districts, imposes a less exacting one person, one vote principle. Mahan, 410 U.S. at 322. Consistent with principles of federalism, states have limited flexibility to pursue other legitimate policy objectives, such as "maintain[ing]

the integrity of various political subdivisions" and "provid[ing] for compact districts of contiguous territory." Brown v. Thomson, 462 U.S. 835, 842 (1983) (quoting Reynolds, 377 U.S. at 578) (modifications in the original).

2. Federal Statutes

¶27 Federal statutes also govern redistricting. 2 U.S.C. § 2c prohibits multimember congressional districts. See also Wis. Stat. § 3.001 (same). The VRA prohibits the denial or abridgment of the right to vote on account of race, color, or membership in a language minority group, which implicates redistricting practices. It provides, in relevant part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2)[, which protects language minority groups,] of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301. The "dispersal" of a minority group among

several districts can render the group an "ineffective" voting bloc. Cooper v. Harris, 137 S. Ct. 1455, 1464 (2017) (quoting Thornburg v. Gingles, 478 U.S. 30, 46 n.11 (1986)). Such a result may violate the VRA, even if the map drawers lacked discriminatory intent. Thornburg, 478 U.S. at 71. All parties in this case agree we should ensure any remedy we impose satisfies the requirements of the VRA.

3. Wisconsin Constitutional Requirements

¶28 Via the Wisconsin Constitution, the people of Wisconsin have imposed additional requirements on redistricting. Article IV, Section 3 of the Wisconsin Constitution provides, "[a]t its first session after each enumeration made by the authority of the United States," i.e., the census, "the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." (Emphasis added.) As we stated in our seminal decision in State ex rel. Attorney General v. Cunningham:

> It is proper to say that perfect exactness in the apportionment, according to the number of inhabitants, is neither required nor possible. But there should be as close an approximation to exactness as possible, and this is the utmost limit for the exercise of legislative discretion.

81 Wis. 440, 484, 51 N.W. 724 (1892). Our decision in Cunningham comports with the provision's original meaning.

¶29 The one person, one vote principle had been "germinating" since the nation's founding——although the phrase is a twentieth-century invention. James A. Gazell, One Man, One Vote: Its Long Germination, 23 W. Pol. Q. 445, 462 (1970). As a delegate

to the federal constitutional convention, founding father James Wilson was an outspoken advocate for equal representation by population: "[E]qual numbers of people ought to have an equal no. of representatives. . . . Representatives of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other." 1 The Records of the Federal Convention of 1787 179–80 (Max Farrand ed., 1911) (statement of James Wilson, Penn.); see also James Wilson, Of the Constitutions of the United States and of Pennsylvania——Of the Legislative Department (1790–91), in 2 The Works of the Honourable James Wilson, L.L.D., 117, 129 (1804) ("Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state.").

¶30 In choosing per capita representation for the House of Representatives, the founders rejected England's infamous rotten boroughs:

> The number of inhabitants in the two kingdoms of England and Scotland cannot be stated at less than eight million. The representatives of these eight millions in the House of Commons amount to five hundred and fifty-eight. Of this number, one ninth are elected by three hundred and sixty-four persons, and one half, by five thousand seven hundred and twenty-three persons. It cannot be supposed that the half thus elected . . . can add any thing either to the security of the people against the government, or to the knowledge of their circumstances and interests in the legislative councils.

The Federalist No. 56, at 349 (James Madison). In contrast, the equal proportion of representation prescribed by the Constitution "will render the [House of Representatives] both a safe and

competent guardian of the interests which will be confined to it." Id. at 350.

¶31 The Northwest Ordinance of 1787 further evidences the founders' regard for equal representation by population. It states, in relevant part, "[t]he inhabitants of the said territory shall always be entitled to . . . a proportionate representation of the people in the legislature[.]" Northwest Ordinance § 14, art. 2 (1787). Its enactment guaranteed the equality of representation for newly admitted states.

¶32 In the first redistricting case this court decided, a concurring justice referenced the Northwest Ordinance. Cunningham, 81 Wis. at 512 (Pinney, J., concurring). He explained the phrase "according to the number of inhabitants" in Article IV, Section 3 of the Wisconsin Constitution was "intended to secure in the future" a pre-existing right of the people, specifically, "'proportionate representation,' and apportionment 'as nearly equal as practicable among the several counties for the election of members' of the legislature[.]" Id.

¶33 Early legislative redistricting practices confirm this original meaning. Id. In 1851, the state's first governor, Nelson Dewey, vetoed the legislature's first redistricting plan, explaining in his veto message:

> I object to the provisions of this bill, because the apportionment in many cases, is not made upon the constitutional basis. A comparison of some of the senatorial districts with the ratio and with each other, will clearly present its unconstitutional features.

1851 Wis. Assemb. J. 810. Consistent with its federal counterpart,

Article IV, Section 3 of the Wisconsin Constitution gives the legislature the duty to enact a redistricting plan after each federal census to prevent one person's vote——in an underpopulated district——from having more weight than another's in an overly populated district. Zimmerman I, 22 Wis. 2d at 564–69.

¶34 In addition to proportional representation by population, the Wisconsin Constitution establishes principles of "secondary importance" that circumscribe legislative discretion when redistricting. Wis. State AFL-CIO v. Elections Bd., 543 F. Supp. 630, 635 (E.D. Wis. 1982). In this case, the parties raise only malapportionment claims; no one claims the current maps violate one of these secondary principles. Nevertheless, in remedying the alleged harm, we must be mindful of these secondary principles so as not to inadvertently choose a remedy that solves one constitutional harm while creating another.

¶35 Article IV, Section 4 of the Wisconsin Constitution directs assembly districts "be bounded by county, precinct, town or ward lines[.]" Applying the one person, one vote principle may make bounding districts by county lines nearly impossible. See Wis. State AFL-CIO, F. Supp. at 635 (stating the maintenance of county lines is "incompatib[le] with population equality"); see also 58 Wis. Att'y Gen. Op. 88, 91 (1969) ("[T]he Wisconsin Constitution no longer may be considered as prohibiting assembly districts from crossing county lines, in view of the emphasis the United States Supreme Court has placed upon population equality in electoral districts."). Nonetheless, the smaller the political subdivision, the easier it may be to preserve its boundaries. See

Baumgart v. Wendelberger, No. 01-C-0121, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002) ("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.").

¶36 Article IV, Section 4 of the Wisconsin Constitution further commands assembly districts be "contiguous," which generally means a district "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). 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. Prosser v. Elections Bd., 793 F. Supp. 859, 866 (W.D. Wis. 1992).

¶37 Article IV, Section 4 of the Wisconsin Constitution also requires assembly districts to be "in as compact form as practicable[.]" We have never adopted a particular measure of compactness, but the constitutional text furnishes some latitude in meeting this requirement. Additionally, Article IV, Section 4 prohibits multi-member assembly districts; therefore, each district may have only a single representative. Finally, Article IV, Section 5 states no assembly district can be "divided in the formation of a senate district," and senate districts must consist of "convenient contiguous territory" with each senate district served by only a single senator.

¶38 In summary, the Wisconsin Constitution "commits the state to the principle of per capita equality of representation

subject only to some geographical limitations in the execution and administration of this principle." Zimmerman I, 22 Wis. 2d at 556. In determining a judicial remedy for malapportionment, we will ensure preservation of these justiciable and cognizable rights explicitly protected under the United States Constitution, the VRA, or Article IV, Sections 3, 4, or 5 of the Wisconsin Constitution.

B. This Court Will Not Consider the Partisan Makeup of Districts

¶39 The simplicity of the one person, one vote principle, its textual basis in our constitution, and its long history stand in sharp contrast with claims that courts should judge maps for partisan fairness, a concept untethered to legal rights. The parties have failed to identify any judicially manageable standards by which we could determine the fairness of the partisan makeup of districts, nor have they identified a right under the Wisconsin Constitution to a particular partisan configuration. Because partisan fairness presents a purely political question, we will not consider it.

1. Partisan Fairness Is a Political Question

¶40 "Sometimes, . . . 'the law is that the judicial department has no business entertaining [a] claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.'" Rucho, 139 S. Ct. at 2494 (quoting Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (plurality)). For this reason, "political questions" are non-justiciable, that is, "outside the courts' competence[.]" Id.

(quoting Baker v. Carr, 369 U.S. 186, 217 (1962)). Whether a map is "fair" to the two major political parties is quintessentially a political question because: (1) there are no "judicially discoverable and manageable standards" by which to judge partisan fairness; and (2) the Wisconsin Constitution explicitly assigns the task of redistricting to the legislature——a political body. See Baker, 369 U.S. at 217.

¶41 The lack of standards by which to judge partisan fairness is obvious from even a cursory review of partisan gerrymandering jurisprudence. Partisan "gerrymandering" is "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength." Gerrymandering, Black's Law Dictionary (11th ed. 2019). The United States Supreme Court declared partisan gerrymandering claims to be non-justiciable under the United States Constitution, and the very existence of such claims is doubtful. Rucho, 139 S. Ct. 2484; Vieth, 541 U.S. 267. See generally Daniel H. Lowenstein, Vieth's Gap: Has the Supreme Court Gone from Bad to Worse on Partisan Gerrymandering, 14 Cornell J.L. & Pub. Pol'y 367 (2005). Writing for the Court in Rucho v. Common Cause, Chief Justice Roberts noted at the outset the Court has never struck down a map as an unconstitutional partisan gerrymander and acknowledged that several decades of searching for a judicially manageable standard by which to judge maps' partisan fairness had been in vain. 139 S. Ct. at 2491.

¶42 "Partisan gerrymandering claims invariably sound in a desire for 'proportional representation.'" Id. at 2499. Advocated by several parties in this case, proportional representation is the political theory that a party should win a percentage of seats, on a statewide basis, that is roughly equal to the percentage of votes it receives. See Proportional representation, Black's Law Dictionary. This theory has no grounding in American or Wisconsin law or history, and it directly conflicts with traditional redistricting criteria. Davis v. Bandemer, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in judgment), abrogated on other grounds by Rucho, 139 S. Ct. 2484. "It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support." Rucho, 139 S. Ct. at 2501.

¶43 To begin with, measuring a state's partisan divide is difficult. Wisconsin does not have party registration, so voters never formally disclose their party membership at any point in the electoral process. Democratic Party v. Wisconsin, 450 U.S. 107, 110-11 (1981). According to one recent survey, more than one-third of Wisconsinites self-identify as independents, affiliating themselves with no party at all. Marquette Law School Poll (Aug. 3-8, 2021), https://law.marquette.edu/poll/wp-content/uploads/2021/10/MLSP66Toplines.html.

¶44 Even if a state's partisan divide could be accurately ascertained, what constitutes a "fair" map poses an entirely subjective question with no governing standards grounded in law.

"Deciding among . . . different visions of fairness . . . poses basic questions that are political, not legal. There are no legal standards discernable in the Constitution for making such judgements[.]" Rucho, 139 S. Ct. at 2500. Nor does the Wisconsin Constitution provide any such standards.

¶45 The people have never consented to the Wisconsin judiciary deciding what constitutes a "fair" partisan divide; seizing such power would encroach on the constitutional prerogatives of the political branches. Vieth, 541 U.S. at 291. In contrast to legislative or executive action, "'judicial action must be governed by standard, by rule,' and must be 'principled, rational, and based upon reasoned distinctions' found in the Constitution or laws." Rucho, 139 S. Ct. at 2507 (quoting Vieth, 541 U.S. at 278–79). Nothing in the Wisconsin Constitution authorizes this court to recast itself as a redistricting commission in order "to make [its] own political judgment about how much representation particular political parties deserve—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end." Id. at 2499.

¶ 46 Nothing in the United States Constitution or the Wisconsin Constitution commands "that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers[.]" Vieth, 541 U.S. at 288; see also id. at 308 (Kennedy, J., concurring in judgment) (stating there is "no authority" for the notion that a Democrat majority of voters in Pennsylvania should be able to elect a Democrat majority of Pennsylvania's

congressional delegation); Nathaniel Persily, In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders, 116 Harv. L. Rev. 649, 672–73 (2002) ("So long as the state's majority has its advocate in the executive, is it necessarily true that the state's majority should control the legislature as well?").

¶47 Not only is a right to proportional party representation nonexistent in either constitution but the theory conflicts with principles that are constitutionally protected. The theory is irreconcilable with the requirement that congressional and state legislative districts be single-member districts. See 2 U.S.C. § 2c; Wis. Const. art. IV, §§ 4–5. For state legislative districts, the theory is particularly ill suited because Article IV of the Wisconsin Constitution specifies requirements that favor the preservation of communities of interest, irrespective of individual partisan alignment. See Wis. Const. art. IV, §§ 4–5 (explaining state assembly districts must be compact, contiguous, and respect political boundary lines and state senate districts must be contiguous and not divide assembly districts in their formation); Prosser, 793 F. Supp. at 863 (stating there is a "correlation between geographical propinquity and community of interest, and therefore compactness and contiguity are desirable features in a redistricting plan").

¶48 A 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. See 2 U.S.C. § 2c; Wis. Const. art. IV, §§ 4-5. Democrats tend to live close together in urban areas, whereas Republicans tend to disperse into suburban and rural areas. See Baumgart, 2002 WL 34127471, at *6 ("Wisconsin Democrats tend to be found in high concentrations in certain areas[.]"). 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——at least if the competition is defined as an inter- rather than intra-party contest. Davis, 478 U.S. at 159; see also Larry Alexander & Saikrishna B. Prakash, Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering, 50 Wm. & Mary L. Rev. 1, 42 n.117 (2008) (explaining "competitive primaries" often produce "responsiveness, accountability, and 'ritual cleansing'"). Democrats in urban cities may win by large margins, thereby skewing the proportion of Democrat votes statewide relative to the proportion of Democrat victories.

¶49 Perhaps the easiest way to see the flaw in proportional party representation is to consider third party candidates. Constitutional law does not privilege the "major" parties; if Democrats and Republicans are entitled to proportional representation, so are numerous minor parties. If Libertarian Party candidates receive approximately five percent of the statewide vote, they will likely lose every election; no one deems

this result unconstitutional. The populace that voted for Libertarians is scattered throughout the state, thereby depriving them of any real voting power as a bloc, regardless of how lines are drawn. See Robert Redwine, Comment, Constitutional Law: Racial and Political Gerrymandering——Different Problems Require Different Solutions, 51 Okla. L. Rev. 373, 396–97 (1998). Only meandering lines, which could be considered a gerrymander in their own right, could give the Libertarians (or any other minor party) a chance. Proportional partisan representation would require assigning each third party a "fair" share of representatives (while denying independents any allocation whatsoever), but doing so would in turn require ignoring redistricting principles explicitly codified in the Wisconsin Constitution.

¶50 To sacrifice textually grounded requirements designed to safeguard communities of interest in favor of proportional representation between dominant political parties mandated nowhere in the constitution would ignore not only the text but its history. "The roots of Anglo-American political representation lie in the representation of communities[.]" James A. Gardner, One Person, One Vote and the Possibility of Political Community, 80 N.C. L. Rev. 1237, 1243 (2002). "The idea that the political interests of communal groups of individuals correlated strongly with territory served, for example, as an axiom in Madison's famous defense of the large republic in The Federalist No. 10." James A. Gardner, Foreword, Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering, 37 Rutgers L.J. 881, 935 (2006). Proportional party representation is simply

incompatible with the constitutionally prescribed form of representative government chosen by the people of Wisconsin.

¶51 The Wisconsin Constitution's "textually demonstrable constitutional commitment" to confer the duty of redistricting on the state legislature evidences the non-justiciability of partisan gerrymandering claims. Baker, 369 U.S. at 217. Article IV, Section 3 of the Wisconsin Constitution unequivocally assigns the task of redistricting to the legislature, leaving no basis for claiming that partisanship in redistricting raises constitutional concerns. "[P]artisan intent is not illegal, but is simply the consequence of assigning the task of redistricting to the political branches of government." Whitford v. Gill, 218 F. Supp. 3d 837, 939 (W.D. Wis. 2016) (Griesbach, J., dissenting), rev'd sub nom., Gill v. Whitford, 138 S. Ct. 1916 (2018). "[P]oliticians pass many statutes with an eye toward securing their elections and giving their party a leg up on the competition. Gerrymandered districts are no different in kind." Alexander & Prakash, Tempest in an Empty Teapot, at 7.

¶52 The Wisconsin Constitution, like its federal counterpart, "clearly contemplates districting by political entities, . . . and unsurprisingly . . . [districting] turns out to be root-and-branch a matter of politics." Vieth, 541 U.S. at 285 (citations omitted). For the same reasons cited by the United States Supreme Court, we "have no license to reallocate political power between the two major political parties," because "no legal standards [exist] to limit and direct [our] decisions." Rucho, 139 S. Ct. at 2507. The Wisconsin Constitution contains "no

plausible grant of authority" to the judiciary to determine whether maps are fair to the major parties and the task of redistricting is expressly assigned to the legislature. Id. Adjudicating claims of "too much" partisanship in the redistricting process would recast this court as a policymaking body rather than a law-declaring one.

2. The Wisconsin Constitution Says Nothing About Partisan Gerrymandering

¶53 The United States Supreme Court has been unable to identify "what it is in the Constitution that . . . might be offended by partisan gerrymandering." Lowenstein, Vieth's Gap, at 369. We are told if we look hard enough, we will find a right to partisan fairness in Article I, Sections 1, 3, 4, or 22 of the Wisconsin Constitution. Having searched in earnest, we conclude the right does not exist. As the United States Supreme Court explained when it considered a partisan gerrymandering challenge to Wisconsin's current state legislative maps, courts are "not responsible for vindicating generalized partisan preferences." Gill, 138 S. Ct. at 1933.

¶54 The first section in the Wisconsin Constitution's Declaration of Rights states: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const. art. I, § 1. This section enshrines a first principle of our nation's founding: "[T]he only source of political power is in the people; . . . they are

sovereign, that is to say, the aggregate community, the accumulated will of the people, is sovereign[.]" Cunningham, 81 Wis. at 497.

¶55 Article I, Section 1 of the Wisconsin Constitution has nothing to say about partisan gerrymanders. "The idea that partisan gerrymandering undermines popular sovereignty because the legislature rather than the people selects representatives is rhetorical hyperbole masked as constitutional argument. When legislatures draw districts, they in no way select who will occupy the resulting seats." Alexander & Prakash, Tempest in an Empty Teapot, at 43. Voters retain their freedom to choose among candidates irrespective of how district lines are drawn. Id.

¶56 Contriving a partisan gerrymandering claim from the text of the Wisconsin Constitution (aside from overstepping our judicial role) would require us to indulge a fiction——that partisan affiliation is permanent and invariably dictates how a voter casts every ballot. Of course, political affiliation "is not an immutable characteristic, but may shift from one election to the next[.]" Vieth, 541 U.S. at 287. "[V]oters can——and often do——move from one party to the other[.]" Davis, 478 U.S. at 156. Not only is political affiliation changeable, but self-identified partisans can——and do——vote for a different party's candidates.

¶57 If the constitution were misinterpreted to make changeable characteristics relevant factors in evaluating redistricting plans, "we fail to see why it demands only a partisan political mix." Alexander & Prakash, Tempest in an Empty Teapot, at 21. "[W]hy would a Constitution that never mentions political parties, much less Republicans[] [and] Democrats . . . grant

special status to partisan identity?" Id. If we opened the floodgates, what would stop claims seeking proportional representation for "gun owners" or "vegetarians"? Id. Nothing distinguishes partisan affiliation from hundreds——perhaps thousands——of other variables. Id. at 22. Dispositively, none of these factors are mentioned in the text of the constitution.

¶58 Nothing supports the notion that Article I, Section 1 of the Wisconsin Constitution was originally understood——or has ever been interpreted——to regulate partisanship in redistricting. After discussing the concept of popular sovereignty in Cunningham, Justice Pinney declared: "The rules of apportionment and the restrictions upon the power of the legislature are very simple and brief." 81 Wis. at 511. He then proceeded to discuss only those requirements found in Article IV of the Wisconsin Constitution. Id. Regulation of partisanship is not among them.

¶59 Likewise, Article I, Sections 3 and 4 of the Wisconsin Constitution do not inform redistricting challenges. These sections state:

> Section 3. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libel, the truth may be given in evidence, and if it shall appear to the jury that the matter charged as libelous be true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.
>
> Section 4. The right of the people peaceably to assemble, to consult for the common good, and to petition

> the government, or any department thereof, shall never be abridged.

Collectively, these sections protect four related freedoms: (1) freedom of speech; (2) freedom of the press; (3) freedom of assembly; and (4) freedom of petition. The First Amendment of the United States Constitution also secures these rights.

¶60 Nothing about the shape of a district infringes anyone's ability to speak, publish, assemble, or petition. Even after the most severe partisan gerrymanders, citizens remain free to "run for office, express their political views, endorse and campaign for their favorite candidates, vote, and otherwise influence the political process through their expression." Radogno v. Ill. State Bd. of Elections, No. 11-CV-04884, 2011 WL 5025251 at *7 (N.D. Ill. Oct. 21, 2011) (quoted source omitted).

¶61 Parties urging us to consider partisan fairness appear to desire districts drawn in a manner ensuring their political speech will find a receptive audience; however, nothing in either constitution gives rise to such a claim. "The first amendment's protection of the freedom of association and of the rights to run for office, have one's name on the ballot, and present one's views to the electorate do not also include entitlement to success in those endeavors. The carefully guarded right to expression does not carry with it any right to be listened to, believed or supported in one's views." Washington v. Finlay, 664 F.2d 913, 927–28 (4th Cir. 1981). Associational rights guarantee the freedom to participate in the political process; they do not guarantee a favorable outcome. See Badham v. Eu, 694 F. Supp. 664, 675 (N.D.

Cal. 1988). As the United States Supreme Court has explained, "[n]one of our cases establishes an individual's right to have a 'fair shot' at winning[.]" New York State Bd. of Elections V. Torres, 552 U.S. 196, 205 (2008). Nor does the constitution.

¶62 Article I, Section 22 of the Wisconsin Constitution provides: "[t]he blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." Wis. Const. art. I, § 22. To fabricate a legal standard of partisan "fairness"——§ 22 does not supply one——would represent anything but "moderation" or "temperance[.]" Whatever operative effect Section 22 may have, it cannot constitute an open invitation to the judiciary to rewrite duly enacted law by imposing our subjective policy preferences in the name of "justice[.]"

¶63 Unlike the Declaration of Rights, Article IV, Sections 3, 4, and 5 of the Wisconsin Constitution express a series of discrete requirements governing redistricting. These are the only Wisconsin constitutional limits we have ever recognized on the legislature's discretion to redistrict. The last time we implemented a judicial remedy for an unconstitutional redistricting plan, we acknowledged Article IV as the exclusive repository of state constitutional limits on redistricting:

> [T]he Wisconsin constitution itself provides a standard of reapportionment 'meet [sic] for judicial judgment.' The legislature shall reapportion 'according to the number of inhabitants' subject to some geographical and political unit limitations in execution of this standard. We need not descend into the 'thicket' to fashion standards whole-cloth.

Zimmerman I, 22 Wis. 2d at 562 (emphasis added) (quoted sources omitted). In other words, the standards under the Wisconsin Constitution that govern redistricting are delineated in Article IV. To construe Article I, Sections 1, 3, 4, or 22 as a reservoir of additional requirements would violate axiomatic principles of interpretation, see James, __ Wis. 2d __, ¶¶21–22, while plunging this court into the political thicket lurking beyond its constitutional boundaries. Zimmerman I, 22 Wis. 2d at 562.

C. We Will Utilize a "Least-Change" Approach

¶64 The constitutional confines of our judicial authority must guide our exercise of power in affording the Petitioners a remedy for their claims. The existing maps were adopted by the legislature, signed by the governor, and survived judicial review by the federal courts. See Gill, 138 S. Ct. 1916; Baldus, 862 F. Supp. 2d 860. Treading further than necessary to remedy their current legal deficiencies, as many parties urge us to do, would intrude upon the constitutional prerogatives of the political branches and unsettle the constitutional allocation of power.

¶65 For the paramount purpose of preserving liberty, the Wisconsin Constitution embodies a structural separation of powers among the three branches of government, restraining this court from exercising anything but judicial power. "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty" than the separation of powers. The Federalist No. 47, at 301 (James Madison); see also The Federalist No. 51, at 321–22 (James Madison) ("[The] separate and distinct exercise of the different

powers of government . . . is admitted on all hands to be essential to the preservation of liberty."). "While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty." Morrison v. Olson, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting).

¶66 This court's precedent declares that the legislature's enactment of a redistricting plan is subject to presentment and a gubernatorial veto. Zimmerman I, 22 Wis. 2d at 559. If the legislature and the governor reach an impasse, the judiciary has a duty to remedy the constitutional defects in the existing plan. See Zimmerman II, 23 Wis. 2d 606 (implementing a judicially-created plan). But a duty to remedy a constitutional deficiency is not a prerogative to make law. See Cunningham, 81 Wis. at 482–83 (majority opinion) (describing the lawmaking prerogative).

¶67 While courts sometimes declare statutes unconstitutional and may enjoin their enforcement, typically the judiciary does not order government officials to enforce a modified, constitutional version of the statute. See generally Gimbel Bros. v. Milwaukee Boston Store, 161 Wis. 489, 496, 154 N.W. 998 (1915) (citing 1 James High, A Treatise on the Law of Injunctions § 2 (edition and year not specified in the citation)) ("While the power to issue mandatory injunctions is vested in courts of equity, it is a power which is sparingly used."). Courts issue mandatory injunctions, an equitable remedy, "with extreme caution" and "only in cases of equitable cognizance[.]" 1 James High, A Treatise on the Law of Injunctions § 2 (4th ed. 1905) (emphasis added).

¶68 Redistricting litigation presents a unique problem.

Unlike the constitutional monarchies of old England, which could exist in the absence of Parliament, our republican form of government presupposes the existence of a legislature. U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government[.]"). If the legislature and the governor reach an impasse, merely declaring the maps unconstitutional and enjoining elections pursuant to them creates an intractable impediment to conducting elections, imperiling our republican form of government. Judicial action becomes appropriate to prevent a constitutional crisis. But we must "limit the solution to the problem." See Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 328 (2006).

¶69 Court involvement in redistricting, as in any other case, is judicial in nature. In Jensen v. Wisconsin Elections Board, we stated: "Courts called upon to perform redistricting are, of course, judicially legislating, that is, writing the law rather than interpreting it, which is not their usual——and usually not their proper——role." 249 Wis. 2d 706, ¶10. With few exceptions confined to the judicial sphere——none of which are relevant to this case——we have no power to "judicially legislate."[6] "Safeguarding constitutional limitations on the exercise of legislative power is particularly important in light of its awesome sweep." Fabick v. Evers, 2021 WI 28, ¶55, 396 Wis. 2d 231, 956 N.W.2d 856 (Rebecca Grassl Bradley, J., concurring). The people

[6] We have limited legislative power to regulate certain subject matter related to the court system. See, e.g., Rao v. WMA Sec., Inc., 2008 WI 73, ¶35, 310 Wis. 2d 623, 752 N.W.2d 220.

vested the power in the legislature——not the executive and certainly not the judiciary. Id. "Because the people gave the legislature its power to make laws, the legislature alone must exercise it." Id., ¶56.

¶70 "From the very nature of things, the judicial power cannot legislate nor supervise the making of laws." League of Women Voters of Wis. v. Evers, 2019 WI 75, ¶35, 387 Wis. 2d 511, 929 N.W.2d 209 (quoting State ex rel. Rose v. Sup. Ct. of Milwaukee Cnty., 105 Wis. 651, 675, 81 N.W. 1046 (1900)). By design, the judicial power has long been kept distinct from the legislative power. See Neil Gorsuch, A Republic, If You Can Keep It 52–53 (Forum Trade Paperback ed., 2020) (2019) ("To the founders, the legislative and judicial powers were distinct by nature and their separation was among the most important liberty-protecting devices of the constitutional design, an independent right of the people essential to the preservation of all other rights later enumerated in the Bill of Rights.").

¶71 We have the power to provide a judicial remedy but not to legislate. We have no authority to act as a "super-legislature" by inserting ourselves into the actual lawmaking function. Flynn v. Dep't of Admin., 216 Wis. 2d 521, 528–29, 576 N.W.2d 245 (1998) ("If we are to maintain the public's confidence in the integrity and independence of the judiciary, we must exercise that power with great restraint, always resting on constitutional principles, not judicial will. We may differ with the legislature's choices, as we did and do here, but must never rest our decision on that basis lest we become no more than a super-legislature."). Courts

"lack the authority to make the political decisions that the Legislature and the Governor can make through their enactment of redistricting legislation[.]" Hippert v. Ritchie, 813 N.W.2d 374, 380 (Minn. Spec. Redistricting Panel 2012) (citing LaComb v. Growe, 541 F. Supp. 145, 151 (D. Minn. 1982), aff'd sub nom. Orwoll v. LaComb, 456 U.S. 966). Stated otherwise, "[o]ur only guideposts are the strict legal requirements."[7] In re Legislative Districting of the State, 805 A.2d 292, 298 (Md. 2002) (emphasis added).

¶72 Because our power to issue a mandatory injunction does not encompass rewriting duly enacted law, our judicial remedy "should reflect the least change" necessary for the maps to comport with relevant legal requirements. See Wright v. City of Albany, 306 F. Supp. 2d 1228, 1237 (M.D. Ga. 2003) (citations omitted). Using the existing maps "as a template" and implementing only those remedies necessary to resolve constitutional or statutory deficiencies confines our role to its proper adjudicative

[7] The judiciary lacks the institutional competency to make the kind of factual determinations necessary to properly consider various extra-legal factors. In re Legislative Districting of the State, 805 A.2d 292, 298 (Md. 2002) ("When the Court drafts the plan, it may not take into account the same political considerations as the Governor and the Legislature. Judges are forbidden to be partisan politicians. Nor can the Court stretch the constitutional criteria in order to give effect to broader political judgments, such as . . . the preservation of communities of interest. More basic, it is not for the Court to define what a community of interest is and where its boundaries are, and it is not for the Court to determine which regions deserve special consideration and which do not. . . . Our instruction to the consultants was to prepare for our consideration a redistricting plan that conformed to federal constitutional requirements, the Federal Voting Rights Act, and the requirements of Article III, § 4 of the Maryland Constitution.").

function, ensuring we fulfill our role as apolitical and neutral arbiters of the law.[8] See Baumgart, 2002 WL 34127471, at *7 ("The court undertook its redistricting endeavor in the most neutral way it could conceive——by taking the 1992 reapportionment plan as a template and adjusting it for population deviations."); see also Robert H. Bork, The Tempting of America: The Political Seduction of the Law 88–89 (First Touchstone ed. 1991) (1990) (describing how Robert H. Bork, as special master in a redistricting case, drew lines without any consideration of the partisan effect of his remedy). A least-change approach is nothing more than a convenient way to describe the judiciary's properly limited role in redistricting.

¶73 The least-change approach is far from a novel idea; many courts call it the "minimum change doctrine," reflecting its general acceptance among reasonable jurists. It was applied in numerous cases during the last two redistricting cycles. See, e.g., Crumly v. Cobb Cnty. Bd. of Elections & Voter Registration, 892 F. Supp. 2d 1333, 1345 (N.D. Ga. 2012) ("In preparing the draft map, the Court began with the existing map drawn by Judge Carnes in 2002. The Court followed the doctrine of minimum change[.]"); Martin v. Augusta-Richmond Cnty., Ga., Comm'n, No. CV 112-058,

[8] The legislature asks us to use the maps it passed during this redistricting cycle as a starting point, characterizing them as an expression of "the policies and preferences of the State[.]" Legislature Br. at 16 (quoting White v. Weiser, 412 U.S. 783, 795 (1973)). The legislature's argument fails because the recent legislation did not survive the political process. The existing plans are codified as statutes, without a sunset provision, and have not been supplanted by new law.

2012 WL 2339499, at *3 (S.D. Ga. June 19, 2012) ("Essentially, the Court is required to change only the faulty portions of the benchmark plan, as subtly as possible, in order to make the new plan constitutional. Keeping the minimum change doctrine in mind, the Court only made changes it deemed necessary to guarantee substantial equality and to honor traditional redistricting concerns." (Internal citation omitted)); Stenger v. Kellet, No. 4:11-cv-2230, 2012 WL 601017, at *3 (E.D. Mo. Feb. 23, 2012) ("A frequently used model in reapportioning districts is to begin with the current boundaries and change them as little as possible while making equal the population of the districts. This is called the 'least change' or 'minimal change' method . . . . The 'least change' method is advantageous because it maintains the continuity of representation for each district and is by far the simplest way to reapportion[.]"); Below v. Gardner, 963 A.2d 785, 794 (N.H. 2002) ("[W]e use as our benchmark the existing senate districts because the senate districting plan enacted in 1992 is the last validly enacted plan and is the clearest expression of the legislature's intent." (Quotation marks and quoted source omitted)); Alexander v. Taylor, 51 P.3d 1204, 1211 (Okla. 2002) ("A court, as a general rule, should be guided by the legislative policies underlying the existing plan. The starting point for analysis, therefore, is the 1991 Plan."); Bodker v. Taylor, No. 1:02-cv-999, 2002 WL 32587312, at *5 (N.D. Ga. June 5, 2002) ("The court notes . . . that its plan represents only a small, though constitutionally necessary, change in the district lines in accordance with the minimum change doctrine."); Markham v. Fulton

Cnty. Bd. of Registrations & Elections, No. 1:02-cv-1111, 2002 WL 32587313, at *6 (N.D. Ga. May 29, 2002) ("Keeping the minimum change doctrine in mind, the Court made only the changes it deemed necessary to guarantee substantial equality and to honor traditional redistricting concerns.").

¶74 In declaring this court's role in resolving redistricting cases, we are mindful that "Wisconsin adheres to the concept of a nonpartisan judiciary." SCR 60.06(2)(a). "In the debate over the Wisconsin Constitution, objections to an elected judiciary had centered upon the dangers of partisanship. The debate was resolved with the mandate that elections for state courts be distinctly non-partisan in character." Ellen Langill, Levi Hubbell and the Wisconsin Judiciary: A Dilemma in Legal Ethics and Non-Partisan Judicial Elections, 81 Marq. L. Rev. 985, 985 (1998). The Wisconsin Constitution discourages judicial partisanship. Wis. Const. art. IV, § 9 ("There shall be no election for a justice or judge at the partisan general election for state or county officer, nor within 30 days either before or after such election."). Similarly, the Judicial Code of Conduct prohibits judges from "be[ing] swayed by partisan interests[.]" SCR 60.04(1)(b).

¶75 To dive into the deepest of "political thicket[s],"[9] as redistricting has been described, with the intention of doing

[9] Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality), abrogation recognized by Evenwel v. Abbott, 577 U.S. 937 (2016) ("Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of

anything more than securing legal rights would be profoundly incompatible with Wisconsin's commitment to a nonpartisan judiciary. If a simple majority of this court opted to draw maps from scratch, thereby fundamentally altering Wisconsin's political landscape for years, it would significantly "increase the political pressures on this court in a partisan way that is totally inconsistent with our jobs as [a] nonpartisan judiciary." Wisconsin Supreme Court Open Administrative Conference (Open Administrative Conference), at 33:36 (Jan. 22, 2009) (statements of Roggensack, J.), https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/.

¶76 Many intervenors have argued the 2011 maps entrenched a Republican Party advantage, so using them as a starting point perpetuates a partisan gerrymander. In other words, these intervenors argue we must tip the partisan balance to benefit one party in order to avoid accusations of partisanship. We reject this demand to "[s]imply undo[] the work of one political party for the benefit of another[.]" Henderson v. Perry, 399 F. Supp. 2d 756, 768 (E.D. Tex. 2005), rev'd in part on other grounds sub nom., League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 420 (2006) (plurality). Endeavoring to rebalance the allocation of districts between the two major parties would be a decidedly nonjudicial exercise of partisanship by the court. Instead, we adopt a neutral standard. While the application of neutral standards inevitably benefits one side or the other in any case,

Congress.").

it does not place our thumb on any partisan scale, as some intervenors urge us to do.

¶77 "Putting courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the Bench." Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice (1906), as reprinted in Roscoe Pound Kindles the Spark of Reform, 57 A.B.A. J. 348, 351 (1971). A least-change approach safeguards the long-term institutional legitimacy of this court by removing us from the political fray and ensuring we act as judges rather than political actors.

¶78 The judiciary has been repeatedly subject to "purely political attacks" by people who "did not get the result from the court . . . [they] wanted." Patience Drake Roggensack, Tough Talk and the Institutional Legitimacy of Our Courts, Hallows Lecture (Mar. 7, 2017), in Marq. Law., Fall 2017, at 45, 46. These often partisan onslaughts threaten the "[i]nstitutional legitimacy" of the judiciary, which, in turn, threatens the "rule of law" itself. Id. By utilizing the least-change approach, we do not endorse the policy choices of the political branches; rather, we simply remedy the malapportionment claims. Attempting to redress the criticisms of the current maps advanced by multiple intervenors would amount 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.

¶79 We close by addressing Article IV, Section 3 of the

Wisconsin Constitution, which says, in each redistricting cycle, "the legislature shall apportion and district anew[.]" (Emphasis added.) Focusing on the word "anew," an intervenor and an amicus curiae argue the court must make maps from scratch.[10] Although the proponents of this interpretation attempt to ground their argument in the provision's text, they miss the forest for the trees. Read as a whole, the provision means the legislature must implement a redistricting plan each cycle and the language cannot reasonably be read to require the court to make maps at all, let alone from scratch.

V. CONCLUSION

¶80 This case illustrates the extraordinary danger of asking the judiciary to exercise "FORCE" and "WILL" instead of legal "judgment." The Federalist No. 78, at 465 (Alexander Hamilton). Manufacturing a standard of political "fairness" by which to draw legislative maps in accordance with the subjective preferences of judges would refashion this court as a committee of oligarchs with political power superior to both the legislature and the governor. See In re Review of the Code of Judicial Ethics, SCR Chapter 60, 169 Wis. 2d xv, xxv (1992) (Day, J., concurring, joined by a majority) ("Tyranny need not be dressed in a military uniform, it can also wear a black robe!"). Judges must refuse to become "philosopher kings empowered to 'fix' things according to the dictates of what we fancy is our superior insight[.]" Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 707 (6th Cir. 2016)

[10] BLOC Br. at 31–36; Whitford Amicus Br. at 5–6.

(Batchelder, J., concurring in part).

¶81 In this case, we will implement judicial remedies only to the extent necessary to remedy the violation of a justiciable and cognizable right found in the United States Constitution, the VRA, or Article IV, Sections 3, 4, or 5 of the Wisconsin Constitution. We will not consider the partisan makeup of districts because it does not implicate any justiciable or cognizable right. We adopt the least-change approach to remedying any constitutional or statutory infirmities in the existing maps because the constitution precludes the judiciary from interfering with the lawful policy choices of the legislature.

By the court.——Rights declared.

¶82 BRIAN HAGEDORN, J. *(concurring).* To the extent feasible, a court's role in redistricting should be modest and restrained. We are not the branch of government assigned the constitutional responsibility to "apportion and district anew" after each decennial census; the legislature is.[1] The job of the judiciary is to decide cases based on the law.[2] Here, the laws passed in 2011 establishing legislative and congressional districts cannot govern future elections as written due to population shifts. Accordingly, our role is appropriately limited to altering current district boundaries only as needed to comply with legal requirements.[3] The majority opinion so concludes, and I join it in almost all respects.[4]

---

[1] Wis. Const. art. IV, § 3; Jensen v. Wis. Elections Bd., 2002 WI 13, ¶6, 249 Wis. 2d 706, 639 N.W.2d 537.

[2] Serv. Emps. Int'l Union, Loc. 1 v. Vos, 2020 WI 67, ¶1, 393 Wis. 2d 38, 946 N.W.2d 35.

[3] Upham v. Seamon, 456 U.S. 37, 43 (1982) ("Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of 'reconciling the requirements of the Constitution with the goals of state political policy.' An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect." (citation omitted)); White v. Weiser, 412 U.S. 783, 795 (1973) ("In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'" (quoting another source)).

[4] I concur in the majority's conclusions that: (1) remedial maps must comply with the United States Constitution; the Voting Rights Act; and Article IV, Sections 3, 4, and 5 of the Wisconsin Constitution; (2) we should not consider the partisan makeup of districts; and (3) our relief should modify existing maps under a least-change approach. I join the entirety of the majority opinion except ¶¶8, 69-72, and 81. The paragraphs I do not join contain

¶83 Where the political process has failed and modified maps are needed before the next election, the court's function is to formulate a remedy——one tailored toward fixing the legal deficiencies.[5] The majority opinion asserts that only legal requirements may be considered in constructing a fitting remedy. That is not quite correct. Legal standards establish the need for a remedy and constrain the remedies we may impose, but they are not the only permissible judicial considerations when constructing a proper remedy.[6] For example, one universally recognized redistricting criterion is communities of interest.[7] It is not a legal requirement, but it may nonetheless be an appropriate,

---

language that would foreclose considerations that could be entirely proper in light of the equitable nature of a judicial remedy in redistricting. I address this below.

The dissent uses the term "majority/lead opinion" to reflect that not all paragraphs of the court's opinion reflect the opinion of four justices. While this is true, I use "majority opinion" for ease of use and to convey that the opinion is a majority except in the limited area of disagreement with the paragraphs I do not join.

[5] North Carolina v. Covington, 137 S. Ct. 1624, 1625 (2017) (per curiam) ("Relief in redistricting cases is 'fashioned in the light of well-known principles of equity.'" (quoting Reynolds v. Sims, 377 U.S. 533, 585 (1964))); New York v. Cathedral Acad., 434 U.S. 125, 129 (1977) ("[I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." (quoting another source)).

[6] Covington, 137 S. Ct. at 1625 (explaining that a court in a redistricting action "must undertake an 'equitable weighing process' to select a fitting remedy for the legal violations it has identified" and noting "there is much for a court to weigh" (quoting another source)).

[7] See Abrams v. Johnson, 521 U.S. 74, 99-100 (1997).

useful, and neutral factor to weigh.[8] Suppose we receive multiple proposed maps that comply with all relevant legal requirements, and that have equally compelling arguments for why the proposed map most aligns with current district boundaries. In that circumstance, we still must exercise judgment to choose the best alternative. Considering communities of interest (or other traditional redistricting criteria) may assist us in doing so.[9] In other words, while a remedy must be tailored to curing legal violations, a court is not necessarily limited to considering legal rights and requirements alone when formulating a remedy.

¶84 This does not mean our remedial powers are without guardrails.[10] And this is where the dissent errs. The dissent argues we can take over the responsibility of the legislature entirely, discard policy judgments we don't like, and craft a new law from scratch consistent with our own policy concerns. The reader should look past pleas for fairness and see this for what it is: a claim of dangerously broad judicial power to fashion

[8] Id. (noting with approval that a federal district court properly considered traditional redistricting criteria "includ[ing] maintaining core districts and communities of interest" when adopting a redistricting plan).

[9] Another example of a traditional and neutral redistricting criterion that may assist us, but does not implicate a legal right per se, is the goal of minimizing the number of voters who must wait six years between voting for their state senator. See Prosser v. Elections Bd., 793 F. Supp. 859, 864 (W.D. Wis. 1992).

[10] Schroeder v. Richardson, 101 Wis. 529, 531, 78 N.W. 178 (1899) ("[W]hile the power of a court of equity is quite broad where a remedy is called for and legal remedies do not meet the situation, it does not extend so far as to clothe the court with power to substitute judicial notions of justice for the written law.").

state policy. According to the dissent, this court should simply ignore the law on the books——one the dissent makes clear it is not fond of——and draft a new one more to its liking.

¶85 The majority opinion aptly explains that our judicial role forecloses this; our remedial powers are not so unbounded.[11] It is appropriate for us to start with the laws currently on the books because they were passed in accordance with the constitutional process and reflect the policy choices the people made through their elected representatives.[12] Our task is therefore rightly focused on making only necessary modifications to accord with legal requirements.[13] A least-change approach is the most consistent, neutral, and appropriate use of our limited

[11] Whitcomb v. Chavis, 403 U.S. 124, 161 (1971) ("The remedial powers of an equity court must be adequate to the task, but they are not unlimited.").

[12] Laws do not become any less authoritative simply because newly-elected politicians disapprove of them. This court has no license to ignore laws based on our own personal policy disagreements or those of today's elected officials. The law changes by legislation, not by elections. See Vos, 393 Wis. 2d 38, ¶1.

[13] It appears that we also used the pre-existing statutory maps as our starting point in State ex rel. Reynolds v. Zimmerman, 23 Wis. 2d 606, 128 N.W.2d 16 (1964). While we did not expressly adopt a least-change approach, the similarities between the remedial maps and the pre-existing statutory maps are striking. For example, of the 33 senate districts the court drew, 31 consisted of some or all of the same counties as the parallel predecessor districts. Compare Reynolds, 23 Wis. 2d at 617-18 with Wis. Stat. § 4.02 (1963-64). In contrast, only two districts——the 28th and the 31st——contained none of the same counties as they did under the prior maps. Id.

judicial power to remedy the constitutional violations in this case.[14]

¶86 We asked the parties to brief whether we should use a least-change approach, and if not, what approach we should use. The main alternative we received[15] was an entreaty to use this as an opportunity to rearrange district boundaries with the goal of reversing what the dissent calls "an obsolete partisan agenda."[16] As the majority opinion explains, the Wisconsin Constitution does not preclude the legislature from drawing districts with partisan interests in mind.[17] In reality, we are being asked to make a political judgment cloaked in the veneer of neutrality. Namely, we are being asked to conclude that the current maps are likely to result in the election of too many representatives of one party, so we should affirmatively and aggressively redesign maps that are likely to result in the election of more members of a different political party. The petition here——that we should use our equitable authority to reallocate political power in Wisconsin——

[14] The legislature, on the other hand, may decide for itself whether to defer to prior maps when enacting new districts into law. The Wisconsin Constitution gives the legislature wide discretion to draft new maps from scratch based on the policy considerations it chooses. Wis. Const. art. IV, §§ 1, 3.

[15] The Legislature suggested we start with their proposed maps. But those maps, if not enacted into law, are mere proposals deserving no special weight.

[16] Dissent, ¶114.

[17] The majority opinion concludes a claim for partisan gerrymandering is neither cognizable nor justiciable under the Wisconsin Constitution. I agree and join the majority's holdings and analysis explaining why this is so.

is not a neutral undertaking. It stretches far beyond a proper, focused, and impartial exercise of our limited judicial power.

¶87 With this in view, parties are invited to submit congressional and state legislative maps that comply with all relevant legal requirements, and that endeavor to minimize deviation from existing law.[18] Parties should explain in their proposals why their maps comply with the law, and how their maps are the most consistent with existing boundaries. Parties should not present arguments regarding the partisan makeup of proposed districts. While other, traditional redistricting criteria may prove helpful and may be discussed, our primary concern is modifying only what we must to ensure the 2022 elections are conducted under districts that comply with all relevant state and federal laws.

[18] The Wisconsin Constitution explicitly requires the legislature to draw new state assembly and state senate districts after each census. Wis. Const. art. IV, § 3. This section does not refer to congressional districts. The parties dispute whether other provisions of the Wisconsin Constitution have anything to say about congressional districts. Regardless of the answer to that question, we have explained that "congressional reapportionment and state legislative redistricting are primarily state, not federal, prerogatives," and that "the United States Constitution and principles of federalism and comity dictate that the states' role is primary." Jensen, 249 Wis. 2d 706, ¶5. Where judicial action is necessary, this includes the primary role of state supreme courts. Id., ¶11. Accordingly, it is fitting for us to address congressional malapportionment claims as well, whether under state or federal law.

¶88 REBECCA FRANK DALLET, J. (*dissenting*). Redistricting is an "inherently political and legislative——not judicial——task," even when judges do it. See Jensen v. Wis. Elections Bd., 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam). That is one reason why I said that the federal courts, comprised of judges insulated from partisan politics by lifetime appointments, are best suited to handle redistricting cases. See Johnson v. WEC, No. 2021AP1450-OA, unpublished order, at 15-16 (Wis. Sept. 22, 2021) (Dallet, J., dissenting). But now that we have stepped out of our traditional judicial role and into the "the political thicket" of redistricting, it is vital that this court remain neutral and nonpartisan. See Evenwel v. Abbott, 136 S. Ct. 1120, 1123 (2016). The majority[1] all but guarantees that we cannot. First, the majority adopts 2011's "sharply partisan" maps as the template for its "least-change" approach. See Baldus v. Members of Wis. Gov't Accountability Bd., 849 F. Supp. 2d 840, 844 (E.D. Wis. 2012). And second, it effectively insulates future maps from being challenged as extreme partisan gerrymanders. The upshot of those two decisions, neither of which is politically neutral, is to elevate outdated partisan choices over neutral redistricting criteria. That outcome has potentially devastating consequences for representative government in Wisconsin. I therefore dissent.

[1] I refer to Justice Rebecca Grassl Bradley's opinion as the "majority/lead opinion," because a majority of the court does not join it in its entirety. I refer to the "majority" only when discussing conclusions in the majority/lead opinion that garnered four votes.

I

¶89 The majority/lead opinion's adoption of a "least-change" approach to evaluating or crafting remedial maps does not "remov[e] us from the political fray and ensur[e] we act as judges rather than political actors." Majority/lead op., ¶77. It does the opposite, inserting the court directly into politics by ratifying outdated partisan political choices. In effect, a least-change approach that starts with the 2011 maps nullifies voters' electoral decisions since then. In that way, adopting a least-change approach is an inherently political choice. Try as it might, the majority is fooling no one by proclaiming its decision is neutral and apolitical.

¶90 Although no court in Wisconsin, state or federal, has ever adopted a least-change approach, the majority/lead opinion would have you believe that other jurisdictions commonly use such an approach when starting from legislatively drawn maps. But the cases it cites provide virtually no support for this approach. One simply involves a state's supreme court approving the trial court's selection of a congressional map. Alexander v. Taylor, 51 P.3d 1204, 1211 (Okla. 2002). All but one of the remaining cases began with court-drawn maps or involved local maps drawn for county boards and commissions. See Below v. Gardner, 963 A.2d 785, 794 (N.H. 2002). The bottom line is that the least-change approach has no "general acceptance among reasonable jurists" when the court's starting point is a legislatively drawn map. See majority/lead op., ¶73.

¶91 To be sure, there may be limited circumstances in which a least-change approach is appropriate. For example, when a court

is redrawing maps based on a prior court-drawn plan, it may make sense to make fewer changes since the existing maps should already reflect neutral redistricting principles. See, e.g., Hippert v. Ritchie, 813 N.W.2d 374, 380 (Minn. Special Redistricting Panel 2012) (explaining that the panel utilizes a least-change strategy "where feasible"); see also Zachman v. Kiffmeyer, No. C0-01-160, unpublished order, at 6 (Minn. Special Redistricting Panel Mar. 19, 2002) (adopting the plan that the Hippert court used as its template). Another situation where minimizing changes may be appropriate is when a court finds localized problems with a plan validly enacted through the political process. See Baldus, 849 F. Supp. 2d at 859-60 (E.D. Wis. 2012) (holding that two Milwaukee-area assembly districts violated the Voting Rights Act, but emphasizing that "the re-drawing of lines for [those districts] must occur within the combined outer boundaries of those two districts" to avoid disrupting the otherwise valid state map).

¶92 Here, however, we are dealing with neither of those situations. We are adopting statewide maps to replace a 2011 plan that the parties all agree is now unconstitutional. More to the point, however, the 2011 map was enacted using a "sharply partisan methodology" by a legislature no longer in power and a governor who the voters have since rejected. See id. at 844, 851 (adding that it was "almost laughable" that anyone would assert that those maps "were not influenced by partisan factors"). The partisan character of the 2011 maps is evident both in the process by which they were drawn——"under a cloak of secrecy," totally excluding the

minority political party[2]——and in their departure from neutral traditional redistricting criteria. See id. at 850 (explaining that the court shared "in many respects" plaintiffs' expert's concerns that the 2011 maps contained "excessive shifts in population, disregard for core district populations, arbitrary partisan motivations related to compactness, and unnecessary disenfranchisement").

[2] At the outset of the 2011 redistricting process, "the Republican legislative leadership announced to members of the Democratic minority that the Republicans would be provided unlimited funds to hire counsel and consultants" to assist in redistricting, while "Democrats . . . would not receive any funding." Baldus, 849 F. Supp. 2d at 844-45. One of the drafters met with "every single Republican member of the State Assembly," but "[h]e did not meet with any Democrats." Id. at 845. Before each meeting, the participants were required to sign confidentiality agreements. Id. Another drafter held meetings "with the Republican members [of Congress]," who "expressed their desire to draw districts that would maximize the chances for Republicans to be elected." Id. at 846. In addition to keeping the plan secret from Democratic legislators, "[e]very effort was made to keep this work out of the public eye." Id. at 845.

¶93 It is one thing for the current legislature to entrench a past legislature's partisan choices for another decade.[3] It is another thing entirely for this court to do the same. For starters, the least-change approach is not the "neutral standard" the majority/lead opinion portrays it as. Rather, applying that approach to 2011's maps affirmatively perpetuates the partisan agenda of politicians no longer in power. It doesn't matter which political party benefits from the 2011 maps, only that we cannot start with them and maintain judicial neutrality. Moreover, a least-change approach risks entrenching 2011's partisan agenda in future redistricting cycles. If the party that benefits from the maps adopted in this case controls only the legislature for the next redistricting cycle, it has every incentive to ensure an impasse. After all, an impasse will result in the court changing the maps as little as possible——thus preserving that party's hold

[3] The majority/lead opinion hints that a least-change approach is appropriate because the 2011 maps were "codified as statutes, without a sunset provision, and have not been supplanted by new law." Majority/lead op., ¶72 n.8. But both the Wisconsin and U.S. Constitutions require that all maps be redrawn every ten years to account for population shifts since the prior census. See Wis. Const. art. IV, § 3 (requiring the legislature to "apportion and district anew the members of the senate and assembly" in the first session after each census); see also Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962). These are the sunset provisions. In this respect, the 2011 maps are unlike an ordinary unconstitutional statute, since they were enacted without any expectation of longevity. Indeed, at this point they are a practical nullity. Accordingly, the majority/lead opinion's comparisons to the typical remedies when a court finds a statute unconstitutional are inapt. See id., ¶¶67, 72 & n.8. And the fact that the maps have "not been supplanted by new law," id., ¶72 n.8, is precisely the reason why the court is redistricting at all. It is hardly a reason to treat the prior maps as a valid template.

on power. The point is, the least-change approach is anything but a "neutral standard." Majority/lead op., ¶76.

¶94 True neutrality could be achieved by instead adhering to the neutral factors supplied by the state and federal constitutions, the Voting Rights Act, and traditional redistricting criteria. The population equality (i.e., "one person, one vote") principles in the state and federal constitutions and the federal Voting Rights Act, 52 U.S.C. § 10301(a), are universally acknowledged as politically neutral and central to any redistricting plan. Likewise for the remaining requirements of the Wisconsin Constitution, compactness, contiguity, and respect for political subdivision boundaries. Wis. Const. art. IV, §§ 3, 4. In addition to these constitutional and statutory baselines, neutral factors include other "traditional redistricting criteria" such as compactness,[4] preserving communities of interest, and minimizing "senate disenfranchisement."[5] E.g., Baumgart v. Wendelberger, No. 01-C-0121, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002).

[4] Unlike the Wisconsin Constitution, the U.S. Constitution does not impose a compactness requirement on congressional districts. Nonetheless, compactness is one of the traditional redistricting criteria applied by courts drawing congressional maps or reviewing legislatively-drawn ones. See, e.g., Baldus, 849 F. Supp. 2d at 850; Prosser v. Elections Bd., 793 F. Supp. 859, 863 (W.D. Wis. 1992).

[5] Senate disenfranchisement occurs when a voter is shifted from an odd-numbered senate district (which votes only in midterm election years) to an even-numbered senate district (which votes only in presidential election years), thereby delaying for two years the voter's ability to vote for her state senator. See Baumgart v. Wendelberger, No. 01-C-0121, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002).

¶95 The traditional redistricting criteria, however, are glaringly absent from the majority/lead opinion. A charitable read of the majority/lead opinion is that whatever factors it doesn't discuss——preserving communities of interest and minimizing senate disenfranchisement, for example——are sufficiently baked into the 2011 maps such that we can simply rebalance the populations of existing districts and call it a day. But, as mentioned previously, there is good reason to doubt that the 2011 maps meaningfully balanced any of the traditional redistricting criteria.

¶96 For one thing, while the 2011 maps were attacked in federal court for failing to satisfy some of the traditional redistricting criteria, the federal court examined those criteria only to the extent needed to justify constitutionally suspect population deviations between districts. See Baldus, 849 F. Supp. 2d at 849-52. As a result, the federal court made no finding, for example, that the prior maps adequately accounted for communities of interest. In fact, the federal court noted that it shared many of plaintiffs' expert's concerns that the maps did not do so. See id. at 851.

¶97 For another thing, even if the 2011 maps reflected the traditional redistricting criteria when they were adopted, we cannot assume that they still reflect those criteria today. Population shifts over the last ten years may have expanded or altered existing communities of interest, and various ways of equalizing the populations of state legislative districts may result in unnecessary senate disenfranchisement. This is why even when other courts use a least-change approach, they acknowledge

that traditional redistricting criteria might still require more substantial changes. See, e.g., Alexander, 51 P.3d at 1211 (starting with the prior legislatively enacted map but considering "[w]idely recognized neutral redistricting criteria" including core retention, communities of interest, and avoiding incumbent pairing); Hippert, 813 N.W.2d at 380-82, 385-86 (using "a least-change strategy where feasible" alongside considerations of communities of interest and incumbent residences).

¶98 In this case we are adopting new maps, not reviewing legislatively enacted ones. We should therefore ensure that the maps we adopt are the "best that c[an] be managed" under all relevant criteria, especially since we know that there is no single dispositive factor in crafting districts. See Prosser v. Elections Bd., 793 F. Supp. 859, 863 (W.D. Wis. 1992); see also Baldus, 849 F. Supp. 2d at 850 (explaining that "factors like homogeneity of needs and interests, compactness, contiguity, and avoidance of breaking up counties, towns, villages, wards, and neighborhoods," not just population equality, "are all necessary to achieve" a representative democracy). Adopting the best maps possible based on all the relevant criteria protects our neutrality and ensures that the resulting districts foster a representative democracy. That is, in part, why the last three federal courts to draw Wisconsin's districts took a similar tack. See Baumgart, 2002 WL 34127471, at *2 ("The reapportionment of state legislative districts requires balancing of several disparate goals."); Prosser, 793 F. Supp. at 865 ("The issue for us is therefore remedy: not, [i]s some enacted plan constitutional? But, [w]hat plan shall we as a court of equity promulgate in order to rectify

the admitted constitutional violation? What is the best plan?"); Wis. State AFL-CIO v. Elections Bd., 543 F. Supp. 630, 637 (E.D. Wis. 1982) (discussing the traditional redistricting criteria before adopting the court's own plan, without deference to the last set of maps adopted by the legislature). Along the way, we may have to make fewer changes in some places, and more changes in others. See Robert Yablon, Gerrylaundering, 97 N.Y.U. L. Rev. (forthcoming 2022) (explaining that in redistricting "we should not reflexively embrace the past for the sake of stability," but "we also should not reflexively embrace change above all else"). But resorting to a least-change approach does not help us balance the relevant factors.

¶99 More concerning than its silence regarding the traditional redistricting criteria is the possibility that the majority/lead opinion will prioritize its atextual least-change approach over the text of the Wisconsin Constitution. The Wisconsin Constitution imposes several substantive requirements on assembly districts, including that they be in "as compact form as practicable." Wis. Const. art. IV, § 4. The majority/lead opinion's reasoning suggests that, despite that constitutional directive and even if a more compact set of population-equalizing assembly maps is "practicable," the court is free to adopt a less compact set of maps simply because they make fewer changes to the 2011 plan. That cannot be right. The least-change principle is found nowhere in the Wisconsin or U.S. Constitutions. Constitutionally mandated criteria do not take a back seat to extra-constitutional methods like least-change. See Yablon, supra (explaining that nothing would "license the legislature to adopt

a map that subordinates the[] criteria [of the Wisconsin Constitution] to an extra-legal preference" for minimal changes to the previous maps).

¶100 Likewise, the text of the Wisconsin Constitution provides no support for the majority's hierarchical distinctions between its various criteria. Nowhere does the Constitution relegate to "secondary importance" the requirements of compactness, contiguity, and respect for political subdivision boundaries found in Article IV, § 4. Contra majority/lead op., ¶34 (citing Wis. State AFL-CIO, 543 F. Supp. at 635). And the majority offers no legitimate explanation for why some constitutional requirements are more important than others. The source it cites for this supposed primary/secondary distinction——Wisconsin State AFL-CIO——is of no help because that case found the distinction in an Illinois case citing the Illinois Constitution. See Wis. Stat. AFL-CIO, 543 F. Supp. at 635 (citing People ex rel. Scott v. Grivetti, 277 N.E.2d 881 (Ill. 1971)). Just as we cannot allow an atextual approach, such as least-change, to supersede the Constitution's text, we cannot pretend that some constitutional provisions are more important than others.

¶101 Finally, the majority fails to flesh out exactly what a least-change approach entails, thus leaving the parties with little actual guidance. What exactly, should the parties change the least? Does "least change" refer to the fewest changes to districts' boundary lines? The fewest number of people moved from one district to the next? Moreover, based on recent population shifts, what is the feasibility of a least-change approach? Hippert, 813 N.W.2d at 381 ("[P]opulation shifts within the state,

however, sometimes [render] a least-change approach . . . not feasible."). For example, Dane County has gained more than 73,000 residents since the last census——more than the optimal population of an entire assembly district.[6] Meanwhile, Milwaukee County and many of the state's rural areas have seen slow growth or outright declines in population.[7] These population shifts suggest that the 2011 district lines, particularly on a legislative level, may not provide a very useful template for crafting a remedial plan.

II

¶102 In an unnecessary and sweeping overreach, the majority effectively insulates future maps from constitutional attack by holding that excessive partisan gerrymandering claims are not viable under the Wisconsin Constitution. It gets there by answering a constitutional question that we never asked, that the parties did not brief, and that is immaterial to this case.[8] The majority seems to think that, because it fails to "find a right to partisan fairness in . . . the Wisconsin Constitution," the court cannot consider, for any reason, the partisan effects of remedial maps. Majority/lead op., ¶53. But there is no logical connection between these conclusions. In fact, willfully blinding the court

[6] See https://www.census.gov/quickfacts/fact/table/milwaukeecountywisconsin,danecountywisconsin,marinettecountywisconsin/PST045219.

[7] See id.

[8] The question we actually asked was whether the "partisan makeup of districts [is] a valid factor for us to consider in evaluating or creating new maps." Johnson v. WEC, No. 2021AP1450-OA, unpublished order, at 2 (Wis. Oct. 14, 2021).

to the partisan makeup of districts increases the risk that we will adopt a partisan gerrymander.

A

¶103 The majority's gratuitous discussion of whether claims of extreme partisan gerrymandering are cognizable under the Wisconsin Constitution starts with a flawed reading of the United States Supreme Court's decision in Rucho v. Common Cause, 139 S. Ct. 2484 (2019). There, the Court held that excessive partisan-gerrymandering claims were not justiciable under the federal constitution because there were no judicially manageable standards by which federal courts could determine that gerrymandering had gone too far. Id. at 2498-2502 (clarifying that the Court does "not condone excessive partisan gerrymandering"). The Court observed, however, that this remained an open question under state constitutions. Id. at 2507-08. It should be obvious that here, because we have no partisan gerrymandering claim before us, Rucho is irrelevant. Several parties have urged us not to adopt a map tantamount to a partisan gerrymander, and some have pointed out that Wisconsin's current legislative and congressional districts are the result of a "sharply partisan methodology."[9] See Baldus, 849 F. Supp. 2d at 844. But nobody argues that we should strike

[9] The majority mischaracterizes this argument as advocating a "proportional party representation" requirement. See majority/lead op., ¶¶42, 47. No party has suggested that the court should radically reform our system of government to ensure the political parties are represented in proportion to their percentage of the statewide vote. In fact, the only party that argues for a constitutional requirement that the court consider partisan metrics acknowledges that proportional representation by political party is unattainable given single-member districts and the political geography of Wisconsin.

down any existing map on the basis that it is an extreme partisan gerrymander. Without an excessive partisan-gerrymandering claim before us, there is no reason for the majority to issue an advisory opinion about whether such claims are cognizable under the Wisconsin Constitution.

¶104 That said, even if someone had brought such a claim, the majority is wrong that determining when partisan gerrymandering has gone too far is a non-justiciable political question under the Wisconsin Constitution. It is not, as the majority claims, "obvious[ly]" impossible to develop judicially manageable standards for judging when partisan gerrymandering is excessive. Indeed, other state courts have done it. See League of Women Voters of Pa. v. Pennsylvania, 178 A.3d 737, 814, 821 (Pa. 2018) (holding that claims of extreme partisan gerrymandering are cognizable under the Pennsylvania Constitution and striking down the state's congressional map on that basis); Common Cause v. Lewis, No. 18CVS014001, 2019 WL 4569584, at *2-3 (N.C. Super. Ct. Sept. 3, 2019) (striking down state legislative maps as "extreme partisan gerrymandering"). And the federal courts had done it before Rucho. See, e.g., Ohio A. Philip Randolph Inst. v. Householder, 373 F. Supp. 3d 978, 1078 (S.D. Ohio 2019) (concluding that "workable standards, which contain limiting principles, exist so that courts can adjudicate [partisan] gerrymandering claims just as they have adjudicated other types of gerrymandering claims"), vacated and remanded sub nom. Chabot v. Ohio A. Philip Randolph Inst., 140 S. Ct. 102 (2019); League of Women Voters of Mich. v. Benson, 373 F. Supp. 3d 867, 911-12 (E.D. Mich. 2019) (explaining that "lower federal courts have formulated judicially-

manageable standards for adjudicating partisan gerrymandering claims"), vacated and remanded sub nom. Chatfield v. League of Women Voters of Mich., 140 S. Ct. 429 (2019). There is no reason why we could not develop similar standards to judge such claims in Wisconsin.

¶105 In any case, there is no need for us to decide this question now. We have no claim of excessive partisan gerrymandering before us. We should wait until we do and then decide——with the benefit of full briefing from the parties——whether our Constitution protects a practice that is "incompatible with democratic principles." See Ariz. State Legis. v. Ariz. Ind. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015).

B

¶106 Although the majority's rejection of extreme partisan-gerrymandering claims has no effect on the outcome of this case, it likely has far-reaching consequences for future redistricting cycles. Discarding a potential limitation on partisan gerrymandering gives future legislators and governors a green light to engage in a practice that robs the people of their most important power——to select their elected leaders. See The Federalist No. 37, at 4 (James Madison) ("The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those [e]ntrusted with it should be kept in independence on the people.").

¶107 Extreme partisan gerrymandering strikes at the foundation of that power. Representative government demands "that the voters should choose their representatives, not the other way

around." Ariz. State Legis., 135 S. Ct. at 2677 (internal quotation marks omitted). Extreme partisan gerrymandering turns that on its head. It allows a party in power to draw district lines that guarantee its hold on power for a decade or more, no matter what the voters choose.

¶108 No problem, the majority says, "[e]ven after the most severe partisan gerrymanders, citizens remain free" to run for office, express their views, and vote for the candidates of their choice. Majority/lead op., ¶60. But the problem with extreme partisan gerrymandering isn't that it literally denies people the right to vote or run for office. It's that extreme gerrymandering distorts the political process so thoroughly that those rights can become meaningless. No matter how warped the process becomes, post-Rucho, the federal courts cannot intervene. Now, the majority all but guarantees that we won't either.

C

¶109 The majority's misapplication of Rucho leads it to conflate how the court might analyze legislatively drawn maps with how it should select or draw remedial ones. That error is evident from the start, as the majority frames the analysis around the question of whether we "should judge maps for partisan fairness," regardless of who draws them. Majority/lead op., ¶39. But "who draws them" makes all the difference. There is a significant difference between second-guessing the partisan fairness of a map drawn by an inherently partisan legislature, which "would have the virtue of political legitimacy," and our task here, which is to "pick[] the [plan] (or devis[e] our own) most consistent with

judicial neutrality." See Prosser, 793 F. Supp. at 867. We are not asked to determine if maps enacted by the legislature through the normal legislative process amount to an unconstitutional partisan gerrymander. Cf. Rucho, 139 S. Ct. at 2507. Rather, we are adopting maps because that process has failed. In doing so, we must act consistent with our role as a non-partisan institution and avoid choosing maps designed to benefit one political party over all others. See Prosser, 793 F. Supp. at 867. The people rightly expect courts to redistrict in neutral ways.

¶110 The majority claims that considering partisanship for any reason is inconsistent with judicial neutrality. That all-or-nothing position distorts the nuanced reality of the court's role in redistricting. Other courts' redistricting experience shows that partisanship is just another one of the many factors a court must balance when enacting remedial maps.

¶111 The last three courts to tackle redistricting in Wisconsin all considered partisan effects alongside other generally accepted neutral factors when evaluating and choosing remedial maps. See Baumgart, 2002 WL 34127471, at *3-4 (rejecting maps proposed by the parties on the grounds that they were drawn to preserve or obtain partisan advantage); Prosser, 793 F. Supp. at 867-68, 870-71 (analyzing the partisan effects of several proposals before ultimately adopting a court-drawn plan that was "the least partisan"); Wis. State AFL-CIO, 543 F. Supp. at 634. Those courts considered the partisan effects of their decisions not to enact their subjective view of what is politically fair but because courts, unlike legislatures, should not behave like political entities:

> Judges 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 do under a plan drawn up by persons having no political agenda——even if they would not be entitled to invalidate an enacted plan that did so.

Prosser, 793 F. Supp. at 867; see also Baumgart, 2002 WL 34127471, at *3 (following Prosser); Jensen, 249 Wis. 2d 706, ¶12 (quoting Prosser). The Indiana Supreme Court likewise declined to enact "a plan that represents one political party's ideas of how district boundaries should be drawn [because doing so] does not conform to the principle of judicial independence and neutrality." Peterson v. Borst, 786 N.E.2d 668, 675 (Ind. 2003).

¶112 Indeed, although it sounds contradictory, the only way for the court to avoid unintentionally selecting maps designed to benefit one political party over others is by considering the maps' likely partisan effects. The United States Supreme Court has suggested as much, explaining that taking a "politically mindless approach" to redistricting may lead to "grossly gerrymandered results," "whether intended or not." Gaffney v. Cummings, 412 U.S. 735, 753 (1973). Refusing to consider partisan effects only increases the risk that the court will be used, intentionally or not, to achieve partisan ends. This is especially true when our starting point is 2011's indisputably partisan maps.

III

¶113 I close with a lingering question that the majority/lead opinion surprisingly leaves unaddressed: Exactly what maps are we talking about——congressional and state legislative maps or only the latter? There is evidence in the majority/lead opinion to support both answers. On the one hand, the majority/lead opinion

begins by discussing the legislature's duty under Article IV, § 3 of the Wisconsin Constitution "to apportion and district anew the members of the senate and assembly," and later explains that this requirement does not apply to congressional districts. See majority/lead op., ¶¶1, 13 & n.4. That suggests only state legislative maps are at play. On the other hand, the majority/lead opinion identifies redistricting principles applicable to congressional maps under the federal constitution, but without stating that it intends to draw new congressional maps. See id. ¶¶24-25. Similarly, the majority/lead opinion states at different times that it intends to remedy the "malapportionment" of "each legislative district," id., ¶4 (emphasis added), but also that "any judicial remedy" in this case will be confined "to making the minimum changes necessary in order to conform the existing congressional and state legislative redistricting plans to constitutional and statutory requirements." Id., ¶8 (emphasis added). At least two parties, the Hunter Plaintiffs and the Congressmen, have suggested that they intend to litigate what, if anything, the Wisconsin Constitution has to say about congressional redistricting, but so far the court has no motion or other briefing on that question. So it is unclear from the start what the majority/lead opinion is even addressing.

IV

¶114 The majority repeatedly protests that any approach other than its preferred one would undermine our non-partisan role and imperil the legitimacy and independence of the judiciary. But the neutral principles supplied by the U.S. and Wisconsin

Constitutions, the Voting Rights Act, and the traditional redistricting criteria can preserve our independence while still guiding the parties and the court towards resolving this case. The majority deals a striking blow to representative government in Wisconsin by ignoring those neutral principles and committing the court to an approach that prioritizes an obsolete partisan agenda. I therefore dissent.

¶115 I am authorized to state that Justices ANN WALSH BRADLEY and JILL J. KAROFSKY join this dissent.

IN THE SUPREME COURT OF WISCONSIN

No. _____

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS, AND RONALD ZAHN,

Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, JULIE GLANCEY, ANN JACOBS, DEAN KNUDSON, ROBERT SPINDELL, AND MARK THOMSEN, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS COMMISSION,

Respondents.

PETITION TO THE SUPREME COURT OF WISCONSIN TO TAKE JURISDICTION OF AN ORIGINAL ACTION

RICHARD M. ESENBERG (WI Bar No. 1005622)
ANTHONY LOCOCO (WI Bar No. 1101773)
LUCAS VEBBER (WI Bar No. 1067543)
Wisconsin Institute for Law & Liberty, Inc.
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
Phone: (414) 727-9455
Facsimile: (414) 727-6385
Rick@will-law.org
ALoCoco@will-law.org
Lucas@will-law.org
Attorneys for Petitioners

ISSUE PRESENTED

1. Whether the Petitioners, who, based on the 2020 Census results, live in malapportioned districts, are entitled to:

(a) a declaration that the existing apportionment maps as set forth in Wis. Stat. §§ 3.11-3.18 (for congressional districts) and §§ 4.01-4.99 (for state assembly districts) and § 4.009 (for state senate districts) violate the one person one vote principle, contained in art. IV of the Wisconsin Constitution;

(b) an injunction prohibiting the Respondents from administering any election for Congressional, State Senate, or State Assembly seats until a new apportionment plan is adopted and in place that satisfies the requirements of art. IV of the Wisconsin Constitution; and

(c) in the absence of an amended state law with a lawful apportionment plan, establishment of a judicial plan of apportionment to meet the requirements of art. IV of the Wisconsin Constitution.

INTRODUCTION

1. The results of the 2020 census make clear what everyone knew would occur. Based on population increases and decreases in different geographic areas, the existing apportionment plans for Wisconsin's Congressional, State Senate and State Assembly seats no longer meet the Wisconsin constitutional requirements summarized in the principle of one person, one vote.

2. In *State ex rel. Reynolds v. Zimmerman,* 22 Wis. 2d 544, 564, 126 N.W.2d 551 (1964), this Court said, with respect to redistricting cases, that such cases involve a denial of voting rights under art. IV of the Wisconsin Constitution (as well as the equal protection clause of the U.S. Constitution).[1]

3. The Petitioners, among many others, now live in state and/or congressional voting districts that have many more people than live in other districts and, as a result, have a diluted vote relative to the votes of others who live in less populated districts.

[1] The Petitioners do not raise a claim under the federal constitution in this proceeding.

4. That situation requires that a new apportionment plan with new maps be adopted to replace the election districts currently set forth in Wis. Stat. §§ 3.11-3.18 (for the congressional districts) and §§ 4.01-4.99 (for the state assembly districts) and § 4.009 (for the state senate districts).

5. A group of Wisconsin voters have already filed an action in federal court, *see Hunter v. Bostelmann*, No. 21-cv-512 (W.D. Wis. Aug. 13, 2021), seeking similar relief to the relief being sought herein.

6. But the U.S. Constitution directly endows the States with the primary duty to redraw their congressional districts. U.S. Const. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]")

7. And, although the federal and state courts have concurrent jurisdiction to decide redistricting matters, the U.S. Supreme Court has made it clear that the states' role is primary. *Growe v. Emison,* 507 U.S. 25, 34 (1993).

8. This Court said the same in *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶5, 249 Wis. 2d 706, 639 N.W.2d 537: "It is an established constitutional principle in our federal system that congressional reapportionment and state legislative redistricting are primarily state, not federal, prerogatives."

9. Given that the state's role is primary, this Court previously noted that if the Legislature is unable to timely enact a new redistricting map, this Court's "participation in the resolution of these issues would ordinarily be highly appropriate." *Jensen*, 249 Wis. 2d 706, ¶4.

10. Further, this Court said that in our State, "[t]he people . . . have a strong interest in a redistricting map drawn by an institution of state government—ideally and most properly, the legislature, secondarily, this court." *Id.* at ¶17.

11. Thus, redistricting is a state matter both with respect to the legislative function and the judicial function.

12. The Petitioners should not be required to resort to a federal court, and only a federal court, to protect their state constitutional rights. In *Reynolds*, this Court said that

"*there is no reason for Wisconsin citizens to have to rely upon the federal courts for the indirect protection of their state constitutional rights*." 22 Wis. 2d at 564 (emphasis added).

PARTIES

13. Petitioners are Wisconsin voters who live in malapportioned districts. Each of the districts the parties live in fail the one person, one vote constitutional standard, under which population equality across districts ensures that each Wisconsinite's vote counts equally.

14. Petitioner Billie Johnson resides at 2313 Ravenswood Road, Madison, Wisconsin 53711, in the Second Congressional District, State Assembly District 78, and State Senate District 26. Because of the latest reapportionment count, Petitioner Johnson's vote is unconstitutionally diluted, counting less than if he lived in a different district.

15. Petitioner Eric O'Keefe resides at 5367 County Road C, Spring Green, Wisconsin 53588, in the Second Congressional District, State Assembly District 51, and State Senate District 17.

Because of the latest reapportionment count, Petitioner O'Keefe's vote is unconstitutionally diluted, counting less than if he lived in a different district.

16. Petitioner Ed Perkins resides at 4486 N. Whitehawk Drive, Grand Chute, Wisconsin 54913, in the Eighth Congressional District, State Assembly District 56, and State Senate District 19. Because of the latest reapportionment count, Petitioner Perkins' vote is unconstitutionally diluted, counting less than if he lived in a different district.

17. Petitioner Ronald Zahn resides at 287 Royal Saint Pats Drive, Wrightstown, Wisconsin 54180, in the Eighth Congressional District, State Assembly District 2, and State Senate District 1. Because of the latest reapportionment count, Petitioner Zahn's vote is unconstitutionally diluted, counting less than if he lived in a different district.

18. Respondent Wisconsin Elections Commission ("WEC") is a governmental agency created under Wis. Stat. § 5.05 and charged with the responsibility for the administration of Chapters 5 and 6 of the Wisconsin Statutes and other laws relating to

elections and election campaigns, other than laws relating to campaign financing. WEC has its offices and principal place of business at 212 E. Washington Avenue, 3rd Floor, Madison, Wisconsin 53703.

19. Respondents Marge Bostelmann, Julie Glancey, Ann Jacobs, Dean Knudson, Robert Spindell, and Mark Thomsen are commissioners of WEC. The WEC Commissioners are sued solely in their official capacities.

STATEMENT OF FACTS

20. There must be population equality across districts under the command of the "one person, one vote" principle. As this Court said in *Reynolds*, "sec. 3, art. IV, Wis. Const., contains a precise standard of apportionment-the legislature shall apportion districts according to the number of inhabitants." 22 Wis. 2d at 564.

21. This Court further acknowledged, however, that "a mathematical equality of population in each senate and assembly district is impossible to achieve, given the requirement that the boundaries of local political units must be considered in the

execution of the standard of per capita equality of representation." *Id.* at 564.

22. This comports generally with the federal standard for population equality in that states must draw congressional districts with populations as close to perfect equality as possible, *Evenwel v. Abbott*, ___ U.S. ___, 136 S. Ct. 1120, 1124 (2016), while the federal standard for state legislative districts is more lenient.

23. For example, in 2011, when the Legislature drew the existing maps for congressional districts it "apportion[ed] the 2010 census population of the state of Wisconsin perfectly." *Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 853 (E.D. Wis. 2012).

24. The report from the Legislative Reference Bureau on the proposed bill adopting the existing 2011 congressional maps stated that the population in Congressional Districts 3, 4, 5, 6, 7, and 8 was 710,873 and in Congressional Districts 1 and 2 was 710,874—a difference of one voter.

25. Indeed, except for a dispute regarding whether Hispanics in the Milwaukee area were entitled to one majority

Hispanic assembly district or two minority influenced assembly districts (which dispute was ultimately resolved), the existing congressional, state senate and state assembly maps now contained in Wis. Stat. §§ 3.11-3.18 (for the congressional districts) and §§ 4.01-4.99 (for the state assembly districts) and § 4.009 (for the state senate districts), were held to meet all of the traditional redistricting criteria including equality of population. *Baldus*, 849 F. Supp. 2d 840.

26. On August 12, 2021 the United States Census Bureau delivered apportionment counts to the President based upon the 2020 census.

27. From 2010 to 2020, the population of Wisconsin increased from 5,686,986 to 5,893,718.

28. Because there are eight Wisconsin congressional districts, the ideal population of each district is 736,715.

29. However, the apportionment counts establish the following with respect to the populations now contained in each of the eight Wisconsin congressional districts:

1st Congressional District – 727,452

2nd Congressional District – 789,393

3rd Congressional District – 733,584

4th Congressional District – 695,395

5th Congressional District – 735,571

6th Congressional District – 727,774

7th Congressional District – 732,582

8th Congressional District – 751,967

30. As a result, there is no longer the required level of equality between the populations in the eight Wisconsin congressional districts needed to meet the constitutional requirement of one person, one vote. The 2nd and 8th Congressional Districts, where the Petitioners reside, are overpopulated.

31. The data for state legislative redistricting similarly shows that new maps for the state legislative seats are necessary. Given the total population of Wisconsin, the ideal population for

each of Wisconsin's 99 assembly districts is 59,533, and the ideal population for each of Wisconsin's 33 senate districts is 178,598.

32. Yet the assembly and senate districts in which the Petitioners reside are now malapportioned: Assembly District 78 (Johnson – 67,142); Assembly District 51 (O'Keefe – 56,878); Assembly District 56 (Perkins – 64,544); Assembly District 2 (Zahn – 62,564); Senate District 26 (Johnson – 201,819); Senate District 17 (O'Keefe – 173,532); Senate District 19 (Perkins – 184,473); Senate District 1 (Zahn – 184,304).

33. The Petitioners are entitled to new apportionment maps that continue to meet all of the traditional redistricting criteria including equality of population.

34. This lawsuit is already ripe although the Legislature may yet draw, and the Governor may yet approve, maps that redress the Petitioners' injury. *Cf. generally Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 860 (E.D. Wis. 2001) ("Since it is impossible for legislative districts to remain equipopulous from decade to decade, challenges to districting laws may be brought immediately upon release of official data showing district

imbalance—that is to say, "*before* reapportionment occurs." (quoting Pamela S. Karlan, *The Right to Vote: Some Pessimism about Formalism,* 71 Tex. L.Rev. 1705, 1726 (1993))). Consequently, this Court should accept jurisdiction of this case and stay it until the Legislature adopts a constitutionally adequate apportionment plan.

35. If the State Legislature does not, while this litigation is pending, adopt new maps that are approved by the Governor and which meet all of the traditional redistricting criteria including equality of population, then the Petitioners request that this Court do so, applying the principle of making the least number of changes to the existing maps as are necessary to meet the requirement of equal population and the remaining traditional redistricting criteria. This "least changes" approach is consistent with past practice, *Baumgart v. Wendelberger*, No. 01-C-0121, 02-C-0366, 2002 WL 34127471, *7 (E.D. Wis. May 30, 2002) (unpublished) (court begins with last-enacted maps), *amended*, No. 01-C-0121, 02-C-0366, 2002 WL 34127473 (E.D. Wis. July 11, 2002) (unpublished), and "creates the least perturbation in the political

balance of the state." *Prosser v. Elections Bd.,* 793 F. Supp. 859, 871 (W.D. Wis. 1992).

STATEMENT OF RELIEF SOUGHT

36. This Court should grant this petition, declare that a new constitutional apportionment plan is necessary under the Wisconsin Constitution, enjoin the Respondents from administering any election under the existing maps and then stay this matter until the Legislature has adopted a new apportionment plan and then, if any challenge is made to the new maps, rule on the constitutionality of such plan. Further, if the Legislature does not approve new maps that are approved by the Governor and which meet all of the traditional redistricting criteria including equality of population, then the Petitioners request that this Court do so. In so doing, the Petitioners intend to urge the Court to create districts that are equal in population, contiguous, compact, and that maximize "continuity," moving the fewest number of voters to a district currently represented by someone other than that voter's current representative. The Petitioners intend to

argue that the Court need not and should not take into account projections of the likely political impact of the maps. Such considerations are not required under the United States Constitution, *see Rucho v. Common Cause*, 588 U.S. ___, 139 S. Ct. 2484 (2018). The Petitioners intend to ask that this Court approve maps in time for candidates to timely circulate nomination papers for the Fall 2022 elections.

REASONS WHY THIS COURT SHOULD TAKE JURISDICTION

37. It is an established constitutional principle, recognized by both the U.S. Supreme Court and this Court, that congressional and state legislative redistricting is primarily a state and not a federal prerogative. This Court has a duty under both to exercise its jurisdiction.

38. A violation of the one person, one vote principle is a violation of art. IV of the Wisconsin Constitution.

39. Given that the Petitioners assert rights under the Wisconsin Constitution and that the U.S. Supreme Court and this Court have recognized that reapportionment, including

reapportionment undertaken by courts when the political branches cannot agree, is primarily a state responsibility, there is no reason that the Petitioners should have to rely upon the federal court rather than this Court to protect those rights. To the contrary, they ought to be able to appeal to the courts of the state of Wisconsin.

40. In *Jensen* this Court said that "there is no question" that redistricting actions warrant "this court's original jurisdiction; any reapportionment or redistricting case is, by definition, *publici juris*, implicating the sovereign rights of the people of this state." *Jensen*, 249 Wis.2d 706, ¶17.

41. Further, the time for the resolution of redistricting litigation is so short (especially given the delay in the completion of the 2020 census) that completing both a circuit court action and appellate review within the available period of time would be extremely difficult.

42. It is not yet known precisely when the Legislature will adopt new redistricting maps.

43. The redistricting map after the 1990 census was not completed by the Legislature until April 14, 1992.[2] After the 2000 census, each house approved its own map on March 7, 2002 but neither house acted on the other's proposed map.[3] The redistricting map after the 2010 census was approved by the Legislature on July 19, 2011 (but that date was based on receiving the state level redistricting counts from the Census Bureau on March 10, 2011).[4] The 2011 maps were the quickest done by the Legislature in the last three decades of redistricting and were done in a situation where the state actually received the state level data 21 days before the March 31st deadline and where the Legislature and the Governorship were in the hands of the same party.

44. Here, given the delay in census results and the fact that Wisconsin currently has divided government, it is likely that

[2] Michael Keane, *Redistricting in Wisconsin* 14, Wisconsin Legislative Reference Bureau (Apr. 1, 2016), *available at* https://www.wisdc.org/images/files/pdf_imported/redistricting/redistricting_april2016_leg_ref_bureau.pdf.
[3] *Id.*
[4] *Id.* at 15.

new maps, if they are approved, would not be approved until the end of the year.

45. Under current law, candidates may begin circulating nomination papers for the 2022 fall elections on April 15, 2022, which papers must be filed no later than June 1.[5] Given the probable timeline discussed in the previous paragraphs, litigation regarding the Legislature's proposed maps cannot proceed on the merits until approximately the end of the year when the Legislature has completed proposed maps, but the case must be completed in time for candidates to begin circulating nomination papers by April 15, 2022. That would be an extremely difficult time frame for both a circuit court action and Supreme Court review.

46. While this litigation may require some fact finding, the requirements of hearing and resolving those questions are not beyond the capacities of a referee. In 2012, the trial before a three-judge panel of a challenge to the enacted maps took only about two

[5] *See* Wis. Stat. § 8.15.

days. *Baldus*, 849 F. Supp. 2d at 847. This Court routinely refers matters of comparable length to a referee in attorney discipline matters and can do so here.

CONCLUSION

47. For the foregoing reasons, the Petitioners respectfully request that this Court declare that a new constitutional apportionment plan is necessary under the Wisconsin Constitution, enjoin the Respondents from administering any election under the existing maps, stay this matter until the Legislature has adopted a new apportionment plan, and then rule on the constitutionality of such plan (if there is any challenge thereto). Further, if the Legislature does not approve new maps that are approved by the Governor and which meet all of the traditional redistricting criteria including equality of population, then the Petitioners request that this Court do so, applying the principle of making the least number of changes to the existing maps as are necessary to meet the requirement of equal population and the remaining traditional redistricting criteria and that this

Court do so in time for candidates to timely circulate nomination papers for the Fall 2022 elections.

Dated this 23rd day of August, 2021.

Respectfully Submitted,

RICHARD M. ESENBERG (WI Bar No. 1005622)
ANTHONY LOCOCO (WI Bar No. 1101773)
LUCAS VEBBER (WI Bar No. 1067543)
Wisconsin Institute for Law & Liberty, Inc.
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
Phone: (414) 727-9455
Facsimile: (414) 727-6385
Rick@will-law.org
ALoCoco@will-law.org
Lucas@will-law.org
Attorneys for Petitioners

No. 2021AP1450-OA

IN THE SUPREME COURT OF WISCONSIN

BILLIE JOHNSON, ERIC O'KEEFE,
ED PERKINS AND RONALD ZAHN,

Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN,
JULIE GLANCEY, ANN JACOBS, DEAN KNUDSON,
ROBERT SPINDELL, AND MARK THOMSEN,
in their official capacities as members of
the Wisconsin Election Commission,

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE BY THE WISCONSIN LEGISLATURE

BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Suite 2200
Madison, WI 53718
608.216.7995
kstjohn@bellgiftos.com

LAWFAIR LLC
ADAM K. MORTARA, SBN 1038391
125 South Wacker, Suite 300
Chicago, IL 60606
773.750.7154
mortara@lawfairllc.com

CONSOVOY MCCARTHY PLLC
JEFFREY M. HARRIS*
TAYLOR A.R. MEEHAN*
JAMES P. MCGLONE*
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
703.243.9423
jeff@consovoymccarthy.com

* *Pro hac vice motions forthcoming.*

TABLE OF CONTENTS

INTRODUCTION 4

BACKGROUND 4

ARGUMENT 6

I. The Legislature may intervene as of right 6

II. This suit implicates the Legislature's unique institutional interest in redistricting 8

CONCLUSION 11

CERTIFICATIONS 13

TABLE OF AUTHORITIES

CASES

Baumgart v. Wendelberger, Nos. 01-C-121, 02-C-366, 2002 WL 34127471 (E.D. Wis. May 30, 2002) 11

Democratic Nat'l Comm. v. Bostelmann, 2020 WI 80, 394 Wis. 2d. 33, 949 N.W.2d 423 7

Helgeland v. Wis. Municipalities, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1..... 11

Jensen v. Wis. Elections Bd., 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537 ..... 9, 10

Prosser v. Elections Bd., 793 F. Supp. 859 (W.D. Wis. 1992) 11

SEIU, Local 1 v. Vos, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 ..... 8, 9

Sixty-Seventh Minn. State Senate v. Beens, 406 U.S. 187 (1972) 10

State ex rel. Reynolds v. Zimmerman, 22 Wis. 2d 544, 126 N.W.2d 551, 554 (1964) 10

Wis. State AFL-CIO v. Elections Bd., 543 F. Supp. 630 (E.D. Wis. 1982) 11

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, §4, cl. 1..... 4, 9

Wis. Const. art. IV, §3..... 4, 8, 9

STATUTES

Wis. Stat. §13.365 6

Wis. Stat. §803.09 ..... 5, 8, 10

Wis. Stat. §803.09(2m)..... 4, 6, 7, 8

OTHER AUTHORITIES

Fed. R. Civ. P. 24 10

INTRODUCTION

This case challenges the constitutionality of existing congressional and legislative districts established by law. Whenever a party challenges the constitutionality of state law, the Wisconsin Legislature may intervene as of right. *See* Wis. Stat. §803.09(2m). What's more, this case implicates the Legislature's unique institutional interests as the body primarily responsible for redistricting. *See* U.S. Const. art. I, §4, cl. 1; Wis. Const. art. IV, §3. Accordingly, the Legislature respectfully requests that the Court grant its motion to intervene as a defendant in this case.

BACKGROUND

1. This case concerns Wisconsin's electoral districts, which the Legislature is currently redrawing based on the recently released 2020 census results. Petitioners, four Wisconsin voters, ask the Court to declare the State's existing maps malapportioned, enjoin their future use, and approve new electoral maps if the Legislature fails to do so. Pet. ¶36.

This Court granted the petition for an original action. Order (Sept. 22, 2021), *as amended* (Sept. 24, 2021). The Court's order stressed that "[the State's] Constitution places primary responsibility for the

apportionment of Wisconsin legislative districts on the legislature." *Id.* at 2 (citing Wis. Const. art. IV, §§3, 4).

As part of its order, the Court asked all prospective intervenors to file motions to intervene with supporting memoranda of law analyzing the standards of Wis. Stat. §803.09. The Court further instructed parties and prospective intervenors to address in a separate letter brief the question of when a new redistricting plan must be put in place. *See* Order at 3.

2. Meanwhile, two groups of federal plaintiffs have filed federal suits. *See Hunter v. Bostelmann*, No. 21-CV-512 (W.D. Wis.); *Black Leaders Organizing for Communities (BLOC) v. Bostelmann*, No. 21-CV-534 (W.D. Wis.). Like the *Johnson* petitioners, the federal plaintiffs allege that the existing maps are malapportioned, and the *BLOC* plaintiffs allege that existing maps also violate the Voting Rights Act.

The Legislature has intervened as a defendant in the federal cases. It has asked the federal court to dismiss the federal suits for lack of Article III jurisdiction in light of the State's ongoing redistricting efforts, including the ongoing legislative process and this Court's involvement. The federal court has not dismissed, and the Legislature has petitioned to the U.S. Supreme Court for a writ of mandamus or prohibition,

requesting that the Court direct dismissal of the federal suits. *See In re Wis. Legislature*, No. 21-474 (U.S. Sept. 24, 2021).

The Legislature now requests intervenor status in this action.

ARGUMENT

Wisconsin law permits the Legislature to intervene as of right in any suit challenging the constitutionality of state law, including this one. *See* Wis. Stat. §803.09(2m). Further, this suit implicates the Legislature's unique constitutional role in redistricting. Based on its statutory intervention right and this unique institutional interest, intervention is appropriate.

I. The Legislature may intervene as of right.

Wisconsin law permits the Legislature to intervene in any action challenging the validity of state law. Wis. Stat. §803.09(2m); *see also* Wis. Stat. §13.365.[1] As this Court has explained, section 803.09(2m) "gives the Legislature a statutory right to participate as a party, with all the rights and privileges of any other party, in litigation defending the state's interest in the validity of its laws." *Democratic Nat'l Comm. v.*

[1] Pursuant to section 13.365(3), the Legislature's Joint Committee on Legislative Organization approved the Legislature's intervention in this suit on September 29, 2021.

Bostelmann, 2020 WI 80, ¶13, 394 Wis. 2d. 33, 949 N.W.2d 423. Where a party challenges a state law as unconstitutional or otherwise invalid—such as Petitioners' malapportionment challenge to the existing redistricting maps codified in Acts 43 and 44—the Legislature enjoys the "same power to defend the validity of state law" as the Attorney General. *Id.* ¶13. Challenges to laws relating to state elections are no exception to this rule. *Id.* ¶2.

Here, the statutory criteria are met. Petitioners challenge the State's existing electoral map, a creature of statute, as unconstitutionally malapportioned. Pet. ¶¶1-2, 30-32. They have asked the Court to declare the old maps malapportioned and draw new maps if the Legislature is unable to enact a new redistricting plan. *Id.* ¶36. That should end the analysis with respect to the Legislature's intervention: a "party to [this] action" is challenging "the constitutionality of a statute." Wis. Stat. §803.09(2m); *see also Bostelmann*, 2020 WI 80, ¶13.[2]

[2] Generally, proposed intervenors including those with a statutory right to intervene must submit a separate pleading with their intervention motion. Wis. Stat. §803.09(3). But in original actions, pleadings are required only when ordered by the Court. *See* Wis. Stat. §809.70(3). Additionally, this Court already granted the only pleading (the Petition for an Original Action) and asked only for a motion to intervene and a memorandum of law assessing the standards contained in Wis. Stat. §803.09. The Legislature does not interpret the Court's Order to require a separate pleading to be attached to its

II. This suit implicates the Legislature's unique institutional interest in redistricting.

Even setting aside its statutory right to intervene under section 803.09(2m), the Legislature would also readily meet the intervention criteria given its unique institutional power to redistrict. The Legislature's motion is timely, filed on the date prescribed by the Court's order. *See* Order at 3; Wis. Stat. §803.09(1). Described below, the Legislature has a unique and indisputable interest in this malapportionment suit. Wis. Stat. §803.09(1); *see* Wis. Const. art. IV, §3. Adjudicating this action without the Legislature would impair that interest, and the Legislature is not adequately represented by the existing parties—none of whom shares the Legislature's constitutionally assigned reapportionment power. Wis. Stat. §803.09(1).

The Legislature's power to redistrict is distinct from its lawmaking power. *Compare* Wis. Const. art. IV, §3, *with id.* §1. As this Court acknowledged in *SEIU, Local 1 v. Vos*, where such "institutional interests are implicated," intervention is appropriate. 2020 WI 67, ¶72, 393 Wis. 2d 38, 946 N.W.2d 35.

---

intervention motion. But should the Court order further pleadings, the Legislature will file an answer without delay.

It is undisputed that this action implicates the Legislature's unique institutional interest in redistricting. It is the Legislature's role to redraw the electoral maps. U.S. Const. art. I, §4, cl. 1; Wis. Const. art. IV, §3; *see also Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶17, 249 Wis. 2d 706, 639 N.W.2d 537 (redistricting is "ideally and most properly" a task for the Legislature). As this Court stated in its order granting the petition for review, "We cannot emphasize strongly enough that our Constitution places primary responsibility for the apportionment of Wisconsin legislative districts on the legislature." Order at 2. That institutional interest is sufficient for the Legislature's intervention. *See Vos*, 2020 WI 67, ¶72.

This case, moreover, could affect the Legislature's institutional interests in other ways, too. The case is inextricably intertwined with the Legislature's ongoing redistricting efforts. The Petitioners have asked that this Court not only review the Legislature's maps, but also resolve any future impasse and take over redistricting by a date certain if necessary. Pet. ¶35. More immediately, the Court has asked parties and prospective intervenors "how long this court should give the Legislature and the Governor to accomplish their constitutional responsibilities." Order at 2. The Legislature has a strong interest in providing that sort

of input as a full participant in this case, given that it is the entity currently engaged in redistricting. Additionally, redistricting will alter the Legislature's own composition. That too is an interest that the Supreme Court recognized as sufficient for legislative intervention in *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972) (legislative body was a "substantially interested party … because it would be directly affected by the decree of this court" (citation omitted)).

In light of these unique institutional interests, courts have regularly allowed intervention in cases like this one. In redistricting disputes before the adoption of section 803.09(2m), legislative leaders participated in redistricting litigation as intervenors or parties in this Court. *See, e.g.*, *Jensen*, 2002 WI 13, ¶1 (legislative officials as original parties and intervenors); *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 548, 126 N.W.2d 551, 554 (1964) (intervention granted to assembly speaker and senate president).

The same has been true in federal redistricting disputes, too.[3] The Legislature, represented by its members or one of its constituent houses,

[3] The standards for mandatory and permissive intervention under the Wisconsin and Federal Rules of Civil Procedure are similar. *Compare* Fed. R. Civ. P. 24(a)(2), (b), *with* Wis. Stat. §803.09(1)-(2); *see also Helgeland v. Wis.*

has been involved in the last four decades of redistricting disputes in federal courts. *See, e.g.*, Order Granting Mot. to Intervene at 2, *Whitford v. Gill*, No. 3:15-CV-421 (W.D. Wis. Nov. 13, 2018), ECF No. 223; *Baumgart v. Wendelberger*, Nos. 01-C-121, 02-C-366, 2002 WL 34127471, at *1 (E.D. Wis. May 30, 2002); *Prosser v. Elections Bd.*, 793 F. Supp. 859, 862 (W.D. Wis. 1992); *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 632 (E.D. Wis. 1982). Here again, the Legislature has intervened in the ongoing federal litigation. *See* Order at 1-2, *Hunter*, No. 21-CV-512 (W.D. Wis. Aug. 27, 2021), ECF No. 24; Order at 6, *BLOC*, No. 21-CV-534 (W.D. Wis. Sept. 16, 2021), ECF No. 30 (consolidating case with *Hunter* "with the understanding that all the parties are now full participants in both cases").

CONCLUSION

The Legislature has not only a right to defend against Petitioners' challenge to state law but also a strong, unique interest in doing so here in light of the relief Petitioners seek—reapportionment of districts. The

Municipalities, 2008 WI 9, ¶37, 307 Wis. 2d 1, 745 N.W.2d 1 ("interpretation and application of the federal rule provide guidance" as to the state rule).

Legislature respectfully requests that this Court grant the Legislature's motion to intervene.

Dated this 6th day of October, 2021.

Respectfully submitted,

Electronically Signed By
Kevin M. St. John

CONSOVOY MCCARTHY PLLC
Jeffrey M. Harris*
Taylor A.R. Meehan**
James P. McGlone***
1600 Wilson Boulevard, Suite 700
Arlington, Virginia 22209
703.243.9423
jeff@consovoymccarthy.com
taylor@consovoymccarthy.com
jim@consovoymccarthy.com

** Pro hac vice forthcoming*
*** Pro hac vice forthcoming; licensed to practice in Ill. & D.C.*
**** Pro hac vice forthcoming; licensed to practice in Mass.*

BELL GIFTOS ST. JOHN LLC
Kevin M. St. John, SBN 1054815
5325 Wall Street, Suite 2200
Madison, Wisconsin 53718
608.216.7990
kstjohn@bellgiftos.com

LAWFAIR LLC
Adam K. Mortara, SBN 1038391
125 South Wacker, Suite 300
Chicago, Illinois 60606
773.750.7154
mortara@lawfairllc.com

Attorneys for Proposed Intervenor-Defendant, The Wisconsin Legislature

CERTIFICATIONS

Certifications as Required By Wis. Stat. § 809.19(8g)

I certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), (c) relating to the form of briefs. This brief uses a proportionally spaced serif font, is produced with margins equal to or greater than those specified by rule, and includes page numbers as specified by the rules. Excluding the caption, table of contents, table of authorities, signatures, and these certifications, the length of this brief is 1,619 words as calculated by Microsoft Word.

Certificate of Filing and Service Pursuant to this Court's Order of September 22, 2021 (as amended September 24, 2021)

I certify that I caused the Motion by the Wisconsin Legislature to Intervene as Defendant and this Memorandum of Law in support of that motion to be filed with the Court as attachments to an email dated this day and directed to clerk@wicourts.gov. I further certify that I will cause 10 copies of these materials with a notation that "This document was previously filed by email" to be filed with the clerk no later than 4 p.m. on Thursday, October 7, 2021.

I further certify that on this day, I caused service copies of what was emailed to the Clerk to be sent to counsel of record for Petitioners and Respondents by U.S. mail and email. Additionally, I caused courtesy copies of these documents to be sent by email to all counsel noticed by the Court's Order dated September 22, 2021.

Dated this 6th day of October, 2021.

Respectfully submitted,

Electronically Signed by
Kevin M. St. John

BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Suite 2200
Madison, Wisconsin 53718
608.216.7990
kstjohn@bellgiftos.com

Attorney for the Wisconsin Legislature

No. _____

In the
Supreme Court of the United States

IN RE WISCONSIN LEGISLATURE,

Petitioner.

PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

KEVIN M. ST. JOHN
BELL GIFTOS ST. JOHN LLC
532 Wall St., Suite 2200
Madison, Wisconsin 53718
(608) 216-7990

ADAM K. MORTARA
Counsel of Record
LAWFAIR LLC
125 South Wacker, Suite 300
Chicago, Illinois 60606
(773) 750-7154
mortara@lawfairllc.com

JEFFREY M. HARRIS
TAYLOR A.R. MEEHAN*
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423

* *Licensed in Illinois & D.C.; Virginia bar application is pending.*

September 24, 2021

Counsel for Petitioner

QUESTIONS PRESENTED

Less than 24 hours after the 2020 census data was released, plaintiffs filed redistricting litigation premised on the theory that Wisconsin is incapable of redistricting. The Legislature immediately moved to dismiss for lack of an Article III case or controversy. Before the motions could even be fully briefed, the three-judge federal district court denied the Legislature's motion. Citing a "historical pattern" of federal court involvement in Wisconsin redistricting and an "urgent requirement of prompt action," the court asserted that it "must prepare now to resolve the redistricting dispute, should the state fail to establish new maps in time for the 2022 elections." Pet.App.10. The next elections are nearly a year away, the Legislature is drawing new districts, there is no legislative impasse, and the Wisconsin Supreme Court has agreed to resolve any disputes about the new maps.

The questions presented are:

(1) Does a federal court clearly and indisputably transgress its Article III judicial power by exercising jurisdiction over a redistricting dispute challenging old districts based on new census data, when the State is actively redrawing those old districts based on that new census data as required by state law?

(2) Does a federal court clearly and indisputably transgress its Article III judicial power, as well as principles of federalism and comity, when it refuses to defer consideration of a redistricting dispute to the legislature and state supreme court on the assumption that multiple branches of state government will fail to timely redistrict?

PARTIES TO THE PROCEEDING

Petitioner is the Wisconsin Legislature. The Legislature is an Intervenor-Defendant in two consolidated reapportionment suits filed in the U.S. District Court for the Western District of Wisconsin. The Legislature seeks a writ of mandamus or a writ of prohibition that directs the federal court to dismiss the federal cases. The cases are pending before the Hon. James D. Peterson, of the U.S. District Court for the Western District of Wisconsin, the Hon. Amy J. St. Eve, of the U.S. Court of Appeals for the Seventh Circuit, and the Hon. Edmond E. Chang, of the U.S. District Court for the Northern District of Illinois.

Plaintiffs in the consolidated proceedings are Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, & Kathleen Qualheim, Black Leaders Organizing for Communities (BLOC), Voces de la Frontera, League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson, Rebecca Alwin, Helen Harris, Woodrow Wilson Cain II, Nina Cain, Tracie Y. Horton, Sean Tatum, Melody McCurtis, Barbara Toles, and Edward Wade, Jr. Intervenor-Plaintiffs are Billie Johnson, Eric O'Keefe, Ed Perkins, and Ronald Zahn. There is a pending intervention motion by Leah Dudley, Somesh Jha, Joanne Kane, Michael Switzenbaum, Jean-Luc Thiffeault, and Stephen Joseph Wright, who also wish to intervene as plaintiffs.

Defendants in the consolidated proceedings are Marge Bostelmann, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr., and Mark L. Thomsen, in their official capacities as members of the Wisconsin Elections Commission, as well as Meagan

Wolfe, in her official capacity as administrator of the Wisconsin Elections Commission. Intervenor-Defendants are the Legislature; Congressmen Scott Fitzgerald, Mike Gallagher, Glenn Grothman, Bryan Steil, and Tom Tiffany; and Governor Tony Evers.

CORPORATE DISCLOSURE STATEMENT

Plaintiff Black Leaders Organizing for Communities (BLOC) is a fiscally sponsored project of Tides Advocacy, a California nonprofit, with no stock and no parent corporation.

Plaintiff Voces de la Frontera is a nonprofit corporation with no stock and no parent corporation.

Plaintiff the League of Women Voters of Wisconsin is a nonprofit corporation, and League of Women Voters of the United States is its parent corporation.

All other parties are individuals, government officers, or government entities.

STATEMENT OF RELATED PROCEEDINGS

This petition arises from *Hunter, et al. v. Bostelmann, et al.*, No. 3:21-cv-00512 (W.D. Wis.) and *BLOC, et al. v. Bostelmann, et al.*, No. 3:21-cv-00534 (W.D. Wis.).

Related proceedings are pending in the Wisconsin Supreme Court. *See Johnson, et al. v. Wisconsin Elections Commission, et al.*, No. 2021AP1450-OA.

Petitioners are not aware of any other directly related cases in state or federal courts.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
CORPORATE DISCLOSURE STATEMENT iv
STATEMENT OF RELATED PROCEEDINGS v
TABLE OF AUTHORITIES ix
INTRODUCTION 1
OPINIONS BELOW 3
JURISDICTION 3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4
STATEMENT OF THE CASE 5
A. The Legislature's redistricting efforts are ongoing 5
B. Plaintiffs began federal redistricting litigation on Day 1 of redistricting. 5
C. The federal court refuses to dismiss the premature federal suits 8
REASONS FOR GRANTING THE WRIT 12
I. Writs of mandamus or prohibition are appropriate remedies 12
II. It is clear and indisputable that there is no federal jurisdiction 16
A. Plaintiffs have no Article III standing. 16
B. Plaintiffs' suits are not ripe. 22

III. This Court's intervention is warranted to stop the federal reapportionment proceedings..... 25

B. The refusal to dismiss has irreversible effects on Wisconsin redistricting..... 29

B. These premature cases are part of a broader trend that has evaded review. 29

C. Federal courts have allowed *Growe*'s exception to swallow its rule..... 31

CONCLUSION..... 35

APPENDIX

Appendix A Order of the United States District Court for the Western District of Wisconsin (Sept. 16, 2021).....App. 1

Appendix B Order of the United States District Court for the Western District of Wisconsin (Sept. 21, 2021)..... App.13

Appendix C *Hunter* Complaint for Declaratory and Injunctive Relief in the United States District Court for the Western District of Wisconsin (Aug. 13, 2021)..... App.18

Appendix D First Amended *BLOC* Complaint for Declaratory and Injunctive Relief in the United States District Court for the Western District of Wisconsin (Sept. 21, 2021) App.42

Appendix E Order of the Supreme Court of Wisconsin (Sept. 22, 2021) App.90

TABLE OF AUTHORITIES

Cases

Abbott v. Perez,
138 S. Ct. 2305 (2018) 15

Ariz. Christian Sch. Tuition Org. v. Winn,
563 U.S. 125 (2011) 33

Arrington v. Elections Board,
173 F. Supp. 2d 856 (E.D. Wis. 2001).....passim

Babbitt v. United Farm Workers Nat'l Union,
442 U.S. 289 (1979) 16, 17, 18

Baumgart v. Wendelberger, No. 02-cv-366,
2002 WL 34127471 (E.D. Wis. May 30, 2002) 27

Branch v. Smith,
538 U.S. 254 (2003) 11, 30

California v. Texas,
141 S. Ct. 2104 (2021) 17, 22

Cheney v. U.S. Dist. Ct. for the Dist. of Columbia,
542 U.S. 367 (2004) 13, 35

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 16, 17, 19, 32

*Colo. River Water Conservation Dist. v.
United States*, 424 U.S. 800 (1976)..... 31

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 16

Ex parte Peru,
318 U.S. 578 (1943) 4, 13, 15, 35

Franklin v. Massachusetts,
505 U.S. 788 (1992) 22

Growe v. Emison,
507 U.S. 25 (1993) .....passim

In re Chicago, Rock Island & Pac. Ry. Co.,
255 U.S. 273 (1921) 4

Jensen v. Wis. Elections Bd.,
639 N.W.2d 537 (Wis. 2002)..... 8, 14, 26, 28

Lawyer v. Dep't of Justice,
521 U.S. 567 (1997) 31

League of United Latin Am. Citizens v. Perry,
548 U.S. 399 (2006) 15, 32

Lewis v. Casey,
518 U.S. 343 (1996) 17

Maryland v. Soper,
270 U.S. 9 (1926) 13

Massachusetts v. Mellon,
262 U.S. 447 (1923) 17

Mayfield v. Texas,
206 F. Supp. 2d 820 (E.D. Tex. 2001)..... 24, 29

Miller v. Johnson,
515 U.S. 900 (1995) 32

Miss. State Conf. of N.A.A.C.P. v. Barbour,
No. 3:11-cv-159, 2011 WL 1870222
(S.D. Miss. May 16, 2011) 27, 29

Nat'l Park Hosp. Ass'n v. Dep't of Interior,
538 U.S. 803 (2003) 23

Poe v. Ullman,
367 U.S. 497 (1961) 16

Reno v. Catholic Social Servs., Inc.,
509 U.S. 43 (1993) 23

Reynolds v. Sims,
377 U.S. 533 (1964) 2, 17

Rucho v. Common Cause,
139 S. Ct. 2484 (2019) 14

Schlagenhauf v. Holder,
379 U.S. 104 (1964) 13

Scott v. Germano,
381 U.S. 407 (1965) 33

Shelby County v. Holder,
570 U.S. 529 (2013) 30

Smith v. Clark,
189 F. Supp. 2d 502 (S.D. Miss. 2001)..... 28, 29

State ex rel. Att'y Gen. v. Cunningham,
51 N.W. 724 (1892) 19

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 22

Stratton v. St. Louis Sw. Ry. Co.,
282 U.S. 10 (1930) 3, 15

Tenney v. Brandhove,
341 U.S. 367 (1951) 14

Trump v. Mazars USA, LLP,
140 S. Ct. 2019 (2020) 30

Trump v. New York,
141 S. Ct. 530 (2020) 23, 24, 31, 32

U.S. Alkali Exp. Ass'n v. United States,
325 U.S. 196 (1945) 13, 15

Vigil v. Lujan,
191 F. Supp. 2d 1273 (D.N.M. 2001) 29

Voinovich v. Quilter,
507 U.S. 146 (1993) 29

White v. Weiser,
412 U.S. 783 (1973) 20, 29

Will v. United States,
389 U.S. 90 (1967) 13

Williams v. Simmons,
355 U.S. 49 (1957) 15

Wis. State AFL-CIO v. Elections Bd.,
543 F. Supp. 630 (E.D. Wis. 1982)..... 26, 27

Wise v. Lipscomb,
437 U.S. 535 (1978) 12, 32, 34

Constitutional Provisions

U.S. Const. art. I, §4 4

Wis. Const. art. IV, §1..... 5

Wis. Const. art. IV, §3..... 4, 5, 18, 19

Wis. Const. art. IV, §4..... 5

Wis. Const. art. IV, §5..... 5

Statutes

28 U.S.C. §1253..... 3, 15

28 U.S.C. §1257(a)..... 3, 15, 34

28 U.S.C. §1651(a)..... 3, 4

28 U.S.C. §2284(a)..... 3

Wis. Stat. §4.001 5

Wis. Stat. §8.15(1)..... 26

Rules

Fed. R. Civ. P. 15(a)(3) 9
Sup. Ct. R. 20.1 13

INTRODUCTION

The U.S. Census Bureau delivered preliminary census data on August 12, 2021. In a clear exercise of forum shopping, plaintiffs sued the very next day on the theory that Wisconsin (including its courts) is incapable of redistricting. Another group of plaintiffs filed a second federal suit ten days later on the same theory. Plaintiffs challenge the constitutionality of existing districts that the Wisconsin Legislature is redrawing at this very moment. Plaintiffs want a three-judge federal court (with two federal judges from Illinois) to draw Wisconsin's maps instead of the elected representatives of the people of Wisconsin (or the elected members of the Wisconsin Supreme Court, which has agreed to step in if necessary).

The Legislature intervened and moved to dismiss for lack of jurisdiction. Before the motions to dismiss were even fully briefed, and without waiting to see what the Wisconsin Supreme Court would do, the district court announced that it would not be dismissing the federal suits. It has since set a March 2022 deadline for redistricting unless the Legislature enacts legislation changing pre-election deadlines. And based on the assumption that the federal court will be drawing Wisconsin's districts, the court has told the parties that it must "prepare now" to create a federal court-drawn map by that date. The parties will soon be embroiled in pretrial discovery, with a trial slated for January 2022. If the Legislature or state courts do not reapportion by the court's March deadline, the federal court has said it will.

The district court has flouted Article III's limits and longstanding rules of federalism. Its rush to rule

is an affront to Wisconsin's sovereignty. For well over a century, the U.S. Constitution and the Wisconsin Constitution have empowered "the Legislature" to redistrict. U.S. Const. art. I, §4; Wis. Const. art. IV, §3. There is not a malapportionment exception to that power. *Reynolds v. Sims* itself holds "that judicial relief" for a malapportionment claim "becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." 377 U.S. 533, 586 (1964) (emphasis added). The Constitution does not require "daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation." *Id.* at 583. Likewise, in *Growe v. Emison*, involving simultaneous state and federal redistricting litigation, this Court held that a State "can have only one set of legislative districts, and the primacy of the State in designing those districts compels a federal court to defer" to the State and any state-court proceedings. 507 U.S. 25, 35 (1993).

This petition challenges the refusal of the federal court to dismiss, in violation of its limited judicial power. There is no justification for a federal court to exercise jurisdiction beginning-to-end to oversee a State's redistricting process. And there is no logical stopping point. Why not issue a structural injunction and take over Wisconsin redistricting for the next thirty years? This district court must be confined to the lawful exercise of its prescribed jurisdiction. Allowing the federal suits to proceed will have irreversible effects on Wisconsin redistricting and the State's sovereign power to reapportion.

OPINIONS BELOW

The opinion and order refusing to dismiss the federal suits is reproduced at Pet.App.1-12.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1651(a). A writ of mandamus or prohibition would be in aid of the Court's future jurisdiction over this reapportionment dispute. *Id.*; *see id.*, §1253. The relief the Legislature seeks is not available in any other court. *See, e.g.*, *Stratton v. St. Louis Sw. Ry. Co.*, 282 U.S. 10, 16-17 (1930).

Plaintiffs' have challenged "the constitutionality of the apportionment of congressional districts [and] the apportionment of … statewide legislative bod[ies]" in Wisconsin. 28 U.S.C. §2284(a). A three-judge district court has been convened. *Id.* Plaintiffs have asked for injunctive relief to enjoin the use of Wisconsin's existing congressional and legislative districts (even though there are no imminent elections) and to redraw new districts if necessary. When the three-judge court grants (or denies) an injunction, any appeal would be heard in this Court. *Id.*, §1253. Simultaneously, a related action involving the same districts is pending in the Wisconsin Supreme Court. Any appeal from the Wisconsin Supreme Court is also appealable only to this Court. *Id.*, §1257(a).

Mandamus is thus appropriate to preserve this Court's future jurisdiction in these dueling redistricting disputes. The district court has joined the plaintiffs' race to redistrict without any Article III case or controversy and in flagrant disregard of federalism. Writs of mandamus and prohibition have long been

used in such circumstances. *See Ex parte Republic of Peru*, 318 U.S. 578, 583 (1943) ("writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction"); *In re Chicago, Rock Island & Pac. Ry. Co.*, 255 U.S. 273, 275-76 (1921).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1651(a) states,

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Art. I, §4, cl. 1 of the U.S. Constitution states in relevant part,

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof....

Art. IV, §3 of the Wisconsin Constitution states in relevant part,

> At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly according to the number of inhabitants.

STATEMENT OF THE CASE

A. The Legislature's redistricting efforts are ongoing.

The Wisconsin Legislature is the bicameral legislative branch of the Wisconsin state government. Wis. Const. art. IV, §1. It comprises 99 state assembly districts and 33 state senate districts. Wis. Const. art. IV, §§4-5; Wis. Stat. §4.001.

The Wisconsin Constitution requires the Legislature to redistrict after every federal census. Wis. Const. art. IV, §3. The Legislature's redistricting power is distinct from its general power to legislate. *Compare id*., *with* Wis. Const. art. IV, §1.

On August 12, 2021, the Secretary of Commerce delivered legacy census data for the 2020 census to Wisconsin state officials. Consistent with the Legislature's constitutional responsibility, the Legislature has commenced the redistricting process, reapportioning districts with new census data, and soliciting public comment.[1]

The next elections in Wisconsin are far off. Primary elections for Congress, state assembly, and state senate are scheduled for August 9, 2022. The general elections are scheduled for November 8, 2022.

B. Plaintiffs begin federal redistricting litigation on Day 1.

This petition implicates three ongoing redistricting lawsuits in Wisconsin, all filed days after census

[1] *See, e.g.*, *Draw Your District Wisconsin*, https://drawyourdistrict.legis.wisconsin.gov/.

data was released. One case is in the Wisconsin Supreme Court. Two additional consolidated cases are before the federal district court in the Western District of Wisconsin. The federal court has refused to dismiss for lack of jurisdiction.

1. A group of plaintiffs (the *Hunter* plaintiffs) filed the first lawsuit in federal court 24 hours after new census data was delivered to Wisconsin. *See Hunter v. Bostelmann* (W.D. Wis. No. 3:21-cv-00512). Notionally, their claims are malapportionment claims. They allege that Wisconsin's existing congressional and legislative districts, enacted in 2011, are unconstitutionally malapportioned based on new 2020 census data. Pet.App.18-41 (Compl.). They also allege that Wisconsin might (or might not) violate their First Amendment right to associate if it takes too long to redistrict. Pet.App.38-39.

The complaint seeks a declaration that the existing districts are malapportioned, an injunction forbidding election officials from using the districts in next year's elections, a redistricting schedule, and—most tellingly—new districts drawn by the federal court if Wisconsin does not comply with that schedule. Pet.App.39-40. Plaintiffs concede "there is still time" for the State to redistrict, but their complaint asks the federal court to "prepare itself to intervene" now by "assum[ing] jurisdiction" and "establish[ing] a schedule" to "enable the Court to adopt its own plans in the near-certain event that the political branches fail timely to do so." Pet.App.21, 33 (Compl. ¶¶7, 35); *see also* Pet.App.40 (asking for the "Court to adopt and implement new legislative and congressional district

plans by a date certain" should the State fail to do so "by that time").

The *Hunter* plaintiffs allege that "[t]here is no reasonable prospect that Wisconsin's political branches will reach consensus to enact lawful legislative and congressional district plans in time to be used in the upcoming 2022 election." Pet.App.20-21 (Compl. ¶6). The "upcoming" elections are those scheduled for August and November 2022.

2. A second group of plaintiffs (the *BLOC* plaintiffs) filed another federal lawsuit eleven days after the census data was delivered. *See BLOC v. Bostelmann* (W.D. Wis. No. 3:21-cv-00534). Their complaint similarly alleged that existing districts are malapportioned based on the 2020 census data, and they sought the same relief as the *Hunter* plaintiffs. They have since amended their complaint to add a Voting Rights Act claim. Pet.App.42-89 (Am. Compl.). They allege that six existing state assembly districts in Milwaukee violate section 2 of the Voting Rights Act and ask the federal court to "[o]rder the adoption of a valid State Assembly plan that includes a *seventh* BVAP majority district." Pet.App.44-45, 85-87 (emphasis added).

3. The Wisconsin Legislature intervened immediately in the federal cases, which have now been consolidated. Wisconsin members of Congress, the Governor, and other individual voters have also intervened. Pet.App.11.

4. A third set of individuals (the *Johnson* petitioners) filed a petition in the Wisconsin Supreme Court on the same day the *BLOC* plaintiffs filed their federal

suit. *Johnson v. Wis. Elections Comm'n* (Wis. S. Ct. No. 2021AP1450-OA). The *Johnson* petitioners asked the Wisconsin Supreme Court to exercise its original jurisdiction, declare the existing districts malapportioned, enjoin the elections commission from administering elections under the existing districts, and to rule on the constitutionality of a new plan by the Legislature or resolve any impasse should one arise. *See Jensen v. Wis. Elections Bd.*, 639 N.W.2d 537, 542 (Wis. 2002) (explaining that redistricting actions warrant the exercise of original jurisdiction).

On September 22, 2021, the Wisconsin Supreme Court accepted the *Johnson* petition for an original action. Pet.App.90-95. The court stated it will give the Legislature "an adequate opportunity" to redistrict before making any declarations or issuing any injunctions about the existing districts. Pet.App.92. In her concurring opinion, Justice Bradley added that it is the State's prerogative to redistrict and that federal courts are a "last resort" under this Court's precedents. Pet.App.97.

C. The federal court refuses to dismiss the premature federal suits.

1. The Wisconsin Legislature moved to dismiss the federal litigation for lack of jurisdiction. The Legislature explained that there was no Article III case or controversy in either of the federal cases. Neither the *Hunter* nor *BLOC* plaintiffs alleged that there is any real probability that the existing districts will be used again in next year's elections. And every Plaintiff acknowledged that federal courts in such circumstances can do nothing but wait for a suit to become ripe.

The congressional intervenors filed a motion to dismiss raising similar arguments. The *Johnson* petitioners, as intervenors in the federal proceedings, moved to stay the federal cases indefinitely during any state-court proceedings.

2. On September 16, 2021—when the *Johnson* petition was still pending at the Wisconsin Supreme Court and before the Legislature could file its reply brief on the motion to dismiss the federal suits—the district court denied the Legislature's motion to dismiss for lack of jurisdiction. Pet.App.8-11.[2]

Citing an "urgent requirement of prompt action," the court rejected the argument that it "should forestall from any action until the state court system hears the case." Pet.App.9-10. The primary basis for the court's refusal to do so was because federal courts had done it before—what it called a "historical pattern" that "[f]ederal panels—not state courts—have intervened in the last three redistricting cycles in which Wisconsin has had a divided government." Pet.App.9-10. Implicitly conceding there was no current impasse, Pet.App.9, the court ordered everyone to "prepare now to resolve the redistricting dispute,

[2] At the same time, the court permitted the *BLOC* plaintiffs to amend their complaint. Pet.App.11. The Legislature's standing and ripeness arguments, which it raised days after each case was filed, apply equally to both cases, even with the addition of a Voting Rights Act claim. And while the parties have until September 30, 2021, to respond to the amended complaint, Fed.R.Civ.P. 15(a)(3), the court has asked that the Legislature "not repeat the same standing arguments." Transcript of Status Conference at 41, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Sept. 23, 2021), ECF No. 78.

should the state fail to establish new maps in time for the 2022 elections," Pet.App.10.

The court's short order did not meaningfully address the Legislature's arguments that the federal plaintiffs' complaints failed to allege any Article III case or controversy. The court instead relied on cases from past redistricting cycles and concluded it would follow the same approach. In particular, the court cited favorably *Arrington v. Elections Board*, 173 F. Supp. 2d 856 (E.D. Wis. 2001). Pet.App.9-10. In *Arrington*, another three-judge court concluded that a similarly early redistricting suit was ripe and decided to retain jurisdiction and set a redistricting deadline. Judge Easterbrook dissented, stating he would remove himself from the three-judge court because the majority got it so wrong. 173 F. Supp. 2d at 870. Judge Easterbrook got it right.

Even though the *Johnson* petition was pending at the Wisconsin Supreme Court, the district court stated that "there is yet no indication that the state courts will entertain redistricting in the face of an impasse"—that has not occurred—"between the legislature and the governor." Pet.App.9. The court stated it would "consider" the Wisconsin Supreme Court in setting its own schedule, but specifically rejected arguments that it should stay the federal proceedings until the state-court proceedings were complete. Pet.App.10 & n.3.

3. The district court next held a scheduling conference and issued a preliminary scheduling order. Pet.App.13-17. The order purported to "recognize[] that responsibility for drawing legislative and congressional maps falls primarily to the states."

Pet.App.15. But the court then set a redistricting deadline of March 1, 2022, which the Wisconsin Elections Commissioners had proposed. Pet.App.15. Citing a Voting Rights Act preclearance case, the court accepted that proposed March deadline even though it falls *five months* before the primary elections. Pet.App.15 (citing *Branch v. Smith*, 538 U.S. 254 (2003)). To meet that deadline, the court intends to hold a January trial and has ordered the parties "to submit a joint proposed discovery plan and pretrial schedule on the assumption that trial will be completed by January 28, 2022." Pet.App.16. The court stated it "could consider alternative trial dates" and reconsider the March deadline "if the State were to *enact legislation*" moving pre-election deadlines, but that no party was relieved "of its obligation to cooperate in preparing the plan for the January trial." Pet.App.16 (emphasis added). The court stated that it was not inevitable that it would draw Wisconsin's maps, but the State would have to meet the court's deadline to avoid it: "If the State enacts maps by March 1, 2022, the court may be able to refrain from issuing a judgment in this case." Pet.App.16.

4. After the Wisconsin Supreme Court granted the *Johnson* petition for an original action, the *Johnson* petitioners renewed their motion to stay the federal cases, while telling the federal court it could have a status conference in November to check on the ongoing state proceedings.[3] The federal court has since asked the parties to address "how the supreme court's

[3] Second Mot. to Stay, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Sept. 23, 2021), ECF No. 79.

decision should affect" the federal proceedings and to "take into account the supreme court's decision" in proposing a pretrial schedule, while saying nothing about its intended March 2022 redistricting deadline.[4] The Legislature has responded that there is not now and has never been jurisdiction to entertain the federal proceedings.[5]

REASONS FOR GRANTING THE WRIT

The three-judge district court is acting without jurisdiction in these reapportionment suits implicating one of the State's most sovereign tasks. "[R]edistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (op. of White, J.). A writ of mandamus or prohibition is appropriate in these extraordinary circumstances. There is no Article III case or controversy that could possibly empower a federal court to supervise the State's reapportionment efforts from beginning to end.

I. Writs of Mandamus or Prohibition Are Appropriate Remedies.

A writ of mandamus or prohibition is appropriate for exceptional circumstances of the kind present here. In general, the writ may issue in this Court's discretion when there is no other adequate means to attain the desired relief and when the petitioner's right

---

[4] Order, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Sept. 23, 2021), ECF No. 80.

[5] Notice, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Sept. 23, 2021), ECF No. 81.

is clear and indisputable. *See Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367, 380-81 (2004); Sup. Ct. R. 20.1. "These hurdles, however demanding, are not insuperable." *Cheney*, 542 U.S. at 381. The Court has historically used these writs to "confin[e] the inferior court to a lawful exercise of its prescribed jurisdiction." *Ex parte Peru*, 318 U.S. 578, 583 (1943); *Schlagenhauf v. Holder*, 379 U.S. 104, 109-10 (1964). Other "exceptional circumstances" include those "amounting to a judicial usurpation of power," or when the writ is "the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations." *Will v. United States*, 389 U.S. 90, 95 (1967) (quotation marks omitted).

That is precisely the situation here. A three-judge federal district court has acted well outside of its jurisdiction and intruded on one of the most delicate areas of federal-state relations. *Id.*; *see Growe v. Emison*, 507 U.S. 25, 33 (1993) (federal courts must "defer consideration of disputes involving redistricting" when the State "has begun to address that highly political task itself"); *see also, e.g.*, *Maryland v. Soper*, 270 U.S. 9, 28-30 (1926) (issuing writ after removal of state criminal prosecution).

The court's refusal to dismiss these redistricting suits, despite the absence of jurisdiction and the unquestioned capacity of the state courts to act, is "more than the mere denial of [a] right" that can "be corrected by recourse to the prescribed appeal procedure." *U.S. Alkali Exp. Ass'n v. United States*, 325 U.S. 196, 204 (1945). A writ is the "only means of forestalling [this] intrusion by the federal judiciary." *Will*, 389 U.S. at 95. The district court, without any Article

III case or controversy, has set a deadline purporting to bind every branch of the Wisconsin government. Treading on Wisconsin's sovereignty and federalism, that deadline rushes the State's ongoing redistricting efforts. If the State (including the Wisconsin Supreme Court) does not beat the federal court to its redistricting "finish line," then the federal court has said it will issue a judgment redrawing Wisconsin's congressional and legislative districts.[6] *Growe*, 507 U.S. at 37; Pet.App.16. Such action has had real-world effects in Wisconsin in past redistricting cycles, causing the state supreme court to defer altogether to federal-court redistricting. *See Jensen v. Wis. Elections Bd.*, 639 N.W.2d 537, 541-42 (Wis. 2002). Here again, a federal court is acting without jurisdiction as a super-legislature for "one of the most significant acts a State can perform to ensure citizen participation in

[6] In the meantime, the parties will be embroiled in discovery in anticipation of a January trial. The court *sua sponte* suggested that such discovery could involve "deposing the Legislature" during its scheduling conference (plaintiffs' counsel added they might want to depose the Governor too). Transcript of Status Conference at 24-25, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Sept. 23, 2021), ECF No. 78. The disregard for legislative privilege is typical of redistricting challenges in federal court—all the more reason to stop it now. *Cf. Tenney v. Brandhove*, 341 U.S. 367, 372-78 (1951). For example, in Wisconsin's last redistricting challenge, the same district court compelled the deposition of the Speaker of the Wisconsin Assembly because partisan gerrymandering allegations called into question "the legitimacy of the Wisconsin government." Order at 5, *Gill v. Whitford*, 3:15-cv-00421-jdp (W.D. Wis. May 3, 2019), ECF No. 275, *vac'd sub nom.*, *Whitford v. Vos*, No. 19-2066, 2019 WL 4571109 (7th Cir. July 11, 2019); *but see Rucho v. Common Cause*, 139 S. Ct. 2484, 2504 (2019).

republican self-governance." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006) (op. of Kennedy, J.).

That *ultra vires* exercise of the three-judge court's jurisdiction warrants immediate intervention, which can only be had in this Court. *See Stratton v. St. Louis Sw. Ry. Co.*, 282 U.S. 10, 15-17 (1930) (explaining that court of appeals did not have jurisdiction to entertain appeal regarding refusal to institute three-judge court and that Supreme Court may instead issue writ of mandamus); *see also U.S. Alkali Export*, 325 U.S. at 202. A writ of mandamus or prohibition would be in aid of this Court's future jurisdiction over the three-judge court, 28 U.S.C. §1253, as well as its future jurisdiction over any final judgment of the Wisconsin Supreme Court, *id.*, §1257(a). *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943) (mandamus jurisdiction "extends to those cases which are within its appellate jurisdiction although no appeal has been perfected."). If the suit continues below, the Court will have direct appellate jurisdiction when the three-judge court grants or denies an injunction, or issues an order with that "practical effect." *See* 28 U.S.C. § 1253; *Abbott v. Perez*, 138 S. Ct. 2305, 2319 (2018). In such circumstances, mandamus relief is properly sought in this Court, not the courts of appeals. *See, e.g.*, *Stratton*, 282 U.S. at 15 ("where a court of three judges should have been convened, and was not, this Court may issue a writ of mandamus"); *Williams v. Simmons*, 355 U.S. 49, 56-57 (1957); *see also Ex parte Peru*, 318 U.S. at 584-85.

II. It Is Clear and Indisputable That There Is No Federal Jurisdiction.

A. Plaintiffs have no Article III standing.

1. Any federal case requires plaintiffs to show that there is "a 'case' or 'controversy' that is, in James Madison's words, of a 'Judiciary Nature.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quoting 2 Records of the Federal Convention of 1787, p. 430 (Farrand 1966)). To involve the federal courts, plaintiffs must allege a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* (quotation marks omitted). Their injury must be "certainly impending" and "actual or imminent," not merely "conjectural or hypothetical." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation marks omitted); *DaimlerChrysler*, 547 U.S. at 344 (quotation marks omitted). Standing cannot rest on "[a]llegations of a possible future injury," entailing "speculation about the decisions of independent actors." *Clapper*, 568 U.S. at 409, 414 (quotation marks omitted). Rather, plaintiffs must show "a realistic danger of sustaining a direct injury" because an allegedly unconstitutional statute will be enforced against them. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). A federal court "cannot be umpire to debates concerning harmless, empty shadows." *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (op. of Frankfurter, J.).

Especially in cases implicating the "highly political task" of redistricting, *Growe*, 507 U.S at 33, establishing this bare constitutional minimum of standing is an essential "constitutional principle that prevents

courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). Even if new census data shows that existing districts are malapportioned, a federal court has no judicial power to merely declare it so—let alone order court-drawn maps—without an actual case or controversy. *See Reynolds*, 377 U.S. at 586. The mere fact of a malapportioned districting plan is not enough. A plaintiff must show "that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923); *California v. Texas*, 141 S. Ct. 2104, 2114 (2021) (standing requires "an injury that is the result of the statute's actual or threatened enforcement, whether today or in the future").

Applying those rules here, Plaintiffs' complaint alleges that Wisconsin election officials will, *in the future*, violate the Constitution if the existing legislative districts are used in next year's elections. Pet.App.35-38 (Compl. ¶¶43, 49, 53); Pet.App. 82-84, 86 (Am. Compl. ¶¶95, 100, 110). Plaintiffs' injury is entirely speculative—fanciful even. No one intends to use the existing districts; they are being redrawn right now. There is thus no "certainly impending" harm or "realistic danger" that the 10-year-old districts will be used again. *Clapper*, 568 U.S. at 409; *Babbitt*, 442 U.S. at 298. Any ruling on Plaintiffs' claims would entail wading into the political thicket of reapportionment without any judicial power to do so.

The three-judge court was indisputably wrong to conclude that Plaintiffs' possible future injury was sufficient. *See Clapper*, 568 U.S. at 409; *California*, 141 S. Ct. at 2114. There is no basis to assume, as the

district court has, that there is a "realistic danger" that next year's elections will use the existing districts absent this court's involvement. *Babbitt*, 442 U.S. at 298. That baseless assumption rests entirely "on speculation about the decisions of independent actors" in the coming year. *Clapper*, 568 U.S. at 414. All agree that the Legislature has a constitutional obligation to reapportion. *See* Wis. Const. art. IV, §3. All agree that the Legislature is actively redrawing the very districts that Plaintiffs are challenging. All agree that there is no legislative impasse. And even if an impasse were to arise later, all agree that there is active litigation in the fully and equally capable Wisconsin Supreme Court to resolve it. On issues of redistricting and state law, Wisconsin's supreme court justices are indeed *more* capable (not to mention answerable to the people of Wisconsin and residents of the State themselves). *See Growe*, 507 U.S. at 33. In such circumstances, the federal court has no power to interfere or obstruct that ongoing process. *See id*. at 37 ("The District Court erred in not deferring to the state court's timely consideration of congressional reapportionment."). The only opinion a federal court could offer at this time would be purely advisory.

The three-judge court did not grapple with these arguments. It instead took cover under another three-judge court's decision in *Arrington*, from the 2001 redistricting cycle. The *Arrington* plaintiffs similarly filed a malapportionment suit before redistricting could even begin. 173 F. Supp. 2d at 858-59. *Arrington* was wrong—so wrong that dissenting Judge Frank Easterbrook stated he would remove himself from the three-judge panel. *See id*. at 870 (Easterbrook, J.,

dissenting) ("I shall take no further part in the consideration or decision" and "unless a fresh suit is filed, this has become a two-judge court, and *whatever* it does may end up being vacated by higher authority on Article III grounds."). His observation in *Arrington* applies equally here: "The best face one can put on this complaint is that plaintiffs predict that Wisconsin will fail to enact … equal-size districts. Yet a prediction that something will go wrong in the future does not give standing today." *Id*. at 869. There, as here, "Wisconsin does not propose to conduct [next year's] elections under the existing plan." *Id*. The Wisconsin constitution requires a new plan. Wis. Const. art. IV, §3; *State ex rel. Att'y Gen. v. Cunningham*, 51 N.W. 724, 744 (1892). Judge Easterbrook likened such suits, challenging old districts while the Legislature draws new ones, to "asking the judicial branch to enjoin implementation of a state pollution control plan that the EPA has canceled and that can't be enforced without the agency's cooperation." *Arrington*, 173 F. Supp. 2d at 869. In that case, as here, "no plaintiff would have standing to ask the judiciary to drive a second stake through the plan's heart. One death is enough." *Id.* Taking judicial action "would be redundant and thus advisory in the most basic sense." *Id*.

To accept that Plaintiffs have standing at this time is to accept that multiple state branches of government will fail at what they are currently doing. This Court has rejected standing theories premised on "guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 568 U.S. at 413. Such "guesswork" here requires the federalism-defying assumption that, even if there were a

legislative impasse in the redistricting process, the Wisconsin courts would be unequipped to resolve it.

2. The three-judge court's refusal to dismiss Plaintiffs' suits—instead proceeding with full-fledged discovery and a trial—puts Wisconsin on the same path as *Growe v. Emison*. In *Growe*, much like here, there was simultaneous state and federal litigation over redistricting. 507 U.S. at 28-30. The concurrent actions came to a head when the federal district court refused to defer to state-court proceedings. *Id*. at 30-31. In a unanimous opinion, this Court ordered the federal court to stand down and dismissed the federal litigation. *Id*. at 42.

As *Growe* explained, reapportionment disputes are an exception to the rule that federal and state courts may exercise concurrent jurisdiction and proceed simultaneously. 507 U.S. at 32. In reapportionment disputes, important "principles of federalism and comity" require a federal court to defer to the State, including the state courts, because there can be "only one set of legislative districts." *Id*. at 32, 35. The State, with the "primary responsibility for reapportionment," goes first. *Id*. at 34; *see also White v. Weiser*, 412 U.S. 783, 795 (1973). *Growe* demands that federal courts "defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." 507 U.S. at 33. After *Growe*, a federal court cannot "obstruct state reapportionment" or "permit federal litigation to be used to impede it" unless and until it becomes "apparent" that the State's own branches of government, including its

courts, cannot redistrict before the primary elections. *Id*. at 34, 36.

Here, the federal court has refused to defer consideration while the State acts, proceeding ahead without any Article III case or controversy. The court has stated it intends to schedule a January trial, with discovery, expert reports, and all the trappings of federal litigation leading up to it. Pet.App.15-16. If that is not obstruction of the State's own redistricting process after *Growe*, it is not clear what would be.

Addressing *Growe*, the three-judge court stated that *Growe* did not limit its jurisdiction here. Pet.App.8-9 ("The *Growe* Court did not conclude that the federal case was unripe or that the plaintiffs lacked standing."). Of course, there was no occasion for this Court to address threshold issues of standing or ripeness in *Growe*. 507 U.S. at 32 (noting no party disputed jurisdiction). *Growe* came to this Court in the eleventh hour of redistricting. The complex and overlapping state and federal actions were well beyond that threshold stage. But the rule announced in *Growe* necessarily affects the jurisdictional analysis in post-*Growe* cases, including this one.

Growe prohibits a federal court from interceding in redistricting disputes unless and until the State fails to redistrict, and that includes state courts. *See Growe*, 507 U.S. at 34, 36-37. If, as *Growe* instructs, the federal court can do nothing but defer, then there is no Article III basis for the federal court to intervene before that time. *See* Part III.C, *infra*. That is especially so here, where there is no indication of any imminent failure by any of branch of government.

3. *Growe* is also relevant with respect to the redressability component of standing. *Growe* prohibits federal courts from redressing any malapportionment claim "[a]bsent evidence that th[e] state branches," including the state courts if necessary, "will fail" to reapportion. 507 U.S. at 34.

Here, the federal court acknowledged that "impeding or superseding any current state redistricting process" are "steps that might run afoul of *Growe*" and admitted it was "inclined" to impose a "limited stay" to avoid interfering (which it has not yet done). Pet.App.10. These statements speak for themselves. If the district court has no power to remedy Plaintiffs' alleged harm at this time, then there is no Article III case or controversy. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) (standing requires "an acceptable Article III remedy" that will "redress a cognizable Article III injury"); *California*, 141 S. Ct. at 2116 ("To find standing here to attack an unenforceable statutory provision would allow a federal court to issue what would amount to an advisory opinion without the possibility of any judicial relief." (quotation marks omitted)); *Franklin v. Massachusetts*, 505 U.S. 788, 829 (1992) (Scalia, J., concurring in part and concurring in the judgment) ("we cannot remedy appellees' asserted injury without ordering declaratory or injunctive relief against appellant President Bush, and since we have no power to do that, I believe appellees' constitutional claims should be dismissed").

B. Plaintiffs' suits are not ripe.

1. Another component of Article III's case or controversy requirement is that the dispute is ripe. *See Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 57

n.18 (1993). A ripe dispute is "not dependent on contingent future events that may not occur as anticipated, or indeed may not occur at all." *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (quotation marks omitted). That ripeness requirement "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003) (quotation marks omitted); *see id.* (ripeness protects against "judicial interference until an administrative decision has been formalized and its effects felt in a concrete way").

Just as Plaintiffs have failed to establish standing, they have failed to establish ripeness. The suits are "riddled with contingencies and speculation that impede judicial review." *Trump*, 141 S. Ct. at 535. The Wisconsin Legislature is currently redrawing the districts that plaintiffs challenge as unconstitutional, and the Wisconsin Supreme Court has asserted jurisdiction to review the legality of any redistricting plan Judicial resolution of plaintiffs' claims in a federal court is entirely premature. In spite of all this, the court has announced it intends to hold a trial on remedial maps in January.

2. The three-judge court rejected these arguments. The court said it understood the State's "primacy in redistricting." Pet.App.8-9. It also acknowledged that there was no legislative impasse at this time. Pet.App.9. But rather than dismiss the suit on either of these grounds, the court stated that it would take jurisdiction to "prepare now to resolve the redistricting dispute." Pet.App.10.

The federal court again resorted to *Arrington*, almost as if it were a decision of this Court rather than deeply unpersuasive authority that had been eviscerated by Judge Easterbrook (a clear and indisputable mistake on its own). *Arrington* began "by noting that contingent future events generally do *not* deprive courts of jurisdiction." 173 F. Supp. 2d at 863 (emphasis added). Wrong. A ripe dispute is "*not* dependent on contingent future events that may not occur as anticipated, or indeed may not occur at all." *Trump*, 141 S. Ct. at 535 (emphasis added). *Arrington* acknowledged that it was "tempted to dismiss" but refused because of the perceived "problem" of "establishing a date on which [the case] may be re-filed." 173 F. Supp. 2d at 861, 865. The court feared such a date would be "arbitrary" and so instead "retain[ed] jurisdiction, but merely stay proceedings" until the suit became ripe. *Id*. Wrong again. Under the logic of these three-judge courts, "[o]ne might as well commence a suit as soon as some legislator introduces a bill that would be unconstitutional if enacted." *Id*. at 869 (Easterbrook, J., dissenting).

There is no constitutional basis to docket a case, set a deadline purporting to bind the Wisconsin Legislature and its supreme court, and then wait for the suit to become ripe. As Judge Easterbrook put it in *Arrington*: "[R]eserving a place in line is not a proper reason to invoke the judicial power." *Id*. at 869 (Easterbrook, J., dissenting); *see also Mayfield v. Texas*, 206 F. Supp. 2d 820, 826 (E.D. Tex. 2001) (refusing to "invoke jurisdiction, set a deadline, and wait" for plaintiffs' premature malapportionment suit to become ripe); *accord Growe*, 507 U.S. at 37 (criticizing

federal court's "race to beat the Minnesota Special Redistricting Panel to the finish line").

There is no redistricting exception to the Constitution that permits a federal court to set the schedule for a State's redistricting process from beginning to end. The three-judge court here had no jurisdiction to do anything but dismiss the suits.

III. This Court's Intervention Is Warranted to Stop the Federal Reapportionment Proceedings.

A. The refusal to dismiss has irreversible effects on Wisconsin redistricting.

1. That the three-judge federal court is without jurisdiction is indisputable. And yet, there are no adequate means to stop the federal proceedings other than a writ of mandamus or prohibition. Specifically, there is no undoing the effects of the federal court's order that the parties "prepare now" to meet its redistricting deadline. As this Court observed in *Growe*, "States must often redistrict in the most exigent circumstances," 507 U.S. at 35, and the federal court's involvement from the outset of the ongoing redistricting process creates even more exigency. By assuming it must act, the federal court has left the Legislature even less time to reapportion. And by proceeding now, the federal court has left all of Wisconsin's constitutional actors under the burden and expense of a discovery schedule (and whatever other rulings may ensue), made wholly unnecessary by the Wisconsin Supreme Court's decision to exercise its original jurisdiction.

The federal court is setting an unprecedented schedule that does anything but "defer consideration" of these redistricting disputes. *Growe*, 507 U.S. at 33. To set that schedule, the federal court is apparently deferring to the unelected Wisconsin Elections Commission.[7] The commission has alleged new maps are necessary by March 1, 2022 (even though the next primary elections are not until August 2022).[8] Based on the assumption that the federal court will be drawing those maps, the court has ordered the parties to "prepare now" for redistricting failure. Pet.App.10. The court has ordered the parties to create a pretrial schedule (complete with depositions, expert reports, and more) that assumes the federal cases will be tried in January—four months from now and nearly eight months before the primaries. Pet.App.15. The court has left itself and the elections commission more time

---

[7] The Wisconsin Elections Commission has no redistricting power. It never objected to federal jurisdiction and instead told the Wisconsin Supreme Court to stand down. *Compare* Pet.App.91 (noting commission opposed the Wisconsin Supreme Court action by "noting that are two cases pending in federal district court that raise similar claims"), *with Jensen*, 639 N.W.2d at 542-43 ("The people of the state have a strong interest in a redistricting map drawn by an institution of state government—ideally and most properly, the legislature, secondarily, this court."); *see also Growe*, 507 U.S. at 35 (describing "the primacy of the State" in reapportionment).

[8] Primary candidates' nomination papers are currently due in June 2022. Wis. Stat. §8.15(1). Such deadlines are movable in reapportionment cases when necessary. *See, e.g.*, *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 639 (E.D. Wis. 1982).

to prepare for the primary elections than it has left for the Legislature (or the Wisconsin Supreme Court).[9]

2. To justify its refusal to dismiss, the court invoked the "historical pattern" of federal court intervention in past Wisconsin redistricting cycles as a justification for intervening this time around too. Pet.App.10. Observations about "historical pattern[s]" are no substitute for a real Article III case or controversy today. Nor do serial past wrongs make it right today.

That history is at odds with *Growe*. It includes a 1980s Wisconsin redistricting dispute that was *removed* from the Wisconsin Supreme Court to a federal court. *See AFL-CIO*, 543 F. Supp. at 633. After *Growe* a Wisconsin federal court has never proceeded with such haste while state-court action is pending. *See Baumgart v. Wendelberger*, No. 02-cv-366, 2002 WL 34127471, *1 (E.D. Wis. May 30, 2002), *amended* 2002 WL 34127473 (E.D. Wis. July 11, 2002) (trial in April 2002, amended decision in July 2002). Likewise, other federal courts have waited for actual allegations that the redistricting process has failed or stalled before interceding. *See, e.g.*, *Miss. State Conf. of N.A.A.C.P. v. Barbour*, No. 3:11-cv-159, 2011 WL 1870222, at *4 (S.D. Miss. May 16, 2011) (noting legislature adjourned in April without passing a joint redistricting resolution); *Smith v. Clark*, 189 F. Supp. 2d 502, 503

[9] For the Legislature to participate in the federal proceedings, it would have to complete redistricting well ahead of the January trial date so that its maps could be addressed during pretrial expert discovery.

(S.D. Miss. 2001) (noting "many months" had passed without a state redistricting plan).

This also illustrates the irreversible effects of federal-court involvement. In the 2001 redistricting cycle, for example, the Wisconsin Supreme Court refused to entertain an original action because the *Arrington* plaintiffs commenced their federal suit so early. *See Jensen*, 639 N.W.2d at 541. At odds with *Growe*, the State's highest court found itself deferring to the federal court, even though there was "no question" the case belonged in the supreme court. *Id*. This time around, the Wisconsin Supreme Court has again had to act in response to prematurely filed federal proceedings. As a consequence of the federal plaintiffs' early actions, the Wisconsin Supreme Court has asserted its original jurisdiction just as the legislative redistricting process begins. Pet.App.93; *see also* Pet.App.118 (Dallet, J., dissenting) (arguing that the action was premature).

As *Jensen* and *Johnson* illustrate, when a federal court exceeds its jurisdiction and entertains a prematurely filed reapportionment suit—even if only to set a redistricting deadline and wait—the federal court interferes with the State's sovereign redistricting power. *See id*. at 541 (discussing the federal court's order scheduling discovery and trial days). The federal court's early intervention creates "unjustifiable duplication of effort and expense, all incurred by the taxpayers." *Id*. at 542. It rushes redistricting unnecessarily. And it takes finite time away from the very legislative and state-court proceedings for which *Growe* demands deference.

B. These premature cases are part of a broader trend that has evaded review.

The refusal to dismiss is not a one-off event. It is "not uncommon" for plaintiffs to file a reapportionment suit soon after new census data is released and then ask the federal court to set a deadline and wait. *See Arrington*, 173 F. Supp. 2d at 860 (collecting cases); *see also Smith*, 189 F. Supp. at 505-06; *Miss. State Conf. of N.A.A.C.P.*, 2011 WL 1870222, at *9 & n.6; *Vigil v. Lujan*, 191 F. Supp. 2d 1273, 1274 (D.N.M. 2001); *but see, e.g.*, *Mayfield*, 206 F. Supp. 2d at 826 (dismissing for lack of jurisdiction). When the federal court obliges, it follows *Growe* in name only. Federal courts assume jurisdiction at the very beginning of a State's redistricting process and tell the State when that process must be complete, reserving time that the State could otherwise spend redistricting so that the federal court can later bless (or alter) the new districts. But because these courts often take jurisdiction, set a deadline, and stay proceedings, that trend has evaded this Court's review.

Federal courts are not the overseers of redistricting. Quite the opposite. The States have that power. The federal court here violated the basic federalism and separation-of-powers principles that this Court has repeated time and again. States, not federal courts, have primary redistricting responsibility: "Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place." *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993); *White*, 412 U.S. at 795 (collecting cases for

the rule that "state legislatures have 'primary jurisdiction' over legislative reapportionment"); *Growe*, 507 U.S. at 33 ("In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself.").[10]

In similarly sensitive separation-of-powers cases, the Court has been unwilling to presume a co-equal branch will fail at its job as a basis for federal jurisdiction. Doubt about future results does not authorize judicial intervention *in media res*. It would be laughable, for example, to suggest that a Court would have Article III jurisdiction to adjudicate the constitutionality of a newly introduced bill just in case that bill was later enacted. Rather, federal courts must allow issues to be "hashed out in the 'hurly-burly, the give-and-take of the political process'"—no matter how hopeless such a process might seem—before declaring a true impasse and intervening. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2029 (2020) (quoting Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess., 87 (1975) (statement of A. Scalia, Assistant Attorney General, Office of Legal Counsel)); *see, e.g.*, *Trump*,

[10] The Voting Rights Act's preclearance requirement affected the ability of some States to redistrict without federal oversight. That regime can no longer justify federally imposed redistricting deadlines today. *See Shelby County v. Holder*, 570 U.S. 529, 535, 556-57 (2013). But the three-judge court here did just that, relying on *Branch v. Smith*, 538 U.S. 254 (2003), a preclearance case, to justify its early deadline. Pet.App.15.

141 S. Ct. at 535 ("Any prediction how the Executive Branch might eventually implement this general statement of policy is 'no more than conjecture' at this time." (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983)).

Here too, by asserting jurisdiction on Day 1 of redistricting, the federal court is ensuring its continued involvement in reapportionment from beginning to end. Retaining jurisdiction entrenches the federal courts as the supervisory authority over redistricting, denying the State the dignity of redistricting on its own. *See Growe*, 507 U.S. at 37; *see also Lawyer v. Dep't of Justice*, 521 U.S. 567, 589 (1997) (Scalia, J., dissenting) ("The 'opportunity to apportion' that our case law requires the state legislature to be afforded is an opportunity to apportion through normal legislative processes, not through courthouse negotiations attended by one member of each House, followed by a court decree.").

C. Federal courts have allowed *Growe*'s exception to swallow its rule.

1. In many ways, *Growe* simplified the jurisdictional analysis in reapportionment cases going forward. *Growe* spoke in terms of "deferral, not abstention." 507 U.S. at 37; *see also id.* 32-33 & n.1.[11] But in

[11] This Court could alternatively revisit *Growe*'s distinction between "deferral" and "abstention" and clarify that federal courts must dismiss cases asking for reapportionment while state litigation is pending. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-20 (1976). Reapportionment cases implicate the "weightier considerations of constitutional adjudication and state-federal relations," "duplicative litigation," and questions of "wise judicial administration." *Id.* at

doing so, *Growe* created a class of federal cases that definitionally do not meet Article III's case-or-controversy requirement. Because there can be only one set of redistricting maps, *Growe* prescribes that legislative redistricting, state redistricting litigation, and then federal redistricting litigation (if ever necessary) occur sequentially and not concurrently. *Id.* The State goes first, with the presumption that the State will ably redistrict. *Growe*, 507 U.S. at 34; *see Wise*, 437 U.S. at 539-40 (op. of White, J.); *see also Miller v. Johnson*, 515 U.S. 900, 916 (1995) (describing "the presumption of good faith that must be accorded legislative enactments" in redistricting). That is so even if the claims are different in state and federal court because the requested relief is the same: reapportionment of the State's one set of districts. *Growe*, 507 U.S. at 35. The possibility of federal-court involvement later on is a mere "prediction" that "rest[s] on speculation about the decisions of independent state actors." *Trump*, 141 S. Ct. at 536; *see also Clapper*, 568 U.S. at 414.

2. But a single line from *Growe* has emboldened federal courts to take jurisdiction over redistricting from the very beginning, set a deadline, and wait for the suit to become ripe. *Growe* states, "It would have been appropriate for the District Court to establish a deadline by which, if the [state supreme court's]

817-18. There is a century's worth of federal and state constitutional expectations that States are responsible for the "most significant" act of redistricting. *See LULAC*, 548 U.S. at 416 (op. of Kennedy, J.). And because there can be only one set of districts, it serves no one to litigate a federal case that will presumably be mooted by the legislature or the state courts in the meantime.

Special Redistricting Panel had not acted, the federal court would proceed." 507 U.S. at 36.[12]

Courts have misread this as an invitation to supervise and set deadlines for States as soon as a new redistricting cycle begins. *See, e.g.*, *Arrington*, 173 F. Supp. 2d at 865 (citing *Growe* to conclude that court's "docket-management powers" permitted it to set a future redistricting deadline even though the court doubted its current jurisdiction). But *Growe* had no occasion to consider whether an Article III case or controversy would be present at the outset of a post-*Growe* reapportionment case, where federal courts must now defer to allow the State to redistrict. And *Growe* could not, *sub silentio*, expand Article III's limitations on the judicial power for all redistricting cases going forward. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a

[12] The idea of a "deadline" originated with *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam). The *Germano* litigation was one of several malapportionment suits circulating in the 1960s that was then granted, vacated, and remanded after *Reynolds*. *Id.* at 408. On remand, the federal court ordered that the Illinois General Assembly submit a new senate redistricting plan that complied with *Reynolds*. *Id.* at 408. This Court vacated that order and explained that the federal court "should have stayed its hand" because the state supreme court had retained jurisdiction to oversee the senate's reapportionment. *Id.* at 408. But when the Court vacated the federal court's order, it "remanded with directions that the District Court enter an order fixing a reasonable time" for the legislature and state court to act before the next election. *Id.* at 409. Like *Growe*, *Germano* does not suggest that a federal court would have the same authority in a prematurely filed impasse suit.

federal decision, the decision does not stand for the proposition that no defect existed.").

To say *Growe* empowers a federal court to overlook the absence of a case or controversy and retain supervisory federal jurisdiction also ignores what *Growe* says about the primacy of States and state courts in redistricting. *Growe* presumes States will redistrict unless and until it becomes "apparent" that there will not be a redistricting plan in time for the primaries. 507 U.S. at 36. There is no additional requirement that there be months built in for appeals and collateral litigation. *See id*. at 35 ("We fail to see the relevance of the speed of appellate review."). Nor is there any requirement that a lower federal court build in time to bless (or alter) the new districts. That court has no power to sit as a pseudo-court of appeals over ongoing state-court proceedings. Only this Court does. 28 U.S.C. §1257(a). And once the state court acts, its judgment demands full faith and credit by every other court, and normal preclusion rules apply. *See Growe*, 507 U.S at 35-36; *see also Wise*, 437 U.S. at 540 (op. of White, J.) (explaining that, even if districts were declared unconstitutional, the legislature should be afforded a "reasonable opportunity" to adopt its own "substitute" plan, which "if forthcoming, will then be the governing law").

Every branch of the Wisconsin state government is now engaged in reapportionment. The federal court's obligation is to defer. *See Growe*, 507 U.S at 37. Proceeding now defies *Growe* and obstructs the redistricting process. Any relief would be purely advisory. The cases must be dismissed.

CONCLUSION

The absence of jurisdiction is indisputable, principles of federalism are at their zenith, and there is no other adequate means to stop federal courts, including the court below, from exceeding their jurisdiction in an area as sensitive as reapportionment. *See Cheney*, 542 U.S. at 380-81; *Ex parte Peru*, 318 U.S at 583. The Court should grant the petition for writ of mandamus or, in the alternative, a writ of prohibition to direct the federal court to dismiss for lack of jurisdiction.

Respectfully submitted,

KEVIN M. ST. JOHN
BELL GIFTOS ST. JOHN LLC
532 Wall St., Suite 2200
Madison, Wisconsin 53718
(608) 216-7990

ADAM K. MORTARA
Counsel of Record
LAWFAIR LLC
125 South Wacker, Suite 300
Chicago, Illinois 60606
(773) 750-7154
mortara@lawfairllc.com

JEFFREY M. HARRIS
TAYLOR A.R. MEEHAN*
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423

* *Licensed in Illinois & D.C.; Virginia bar application is pending.*

September 24, 2021

IN THE SUPREME COURT OF WISCONSIN

No. 2021AP1450-OA

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS AND RONALD ZAHN,

Petitioners,

BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, REBECCA ALWIN, CONGRESSMAN GLENN GROTHMAN, CONGRESSMAN MIKE GALLAGHER, CONGRESSMAN BRYAN STEIL, CONGRESSMAN TOM TIFFANY, CONGRESSMAN SCOTT FITZGERALD, LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA, GERALDINE SCHERTZ, KATHLEEN QUALHEIM, GARY KRENZ, SARAH J. HAMILTON, STEPHEN JOSEPH WRIGHT, JEAN-LUC THIFFEAULT, AND SOMESH JHA,

Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, JULIE GLANCEY IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, ANN JACOBS IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, DEAN KNUDSON IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, ROBERT SPINDELL, JR. IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION AND MARK THOMSEN IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION,

Respondents,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, IN HIS OFFICIAL CAPACITY, AND JANET BEWLEY SENATE DEMOCRATIC MINORITY LEADER, ON BEHALF OF THE SENATE DEMOCRATIC CAUCUS,

Intervenors-Respondents.

PETITIONERS' BRIEF IN RESPONSE TO THE COURT'S OCTOBER 14, 2021 QUESTIONS

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

Richard M. Esenberg (WI Bar No. 1005622)
Anthony F. LoCoco (WI Bar No. 1101773)
Lucas T. Vebber (WI Bar No. 1067543)
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
Phone: (414) 727-9455
Fax: (414) 727-6385
Rick@will-law.org
ALoCoco@will-law.org
Lucas@will-law.org

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES 4
INTRODUCTION 7
PROCEDURAL HSITORY 7
RESPONSE TO QUESTIONS 8
I. First question: Under the relevant state and federal laws, what factors should the Court consider in evaluating or creating new maps? 8
a. Factors mandated by Wisconsin law 11
i. Population equality 11
ii. Compactness of districts 12
iii. Contiguity of districts 13
iv. Honoring municipal boundaries 14
b. Other traditional redistricting factors that should be considered 15
i. Preserving the cores of prior districts 15
ii. Maintaining traditional communities of interest 19
iii. Respecting the requirements of the Voting Rights Act 19
II. Second question: The petitioners ask us to modify existing maps using a "least change" approach. Should we do so, and if not, what approach should we use? 21
III. Third question: Is the partisan makeup of districts a valid factor for us to consider in evaluating or creating new maps? 28
IV. Fourth question: As we evaluate or create new maps, what litigation process should we use to determine a constitutional sufficient map? 32
CONCLUSION 33
CERTIFICATIONS 34

TABLE OF AUTHORITIES

Cases

Abrams v. Johnson, 521 U.S. 74, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997) 21

Baldus v. Members of Wisconsin Government Accountability Board, 849 F.Supp.2d 840 (E.D. Wis., 2012) 16, 17, 18, 19

Baumgart v. Wendelberger, No. 01-C-0121, 2002 WL 34127471, at (E.D. Wis. May 30, 2002), amended, No. 01-C-0121, 2002 WL 34127473 (E.D. Wis. July 11, 2002)..... 11, 15, 17, 25

Brnovich v. Democratic National Committee, 141 S.Ct. 2321, 210 L.Ed.2d 753 (2021)..... 20-21

Brown v. Thomson, 462 U.S. 835, 842, 103 S. Ct. 2690, 77 L.Ed.2d 214 (1983) 12

Funk v. Wollin Silo & Equip., Inc., 148 Wis. 2d 59, 435 N.W.2d 244 (1989) 29

Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) 26

Gill v. Whitford, 138 S. Ct. 1916, 201 L. Ed. 2d 313 (2018) 18, 28-29, 30-31

Harris v. Arizona Indep. Redistricting Comm'n, 578 U.S. 253, 136 S. Ct. 1301, 1307, 194 L.Ed.2d 497 (2016)..... 12

Hippert v. Ritchie, 813 N.W.2d 374 (Minn. 2012) 23

In re Colorado General Assembly, 332 P.3d 108 (Colo. 2011) 20

Jensen v. Wisconsin Elections Bd., 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537..... 9, 19, 21, 29

Karcher v. Daggett, 462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983) 15-16

People ex rel Scott v. Grivetti, 50 Ill.2d 156, 277 N.E.2d 881 (1971) 13

Prosser v. Elections Board, 793 F. Supp. 859, 863-865 (E.D. Wis., 1992) 13, 17, 25

Reynold v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) 10, 11, 14

Rucho v. Common Cause, 139 S. Ct. 2484, 204 L. Ed. 2d 931 (2019) 18, 28, 30, 31

Shaw v. Reno, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) . 14

State ex rel. Lamb v. Cunningham, 83 Wis. 90, 148, 53 N.W. 35 (1892) 14

State ex rel. Reynolds v. Zimmerman, 22 Wis. 2d 544, 126 N.W.2d 551 (1964) 9, 10, 11, 26

Stenger v. Kellett, No. 4:11CV2230 TIA, 2012 WL 601017 (E.D. Mo. Feb. 23, 2012) 24

Tennant v. Jefferson Cty. Comm'n, 567 U.S. 758, 133 S.Ct. 3, 183 L.Ed.2d 660 (2012) 16-17

Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) 20

Upham v. Seamon, 456 U.S. 37, 102 S.Ct. 1518, 71 L.Ed.2d 725 (1982) 22

Wesberry v. Sanders, 376 U.S. 1, 84 S. Ct. 526, 11 L.Ed.2d 481 (1964) 11

White v. Weiser, 412 U.S. 783, 93 S.Ct. 2348, 37 L.Ed. 335 (1973) 22

Whitford v. Gill, 218 F. Supp. 3d 837 (W.D. Wis. 2016) 28-29

Wisconsin State AFL-CIO v. Elections Bd., 543 F. Supp. 630 (E.D. Wis., 1982) 13, 14, 15, 19

Zivotofsky v. *Clinton*, 566 U.S. 189, 132 S.Ct. 1421, 182 L.Ed.2d 423 (2012) 18

Constitutions

U.S. Const, amend. 14 ..... 28, 30

U.S. Const., art I, sec. 4, cl. 1 27

Wis. Const. art. I, § 1 ..... 9, 29, 30

Wis. Const. Art I, § 3..... 27, 29

Wis. Const., art. IV, § 4..... 13, 14

Wis Const. art. IV, §§ 2-5..... 9, 29

Other Authority

58 Op. Atty. Gen. 88, 91 (1969) 15

Voting Rights Act, 52 U.S.C. 10301 ..... 19, 20

INTRODUCTION

This litigation represents a challenge to Wisconsin's decade-old legislative and congressional district maps. In light of the results of most recent census, these districts no longer meet constitutional muster. They are no longer of equal population. Petitioners brought this action to ensure that , in the event the political branches cannot adopt a plan or fail to adopt one that is adequate, the Court is in a position to provide constitutionally required relief.

As this litigation moves forward, this Court has sought input from all parties regarding questions of law and procedural matters. Petitioners file this brief in response to the Court's second October 14, 2021 Order requesting responses to four specific questions. Those questions, and Petitioners' responses, are all set forth herein.

PROCEDURAL HISTORY

The procedural history of this case is relatively straightforward. Petitioners filed a Petition for an Original Action with this Court on August 23, 2021. Approximately a month later, on September 22, 2021, this Court granted that Petition and took jurisdiction of this matter.

Following that, a number of parties sought to intervene in this matter. As counsel for the Petitioners made clear in a related rule proceeding last January, redistricting litigation involves a multiplicity

of interests and intervention should be liberally granted. Petitioners did not object to these intervenors. This Court granted several motions to intervene, and, on October 14, 2021, it ordered the Petitioners and Intervenor-Petitioners to submit an Omnibus Amended Petition collecting all of the claims made by all petitioners in this matter. Also on October 14, 2021, the Court ordered all parties to answer a series of questions. The Omnibus Amended Petition was filed on October 21, 2021. This brief addresses the Court's four questions.

RESPONSE TO QUESTIONS

The Court has asked the parties to respond to four questions relating to: (1) the relevant factors for redistricting, (2) whether this Court should adopt a "least changes" approach as advocated by the Petitioners, (3) whether this Court should consider a claim of so-called "partisan gerrymandering", and (4) what litigation process should be in place for this matter. The Petitioners repeat each of the Court's questions as a section heading below, and then answer the question thereafter.

I. First question: Under the relevant state and federal laws, what factors should the Court consider in evaluating or creating new maps?

To begin, there is no question that the Congressional and state legislative districts that currently exist are no longer constitutional because they are no longer sufficiently in equal in population. *See* pp. 8-

10, *infra*. With respect to the specific factors to be considered, this Court previously noted in *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶ 6, n.3, 249 Wis. 2d 706, 639 N.W.2d 537,that the Wisconsin Constitution sets forth standards for redistricting in art. I, § 1 and art. IV, §§ 2–5. This Court, however, has not yet had many opportunities to apply those standards except in *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964).

With respect to those standards based on the equal protection guarantee imposed by Article I, section 1, this Court normally applies the standards set by the United States' Supreme Court's interpretations of federal equal protection guarantees although there are circumstances in which it would be free to adopt a differing standard. In assessing the constitutionality of existing maps, even if there were potential differences between federal and state constitutional requirements, they would not matter. Everyone agrees that the existing maps are unconstitutional under either the federal or state constitutions. They must be redrawn. This case is about remedy.

Because the constitutional requisites for new maps do not likely differ under either the state or federal constitution, the Petitioners will discuss the relevant factors as set forth directly in the Wisconsin

Constitution, in *Reynolds v. Zimmerman*,[1] and in federal cases applying federal redistricting principles all of which the Petitioners contend are instructive as to claims they make under the Wisconsin Constitution.

Petitioners contend that the following factors are required to be considered under Wisconsin law: (1) population equality (2) compactness; (3) contiguity; and (4) honoring municipal boundaries. In addition to those, there are several other factors that courts traditionally consider as part of reviewing district maps that should also be considered here: (1) preserving the cores of prior districts; (2) maintaining traditional communities of interest; and (3) compliance with the Voting Rights Act.

Consistent with the above factors, the Petitioners urge the Court to make the fewest changes necessary to the existing maps to achieve equality of population while meeting the other traditional redistricting criteria set forth above.

[1] To distinguish this Court's decision in *State ex rel. Reynolds v. Zimmerman*, from the U.S. Supreme Court's decision in *Reynold v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (discussed later), the Petitioners will refer to the former as *Reynolds v. Zimmerman* and the latter as *Reynold v. Sims*.

a. Factors mandated by Wisconsin law

i. Population equality

The first factor to consider in evaluating or creating new maps, of course, is population equality. The U.S. Supreme Court established this requirement in dual cases from 1964: *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L.Ed.2d 481 (1964) (requiring population equality for Congressional districts) and *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (requiring population equality for state legislative districts).

This Court has similarly held that the Wisconsin Constitution requires equality of population between districts and that while "mathematical equality of population" is impossible to achieve, a valid reapportionment 'should be as close an approximation to *exactness* as possible." *Reynolds v. Zimmerman*, 22 Wis. 2d at 565.

With respect to congressional districts the federal courts require near perfect equality. But, even as a matter of federal law, there is more flexibility with respect to state legislative districts. *See*, *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002), amended, No. 01-C-0121, 2002 WL 34127473 (E.D. Wis. July 11, 2002) (Congressional redistricting plans held to higher standards

than state legislative ones but slight deviations are allowed if supported by historically significant state policy or unique features in the state).

With respect to state legislative seats, the U.S. Supreme Court has held that an apportionment plan with a maximum population deviation under 10%[2] has generally been considered a minor deviation and is generally determined to be constitutionally permissible. *Brown v. Thomson*, 462 U.S. 835, 842, 103 S. Ct. 2690, 77 L.Ed.2d 214 (1983). The U.S. Supreme Court most recently in *Harris v. Arizona Indep. Redistricting Comm'n*, 578 U.S. 253, 136 S. Ct. 1301, 1307, 194 L.Ed.2d 497 (2016), confirmed that as long as a state legislative map's deviation does not exceed 10% it will most likely pass the constitutional standards for population equality of legislative maps. The Petitioners suggest that these same standards would satisfy the Wisconsin Constitution with respect to state legislative districts.

ii. Compactness of districts

[2] The "deviation" is measured by starting with the population of the most populous district in the state and subtracting from it the population of the least populous district in the state and then dividing that number by the mean population in all districts. So, if the mean population in each Wisconsin Assembly District is 60,000 and the most populous assembly district had 62,000 people and the least populous assembly district had 59,000 then the maximum level of deviation is 5% (62,000-59,000 = 3,000; 3,000 divided by 60,000 = 5%).

The Wisconsin Constitution, Article IV, Section 4, requires voting districts "be in as compact form as practicable." "Compactness," to be sure, is somewhat subjective and courts have emphasized that the compactness requirement is a practical requirement and is not an absolute. *See e.g., Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 634 (E.D. Wis., 1982) ("Practical factors such as natural or political subdivision boundaries may legitimately vary the shapes of districts. In other words, districts should be reasonably, though not perfectly, compact and contiguous." (*citing People ex rel Scott v. Grivetti*, 50 Ill.2d 156, 277 N.E.2d 881 (1971))); *see also*, *Prosser v. Elections Board*, 793 F. Supp. 859, 863-865 (E.D. Wis., 1992).

Because it is to be applied "as practicable", compactness has been referred to as a secondary principle for review, as "the requirement of compactness is clearly subservient to the overall objective of population equality." *Wisconsin State AFL-CIO,* 543 F. Supp. at 634.

iii. Contiguity of districts

This factor is also explicitly mentioned by the Wisconsin Constitution in Article IV, Section 4, requiring districts ". . . to consist of contiguous territory. . ." The contiguity factor has been often discussed alongside the compactness factor, *see, e.g., Prosser*, 793 F. Supp. at 863. (discussing the importance of both compactness and contiguity and

nothing that there is some "correlation between geographical propinquity and community of interest, and therefore compactness and contiguity are desirable features in a redistricting plan.")

This Court has defined "contiguous" to mean that a district "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). One might also expect courts to look with disfavor on islands of larger territory connected by thin strands of territory. *Cf., Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (large areas of population connected by areas no wider than I-85 corridor).

This is a relatively simple factor to apply.

iv. Honoring municipal boundaries

Wisconsin Constitution Article IV, Section 4 provides that Wisconsin's legislative districts are "to be bounded by county, precinct, town or ward lines."

This requirement, however, like the compactness factor is only of "secondary importance" to population equality. *Wisconsin State AFL-CIO*, 543 F. Supp. at 635. The Attorney General citing to *Reynolds v. Sims*, has similarly suggested that population equality should be the primary concern, and that maintaining boundary lines as required under the Wisconsin Constitution should be done only "insofar as it does not

compel disregard for the requirements of the federal equal protection clause." 58 Op. Atty. Gen. 88, 91 (1969).

Consistent with these principles, when Courts have considered redistricting for Wisconsin in the past several decades, they have remained concerned about splitting all types of municipalities wherever possible. When drawing a map in the 1980s, for example, the court stated, "[w]e believe that municipal splits should be used sparingly," but recognized that some splitting up of municipalities was necessary to maintain the one person, one vote principle. *Wisconsin State AFL-CIO*, 543 F.Supp at 636. Similarly, in the 2000s, the court noted the map it had drawn was superior to other plans proposed by the parties because its plan split only 50 municipalities, while the others all split more than that number. *Baumgart*, 2002 WL 34127471, at *7.

To the extent practicable then, this Court should consider this as one of the factors in this litigation.

b. Other traditional redistricting factors that should be considered

i. Preserving the cores of prior districts

An important consideration is the preservation of the cores of prior districts. The U.S. Supreme Court, in *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983), noted "[a]ny number of

consistently applied legislative policies might justify some variance [in population amongst districts], including, for instance, making districts compact, respecting municipal boundaries, *preserving the cores of prior districts,* and avoiding contests between incumbent Representatives." (emphasis added). The value of core retention is obvious. It tends to minimize the number of voters who will be represented by a new and potentially unfamiliar legislator and, with respect to state senate districts, reduces the number of voters who are move between even and odd numbered districts and may have to sit out an additional senate re-election cycle. *Baldus v. Members of Wisconsin Government Accountability Board*, 849 F.Supp.2d 840, 852 (E.D. Wis., 2012) (explaining that redistricting can move "voters among senate districts in a manner that causes certain voters who previously resided in an even-number district (which votes in presidential years) to be moved to an odd-numbered district (which votes in mid-term years); this shift means that instead of voting for a state senator in [the presidential year], as they would have done, they must wait until [the following mid-term year] to have a voice in the composition of the State Senate.")

Preserving the cores of prior districts is at the foundation of "least change" review which the Petitioners have advocated for, and discussed further in Section II, *infra*. In *Tennant v. Jefferson Cty. Comm'n*, 567

U.S. 758, 764, 133 S.Ct. 3, 183 L.Ed.2d 660 (2012), the U.S. Supreme Court stated "[t]he desire to minimize population shifts between districts is clearly a valid, neutral state policy." Indeed, as the Petitioners explain in greater detail *infra*, this "least change" approach to reviewing maps is the most neutral way a Court can update and redraw a map.

For example, in 2002 when a federal court redrew Wisconsin's map after the 2000 census, it stated that it "undertook its redistricting endeavor in the most neutral way it could conceive—by taking the 1992 reapportionment plan as a template and adjusting it for population deviations." *Baumgart,* 2002 WL 34127471, at *7. This is similar to the court's action in the 1990s as they said their plan "creates the least perturbation in the political balance of the state." *Prosser,* 793 F. Supp. at 871.

In the most recent redistricting in 2012, the court again emphasized that it would have been preferable to move the fewest number of people as possible. *Baldus*, 849 F. Supp.2d at 849.

We anticipate that certain of the Petitioner-Intervenors will argue that "core retention" or "least changes" should be abandoned because they claim the maps drawn by the legislature and signed into law by the Governor in 2011 are a partisan gerrymander and "unfair." This would be wholly inappropriate. These maps survived not one – but two rounds

of litigation. *Baldus, supra,* and *Gill v. Whitford*, 138 S. Ct. 1916, 201 L. Ed. 2d 313 (2018). Challenges to these (and other) maps as partisan gerrymanders were ultimately rejected because the discernment of such a gerrymander is nonjusticiable.

After considering varying conceptions of what "fairness" between political parties might require, the United States Supreme Court concluded:

> Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts.

Rucho v. Common Cause, 139 S. Ct. 2484, 2500, 204 L. Ed. 2d 931 (2019), *citing Zivotofsky* v. *Clinton*, 566 U.S. 189, 196, 132 S.Ct. 1421, 182 L.Ed.2d 423 (2012).

In *Rucho,* the Supreme Court made clear that, after fifty years of trying, there is no "clear, manageable and politically neutral" to tell how much political consideration in the drawing of maps is "too much." *Rucho*, 139 S.Ct. at 2500, 2501. If this could not be done in assessing challenges to new maps, neither can it be done to treat existing maps as

somehow "illegitimate" such that a traditional redistricting principle like "core retention" can be abandoned.

ii. Maintaining traditional communities of interest

A related factor for this Court's consideration is maintaining communities of interest. Again, the factor is somewhat subjective and a "secondary" principle – a thumb on the scale. One might, for example, try to avoid combining areas with very different interests such as industrial and agricultural areas. One might be reluctant to split a Native American reservation.

This factor overlaps several others. In *Wisconsin State AFL-CIO,* 543 F. Supp. at 636, the court noted that this criteria of maintaining traditional communities of interest is closely related to the goal of maintaining municipal lines. This factor also has some overlap with analysis under the Voting Rights Act (discussed *infra*), as the court in *Baldus* further noted, "the concept of community of interest will have an important role to play when we come to [review a claim under the Voting Rights Act]." *Baldus*, 849 F.Supp.2d at 852.

iii. Respecting the requirements of the Voting Rights Act

Historically, Wisconsin has had majority-minority districts, consistent with the Voting Rights Act ("VRA") as part of its maps. This

Court has acknowledged that "redistricting litigation typically presents . . . questions under the Voting Rights Act." *Jensen,* 2002 WI 13, ¶ 4, n. 1. This Court may be asked to consider the requirements of the VRA in approving maps for Wisconsin, as other State Courts have done in reviewing a redistricting plan. *See, e.g., In re Colorado General Assembly,* 332 P.3d 108 (Colo. 2011) (A case from the state courts of Colorado considering the VRA when reviewing state legislative districts).

Section 2 of the Voting Rights Act provides:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color . . .

52 U.S.C. § 10301(a). The U.S. Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), articulated a three-part test to determine whether a population may be entitled to a majority-minority district under Section 2 of the Voting Rights Act. That test looks at: (1) whether the population in question is sufficiently large and geographically compact to require such a majority-minority district, *id.* 478 U.S. at 50; (2) whether the population is politically cohesive in their voting patterns, *id. at 51.*; and (3) whether the population can show voting is racialized to such an extent that the majority population as a bloc can deny the minority population a representative of its choice, *id.*.

These factors must be applied in light of the U. S Supreme Court's recent decision in *Brnovich v. Democratic National Committee,* 141 S.Ct. 2321, 210 L.Ed.2d 753 (2021), which arguably calls for a stronger emphasis on the opportunity to participate and the magnitude of the impact on the population in question. But it would be premature to consider that question here – in the abstract before any such question has been raised.

II. Second question: The petitioners ask us to modify existing maps using a "least change" approach. Should we do so, and if not, what approach should we use?

The "least change" approach is the most fair and neutral way for this Court to modify any existing maps and to meet the requirements of all the factors outlined under Section I above. It is the approach that best comports with this Court's duty to assess the constitutionality of laws rather than to draft them from scratch.

The Wisconsin Constitution vests in the Legislature the power to determine district lines. Wis. Const. art. IV, § 3. That is, redistricting is inherently a legislative task. This Court has acknowledged as much, stating that redistricting "remains an inherently political and legislative—not judicial—task." *Jensen* 2002 WI 13, ¶ 10.

The U.S. Supreme Court has repeatedly affirmed the idea that the primary governmental body to oversee a redistricting should be the legislature. *See Abrams v. Johnson*, 521 U.S. 74, 87, 117 S.Ct. 1925, 138

L.Ed.2d 285 (1997), ("The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies."); *White v. Weiser*, 412 U.S. 783, 795, 93 S.Ct. 2348, 37 L.Ed. 335 (1973), ("We have adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment").

This idea is further supported by the U.S. Supreme Court's holding that courts should not ignore legislative policy choices on reapportionment even when the courts have been tasked with determining district lines and that any changes a court makes to a legislatively supported reapportionment plan should be as minimal as possible to remedy any constitutional violations. *Upham v. Seamon*, 456 U.S. 37, 42, 102 S.Ct. 1518, 71 L.Ed.2d 725 (1982).

Nonetheless, as has long been recognized, judicial involvement in redistricting is often necessary – and so the question becomes what is the best way for this Court to fulfil *its* duties while still respecting the Legislature's role. The "least change" approach is the most efficient way for this Court to engage in what is inherently a political and legislative task in the most neutral way possible.

The existing maps in Wisconsin were adopted by the Legislature, signed by the Governor and approved by the courts. They are unquestionably constitutional (but for changes in population reflected by the new census) and the simplest way to honor the Legislature's prerogatives with respect to redistricting is to start with the most recent maps approved through the legislative process, including both being adopted by the Legislature and approved by the Governor, and then making the minimum changes necessary to ensure their constitutionality—to deal with the population shifts over the last 10 years. Drastic changes, or an approach that involves drawing an entirely new map—with all the political decisions that such a process would necessarily involve—are tasks that should be reserved to the political branches. This principle also incentivizes those branches to reach agreement on their own, rather than expecting this Court to do their jobs for them. In other words this *will* serve as a constitutional safety-valve should the legislative process fail, but the Court's actions in this politically-charged sphere will be as minimal as possible. If the Legislature and Executive wish for more than that, they must compromise.

The least-change strategy is the legal rule in Minnesota. *Hippert v. Ritchie*, 813 N.W.2d 374, 380 (Minn. 2012) ("Because courts engaged

in redistricting lack the authority to make the political decisions that the Legislature and the Governor can make through their enactment of redistricting legislation, the panel utilizes a least-change strategy where feasible.") *See also*, *Stenger v. Kellett*, No. 4:11CV2230 TIA, 2012 WL 601017, at *3 (E.D. Mo. Feb. 23, 2012) ('This is called the "least change" or "minimal change" method, which assumes that if the current district map complied with the redistricting criteria during the previous census, then a new map will likely comply with only limited changes. The "least change" method is advantageous because it maintains the continuity in representation for each district and is by far the simplest way to reapportion the county council districts.")

The "least change" approach to modifying a map is also consistent with the goal of "preserving the cores of prior districts." Similarly, it is the simplest way to comply with the *other* redistricting review factors as well. That is, since the currently-in-place maps in Wisconsin were found to be constitutional previously, starting with those maps, and making minimal changes to them is the easiest and most neutral way to ensure the other factors (like population equality, maintaining communities of interest, etc.) all also continue to be met.

As discussed briefly in Section I above, the least change approach is also consistent with prior redistricting court decisions in Wisconsin.

For example, in the 2000s, a divided state government, then with a Republican governor and split control in the legislature, failed to adopt a legislative reapportionment plan and legislators from both parties requested the federal district court to devise a new map based on the new census numbers. In *Baumgart,* 2002 WL 34127471, the court reviewed and accepted submission of sixteen maps from a variety of interested parties including representatives of both political parties in the state legislature. *Id.* at *4. The court rejected all of these plans and instead decided to draw their own map. *Id.* at *6. The court then worked off the existing 1992 reapportionment plan and made the necessary adjustments to account for population changes throughout the state. *Id.* In establishing its proposed legislative map, the court said its map was preferable to all of the other submitted maps because the judges adhered to the judicially favored redistricting criteria in devising the map. *Id.* at *7.

In the previous decade to *Baumgart*–the 1990's–the Democrat majority in both legislative chambers passed a reapportionment map that was later vetoed by Republican Governor Tommy Thompson, so redistricting again fell to a court. Recognizing the limitations of judges drawing entirely new maps, the court stated their "task would be easier

if we were reviewing an enacted districting plan rather than being asked to promulgate one ourselves." *Prosser,* 793 F. Supp. at 865.

The court then received a number of different proposals from the parties but again rejected all of them and drew its own working from aspects of one of the plans submitted by the Republican Assembly Leader and one passed by the Democrat controlled state legislature, the court highlighted their new apportionment map "preserves the strengths" of the two plans including those maps' contiguity, compactness, and population equality while discarding its weaknesses. *Id*. at 870. The court noted its plan "creates the least perturbation in the political balance of the state." *Id*. at 871.

Legislatures have the requisite capability to best draw and implement district lines because of the inherent political nature of establishing district boundaries. *Gaffney v. Cummings*, 412 U.S. 735, 754, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973). While easy-to-define criteria do exist to help dictate constitutionally appropriate districts, the subjective factors that innately arise when choosing how to redraw districts are best suited to be considered solely by the legislature.. *Id*. This is especially true in an age of highly computerized programs which help parties design maps, hundreds if not thousands of maps exist that would vary in political advantage for any party that would still be

constitutional. This Court acknowledged as much in *Reynolds v. Zimmerman*, 22 Wis.2d at 565-566: "[T]he problem of drafting a [new reapportionment] plan convinces us that there is no single plan which the constitution, as a matter of law, requires to be adopted to the exclusion of all others, and that there are choices which can validly be made within constitutional limits."

The least changes approach simplifies the Court's job by starting with maps *fully approved by the political process* (and approved by the courts) and then making the minimum number of changes to those maps to ensure equality of population and consistency with the traditional redistricting factors.

To be sure, there are some who will argue that deference to legislatures is not warranted because of the interest that legislators have in the redistricting process. But this observation is at war with the fact that both our United States and Wisconsin constitutions expressly grant redistricting to state legislatures. *U.S. Const., art. I, sec. 4, cl. 1; Wis. Const., art. IV, § 3.*

For these reasons, the Petitioners continue to ask this Court to embrace the "least change" approach to modifying any existing maps, should such a modification become necessary during this litigation.

III. Third question: Is the partisan makeup of districts a valid factor for us to consider in evaluating or creating new maps?

No. The partisan makeup of districts should **not** be a factor this Court considers in evaluating or creating new maps. It cannot be.

This position is consistent with the U.S. Supreme Court's recent opinion in *Rucho*. In *Rucho* the Supreme Court considered and rejected a partisan gerrymander claim brought under the Equal Protection clause of the fourteenth amendment, concluding that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Rucho,* 139 S.Ct. at 2506-2507. The Supreme Court further clarified that "federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." *Id*. at 2507. Significantly, the Court made clear that the absence of congruence between the proportion of seats won in the legislature by Democrats and Republicans and the aggregated total of votes of all votes for Democratic and Republicans in geographic districts does not present a constitutional problem. In a system that elects legislators from single-member geographic districts, there is no right to proportional representation. And in a state where Democratic voters are more heavily

geographically concentrated than Republican voters,[3] there is no reason to believe the outcome will be proportional.

Although the Supreme Court was there concerned with the federal constitution, the same reasoning applies here—there is no plausible grant of authority in the Wisconsin Constitution for the consideration of partisan gerrymandering claims, nor are there legal standards to limit and direct this Court's decisions.

With respect to the former, this Court has "given the equal-protection provision of the Wisconsin Constitution and the parallel clause of the United States Constitution identical interpretation." *Funk v. Wollin Silo & Equip., Inc.*, 148 Wis. 2d 59, 61, n. 2, 435 N.W.2d 244 (1989). And there is no reason to deviate here. There is nothing in the text of the Wisconsin Constitution that suggests that the framers intended to allow a claim of so-called partisan gerrymandering under Wisconsin law. Neither the text of Wis. Const. art. I, §1 or art. IV, §§ 2–5 suggest such a result.

[3] This feature of Wisconsin's political geography has been noted by Courts before. For example, in *Gill v. Whitford*, the Supreme Court quoted the findings of the three-judge panel in that case, noting the lower court recognized that "Wisconsin's political geography, particularly the high concentration of Democratic voters in urban centers like Milwaukee and Madison, affords the Republican Party a natural, but modest, advantage in the districting process." *Gill v. Whitford*, 138 S. Ct. 1916, 1925–26, 201 L. Ed. 2d 313 (2018), (quoting *Whitford v. Gill*, 218 F. Supp. 3d 837, 921 (W.D. Wis. 2016)).

In addition, the Wisconsin Constitution vests the power to draw legislative districts in a partisan body (the Legislature). Wis. Const., art IV. § 3. Given that, and given the fact that this Court has recognized redistricting as "inherently political" (*Jensen*, 2002 WI 13, ¶ 10) it would be nonsensical for this Court to review the inherently political decisions of a partisan legislative body in order to avoid partisan outcomes.

Moreover, while the language of art. I, § 1 certainly supports a claim based on "one person, one vote" there is no way to turn that into a claim based on partisan status. In rejecting the claim that the Equal Protection clause of the fourteenth amendment required them to review the partisan makeup of districts, the U.S. Supreme Court specifically noted that: "It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support." *Rucho,* 139 S.Ct. at 2501. This is because in the "one person, one vote" context, a court can easily apply the standard because "each representative must be accountable to (approximately) the same number of constituents." *Id*. An individual's rights are easy to adjudicate under such a standard. However, the Court was clear "[t]hat requirement does not extend to

political parties. It does not mean that each party must be influential in proportion to its number of supporters." *Id.*

This is also consistent with the U.S Supreme Court's holding in *Gill v. Whitford*, 138 S.Ct. 1916, a year before *Rucho,* where the U.S. Supreme Court rejected a claim for partisan redistricting under the 2011 Wisconsin maps. The Supreme Court there stated that courts are "not responsible for vindicating generalized partisan preferences." *Gill v. Whitford*, 138 S. Ct. at 1933.

In *Rucho*, beyond rejecting partisan gerrymandering claims, the Supreme Court also cautioned that a partisan review would be "unprecedented expansion of judicial power," *Rucho* 139 S.Ct. at 2507. This Court, in reviewing and potentially modifying any redistricting map, should be wary of any such expansion of judicial power, especially where such an expansion would put this Court into the position of playing referee between competing partisan interests.

Further, even if this Court thought it might otherwise possess the license to review partisan gerrymandering claims, no rule exists by which to adjudicate it, or to apply such a standard in creating new maps. The Supreme Court of the United States acknowledged in *Rucho* that it had "struggled without success over the past several decades to discern judicially manageable standards for deciding such claims" before

abandoning the effort. *Id.* at 2491. Some parties to this action will, no doubt, suggest various tests, festooning them with various impressive-sounding statistical terms in order to give them an air of authority. But none will "meet[] the need for a limited and precise standard that is judicially discernible and manageable." *Id.* at 2502. None will "provide[] a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties." *Id.*

For these reasons, this Court should not consider partisan makeup as a factor in reviewing or creating any redistricting map.

IV. Fourth question: As we evaluate or create new maps, what litigation process should we use to determine a constitutional sufficient map?

Consistent with the criteria for review outlined herein, the Petitioners suggest the following process be adopted by the Court to ensure a fair and efficient review:

First, all parties would submit their proposed map to the Court, as well as an expert report addressing why that map meets all the requisite factors necessary. Second, following those initial submittals, all parties would have an opportunity for limited discovery related to the expert reports if necessary.

Third, all parties would file responses to the other proposals and other expert reports. Following these two rounds of briefing, the Court

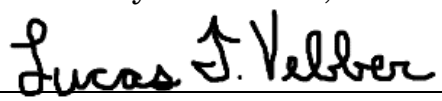
would either select one of the parties' proposals, or draw its own (ideally in a manner that makes the least changes from the adopted maps in current law). If it thought that there were factual issues in need of resolution, it could refer the matter to a referee to take testimony.

The Court could enter a scheduling order consistent with this approach. This process would allow for ample opportunity for all parties to fully brief this court and to support their proposals with expert testimony. The Court would also have ample opportunity to hear from nonparties who may desire to participate in this action.

CONCLUSION

The Petitioners respectfully submit these responses to the Court's questions as to how this litigation should proceed.

Respectfully submitted this 25th day of October, 2021.



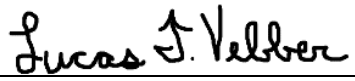
WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
Richard M. Esenberg (WI Bar No. 1005622)
Anthony F. LoCoco (WI Bar No. 1101773)
Lucas T. Vebber (WI Bar No. 1067543)
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
Phone: (414) 727-9455
Fax: (414) 727-6385
Rick@will-law.org
ALoCoco@will-law.org
Lucas@will-law.org

Attorneys for Petitioners

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief produced with a proportion serif font. The length of this brief is 5,759 words.

Signed,



Lucas T. Vebber (WI Bar No. 1067543)
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
Phone: (414) 727-9455
Fax: (414) 727-6385
Lucas@will-law.org

Attorney for Petitioners

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

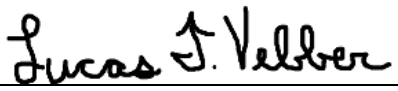
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed,



Lucas T. Vebber (WI Bar No. 1067543)
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
Phone: (414) 727-9455
Fax: (414) 727-6385
Lucas@will-law.org

Attorney for Petitioners

IN THE SUPREME COURT OF WISCONSIN

No. 2021AP1450-OA

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS AND RONALD ZAHN,

Petitioners,

BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, REBECCA ALWIN, CONGRESSMAN GLENN GROTHMAN, CONGRESSMAN MIKE GALLAGHER, CONGRESSMAN BRYAN STEIL, CONGRESSMAN TOM TIFFANY, CONGRESSMAN SCOTT FITZGERALD, LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA, GERALDINE SCHERTZ, KATHLEEN QUALHEIM, GARY KRENZ, SARAH J. HAMILTON, STEPHEN JOSEPH WRIGHT, JEAN-LUC THIFFEAULT, AND SOMESH JHA,

Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, JULIE GLANCEY IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, ANN JACOBS IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, DEAN KNUDSON IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, ROBERT SPINDELL, JR. IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION AND MARK THOMSEN IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION,

Respondents,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, IN HIS OFFICIAL CAPACITY, AND JANET BEWLEY SENATE DEMOCRATIC MINORITY LEADER, ON BEHALF OF THE SENATE DEMOCRATIC CAUCUS,

Intervenors-Respondents.

PETITIONERS' RESPONSE BRIEF REGARDING THE COURT'S OCTOBER 14, 2021 QUESTIONS

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

Richard M. Esenberg (WI Bar No. 1005622)
Anthony F. LoCoco (WI Bar No. 1101773)
Lucas T. Vebber (WI Bar No. 1067543)
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
Phone: (414) 727-9455
Fax: (414) 727-6385
Rick@will-law.org
ALoCoco@will-law.org
Lucas@will-law.org

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES 4
INTRODUCTION 6
ARGUMENT 7
I. Question One 7
a. Agreement on factors 7
b. Core retention 8
c. Partisan makeup of districts 9
II. Question Two 9
a. The Legislature is vested with the primary role in redistricting 11
b. The "least change" approach is most consistent with the text of the Wisconsin Constitution 12
i. The Wisconsin Constitution does not prohibit "least change" . 13
ii. Least change is not "antidemocratic" 14
c. The "least change" approach is the most efficient way to meet the other mandatory factors and resolve this litigation 16
III. Response to Question Three: 17
a. There is no basis for partisan review in Wisconsin law 18
i. The Wisconsin law does not mandate a partisanship review .. 19
b. There are no adequate standards to guide this Court 20
IV. Response to Question Four 22
CONCLUSION 23
CERTIFICATION 24
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12) 25

TABLE OF AUTHORITIES

Cases

Baumgart v. Wendelberger, No. 01-C-0121, 2002 WL 34127471 (E.D. Wis. May 30, 2002), amended, No. 01-C-0121, 2002 WL 34127473 (E.D. Wis. July 11, 2002) 8, 11

Gill v. Whitford, 138 S. Ct. 1916, 201 L. Ed. 2d 313 (2018) 10

Jensen v. Wisconsin Elections Bd., 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537 11-12

Karcher v. Daggett, 462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983) 8

League of Women Voters v. Commonwealth, 645 PA 1, 178 A.3d 737 (2018) 19

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007) 17

Rucho v. Common Cause, 139 S. Ct. 2484, 204 L. Ed. 2d 931 (2019) 21

State ex rel. Reynolds v. Zimmerman, 22 Wis. 2d 544, 126 N.W.2d 551 (1964) 10-11, 12

Tennant v. Jefferson Cty. Comm'n, 567 U.S. 758, 133 S.Ct. 3, 183 L.Ed.2d 660 (2012) 8

Constitutions

Pa. Const. art. I, § 5 19

Wis. Const. art. I, § 22 19

Wis. Const. art. IV, § 3..... 11

Other Authority

2011 Wisconsin Act 23 21

Andre Gallois, *Identity Over Time*, The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., Winter 2016 ed.), ... 14

Don Gonyea, *With Trump Off The Ballot, Republicans Look To Regain Votes In The Suburbs*, NPR, April 2, 2021 20

INTRODUCTION

This Court asked all parties to file responses to a series of four questions regarding how this litigation should proceed. With those responses now in hand, it is clear that the parties are largely in agreement as to what factors should be considered when reviewing or crafting redistricting maps. The primary areas of difference appear to be whether the use of "least change" to craft any new maps is appropriate, whether the partisan makeup of districts should be considered by the Court, and what the litigation process itself should look like.

For the reasons stated in our initial brief, and as further explained herein, Petitioners maintain that "least change" is the most neutral and efficient way for this Court to make any changes that may be necessary, and that the partisan makeup of districts must not be a factor considered in reviewing or crafting any redistricting map. Further, Petitioners continue to believe this litigation can be resolved quickly and efficiently with limited need for fact finding.

In this response brief, Petitioners will once again address the four questions of the court in order, responding to the various claims made by other parties therein.

ARGUMENT

I. Responses to Question One

With regards to the factors, for the most part all parties appear to be in general agreement as to the factors that should be considered, at least for the factors that do not relate to other questions: "least change" and partisanship review.

a. Agreement on factors

Petitioners initially listed the following factors for this Court to consider: population equality, compactness, contiguity, honoring municipal boundaries, preserving the cores of prior districts, maintaining traditional communities of interest, and respecting the requirements of the Voting Rights Act. (Pet. Br. at 10.) Other Parties brought forward additional considerations. Some are simply a recognition of mandatory requirements of the state Constitution, including the nesting of complete Assembly Districts within Senate Districts, the numbering of Districts, the number of Districts, and the creation of single-member districts. We have no objection to this or to adherence to constitutional prohibitions on discrimination using suspect or semi-suspect classifications such as race, national origin or sex.

b. Core retention

One of the points of disagreement in response to the Court's first question was whether "Core Retention" should be a factor. Petitioners noted in our initial brief how this approach has been favored by courts reviewing Wisconsin districts in the past. (Pet. Br. at 15-17.) Indeed, the District Court panel in the 2002 redistricting noted that it "undertook its redistricting endeavor in the most neutral way it could conceive—by taking the 1992 reapportionment plan as a template and adjusting it for population deviations." *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *7 (E.D. Wis. May 30, 2002), amended, No. 01-C-0121, 2002 WL 34127473 (E.D. Wis. July 11, 2002).

A goal of core retention is moving as few voters as possible into new districts, which serves legitimate state interests. *See, e.g., Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758, 764, 133 S.Ct. 3, 183 L.Ed.2d 660 (2012); see also *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983).

Several parties noted opposition to Core Retention as a factor, and that opposition was primarily due to the relationship between Core Retention and those parties' opposition to the "least change" approach, which was discussed as part of responses to Question Two. They don't like that approach because they want to relitigate the "fairness" of the

current maps that were challenged and left standing. We will address that issue in Section II of this brief.

c. Partisan makeup of districts

Several parties sought to include the partisan makeup of districts as a factor for the Court to consider, Petitioners oppose that request – for the reasons outlined in our initial brief and for the additional reasons in Section Three of this brief.

The most important reason for avoiding reviewing the partisan makeup of districts, as explained in greater detail in our opening brief and further in Section III herein, is that state law does not allow for such a review, and there are no standards in place which would guide the Court.

This Court should issue an order making clear the factors that will be a part of any review (either if reviewing any new maps adopted by the Legislature and signed into law, or in crafting its own maps). Those factors should include those noted herein, and should not include the partisanship of any district.

II. Responses to Question Two

In response to the Court's second question, several parties raised objections to Petitioners' proposed "least change" approach to the redrawing of map lines.

The basic theme underlying those objections is exactly as Petitioners anticipated it would be in our opening brief (Pet. Br. at 17): certain parties view the current maps as "unfair" and so they oppose using those maps as the baseline for drawing new maps—and thus oppose the use of a "least change" approach.

But on what basis could these maps be seen as "unfair?" They were challenged on that basis and that challenge failed, with the Supreme Court concluding that the question had no judicial answer. *Gill v. Whitford*, 138 S. Ct. 1916, 201 L. Ed. 2d 313 (2018). No justiciable legal standard could be applied to invalidate the maps. In the absence of such a standard, consideration of partisan "fairness" necessarily asks this Court to depart from the quotidian business of what the law requires and take on the role of super-legislature to make by itself some of the most important public policy decisions for the state of Wisconsin. Giving the game away, some parties referred to this alternative approach as the "best map" or "best possible" approach. (*See, e.g.*, Citizen Mathematicians and Scientists' Br. at 36; *see* also Senator Bewley Br. at 19).

But who decides what is "best"? And just what does "best" mean? As this Court noted in in *State ex rel. Reynolds v. Zimmerman*, 22 Wis.2d 544, 565-566, 126 N.W.2d 551 (1964): "[T]he problem of drafting a [new

reapportionment] plan convinces us that there is no single plan which the constitution, as a matter of law, requires to be adopted to the exclusion of all others, and that there are choices which can validly be made within constitutional limits." Senator Bewley asks this court to "apply its own values" in the drawing of maps. (Bewley Br. at 18.) But what would those be and on what basis would the Court impose them?

Like the *Baumgart* and other courts, Petitioners offered the "least change" approach as the fairest and most neutral way for this Court to ensure population equality and all other selected factors are met. The only serious objection offered to doing so is that the outcome would be partisanally unfair. But this view ignores the both the constitutional text and, as we shall see in response to Question Three, the constitution's limitation of the judicial role.

a. The Legislature is vested with the primary role in redistricting

The Wisconsin Constitution vests the power to draw district lines in the Legislature. Wis. Const. art. IV, § 3. As Petitioners explained in our opening brief, the drawing of district lines is inherently a legislative task. (Pet. Br. at 21-22.) Indeed, this Court has recognized as much, noting that redistricting is "an inherently political and legislative—not judicial—task." *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶ 10, 249

Wis.2d 706, 639 N.W.2d 537. Some of the litigants here may not like that, but it is our constitutional disposition. When judicial involvement becomes necessary, this Court should strive as much as possible to adhere to the Constitutional mandate that the Legislature's role in the process is primary.[1]

b. The "least change" approach is most consistent with the text of the Wisconsin Constitution

Various parties have now argued that the "least change" approach has no basis in Wisconsin law and should be discarded. For example, the BLOC Intervenors argue this approach has "no support in Wisconsin Law" and "would radically depart from this Court's extensive Precedent in interpreting and applying the express language of state statutes and the Wisconsin Constitution." (BLOC Br. at 34.) This "lack of authority" argument is ironic, because these same parties espousing it have paired it with a request for this court to engage in a partisan review of proposed districts which is, in no way, supported by Wisconsin law.

But the "least change" approach *is* supported by Wisconsin law. The question in this case is one of remedy. There is no doubt that the

[1] The Legislature, as an Intervenor-Respondent in this matter argues that any map they adopt should be the presumptive remedial plan. (Legislature Br. at 18 et seq.) Petitioners do not agree. Unless this Court revisits *Zimmerman*, 22 Wis.2d at 556-57, the baseline map must be the map which is current law—i.e., the existing districts. The problem is that, unlike the 2011 maps, the newly-enacted maps would not be enacted law.

districts as they exist in current law are no longer lawful. The question for this Court is how to "fix" those lines so that the maps can meet the requirements outlined in Section One of this brief.

Because the *Legislature* is vested with the power to draw district lines and make the "inherently political and legislative" choices necessary in doing so, then this Court's involvement should seek to preserve as many of those legislative choices as possible. The "least change" approach is the best way for this Court to do so. The "least change" approach begins with those lawfully adopted maps in order to *minimize* the number of "inherently political and legislative" choices this Court will be required to make if it needs to craft a new plan.

The reality is that "least change" *is* based in Wisconsin law, in fact it is the only way for this Court to draw maps that would still respect the various aspects of Wisconsin law on redistricting.

i. The Wisconsin Constitution does not prohibit "least change"

The BLOC intervenors go further than arguing that there is just no basis in law for "least change"—they actually make the argument that because the Wisconsin Constitution requires the legislature to adopt districts "anew", that this Court is actually *prohibited* from using the "least change" approach. (BLOC Br. at 41-47.)

But the BLOC Intervenors' purported textual argument is nonsense. The resulting *new* map would, of course, always be a map which had been adopted "anew." The district lines therein would have been set "anew." This argument posits some undefined standard of "novelty." A map must be sufficiently "different." But this is little more than a variation of the classic philosophical puzzle of Theseus' Ship.[2] This court, thankfully, does not need to engage in this philosophical discussion. Any map adopted by this Court would have been adopted "anew."

The best way for this Court to provide a remedy in this case while also still adhering to the Constitutional mandate vesting the legislature with the power to redistrict is to adopt the Petitioners' proposed "least change" approach.

ii. Least change is not "antidemocratic"

Governor Evers argues that adopting a least change approach is "antidemocratic" because he ran for office on a platform of redistricting reform. (Gov. Br. at 12.) In order to avoid this problem, the Governor

[2] Theseus' Ship examines a ship that is replaced plank by plank, with the discarded planks used to construct a replica alongside the original. The question is whether either or both of the two resulting ships share an identity with the original. *See* Andre Gallois, *Identity Over Time*, The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., Winter 2016 ed.), https://plato.stanford.edu/archives/win2016/entries/identity-time/.

suggests ignoring state law (*i.e.*, the current maps which were adopted by democratically elected representatives) and to have this Court adopt an entirely new districting scheme *not* related to any district approved by the people's representatives. This is, to put it as kindly as we can, preposterous, suggesting that, in applying state law and the state and federal constitutions (which is all it may do), this Court is somehow bound by whatever promises, sentiments, feints and bromides a successful candidate for Governor (but not the various winning candidates for the legislature) has made. The argument is, perhaps more than any other made here, embarrassingly laughable.

Here is the problem that this–or any other court–faces in drawing maps. It takes a legally enacted and constitutional set of districts that must be changed only because they are no longer equal in population. Had the census not changed, there would be no constitutional problem; no cause of action; no need for a remedy. The inequality in population is the only legal problem to be solved and it comes before this Court only if the legislature and the governor are unable to solve it. Some of the parties want to treat this failure as free pass to allow the Court to do whatever strikes its fancy; whatever it believes to be "best."

But that's not what courts do. Here, the Court is asked to address maps that were perfectly legal and fix what is no longer legal. No less,

but decidedly no more. "Least change"—fixing no more than the law requires—is what the Constitution requires and what courts do. It allows for this Court to defer to the democratic process as much as possible by beginning with the maps which are enacted in current law. The Governor's argument that we should entirely throw out democratically adopted state laws that he disagrees—because he talked about in some campaign speech—is nonsense.

c. The "least change" approach is the most efficient way to meet the other mandatory factors and resolve this litigation

As Petitioners noted in our opening brief, the current maps are still in place after multiple legal challenges. (Pet. Br. at 17-18.) As the result of population shifts that are now known from Census data, those district lines are no longer adequate. The easiest way to ensure Wisconsin's maps meet population equality and all other mandatory criteria is to start with the maps that were found to have met those criteria previously, and make the minimal changes necessary to ensure they continue to meet the criteria going forward.

The Hunter Intervenors argue that adopting the "least change" approach would expand the scope of this litigation. (Hunter Br. at 21.) However, this is plainly wrong—indeed, the opposite is actually true. The "least change" approach would reduce the need for any complicated

fact finding or lengthy litigation. They seem to think that using the existing maps as a baseline would warrant relitigating them—for a third time. But the U.S. Supreme Court has already decided that there was no legal reason to disrupt those maps and no state law claim was ever asserted.

The Court should issue an order making clear that it will utilize the "least change" approach if it is called upon to adopt a new redistricting plan.

III. Responses to Question Three

Various parties argued why they believe this court *should* engage in a partisan review of districts, but none of their reasons put forward change the fact that there is: (1) no authority to engage in a partisan review; nor (2) any legal standards on which such a review should be based. This Court should reject those parties' requests for it to engage in partisan politics.

With regards to racial discrimination, the U.S. Supreme Court has said: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007). The same logic can be applied to partisan gerrymandering.

The way to stop gerrymandering on the basis of partisanship is to stop gerrymandering on the basis of partisanship.

The parties' argument amounts to a claim that they believe that maps should be scrutinized to determine whether each party wins "enough" seats to be regarded as "fair." As we have pointed out, there is no reason to believe that, in a system of single member geographic districts, that the composition of the legislature would match the aggregate vote for the various partisan candidates for each of these offices. That is unlikely to happen even if the voters for candidates of each party could be readily identified and were evenly geographically concentrated, but they cannot be and they are not.

a. There is no basis for partisan review in Wisconsin law

As Plaintiffs explained in our opening brief, Wisconsin law provides no basis for this Court to engage in a review of the partisan makeup of legislative districts. (Pet. Br. at 29-32.) Other parties have explained why they do not want this to be so—they want the Court to ensure that one party wins "enough" seats—but none has established where the Court would find the authority to do so and how it might be done.

i. The Wisconsin law does not mandate a partisanship review

The BLOC Intervenors want this Court to find a *requirement* to review the partisan makeup of districts in Wis. Const. art. I, § 22. (BLOC Br. at 29.) This appears to be a long shot attempt by the BLOC Intervenors to get this Court to make a finding similar to what the Pennsylvania Supreme Court did in in *League of Women Voters v. Commonwealth*, 645 PA 1, 178 A.3d 737 (2018). In that case, the Pennsylvania Supreme Court found that the Pennsylvania Constitution's "free and equal elections" clause, which reads "[e]lections shall be free and equal. . .", Pa. Const. art. I, § 5, could give rise to a claim that a redistricting plan is invalid due to alleged partisan gerrymandering.

Why "free and equal" elections means equal or proportional results as opposed to an opportunity for candidates to run for office and qualified electors to vote is unexplained. The Wisconsin Constitution' s art. I, § 22, is entitled "Maintenance of free government" and it provides "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." But whatever another court in another state might make of a different constitutional

provision, nothing in art I, § 22 even suggests the court should engage in a partisanship review of districts, much less *require* it as the BLOC Intervenors have requested.

b. There are no adequate standards to guide this Court

Another problem with partisan review is that there are no standards to guide this Court. First, the determination of how a proposed district will vote is not the easy task that some parties have suggested. In Wisconsin, an Assembly Seat may well elect a Democrat one year, a Republican the next. Or perhaps the same district votes for a Republican candidate for the State Assembly and a Democrat for Governor. Or vice-versa. How it votes will be determined by the candidates and the positions they take. For example, some political observers have noted that Republicans have done increasingly better with rural and working-class voters and lost support in suburbs as they fielded candidates with a more populist approach.[3] Those trends might well be reversed if they nominate more traditional GOP candidates. Few even imagined—in 2015—that Donald Trump would be elected President in the following year. Political seers are not scientists.

[3] *See, e.g.*, Don Gonyea, *With Trump Off The Ballot, Republicans Look To Regain Votes In The Suburbs*, NPR, April 2, 2021 https://www.npr.org/2021/04/02/983385949/with-trump-off-the-ballot-republicans-look-to-regain-votes-in-the-suburbs (last visited Nov. 1, 2021).

Partisanship is not an immutable characteristic. People change and candidates and issues in elections matter. Voters do not always vote for one party or the other. In fact, Wisconsin state law recognized this back in 2011 when the Legislature eliminated so-called "straight party ticket" voting.[4] *See* 2011 Wisconsin Act 23 (which included, among other changes, eliminating "straight party ticket" voting in Wisconsin except as required by federal law for overseas and military electors). That is, the public policy in Wisconsin, established by the people through the legislature, recognizes that partisanship should not be a factor and that individuals can (and do) vote for candidates from a variety of parties for different offices on the same ballot.

But putting this problem aside, the United Supreme Court tried in vain for almost fifty years to discern a standard for determining what partisan outcome was "fair," finally giving the project up in *Rucho v. Common Cause*, 139 S. Ct. 2484, 204 L. Ed. 2d 931 (2019). None of the parties here have explained how this Court could manage to do what numerous justices on the United States Supreme Court over half a century could not.

[4] Straight Party Ticket voting is when a voter selects a political party on a ballot (and in doing so, casts a vote for all candidates of that party on the ballot) rather than selecting individual candidates for each office.

IV. Responses to Question Four

The final area of significant disagreement amongst the submittals to the Court was in how this litigation should be structured going forward. There were essentially two broad groups that parties fell into: (1) efficient and minimal fact finding by this court; and (2) a more extensive and unbounded factual inquiry into a whatever the parties might find interesting. Petitioners originally proposed the former, and continue to believe that is the best way for the Court to handle this litigation.

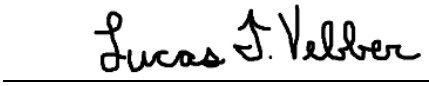
The Court's decision on how to move forward with this litigation will likely flow from its decision on the other questions regarding the scope of this litigation and the review that will be applied. As discussed *supra*, Petitioners believe that adopting the "least change" approach would be the most efficient way for this Court to resolve this litigation.

This Court could set forth the factors for consideration, and then require parties to submit a proposed map that meets those factors while making the least changes from the current maps. This would limit (if not eliminate) the need for fact finding or a lengthy trial, and would allow all parties to be heard and to fully brief the Court on why their map most adequately meets the requirements which are set forth.

CONCLUSION

For these reasons, as well as those in our initial brief on these questions, Petitioners respectfully request the Court proceed as requested.

Respectfully submitted this 1st day of November, 2021.



WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
Richard M. Esenberg (WI Bar No. 1005622)
Anthony F. LoCoco (WI Bar No. 1101773)
Lucas T. Vebber (WI Bar No. 1067543)
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
Phone: (414) 727-9455
Fax: (414) 727-6385
Rick@will-law.org
ALoCoco@will-law.org
Lucas@will-law.org

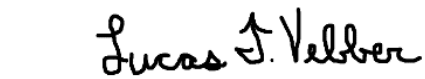
Attorneys for Petitioners

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief produced with a proportion serif font. The length of this brief is 3,741 words.

Dated this 1st day of November, 2021,

Signed,



Lucas T. Vebber (WI Bar No. 1067543)
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
Phone: (414) 727-9455
Fax: (414) 727-6385
Lucas@will-law.org

Attorney for Petitioners

CERTIFICATION 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 § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 1st day of November, 2021,

Signed,

Lucas T. Vebber

Lucas T. Vebber (WI Bar No. 1067543)
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
Phone: (414) 727-9455
Fax: (414) 727-6385
Lucas@will-law.org

Attorney for Petitioners

No. 2021AP1450-OA

IN THE SUPREME COURT OF WISCONSIN

BILLIE JOHNSON, ERIC O'KEEFE,
ED PERKINS, AND RONALD ZAHN,
Petitioners,

BLACK LEADERS ORGANIZING FOR COMMUNITIES,
VOCES DE LA FRONTERA, LEAGUE OF WOMEN VOTERS OF WISCONSIN,
CINDY FALLONA, LAUREN STEPHENSON, REBECCA ALWIN, CONGRESSMAN
GLENN GROTHMAN, CONGRESSMAN MIKE GALLAGHER, CONGRESSMAN
BRYAN STEIL, CONGRESSMAN TOM TIFFANY, CONGRESSMAN SCOTT FITZGERALD, LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA, GERALDINE
SCHERTZ, KATHLEEN QUALHEIM, GARY KRENZ, SARAH J. HAMILTON,
STEPHEN JOSEPH WRIGHT, JEAN-LUC THIFFEAULT, AND SOMESH JHA,
Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, in her official capacity as a member of the Wisconsin Elections Commission, JULIE GLANCEY, in her official capacity as a member of the Wisconsin Elections Commission, ANN JACOBS, in her official capacity as a member of the Wisconsin Elections Commission, DEAN KNUDSON, in his official capacity as a member of the Wisconsin Elections Commission, ROBERT SPINDELL, JR., in his official capacity as a member of the Wisconsin Elections Commission, AND MARK THOMSEN, in his official capacity as a member of the Wisconsin Elections Commission,
Respondents,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, in his official capacity, AND JANET BEWLEY SENATE DEMOCRATIC MINORITY LEADER, on behalf of the Senate Democratic Caucus,
Intervenors-Respondents.

BRIEF BY THE WISCONSIN LEGISLATURE

BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN
SBN 1054815
5325 Wall Street, Suite 2200
Madison, WI 53718
608.216.7995
kstjohn@bellgiftos.com

LAWFAIR LLC
ADAM K. MORTARA
SBN 1038391
125 South Wacker, Suite 300
Chicago, IL 60606
773.750.7154
mortara@lawfairllc.com

CONSOVOY MCCARTHY PLLC
JEFFREY M. HARRIS*
TAYLOR A.R. MEEHAN*
JAMES P. MCGLONE*
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
703.243.9423
jeff@consovoymccarthy.com

* *Admitted pro hac vice.*

Counsel for Intervenor-Respondent,
The Wisconsin Legislature

TABLE OF CONTENTS

INTRODUCTION 10

STATEMENT OF ISSUES FOR REVIEW 10

STATEMENTS ON ORAL ARGUMENT & PUBLICATION 11

STATEMENT OF THE CASE 11

A. The Power to Reapportion 11

B. Procedural History 14

ARGUMENT 15

I. Factors the Court should consider in evaluating or creating new maps begin with the Legislature's role and end with compliance with state and federal law 16

A. The Legislature must have an adequate opportunity to reapportion 16

B. The Legislature's redistricting plans are the presumptive remedial plans 18

C. The remaining factors to consider with respect to the Legislature's presumptive redistricting plans are whether they comply with state and federal law 22

II. In the alternative, the presumptive remedial map is the existing map, adjusted as necessary for population shifts 32

A. A "least changes" map is an appropriate judicial remedy in a redistricting case 32

B. A "least changes" map is necessary to mitigate temporal vote dilution 36

C. A "least changes" map appropriately prioritizes continuity of representation 37

III. The Court cannot consider partisanship when evaluating proposed remedies 41

IV. Nature of the proceedings 43
A. Timing of proceedings 43
B. Form of proceedings 43
CONCLUSION 46
CERTIFICATION REGARDING FORM AND LENGTH 48
CERTIFICATION OF FILING AND SERVICE 49

TABLE OF AUTHORITIES

CASES

Abbott v. Perez, 138 S. Ct. 2305 (2018) 17
Abrams v. Johnson, 521 U.S. 74 (1997) 18, 40
Ala. Leg. Black Caucus v. Alabama, 575 U.S. 254 (2015) 28
Alexander v. Taylor, 2002 OK 59, 51 P.3d 1204 (2002) 36, 40
Arizonans for Fair Representation v. Symington, 828 F. Supp. 684 (D. Ariz. 1992) 20, 40
Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320 (2006) 33
Baker v. Carr, 369 U.S. 186 (1962) 17, 42
Baldus v. Members of the Wis. Gov't Accountability Bd., 849 F. Supp. 2d 840 (E.D. Wis. 2012) 25
Baldus v. Members of the Wis. Gov't Accountability Bd., 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012) 39
Baumgart v. Wendelberger, Nos. 01-C-1021, 02-C-0366, 2002 WL 34127471 (E.D. Wis. May 30, 2002) 31, 35, 37, 40
Below v. Gardner, 148 N.H. 1, 963 A.2d 785 (2002) 35
Bodker v. Taylor, No. 1:02-cv-999, 2002 WL 32587312 (N.D. Ga. June 5, 2002) 35
Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) 27
Bubolz v. Dane Cty., 159 Wis. 2d 284, 464 N.W.2d 67 (Ct. App. 1990) 33
Burns v. Richardson, 384 U.S. 73 (1966) 20
Chapman v. Meier, 420 U.S. 1 (1975) 26, 27
Colleton Cty. Council v. McConnell, 201 F. Supp. 2d 618 (D.S.C. 2002) 35, 39, 40
Connor v. Finch, 431 U.S. 407 (1977) 26
Cooper v. Harris, 137 S. Ct. 1455 (2017) 27, 28, 33

Crumly v. Cobb Cty. Bd. of Elections & Voter Registration,
892 F. Supp. 2d 1333 (N.D. Ga. 2012) 35
Davis v. Bandemer, 478 U.S. 109 (1986) 42
Evenwel v. Abbott, 136 S. Ct. 1120 (2016) 24
F.C.C. v. Beach Comms., Inc., 508 U.S. 307 (1993) 41
Fortson v. Dorsey, 379 U.S. 433 (1965) 41
Gaffney v. Cummings, 412 U.S. 735 (1973) 16, 24, 34, 43
Gill v. Whitford, 138 S. Ct. 1916 (2018) 41, 42
Growe v. Emison, 507 U.S. 25 (1993) 14, 15
Henderson v. Perry,
399 F. Supp. 2d 756 (E.D. Tex. 2005) 19
Hippert v. Ritchie, 813 N.W.2d 374 (Minn. 2012) 35
Holmes v. Burns, No. C.A. 82-1727,
1982 WL 609171 (R.I. Super. Aug. 29, 1982) 36
Jensen v. Wis. Elections Bd.,
2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537 18
Johnson v. Miller, 922 F. Supp. 1556 (S.D. Ga. 1995) 34, 36
Karcher v. Daggett, 462 U.S. 725 (1983) 19, 24, 26, 38
LaComb v. Growe, 541 F. Supp. 145 (D. Minn. 1982) 36
League of United Latin American Citizens v. Perry,
548 U.S. 399 (2006) 19
Legislature v. Reinecke,
10 Cal. 3d 396, 516 P.2d 6 (1973) 40
Markham v. Fulton Cty. Bd. of Registrations & Elections,
No. 1:02-cv-1111, 2002 WL 32587313
(N.D. Ga. May 29, 2002) 35
Martin v. Augusta-Richmond Cty., Ga., Comm'n,
No. CV 112-058, 2012 WL 2339499
(S.D. Ga. June 19, 2012) 35, 38
Mayo v. Wis. Injured Patients & Families Compensation Fund,
2018 WI 78, 383 Wis. 2d 1, 914 N.W.2d 678 42
Md. Citizens Comm. for Fair Cong. Redistricting, Inc. v. Tawes,
253 F. Supp. 731 (D. Md. 1966) 36

Milwaukee Branch of NAACP v. Walker,
2014 WI 98, ¶64, 357 Wis. 2d 469, 851 N.W.2d 262 20
North Carolina v. Covington, 138 S. Ct. 2548 (2018)..... 10, 34, 41
Perry v. Perez, 565 U.S. 388 (2012) 18, 20, 32
Prosser v. Elections Bd.,
793 F. Supp. 859 (W.D. Wis. 1992) 30, 37
Reynolds v. Sims, 377 U.S. 533 (1964)..... 17, 18, 23, 24
Rucho v. Common Cause, 139 S. Ct. 2484 (2019)..... passim
Russello v. United States, 464 U.S. 16 (1983)..... 21
See State ex rel. Reynolds v. Zimmerman,
22 Wis. 2d 544, 126 N.W.2d 551 (1964)..... passim
SEIU, Local 1 v. Vos,
2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 20
Sexson v. Servaas, 33 F.3d 799 (7th Cir. 1994) 19
Shaw v. Reno, 509 U.S. 630 (1993) 28
State ex rel. Att'y Gen. v. Cunningham,
81 Wis. 440, 51 N.W. 724 (Wis. 1892)..... 18, 23, 25, 33
State ex rel. Bowman v. Dammann,
209 Wis. 21, 243 N.W. 481 (1932) 25, 29
State ex rel. Kalal v. Cir. Ct. for Dane Cty.,
2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110 21
State ex rel. Lamb v. Cunningham,
83 Wis. 90, 53 N.W. 35 (Wis. 1892)..... 18, 29
State ex rel. Reynolds v. Zimmerman,
23 Wis. 2d 606, 128 N.W.2d 16 (1964) 25, 29, 30
State v. Halverson,
2021 WI 7, 395 Wis. 2d 385, 953 N.W.2d 847 21
State v. Seigel,
163 Wis. 2d 871, 472 N.W.2d 584 (Ct. App. 1991) 33
Stenger v. Kellett, No. 4:11-cv-2230,
2012 WL 601017 (E.D. Mo. Feb. 23, 2012) 35, 40
Thornburg v. Gingles, 478 U.S. 30 (1986)..... 27
Upham v. Seamon, 456 U.S. 37 (1982) ..... passim

Vieth v. Jubelirer, 541 U.S. 267 (2004) 39, 41, 42
Wesberry v. Sanders, 376 U.S. 1 (1964) 26
Whitcomb v. Chavis, 403 U.S. 124 (1971) 19
White v. Regester, 412 U.S. 755 (1973) 24
White v. Weiser, 412 U.S. 783 (1973) ..... passim
Wis. State AFL-CIO v. Elections Bd.,
543 F. Supp. 630 (E.D. Wis. 1982) 31
Wise v. Lipscomb, 434 U.S. 1329 (1977) 14
Wise v. Lipscomb, 437 U.S. 535 (1978) 19, 22

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 23
U.S. Const. art. I, §2 ..... 23, 26
U.S. Const. art. I, §4, cl. 1 ..... 11, 18
Wis. Const. art. IV, § 5 ..... 29, 30
Wis. Const. art. IV, §1 ..... 11, 21
Wis. Const. art. IV, §11 22
Wis. Const. art. IV, §17 21
Wis. Const. art. IV, §3 ..... passim
Wis. Const. art. IV, §4 ..... 29, 30
Wis. Const. art. V, §10 21
Wis. Const. art. V, §3 22
Wis. Const. art. V, §6 22
Wis. Const. art. VI, §2 22
Wis. Const. art. VII, §12(1) 22
Wis. Const. art. VII, §8 22
Wis. Const. art. XIII, §12(4) 22
Wis. Const. art. XIV, §10 (1848) 21

STATUTES

2 U.S.C. §2a(b) 29
2 U.S.C. §2c 29
52 U.S.C. §10301(b) 27
Wis. Stat. §3.001 29
Wis. Stat. §4.001 ..... 25, 29, 30
Wis. Stat. §4.001(1) (1972) 25
Wis. Stat. §4.001(3) (1983) 25
Wis. Stat. §5.02(12s) 15
Wis. Stat. §5.15 30
Wis. Stat. §751.09 44
Wis. Stat. §8.15(1) 15
Wis. Stat. §805.06 44
2021 Wis. Senate Joint Res. 63 ..... 13, 31, 37, 40

OTHER AUTHORITIES

58 Wis. Op. Att'y Gen. 88 (1969) 31
60 Wis. Op. Att'y Gen. 101 (1971) 31
Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649 (2002) 39
Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131 (2005) 39
Ronald Keith Gaddie & Charles S. Bullock, III, *From* Ashcroft *to* Larios*: Recent Redistricting Lessons from Georgia*, 34 Fordham Urb. L.J. 997 (2007) 38

INTRODUCTION

This case challenges the constitutionality of Wisconsin's existing congressional and legislative districts. The Legislature is actively redrawing those districts based on 2020 census data. The Legislature's redistricting plans are nearly done. They have not been vetoed by the Governor. There is not yet any impasse. Even so, redistricting litigation began in state and federal courts days after the new census data was delivered.

For the reasons that follow, this Court's first task is a simple one: wait for an impasse to occur. In the event of an impasse, the Court must remedy Petitioners' malapportionment claims. That does not mean drafting new redistricting plans on a blank slate. The Court's role is more limited. The Court must "reconcil[e] the requirements of the Constitution with the goals of state political policy." *Upham v. Seamon*, 456 U.S. 37, 43 (1982). Such "reconciliation" can be achieved only if "modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect." *Id.* Redistricting decisions made by the state legislature cannot merely be cast aside. *See White v. Weiser*, 412 U.S. 783, 796 (1973). Once any existing malapportionment is remedied, the proper role of this Court is at its end. *See North Carolina v. Covington*, 138 S. Ct. 2548, 2555 (2018).

STATEMENT OF ISSUES FOR REVIEW

1. Under the relevant state and federal laws, what factors should the Court consider in evaluating or creating new maps?

2. The petitioners ask the Court to modify existing maps using a "least-change" approach. Should the Court do so, and if not, what approach should the Court use?

3. Is the partisan makeup of districts a valid factor for the Court to consider in evaluating or creating new maps?

4. As the Court evaluates or creates new maps, what litigation process should the Court use to determine a constitutionally sufficient map?

STATEMENTS ON ORAL ARGUMENT & PUBLICATION

Given the nascency of the proceedings in this original action, the Legislature does not believe oral argument is necessary at this time. The Legislature requests that this Court publish an order deciding the issues briefed herein, which will guide any future proceedings in the event of an impasse. The Legislature requests publication of this Court's final decision in this original action.

STATEMENT OF THE CASE

A. The Power to Reapportion

1. The Wisconsin Constitution vests the Wisconsin Legislature with the power to reapportion legislative districts: "At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." Wis. Const. art. IV, §3. Likewise, the federal Constitution vests "the Legislature" with the power to determine "the manner" of elections, which necessarily includes reapportionment of electoral districts. U.S. Const. art. I, §4, cl. 1.

That power to reapportion is distinct from the Legislature's general lawmaking power. *See* Wis. Const. art. IV, §1 ("The legislative power shall be vested in a senate and assembly."). When Wisconsin was a territory, for example, the apportionment power was vested in the executive. Act of Apr. 20, 1836, ch. 54, §4, 5 Stat.

10, 12 (vesting Governor with power to "declare the number of members of the [territory's] Council and House of Representatives to which each of the counties is entitled"). Wisconsin's first constitution as a State shifted that power to the Legislature. *See* Wis. Const. art. IV, §3 (1848).

2. The time to "district anew" began again in August 2021 when new 2020 U.S. Census data arrived. Since then, the Legislature has solicited public comment on redistricting and worked to create new district lines to accommodate shifting populations.

As part of the redistricting process, the Legislature passed a joint resolution identifying the considerations important to the ongoing redistricting process. 2021 Wis. Senate Joint Res. 63. The resolution announced that "it is the public policy of this state that plans establishing legislative districts should:

1. Comply with federal and state law;
2. Give effect to the principle that every citizen's vote should count the same by creating districts with nearly equal population, having population deviations that are well below that which is required by the U.S. Constitution;
3. Retain as much as possible the core of existing districts, thus maintaining existing communities of interest, and promoting the equal opportunity to vote by minimizing disenfranchisement due to staggered Senate terms;
4. Contain districts that are compact;
5. Contain districts that are legally contiguous;
6. Respect and maintain whole communities of interest where practicable;
7. Avoid municipal splits unless unavoidable or necessary to further another principle stated

above, and when splitting municipalities, respect current municipal ward boundaries;

8. Promote continuity of representation by avoiding incumbent pairing unless necessary to further another principle stated above; and
9. Contain districts that follow natural boundaries where practicable and consistent with other principles, including geographic features such as rivers and lakes, manufactured boundaries such as major highways, and political boundaries such as county lines."

2021 Wis. Senate Joint Res. 63.

The Legislature's redistricting plans are nearly finished. Legislators have introduced the new redistricting bills into legislative committees. *See* Wis. Senate Bill Nos. 621, 622. Hearings will occur on those bills this week.[1] And legislative leadership expects that the redistricting plans will be brought to a floor vote early next month.

The Governor has the opportunity to approve or veto the redistricting plans passed by the Legislature under the Court's precedent. *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964). If the Governor vetoes the Legislature's redistricting plans, there will be what's known as an "impasse."

[1] Meanwhile, the Governor has created his own redistricting commission. Wis. Executive Order No. 66 (Jan. 27, 2020). The Governor's commission has expressed its intent to share proposed maps with the Legislature, but the maps are not yet complete. *See* "Commission's Work & Records," govstatus.egov.com/peoplesmaps/work-records; "The People's Maps Commission Criteria for Drawing Districts," People's Maps Commission, bit.ly/3C6BvrV.

The Governor has not vetoed the Legislature's redistricting plans, and there is no "impasse" at this time.

B. Procedural History

One day after census data was delivered in Wisconsin, federal plaintiffs sued for a declaration that Wisconsin's existing districts were unconstitutionally malapportioned and asked the federal court to prepare itself to redraw Wisconsin's electoral districts. Another set of federal plaintiffs filed a similar suit days later. *See Hunter v. Bostelmann*, No. 21-cv-512 (W.D. Wis.); *Black Leaders Organizing for Communities (BLOC) v. Bostelmann*, No. 21-cv-534 (W.D. Wis.). The Legislature immediately intervened in the federal suits and filed motions to dismiss for lack of federal jurisdiction. The Legislature's dismissal motions explained, *inter alia*, that redistricting is primarily the responsibility of the Legislature, not the federal court. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 34 (1993) ("[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."); *Wise v. Lipscomb*, 434 U.S. 1329, 1332 (1977) (same). The federal court denied the Legislature's motion to dismiss. The Legislature has since petitioned for a writ of mandamus or prohibition ordering that the federal suits be dismissed. *In re Wisconsin Legislature*, No. 21-474 (Sept. 24, 2021). And the federal court has stayed the federal proceedings until November 5. *See* Order, *Hunter*, No. 3:21-cv-512 (W.D. Wis. Oct. 6, 2021), ECF No. 103.

Around the same time, four Wisconsin voters filed this original action. They asked this Court to declare the existing districts malapportioned. *Johnson* Pet. ¶1(a). They asked this Court to enjoin the Wisconsin Elections Commission "from administering any [future] election" until a new apportionment plan is in place. *Id.*

¶1(b). And they asked this Court to establish a "judicial plan of apportionment" in the event there is no "amended state law with a lawful apportionment plan." *Id.* ¶1(c).

The Court granted the petition for an original action. *See* Order of Sept. 22, 2021, *as amended*, Sept. 24, 2021. As part of its order, the Court declined to immediately declare that the districts were malapportioned or to enjoin the elections commission from conducting elections until a new plan is in place. *Id.* at 3. The Court stated it was "mindful that judicial relief becomes appropriate in reapportionment cases *only* when the legislature fails to reapportion according to constitutional requisites in a timely fashion after having an adequate opportunity to do so." *Id.* at 2.

The Legislature and other parties have since intervened and filed letter briefs regarding when redistricting plans must be complete in advance of next year's elections. *See* First Order of Oct. 14, 2021.[2] The Legislature's brief indicated that the Legislature needed until at least November to have an adequate opportunity to complete its redistricting process. Legislature Letter Br. 2. The Legislature also explained that, in the event of an impasse, this Court is the proper forum to resolve all redistricting-related issues. Legislature Response Letter Br. 3-7. The State can have only one set of redistricting plans, so the time to raise any such issues will be in this forum. *Growe*, 507 U.S. at 35.

ARGUMENT

If the Legislature cannot resolve Petitioners' malapportionment claims, then this Court will need to order a remedy. In doing so, the Court's role is still that of a Court, not a Legislature. The

[2] The next scheduled primary is August 9, 2021. Wis. Stat. §5.02(12s). The nominations period for the primary begins on April 15, 2021, and ends on June 1, 2021. Wis. Stat. §8.15(1).

Court can avoid the "political thicket" of redistricting in three ways. *Gaffney v. Cummings*, 412 U.S. 735, 750 (1973). *First*, and in all events, the Court will not start from a blank slate. Instead, in recognition of the Legislature's constitutionally assigned power to redistrict, the Court can decide that the Legislature's forthcoming redistricting plans are the presumptive remedy, adjusting only if necessary to comply with state and federal law. *Second*, and alternatively, the Court can begin with the existing districts and ask the parties for proposed remedies that adjust those districts as necessary to accommodate shifting populations and to comply with state and federal law. *Third*, whatever the Court's baseline, the Court must reject any adjustments intended to achieve partisan "fairness" or otherwise consider for itself whether there is "too much" partisanship in a redistricting plan. The attempt to achieve "fairness" is a partisan choice in and of itself. Questions of what is "fair" in light of the naturally occurring partisan makeup of the State are not the sort of questions any Court is equipped to answer. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019). *Finally*, the form of the proceedings should require the parties to propose possible remedies for the Court's consideration, supported by briefing and evidence about why the parties' submissions are in furtherance of the Court's guidelines for an appropriate remedy.

I. Factors the Court should consider in evaluating or creating new maps begin with the Legislature's role and end with compliance with state and federal law.

A. The Legislature must have an adequate opportunity to reapportion.

The first factor that this Court must consider in this action is whether there has been an "adequate opportunity" for the Legislature to reapportion the existing districts. Order of Sept. 22,

2021, at 2. For two reasons, the Court cannot presume a future impasse is bound to occur and take over the reapportionment process now before the political branches have completed their task.

As an initial matter, no party can fully know the form that this action should take until the Legislature has had an opportunity to put its redistricting plans before the Governor (as required by this Court's existing precedent). *See Zimmerman*, 22 Wis. 2d at 554-55. If the Governor signs the Legislature's redistricting plans, and if Petitioners were permitted to amend, then the Court would not draw a new plan or adjust the existing plan, except to adjudicate any malapportionment in excess of state or federal limits or any other alleged violation of law. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 237 (1962); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018).

The Legislature, moreover, cannot fully participate in this original action until its redistricting plans are final and passed by both houses of the Legislature. Nor should this Court entertain proposed remedies without the Legislature's full participation. Explained more fully below, the Legislature's redistricting plans are the presumptive remedy, Part I.B, *infra*, or at least must be *a* proposed remedy from which to choose, Part II.A-B, *infra.* So first, the Legislature needs to finish that starting point.

Applied here, there has not been adequate time for the redistricting process to run its course in the Legislature. The Legislature received new census data little more than two months ago. And while the Legislative process is nearly finished, it is not complete. Importantly, "judicial relief becomes appropriate in reapportionment cases *only* when the legislature fails to reapportion according to constitutional requisites in a timely fashion after having had an adequate opportunity to do so." Order of Sept. 22, 2021, at 2. As explained in the Legislature's previously submitted letter

brief, legislative leadership intends to take up redistricting plans before the floor period ending on November 11, 2021.

The Court should not order the parties to submit plans unless there is an impasse, as determined by a gubernatorial veto or the failure of a plan to pass both houses after an adequate time for legislative consideration.

B. The Legislature's redistricting plans are the presumptive remedial plans.

If an impasse results after the Legislature has had adequate time to reapportion, then the next prevailing factor that this Court should consider in evaluating new redistricting plans is deference to the Legislature. *See Upham*, 456 U.S. 37; *Abrams v. Johnson*, 521 U.S. 74 (1997); *Perry v. Perez*, 565 U.S. 388 (2012); *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶17, 249 Wis. 2d 706, 639 N.W.2d 537 (Legislature is "ideally and most properly" the architect of any redistricting plans). Both the state and federal constitutions vest the Legislature specifically with the power to apportion. *See* Wis. Const. art. IV, §3; U.S. Const. art. I, §4, cl. 1. "[R]eapportionment is primarily a matter for legislative consideration and determination," *Reynolds*, 377 U.S. at 586, and "state legislatures have primary jurisdiction over legislative reapportionment," *White*, 412 U.S. at 795.

1. Ordinarily, a court faced with a redistricting dispute would allow the Legislature to remedy the alleged constitutional violation. *See, e.g.*, *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (Wis. 1892); *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35 (Wis. 1892). When a court "declares an existing apportionment scheme unconstitutional," it is "appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a

substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (op. of White, J.). A "legislatively enacted plan should be preferable to one drawn by the courts." *League of United Latin American Citizens v. Perry* (*LULAC*), 548 U.S. 399, 416 (2006) (op. of Kennedy, J.). And even if the Court finds itself "fashioning a reapportionment plan or … choosing among plans," it "should not pre-empt the legislative task or 'intrude upon state policy any more than necessary.'" *White*, 412 U.S. at 795 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)).

Applied here, the Legislature's redistricting plans—passed by both houses comprising the 132 elected representatives for the people of the State of Wisconsin—should be treated as the presumptive remedial plans for Petitioners' malapportionment claims. The Legislature's redistricting plans are an expression of "the policies and preferences of the State" voted upon by the duly elected representatives of the State. *White*, 412 U.S. at 795; *see Henderson v. Perry*, 399 F. Supp. 2d 756, 768 (E.D. Tex. 2005) ("Simply undoing the work of one political party for the benefit of another would have forced this court to make decisions that could not be defended against charges of partisan decision-making … for the lack of a substantive standard."), *rev'd in part on other grounds sub nom.*, *LULAC*, 548 U.S. 399. For example, legislative redistricting plans will reflect policy choices weighing whether to maximize compactness or sacrifice some compactness to follow natural boundaries, or to maximize continuity of representation and avoid pairing incumbents in the same district.[3] The Court cannot

[3] *See, e.g.*, *Sexson v. Servaas*, 33 F.3d 799, 800 (7th Cir. 1994) (consideration of geographical factors may justify drawing less mathematically compact districts); *Karcher v. Daggett*, 462 U.S. 725, 740

"unnecessarily put aside" those legislative choices about how the forthcoming, reapportioned districts ought to be reconfigured, or otherwise "displac[e] legitimate state policy judgments with the court's own preferences." *White*, 412 U.S. at 796; *Perry*, 565 U.S. at 394. Instead, the only question is whether the Legislature's proposed reapportionment solution complies with state and federal law. *Cf. Perry*, 565 U.S. at 393-94. If so, it should be adopted as this Court's remedy for malapportionment.

2. The doctrine of constitutional avoidance is yet another reason why the Court should adopt the Legislature's state legislative districts as the presumptive remedial maps for the State Senate and Assembly if the Court concludes that the plan complies with all legal requirements. *See, e.g.*, *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶64, 357 Wis. 2d 469, 851 N.W.2d 262. Here, there is a lurking constitutional question about whether the Legislature's reapportionment plans are sufficient to effectuate redistricting for the state legislative districts. This Court held in *Zimmerman* that the state legislative districts must also be signed by the Governor because both are "indispensable parts of th[at] legislative process." 22 Wis. 2d at 556-57. But *Zimmerman* is on shaky ground in light of the language of the Article IV, §3 and historical context. *See SEIU, Local 1 v. Vos*, 2020 WI 67, ¶28, 393 Wis. 2d 38, 946 N.W.2d 35 (the "text of the constitution reflects the

---

(1983); *see also White*, 412 U.S. at 792 (approving "policy frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives"); *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688 (D. Ariz. 1992) ("maintenance of incumbents provides the electorate with some continuity"), *aff'd sub nom. Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 507 U.S. 981 (1993).

policy choices of the people, and therefore constitutional interpretation … focuses primarily on the language of the constitution"); *see also State v. Halverson*, 2021 WI 7, ¶22, 395 Wis. 2d 385, 953 N.W.2d 847 ("[W]e focus on the language of the adopted text and historical evidence including "the practices at the time the constitution was adopted, debates over adoption of a given provision, and early legislative interpretation as evidenced by the first laws passed following the adoption.").

The Legislature's power to reapportion its districts is specifically enumerated in the state constitution, distinct from its lawmaking power. And while the Constitution makes the legislative power of Article IV, §1 subject to presentment and possible veto by the Governor, *see* Wis. Const. art. V, §10, the Legislature's reapportionment power does not have the same limitation. *Compare* Wis. Const. art IV, §3, *with id.* §§1, 17. The text regarding that reapportionment power states that "the legislature shall apportion and district anew the members of the senate and assembly…." *Id.* §3. It does not provide that "the legislature should *enact legislation* to apportion anew" or "the legislature shall *by law* apportion anew."[4]

[4] The absence of "by law" is especially significant since such language is used elsewhere in Wisconsin's constitution, including for the Legislature's separate power to reapportion congressional districts in Wisconsin's constitution when it was first ratified. *See* Wis. Const. art. XIV, §10 (1848) ("Two members of congress shall also be elected … and until otherwise provided *by law*, the counties … shall constitute the first congressional district"); *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes"); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but

The Court can avoid revisiting *Zimmerman* and the question of whether the Legislature has already reapportioned if the Court instead adopts the Legislature's remedial plans as the presumptive remedy for Petitioners' malapportionment claims.

C. The remaining factors to consider with respect to the Legislature's presumptive redistricting plans are whether they comply with state and federal law.

If the Court agrees that the Legislature's redistricting plans are the presumptive remedial maps, then compliance with federal and state law are the only additional factors that this Court needs to consider in adopting a remedy. *Cf. Wise*, 437 U.S. at 540 (op. of White, J.) (explaining that a new legislative plan to remedy malapportionment claim "if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution").

1. Equally apportioned. The Court will have to confirm that redistricting plans are properly apportioned, in accordance with federal and state law. The federal and state constitutions

---

omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"); *see also, e.g.*, Wis. Const. art. IV, §11 (legislative sessions to be held "at such time as shall be provided *by law*"); art. VII, §8 (describing circuit court original jurisdiction "[e]xcept as otherwise provided *by law*"); art. V, §3 (describing returns of election for governor and lieutenant governor to "be made in such manner as shall be provided *by law*"); art. V, §6 (gubernatorial pardoning power "subject to such regulations as may be provided *by law*"); art. VI, §2 (describing secretary of state compensation as "provided *by law*"); art. VII, §12(1) (describing circuit court clerk as "subject to removal as provided *by law*"); art. XIII, §12(4) (describing candidate filings for special elections "in the manner provided *by law*").

require reapportionment based on population. U.S. Const. art. I, §2, cl. 1; U.S. Const. amend. XIV; Wis. Const. art. IV, §3; *see Reynolds*, 377 U.S. at 562 ("if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted"); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (describing "equal representation for equal numbers of people [as] the fundamental goal for the House of Representatives"); *Cunningham*, 51 N.W. at 729 ("one of the highest and most sacred rights and privileges of the people of the state, guaranteed to them by ordinance of 1787 and the constitution" is "equal representation in the legislature"); *Zimmerman*, 22 Wis. 2d at 564 ("sec. 3, art. IV, Wis. Const., contains a precise standard of apportionment—the legislature shall apportion districts according to the number of inhabitants").

In Wisconsin, districts are drawn based on total population as reflected by the most recent census. *See* Wis. Const. art. IV, §3 (reapportionment based on "enumeration" and "number of inhabitants").[5] Each district will have an ideal population (taking total population divided by the number of districts).[6] Determining

[5] There are different ways to measure equality. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016). Wisconsin uses total population, *i.e.*, "the number of inhabitants." A State could theoretically redistrict based on voting-age population to better ensure that voters are not diluted *vis a vis* other voters, but the federal constitution does not command it. *Id.*

[6] Wisconsin's population based on the 2020 U.S. Census is 5,893,718 people. The ideal population for a State Assembly district based on total population is 59,533; for State Senate, 178,598; for congressional, 736,715. *See* legis.wisconsin.gov/ltsb/gis/data/.

population deviation from that ideal is determined in the aggregate: "Maximum population deviation is the sum of the percentage deviations from perfect population equality of the most- and least-populated districts. For example, if the largest district is 4.5% overpopulated, and the smallest district is 2.3% underpopulated, the map's maximum population deviation is 6.8%." *Evenwel*, 136 S. Ct. at 1124 n.2.

a. With respect to the state legislative districts, the federal Equal Protection Clause of the Fourteenth Amendment requires apportionment "on a population basis"—meaning districts must be constructed "as nearly of equal population as is practical." *Reynolds*, 377 U.S. at 577; *see also Evenwel*, 136 S. Ct. at 1131. In *Reynolds*, the Supreme Court explained that it was "a practical impossibility" at the time to achieve "an identical number of residents, or citizens, or voters" in each district. 377 U.S. at 577. But the resulting districting plan must be "based substantially on population" so that *Reynolds*'s "equal-population principle" is "not diluted in any significant way." *Id.* at 578. Whether and what amount of population deviation is acceptable will "depen[d] on the particular circumstances of the case." *Id.* In practice, population deviations require an explanation that traditional redistricting criteria (*e.g.* compactness) required some deviation. *See Karcher*, 462 U.S. at 740.

Today, there is a rebuttable presumption that a state legislative map with a total deviation of 10% or less is constitutional, but the goal is always population equality. *See, e.g.*, *Gaffney*, 412 at 750-51 (state legislative map approved with maximum deviation of 7.83% for house districts and 1.81% for senate districts); *White v. Regester*, 412 U.S. 755, 763-64 (1973) (no justification required when total deviation was 9.9%).

b. Likewise, the Wisconsin Constitution demands that districts be as close to equal as possible. Senate and Assembly districts must be "apportion[ed]" by the Legislature "according to the number of inhabitants." Wis. Const. art. IV, §3. This provision guarantees the people "equal representation in the legislature" *Cunningham*, 51 N.W. at 729.

The Wisconsin Constitution does not require mathematical exactness but "as close an approximation to exactness as possible." *Id*. at 730.[7] After *Reynolds v. Sims*, Wisconsin policy was to equalize districts well below the "ten percent" rule of presumptive constitutionality under the federal equal protection clause. This was not accidental. In the wake of *Reynolds*, state law for the 1972 maps stated that "[a]ll senate districts, and all assembly districts, are as equal in the number of inhabitants as practicable" and "no district deviates from the state-wide average for districts of its type by more than one per cent." Wis. Stat. §4.001(1) (1972); *see also* Wis. Stat. §4.001(3) (1983) (articulating 1.72% and 1.05% population deviation benchmark); *Baldus v. Members of the Wis. Gov't Accountability Bd*., 849 F. Supp. 2d 840, 851 (E.D. Wis. 2012) (finding the maximum population deviation for Assembly districts was 0.76% and for Senate districts was 0.62%).

c. With respect to congressional districts, Article I of the U.S. Constitution commands that Representatives shall be chosen "*by*

---

[7] Prior to *Reynolds v. Sims*, this Court approved redistricting plans with significant population deviations. *See, e.g.*, *State ex rel. Reynolds v. Zimmerman*, 23 Wis. 2d 606, 607, 128 N.W.2d 16 (1964); *State ex rel. Bowman v. Dammann*, 209 Wis. 21, 243 N.W. 481, 485 (1932). These substantial deviations were largely the result of the Court's understanding that county lines were "held inviolable"—meaning districts had to be bounded by county lines. *Zimmerman*, 23 Wis. 2d at 606; *see also Cunningham*, 51 N.W. at 730. Courts abandoned that notion that after *Reynolds v. Sims*.

the People of the several States." U.S. Const. art I, §2, cl. 1 (emphasis added). The phrase "by the People" means "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8, 17 (1964). Under the "as nearly as is practicable" standard, States must "make a good-faith effort to achieve precise mathematical equality" when drawing congressional districts. *Karcher*, 462 U.S. at 730 (citation omitted). For congressional redistricting, there is no maximum deviation percentage that can be considered *de minimis*. *See White*, 412 U.S. at 790 n.8. Absolute population equality is the "paramount objective" of congressional reapportionment. *Karcher*, 462 U.S. at 732-33.

Unavoidable population variances are permitted but there must be a "justification" for it. *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). Such justifications include nondiscriminatory application of traditional redistricting criteria, such as "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Karcher*, 462 U.S. at 740.

* * *

The Court's remedy must comply with these equal population principles. Indeed, federal courts have required population equality with more exactness for court-drawn maps. *See Chapman v. Meier*, 420 U.S. 1, 27 & n.19 (1975) (requiring "population equality with little more than de minimis variation," "unless there are persuasive justifications"). The reasons for doing so apply equally here. That higher standard "reflect[s] the unusual position of federal courts as draftsmen of reapportionment plans," *Connor v. Finch*, 431 U.S. 407, 414-15 (1977), even though Legislatures have primary responsibility for reapportionment. When a court prioritizes population equality, that avoids the "taint of arbitrariness or

discrimination" in crafting a malapportionment remedy. *Id.* at 415 (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)). For such court-drawn maps, "any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features." *Chapman*, 420 U.S. at 26. So too here—any map drawn by this Court should prioritize equal population without arbitrarily overriding other "goals of state political policy" embodied in a legislative redistricting plan. *Upham*, 456 U.S. at 43.

2. Fourteenth Amendment and the Voting Rights Act. The Court will also have to confirm that any remedy complies with the Fourteenth Amendment and the Voting Rights Act.

The Fourteenth Amendment of the U.S. Constitution prohibits a redistricting plan from subordinating traditional redistricting factors—"compactness, respect for political subdivisions, partisan advantage, what have you"—to racial considerations. *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). If "racial considerations predominated over others, the design of the district must withstand strict scrutiny"—serving a "compelling interest" and "narrowly tailored" to that end. *Id.* at 1464. One such compelling interest under current U.S. Supreme Court precedent "is complying with operative provisions of the Voting Rights Act of 1965." *Id.*

Section 2 of the Voting Rights Act requires that the political processes are "equally open to participation" for all citizens. 52 U.S.C. §10301(b); *see Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2337-38 (2021). The Court has applied that rule to single-member voting districts where there has been a "dispersal of a group's members into districts" leaving them as "an ineffective minority of voters." *Cooper*, 137 S. Ct. at 1464 (brackets omitted) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986)). Proving vote dilution starts with three threshold preconditions: (1) a

minority group must be sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district; (2) the minority group must be politically cohesive; (3) a district's white majority must vote sufficiently as a bloc to usually defeat the minority's preferred candidate. *Cooper*, 137 S. Ct. at 1470 (citing *Gingles*, 478 U.S. at 50-51). If there are "good reason[s]" to think that these preconditions are met, then there is also "good reason to believe that §2 requires drawing a majority-minority district" under current Supreme Court precedent. *Id.* (citing *Bush v. Vera*, 517 U.S. 952, 978 (1996) (plurality opinion)).

But the VRA does not give *carte blanche* authority to redistrict based on race. *See id*. at 1469-70. There must be a compelling reason for doing so, and any use of race in a reapportionment plan must be narrowly tailored to that end. *See id.*; *Ala. Leg. Black Caucus v. Alabama*, 575 U.S. 254, 279 (2015); *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (race-predominant redistricting "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls").

In these proceedings, as part of ensuring that any judicial order or reapportionment complies with both the Fourteenth Amendment and the Voting Rights Act, the Legislature (and any other party wishing to submit any alternative remedial map) will establish, with support from an expert in the field, that their proposed remedial map complies with both.

3. Number of districts. State and federal law currently provides for 8 congressional districts, 99 State Assembly districts

and 33 State Senate districts. Wis. Stat. §§3.001, 4.001; *see also* 2 U.S.C. §2a(b).[8]

4. "Nested" assembly districts. The Wisconsin Constitution requires State Senate districts to wholly encompass Assembly districts. Wis. Const. art. IV, § 5 (providing that "no assembly district shall be divided in the formation of a senate district"). Because equal apportionment applies to both Senate and Assembly districts and because of the number of Senate and Assembly districts established by law, each Senate district must comprise three Assembly districts.

5. Single-member districts. The Wisconsin Constitution requires single-member legislative districts. Wis. Const. art. IV, §§4, 5. State and federal law both require that each congressional district belongs to a single representative. 2 U.S.C. §2c; Wis. Stat. §3.001.

6. Compactness. The Wisconsin Constitution requires Assembly districts to be "in as compact form as practicable." Wis. Const. art. IV, §4. This Court has not adopted a particular measure of compactness and has observed that compactness is one measure "of securing a nearer approach to equality of representation." *Cunningham*, 53 N.W. at 58. At the same time, in certain areas, achieving a more compact district could also justify the drawing of districts that have slight population deviations. *See Zimmerman*, 23 Wis. 2d at 606-07; *see also Dammann*, 243 N.W. at 484 (perfect population equality is not possible in light of other considerations, including compactness).

---

[8] U.S. Department of Commerce, U.S. Census Bureau, "Apportionment Population and Number of Representatives By State: 2020 Census," www2.census.gov/programs-surveys/decennial/2020/data/apportionment/apportionment-2020-table01.pdf.

7. Contiguity. The Wisconsin Constitution requires Assembly and Senate districts to be contiguous. Wis. Const. art. IV, §4 (requiring Assembly districts to "consist of contiguous territory"); *id.* at §5 (requiring Senate districts to be of a "convenient contiguous territory"). Contiguity means *political* contiguity. If annexation by municipalities creates a municipal "island," the district containing detached portions of the municipality is legally contiguous even if the geography around the municipal island is part of a different district. *See, e.g.*, *Prosser v. Elections Bd.*, 793 F. Supp. 859, 866 (W.D. Wis. 1992) (rejecting argument that Wisconsin's constitution requires "literal" contiguity, and noting "that it has been the practice of the Wisconsin legislature to treat [municipal] islands as contiguous with the cities or villages to which they belong"); *see also* Wis. Stat. §5.15(1)(b), (2)(f)(3); Wis. Stat. §4.001(2) (1972) ("Island territory (territory belonging to a city, town or village but not contiguous to the main part thereof) is considered a contiguous part of its municipality.").

8. County, municipal, or ward boundaries. Last, the Wisconsin Constitution requires Assembly districts to be "bounded by county, precinct, town or ward lines." Wis. Const. art. IV, §4.

Before the U.S. Supreme Court in *Reynolds* announced the one-person-one-vote principle for state legislative districts, this Court interpreted section 4 of article IV of the Wisconsin Constitution to prohibit districts from crossing county boundaries unless the district comprised multiple whole counties. *See, e.g., Zimmerman*, 22 Wis. 2d at 565-66. This resulted in significant and unavoidable population deviations. *See Zimmerman*, 23 Wis. 2d at 623 (largest Assembly district in court drawn plan included more than twice as many inhabitants as smallest district).

After *Reynolds*, Wisconsin Attorney General Robert Warren concluded in a formal opinion that "the Wisconsin Constitution no

longer may be considered as prohibiting assembly districts from crossing county lines, in view of the emphasis the United States Supreme Court has placed upon population equality in electoral districts." 58 Wis. Op. Att'y Gen. 88, 91 (1969). In practice, courts that have subsequently remedied Wisconsin reapportionment disputes have observed that "avoiding the division of counties is no longer an inviolable principle." *Baumgart v. Wendelberger*, Nos. 01-C-1021, 02-C-0366, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002); *see also Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 635 (E.D. Wis. 1982) (calling the maintenance of county boundaries "incompatib[le] with population equality" and thus "of secondary importance").

Nevertheless, respecting municipal boundaries remains a consideration in redistricting plans. As the *Baumgart* court observed, "respect for the prerogatives of the Wisconsin Constitution dictate that wards and municipalities be kept whole where possible." 2002 WL 34127471, at *3; *see also* 60 Wis. Op. Att'y Gen. 101, 106 (1971) (concluding that "insofar as may be consistent with population equality, town and ward lines should be followed"). Accordingly, every judicial map drawn post-*Reynolds v. Sims* has followed ward boundaries. *Baumgart*, 2002 WL 34127471, at *3.

* * *

Each of these requirements have guided the Legislature's redistricting process. 2021 Wis. Senate Joint Res. 63. That is all the more reason that the Legislature's redistricting plans—the manifestation of state policy—ought to be the presumptive remedial plans and accepted as the remedy for Petitioners' malapportionment claims so long as they comply with state and federal law.

II. In the alternative, the presumptive remedial map is the existing map, adjusted as necessary for population shifts.

Alternatively, the Court could begin with the *existing* congressional and legislative districts. The Court would then invite the parties to propose remedial plans that adjust the existing districts as necessary to account for shifting populations and to otherwise ensure that new districts comply with state and federal law. The Court would then accept the remedial plan that is the "least changes" from the existing map. That approach would comport with the Court's limited role in redistricting, respect the traditional redistricting principle of core retention, and mitigate temporal vote dilution.

A. A "least changes" map is an appropriate judicial remedy in a redistricting case.

Judicial restraint must guide any redistricting-related remedy. Remedying Petitioner's malapportionment claims is not a policymaking exercise. Reapportionment—as the term suggests—ordinarily begins with the existing map. *Cf. Perry*, 565 U.S. at 393 ("To avoid being compelled to make such otherwise standardless decisions, a district court should take guidance from the State's recently enacted plan in drafting an interim plan."). Parties then propose modifications to districts as necessary to accommodate shifting population, for a "least changes" or "minimum changes"

redistricting plan to remedy Petitioners' malapportionment claims.[9]

Remedying Petitioners' malapportionment claims with a "least changes" map is consistent with traditional remedial principles. For any court in any case, it is a fundamental tenant of remedies that "[i]njunctive relief should be tailored to the necessities of the particular case." *Bubolz v. Dane Cty.*, 159 Wis. 2d 284, 296, 464 N.W.2d 67 (Ct. App. 1990); *State v. Seigel*, 163 Wis. 2d 871, 890, 472 N.W.2d 584 (Ct. App. 1991) ("because injunctive relief is preventive, not punitive, the relief ordered may not be broader than equitably necessary"). Courts must "limit the solution to the problem." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006); *see also Cunningham*, 51 N.W. at 736 (Pinney, J., concurring) ("it is to be borne in mind that the writ of injunction under our constitution is … of a strictly judicial nature" ensuring that the Court's equitable power does not become "the exercise of political power"). If a plaintiff brought a First Amendment challenge to a state law, for example, a court would not rewrite the law to remedy the plaintiff's First Amendment harm. So too here: "In fashioning a remedy in redistricting cases, courts are

---

[9] Justice Alito summarized the minimum changes approach in his separate opinion in *Cooper v. Harris*:

> When a new census requires redistricting, it is a common practice to start with the plan used in the prior map and to change the boundaries of the prior districts only as needed to comply with the one-person, one-vote mandate and to achieve other desired ends. This approach honors settled expectations and, if the prior plan survived legal challenge, minimizes the risk that the new plan will be overturned.

137 S. Ct. at 1492 (Alito, J., concurring in the judgment in part and dissenting in part).

generally limited to correcting only those unconstitutional aspects of a state's plan." *Johnson v. Miller*, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997); *see also Upham*, 456 U.S. at 42 ("The remedial powers of an equity court must be adequate to the task, but they are not unlimited." (quotation marks omitted)).

Those remedial principles are at their zenith here. Redistricting is a "political thicket." *Gaffney*, 412 U.S. at 750. It is "one of the most intensely partisan aspects of American political life," entailing inherently political decisions. *Rucho*, 139 S. Ct. at 2507. Courts must be especially careful when ordering a redistricting remedy—lest their task be transformed from a judicial one to a legislative one. *Cf. White*, 412 U.S. at 795 (when adherence to "plans proposed by the state legislature ... does not detract from the requirements of the Federal Constitution," courts "should not pre-empt the legislative task nor intrude upon state policy any more than necessary" (quotation marks omitted)); *see, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018) ("The District Court's remedial authority was accordingly limited to ensuring that the plaintiffs were relieved of the burden of voting in racially gerrymandered legislative districts."). By utilizing the existing map as a starting point, "[a] minimum change plan acts as a surrogate for the intent of the state's legislative body," which courts cannot override even in redistricting disputes. *Johnson*, 922 F. Supp. at 1559; *see White*, 412 U.S. at 796 (legislature's "decisions should not be unnecessarily put aside in the course of fashioning relief appropriate to remedy" map's legal defects); *Covington*, 138 S. Ct. at 2555 ("Once the District Court had ensured that the racial gerrymanders at issue in this case were remedied, its proper role in North Carolina's legislative districting process was at an end.").

Choosing among plans and remedying Petitioners' malapportionment claims with a "least changes" plan is not novel. Courts have long used the existing map and then made only those changes "necessary" to remedy constitutional infirmities. *See, e.g.*, *Baumgart*, 2002 WL 34127471, at *7 (describing process as "taking the 1992 reapportionment plan as a template and adjusting it for population deviations"); *Hippert v. Ritchie*, 813 N.W.2d 374, 380 (Minn. 2012) ("Because courts engaged in redistricting lack the authority to make the political decisions that the Legislature and the Governor can make through their enactment of redistricting legislation, the panel utilizes a least-change strategy where feasible."); *Martin v. Augusta-Richmond Cty., Ga., Comm'n*, No. CV 112-058, 2012 WL 2339499, at *3 (S.D. Ga. June 19, 2012) ("chang[ing] only the faulty portions of the benchmark plan, as subtly as possible, in order to make the new plan constitutional"); *Crumly v. Cobb Cty. Bd. of Elections & Voter Registration*, 892 F. Supp. 2d 1333, 1345 (N.D. Ga. 2012) (noting "Court followed the doctrine of minimum change"); *Stenger v. Kellett*, No. 4:11-cv-2230, 2012 WL 601017, at *3 (E.D. Mo. Feb. 23, 2012) ("A frequently used model in reapportioning districts is to begin with the current boundaries and change them as little as possible while making equal the population of the districts."); *Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618, 647 (D.S.C. 2002) ("altering old plans only as necessary to achieve the requisite goals of the new plan"); *Markham v. Fulton Cty. Bd. of Registrations & Elections*, No. 1:02-cv-1111, 2002 WL 32587313, at *6 (N.D. Ga. May 29, 2002) ("Keeping the minimum change doctrine in mind, the Court made only the changes it deemed necessary to guarantee substantial equality and to honor traditional redistricting concerns."); *Bodker v. Taylor*, No. 1:02-cv-999, 2002 WL 32587312, at *5 (N.D. Ga. June 5, 2002) ("The court notes ... that its plan represents only a small, though constitutionally necessary, change in the district lines in

accordance with the minimum change doctrine."); *Below v. Gardner*, 148 N.H. 1, 963 A.2d 785, 794 (2002) ("[W]e use as our benchmark the existing senate districts because the senate districting plan enacted in 1992 is the last validly enacted plan and is the 'clearest expression of the legislature's intent.'"); *Alexander v. Taylor*, 2002 OK 59, ¶23, 51 P.3d 1204 (2002) ("A court, as a general rule, should be guided by the legislative policies underlying the existing plan. The starting point for analysis, therefore, is the 1991 Plan."); *Johnson*, 922 F. Supp. at 1559; *LaComb v. Growe*, 541 F. Supp. 145, 151 (D. Minn. 1982) ("[T]he Court ... takes as the starting point the last configuration of congressional districts. The districts are modified only to serve State policy and satisfy the constitutional mandate that one person's vote shall equal another's."), *aff'd sub nom. Orwoll v. LaComb*, 456 U.S. 966 (1982); *Holmes v. Burns*, No. C.A. 82-1727, 1982 WL 609171, at *20 (R.I. Super. Aug. 29, 1982); *Md. Citizens Comm. for Fair Cong. Redistricting, Inc. v. Tawes*, 253 F. Supp. 731, 734 (D. Md. 1966) ("A basic goal has been to achieve the requirements of equality laid down in the Supreme Court decisions without doing unnecessary violence to the heart of existing districts, county lines, and district lines within the counties and ward lines in the city.").

B. A "least changes" map is necessary to mitigate temporal vote dilution.

Wisconsin's system of staggered State Senate elections is another reason for a "least changes" map for the state legislative districts in particular. The 17 odd-numbered Senate districts will be up for election in 2022 (having last been up for election in 2018), and the 16 even-numbered Senate districts will be up for election in 2024 (having last been up for election in 2020). If a redistricting plan keeps Wisconsin voters in their same districts, they stay on schedule and vote for State Senate every four years. But if a

Wisconsin voter is moved from an odd-numbered district up for election in 2022 and into an even-numbered district up for election in 2024, that voter faces a *six-year* gap between State Senate elections. Her vote has been diluted as compared to other Wisconsin voters who remain in their Senate districts. A "least changes" map mitigates the harm of such temporal vote dilution. Starting from scratch exacerbates it.

Federal courts have referred to this temporal vote dilution as "'disenfranchisement.'" *Prosser*, 793 F. Supp. at 864. The risk of disenfranchisement is a "special consideration[]" that must be kept in mind in Wisconsin redistricting and "is not something to be encouraged." *Baumgart*, 2002 WL 34127471, at *7; *Prosser*, 793 F. Supp. at 866. Because of shifting populations and the one-person-one-vote requirement, some amount of disenfranchisement is inevitable when districts are reapportioned. But this disenfranchisement should be mitigated. One way to do so is to adopt a "least changes" map. *See Baumgart*, 2002 WL 34127471, at *3 (noting that its plan, which took the existing map as the "template," produced the lowest "number of voters disenfranchised with respect to Senate elections").[10]

C. A "least changes" map appropriately prioritizes continuity of representation.

More broadly, a "least changes" map maximizes all Wisconsin voters' continuity of existing representation in the Legislature and in Congress. Continuity of representation, or "core retention,"

[10] Likewise, the Legislature's prioritizing core retention as a redistricting principle will mitigate Senate disenfranchisement. 2021 Wis. Senate Joint Res. 63.

is a long-held and undisputed traditional redistricting criteria.[11] Core retention aims to keep voters in their existing districts to allow for those voters to be represented by the same elected officials over a longer period of time. In a judicial setting, it is "the most significant" of the traditional redistricting criteria. *Martin*, 2012 WL 2339499, at *3 (citing *Upham*, 456 U.S. at 43). In *Karcher*, for example, the U.S. Supreme Court endorsed States' interest in "preserving the cores of prior districts, and avoiding contests between incumbent Representatives." 462 U.S. at 740. Similarly in *White v. Weiser*, the Court explained that States have a legitimate interest in "promot[ing] 'constituency-representative relations,' a policy frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents," among other benefits. 412 U.S. at 791-92.

Courts and social scientists have recognized that there is a societal advantage to being represented by the same individual over a period of time. This advantage is most obvious in the constituent services context:

> Voters develop relationships with their representatives. Long-term representatives have a chance to learn about and understand the unique problems of their districts and to pursue legislation that remedies those problems….the "quality" of at least one political product—namely, representation—is not necessarily improved by competition. On the contrary, novice representatives are likely to be systematically inferior to

[11] *See* Nat'l Conf. of State Legislatures, "Redistricting Criteria" (July 16, 2021), https://bit.ly/2Xv0INC (describing core retention as traditional redistricting criteria); *see also* Ronald Keith Gaddie & Charles S. Bullock, III, *From* Ashcroft *to* Larios*: Recent Redistricting Lessons from Georgia*, 34 Fordham Urb. L.J. 997, 1002 (2007).

> "entrenched" representatives when it comes to the effective representation of their constituents' views.

Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649, 671 (2002); *see also* Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131, 1136 (2005) ("[C]ourts that take account of incumbency do so in order to preserve the constituency-representative relationship that existed under the enjoined plan."). By allowing for "close representation of voter views" and "ease of identifying 'government' and 'opposition' parties," long term representation both promotes "stability in government" and democratic accountability by "mak[ing] it easier for voters to identify which party is responsible for government decisionmaking." *Vieth v. Jubelirer*, 541 U.S. 267, 357-358 (2004) (Breyer, J., dissenting) (collecting sources).

Finally, in an impasse suit, core retention best preserves the Legislature's constitutionally prescribed role in redistricting in a judicial setting. The "cores in existing districts are the clearest expression of the legislature's intent to group persons on a 'community of interest' basis." *Colleton Cty. Council*, 201 F. Supp. 2d at 649. Those legislative prerogatives cannot be overridden merely by initiating a malapportionment suit and placing redistricting into the hands of the courts. *See White*, 412 U.S. at 796; *Upham*, 456 U.S. at 43. For this reason, in past redistricting cycles, courts have recognized and employed core retention as a traditional redistricting criteria to be considered when remedying redistricting-related claims. *See Baldus v. Members of the Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012) (recognizing "core

retention" as a "traditional redistricting criteria"); *Baumgart*, 2002 WL 34127471, at *3 (same).[12]

A "least changes" approach here simultaneously maximizes core retention and minimizes the Court's involvement in the "political thicket" of redistricting by preferring a map that keeps voters in their current districts. *See, e.g.*, *Stenger*, 2012 WL 601017, at *3 ("The 'least change' method is advantageous because it maintains the continuity in representation for each district and is by far the simplest way to reapportion the county council districts.").

* * *

There will inevitably be multiple ways to adjust the existing maps to accommodate shifting populations. All other things equal, the Court should defer to the Legislature's plan. *See White*, 412 U.S. at 796. If not, then the Court itself would be rebalancing the redistricting criteria—compactness, contiguity, communities of interest, protection of incumbents, and so forth—that the Legislature already balanced as part of the redistricting process both now and ten years ago. *See* 2021 Wis. Senate Joint Res. 63; *but see*

[12] For other examples of courts considering core retention, *see, e.g.*, *Abrams*, 521 U.S. at 99-100 (affirming interest in "maintaining core districts"); *Stenger*, 2012 WL 601017, at *3; *Colleton Cty. Council*, 201 F. Supp. 2d at 647 (affirming importance of "protecting the core constituency's interest in reelecting, if they choose, an incumbent representative in whom they have placed their trust"); *Alexander*, 2002 OK 59, ¶23; *Arizonans for Fair Representation*, 828 F. Supp. at 688 ("[T]he maintenance of incumbents provides the electorate with some continuity. The voting population within a particular district is able to maintain its relationship with its particular representative and avoids accusations of political gerrymandering."); *Legislature v. Reinecke*, 10 Cal. 3d 396, 516 P.2d 6, 12 (1973) ("The state may rationally consider stability and continuity in the Senate as a desirable goal which is reasonably promoted by providing for four-year staggered terms.").

White, 412 U.S. at 796; *Covington*, 138 S. Ct. at 2554-55; *Upham*, 456 U.S. at 43.

III. The Court cannot consider partisanship when evaluating proposed remedies.

The partisan makeup of redistricting plans is not a valid factor for the Court to apply in evaluating or creating new maps. There is no judicially manageable standard for rejecting a map as overly partisan or approving a map as more "fair" or "balanced." *See Rucho*, 139 S. Ct. at 2498-2501. If there is no judicially manageable way for a court to evaluate existing redistricting plans on these partisan measures (as *Rucho* explained), then it necessarily follows that this Court cannot craft a *remedy* for Petitioners' malapportionment claim based on partisan measures.

Time and again, courts have refused to referee lawsuits challenging the use of political considerations as unlawful. There are "no legal standards to limit and direct" judicial decisionmaking in this "most intensely partisan aspect[] of American political life." *Id.* at 2507; *see Gill v. Whitford*, 138 S. Ct. 1916, 1926-29 (2018). Considerations of partisanship in redistricting has been "lawful and common practice" dating back to the Founding. *Vieth*, 541 U.S. at 286 (plurality op.); *see Rucho*, 139 S. Ct. at 2494-96. Even if it weren't, whether a redistricting map is "too partisan" or "fair enough" cannot be "judged in terms of simple arithmetic." *Fortson v. Dorsey*, 379 U.S. 433, 440 (1965) (Harlan, J., concurring). Courts cannot "even begin to answer the determinative question": "How much" partisan influence "is too much?" *Rucho*, 139 S. Ct. at 2501.

Importantly, "fairness" is not a component of any state or federal equal protection analysis. *See F.C.C. v. Beach Comms., Inc.*, 508 U.S. 307, 313 (1993) ("equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative

choices"); *Mayo v. Wis. Injured Patients & Families Compensation Fund*, 2018 WI 78, ¶41, 383 Wis. 2d 1, 914 N.W.2d 678. The equal protection clause does not, for example, "require[] proportional representation" or require "district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote would be." *Rucho*, 139 S. Ct. at 2499 (quoting *Davis v. Bandemer*, 478 U.S. 109, 130 (1986) (plurality op.)). Numerous other standards for evaluating partisan "unfairness" have been rejected as well. *See id.* at 2496-98, 2502-04; *Gill*, 138 S. Ct. at 1926-29 (cataloguing rejected standards).

Moreover, "political fairness" is an impossible standard by which to evaluate redistricting maps because "it is not even clear what fairness looks like" in the context of reapportionment. *Rucho*, 139 S. Ct. at 2500. A "large measure of 'unfairness'" is baked into single-member, winner-take-all districts. *Id.* Voters tend to live around like-minded voters, meaning individual districts will not necessarily replicate the partisan makeup of Wisconsin state-wide. *See Bandemer*, 478 U.S. at 130 (plurality op.); *Vieth*, 541 U.S. at 289-90 (plurality op.).

Without a legal standard to evaluate "fairness," there is no principal to apply that would "meaningfully constrain the discretion of courts." *Rucho*, 139 S. Ct. at 2500 (quoting *Vieth*, 541 U.S. at 291 (plurality op.)). Evaluating remedial plans for partisan fairness requires the court to make a policy determination reserved exclusively for legislatures, *see id.* at 2494-97, and one that is "of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. There is simply no constitutional standard authorizing "courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end." *Rucho*, 139 S. Ct. at 2499.

Applied here, there no reason for this Court to consider partisanship in remedying a malapportionment claim. *White*, 412 U.S. at 795 (cautioning courts not to "pre-empt" or "intrude" upon state policy). Nor would there be any judicially manageable way for this Court to do so. *Rucho*, 139 S. Ct. at 2500-01. If this Court were to attempt to consider partisanship—even "fairness"—it would be plunging unnecessarily into the political thicket of redistricting. *See Gaffney*, 412 U.S. at 749 (cautioning against removing redistricting from "legislative hands," such that it is recurringly "performed by federal courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan"). It should not be a factor considered by this Court in remedying Petitioners' claims.

IV. Nature of the proceedings.

A. Timing of proceedings

For the reasons stated in the Legislature's letter brief regarding timing, there is ample time remaining for this court to review and approve redistricting plans. Right now, the Legislature needs time for the redistricting process—which is near completion—to finish. Once the Legislature's redistricting process is complete, and if there is an impasse, the Legislature and the other parties will need time to prepare their remedial submissions, a proposal for which is detailed more fully below.

B. Form of proceedings

As in most redistricting disputes, the Court can choose among remedies proposed by the parties. That will entail remedial submissions by the parties. It could also necessitate a short hearing limited to any disputed facts regarding the proposed remedial

plans. That hearing could be overseen by this Court or a special master. *See* Wis. Stat. §§751.09, 805.06; *see also* Non-Party Br. of Daniel Suhr at 8 (Sept. 7, 2021) (collecting examples). Depending on the Court's resolution of the questions presented here, those submissions could take one two forms—

If the Court agrees that the Legislature's redistricting plans are the presumptive remedy, then the submissions will entail (A) the Legislature's redistricting plans, supported by briefing and expert declarations or reports that detail their compliance with state and federal law; (B) other parties' responses, supported by briefing and expert declarations or reports detailing why adjustments are necessary to comply with state and federal law.

If the Court instead begins with the existing redistricting plans, then the submissions will entail (A) any party's proposed "least changes" map, supported by briefing and expert declarations or reports detailing adherence to a "least changes" remedy and compliance with state and federal law; (B) any party's responsive submissions addressing other proposed plans' adherence to a "least changes" remedy and compliance with state and federal law. The Court would then choose between the proposed "least changes" remedies.

With respect to the timing of those submissions and any potential hearing, the Legislature proposes the following:

1. November 4: Parties submit joint stipulation of facts and law and identify anticipated disputed facts.
2. By December 1, and only in the event of an impasse: This Court issues an interim order providing guidance on the questions briefed herein. That order will give the parties a framework for their subsequent submissions.

3. December 21: Parties' opening submission. The opening submission shall comprise: (a) short pre-hearing brief (< 3,300 words), (b) remedial map (if applicable), (c) expert witness declarations or reports in support of any remedial map. Any party who proposes a remedial map (or any alternative to the Legislature's map) must support that proposed remedy with argument and expert declaration(s) or report(s) explaining the proposed plans' compliance with state and federal law.[13]

4. January 12: Parties' responsive submission. The responsive submission shall comprise: (a) short pre-hearing response brief (< 5,000 words), (b) responsive expert declaration(s) or report(s) regarding other proposed remedial maps.

5. January 14: Parties submit supplemental joint stipulation of facts and law and disputed facts.

6. January 21: Parties submit written direct examination of any expert witness or other fact witness to testify at hearing before the Court or a referee, if any. Any witness would then be made available for live cross-examination and re-direct at hearing.

7. January 25 to 28: Hearing limited to disputed issues of fact, if any.

[13] If the Court agrees that the Legislature's map is the presumptive remedial map, then any alternative districting proposals must be supported by evidence and argument that a deviation from the Legislature's presumptive plans is necessary to comply with state or federal law.

8. February 1: Short post-hearing briefs (simultaneous) on disputed issues of fact, if any.

9. February 8: Closing arguments regarding disputed issues of fact, if any.

10. February 18: Decision resolving disputed issues of fact, if any.

11. February 25: Supplemental briefs (simultaneous), if necessary.

12. Week of March 7: Argument, if necessary.

13. Week of April 4 or earlier: Final order and decision.

CONCLUSION

For the foregoing reasons, the Legislature should be permitted to complete the redistricting process to determine whether there will be an impasse. Once that occurs, and if there is an impasse, then the Legislature's redistricting plans should be the presumptive remedial plan for any malapportionment claim, so long as those redistricting plans comply with state and federal law. In the alternative, the existing districts should be the starting point for any remedial map, to be adjusted as necessary to accommodate the shifting population and to comply with state and federal law.

Dated this 25th day of October, 2021.

Respectfully submitted,

Electronically Signed By
Kevin M. St. John

CONSOVOY MCCARTHY PLLC
Jeffrey M. Harris*
Taylor A.R. Meehan**
James P. McGlone***
1600 Wilson Boulevard, Ste. 700
Arlington, Virginia 22209
703.243.9423
jeff@consovoymccarthy.com
taylor@consovoymccarthy.com
jim@consovoymccarthy.com

** Admitted pro hac vice*
*** Admitted pro hac vice; licensed to practice in Ill. & D.C.*
**** Admitted pro hac vice; licensed to practice in Mass.*

BELL GIFTOS ST. JOHN LLC
Kevin M. St. John, SBN 1054815
5325 Wall Street, Ste. 2200
Madison, Wisconsin 53718
608.216.7990
kstjohn@bellgiftos.com

LAWFAIR LLC
Adam K. Mortara, SBN 1038391
125 South Wacker, Ste. 300
Chicago, Illinois 60606
773.750.7154
mortara@lawfairllc.com

Attorneys for Intervenor-Respondent, The Wisconsin Legislature

CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c) for a brief. This brief uses a proportionally spaced serif font, with margins and line spacing greater than or equal to that specified by rule. Excluding the caption, table of contents, table of authorities, signatures, and these certifications, the length of this brief is 10,285 words as calculated by Microsoft Word.

Dated this 25th day of October, 2021.

Respectfully submitted,

Electronically Signed by
Kevin M. St. John

BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Suite 2200
Madison, Wisconsin 53718
608.216.7990
kstjohn@bellgiftos.com

Attorney for the
Wisconsin Legislature

CERTIFICATION OF FILING AND SERVICE

I certify that I caused the foregoing brief to be filed with the Court as attachments to an email to clerk@wicourts.gov, sent on or before 12:00 noon and dated this day. I further certify that I will cause a paper original and 10 copies of these materials with a notation that "This document was previously filed via email" to be filed with the clerk no later than 12:00 noon on Tuesday, October 26, 2021.

I further certify that on this day, I caused service copies of these documents to be sent by email to all counsel of record who have consented to service by email. I caused service copies to be sent by U.S. mail and email to all counsel of record who have not consented to service by email.

Dated this 25th day of October, 2021.

Respectfully submitted,

Electronically Signed by
Kevin M. St. John

BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Suite 2200
Madison, Wisconsin 53718
608.216.7990
kstjohn@bellgiftos.com

Attorney for the
Wisconsin Legislature