No. 21A490

IN THE SUPREME COURT OF THE UNITED STATES

CONGRESSMAN GLENN GROTHMAN, CONGRESSMAN MIKE GALLAGHER, CONGRESSMAN BRYAN STEIL, CONGRESSMAN TOM TIFFANY, CONGRESSMAN SCOTT FITZGERALD,

Applicants,

v.

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

Respondents.

On Emergency Application for Stay, Or In The Alternative, On Petition for Writ of Certiorari to the Wisconsin Supreme Court

APPENDIX I OF II

TO HUNTER RESPONDENTS' RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION

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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.

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DATED: March 15, 2022

Respectfully submitted,

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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.

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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,

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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]

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[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,

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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

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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,

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No. 2021AP1450

In the Supreme Court of Wisconsin

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS, *and* RONALD ZAHN,
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.

On Petition To The Supreme Court To
Take Jurisdiction Of An Original Action

NONPARTY BRIEF OF CONGRESSMEN GLENN GROTHMAN, MIKE GALLAGHER, BRYAN STEIL, TOM TIFFANY, AND SCOTT FITZGERALD SUPPORTING PETITIONERS

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INTRODUCTION

This Court's disposition of this Petition may well determine whether Wisconsin will cede a core aspect of its sovereignty to the federal courts. Less than three weeks ago, a group of voters filed a lawsuit in the U.S. District Court for the Western District of Wisconsin, raising population-equality objections to Wisconsin's congressional districts,[1] and asking the federal court to redraw these districts in the event of a deadlock between the Legislature and the Governor. The federal court—while still considering a motion to dismiss—has now required the parties to "confer on full case schedule and to submit a joint proposal," explaining that, "given the delay in the release of the 2020 census results with the 2022 mid-terms approaching, time is particularly short." *Hunter v. Bostelmann*, No.21-cv-512-jdp-ajs-eec, Dkt.24 at 1, 3 (W.D. Wis. Aug. 27, 2021). The upshot is that, absent a clear indication from this Court that the Wisconsin courts *will* resolve the population-based concerns with Wisconsin's congressional districts if a deadlock occurs, federal courts may well complete this task in the next few months, undermining our State's sovereignty.

This Court should make clear that Wisconsin does not need federal courts to draw our congressional districts in the

[1] While this Brief refers throughout to Wisconsin's congressional districts, all of the considerations discussed herein also apply to the Assembly and Senate districts.

event of a political deadlock, as it is this Court's unquestioned prerogative under *Growe v. Emison*, 507 U.S. 25 (1993), following one of three available paths. First, and most preferably, this Court should grant the Petition and then stay the case until it is clear whether the Legislature and Governor will be able to come together on a congressional map. Second, and alternatively, this Court should use its superintending authority to convert the Petition into one asking for the appointment of a three-judge panel under 2011 Act 39, and then appoint such a panel immediately. Finally, and at minimum, if this Court is inclined to deny the Petition entirely, it should make clear in that denial order that it *will* grant a petition for original action or make an Act 39 panel appointment if a political deadlock occurs.

STATEMENT OF INTEREST

Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald (hereinafter "the Congressmen"), who also intend to be candidates for re-election in 2022, are duly elected Representatives to the U.S. House of Representatives from five of Wisconsin's eight congressional districts. The Congressmen have "special knowledge [and] experience" in the redistricting issues raised by the Petition, which will "render a brief from [them] of significant value to the court." Wis. Sup. Ct. IOP III.B.6.c. By virtue of their status as elected members of Congress, the Congressmen each have the solemn duty to "promote and

protect their [constituents'] interests," requiring the Congressmen to develop "close[ ] relations" and "common feeling[s] and interests" with the citizens of the districts from which they were elected. *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1892); *accord McCormick v. United States*, 500 U.S. 257, 272 (1991). That is why federal courts have regularly permitted Congressmen to intervene in redistricting actions related to their maps. *See e.g.*, *Baldus v. Members of Wis. Gov't Accountability Bd.*, No. 11-CV-562 JPS-DPW-RMD, 2011 WL 5834275 (E.D. Wis. Nov. 21, 2011); *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572 (6th Cir. 2018).[2]

ARGUMENT

I. This Court Should Act Quickly And Unequivocally To Make Clear That Wisconsin Courts *Will* Carry Out Their Constitutional Redistricting Responsibility In The Event Of A Political Deadlock

A. As this Court explained in *Jensen v. Wisconsin Elections Board*, 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam), under the principles that the U.S. Supreme Court explicated in *Growe*, "state government—legislative *and judicial*—[i]s primary in matters of reapportionment and redistricting," because "[t]he people of this state have a strong interest in a redistricting map drawn by an institution of *state*

[2] While the Congressmen file this Nonparty Brief today, consistent with this Court's August 26, 2021, Order, they would intend to intervene in any granted original action or Act 39 action regarding their districts.

government—ideally and most properly, the legislature, secondarily, *this court*." *Jensen*, 2002 WI 13, ¶¶ 17–18 (emphases added). There is "no reason for Wisconsin citizens to have to rely upon the federal courts" instead of the state courts to adjudicate redistricting disputes because resolving such disputes is Wisconsin courts' constitutional responsibility. *Id.* ¶ 8 (citation omitted; emphasis omitted); *see State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 564, 571, 126 N.W.2d 551 (1964).

While state courts have primacy over redistricting disputes in the event of a political deadlock, they can lose that primacy—and thus improperly surrender the State's sovereignty—by failing to make clear that they will timely resolve redistricting issues and thus protect the citizens' constitutional rights. *Growe*, 507 U.S. at 33–34. As the U.S. Supreme Court has explained, *only* where there is "evidence that [ ] state branches"—including the state judiciary—"will fail timely to perform th[eir] duty" may a "federal court" act in this sensitive, sovereignty-implicating field. *Id.* at 34. Unfortunately, given the prior lack of such signals from the Wisconsin courts in recent decades, the federal courts have assumed the predominant role in adjudicating Wisconsin's redistricting controversies, in violation of Wisconsin's core sovereignty. *See Jensen*, 2002 WI 13, ¶¶ 7, 9; Legislative

Reference Bureau, *Redistricting In Wisconsin 2020: The LRB Guidebook* 58–73 (2020).[3]

B. In light of the above-described principles, as well as the time-sensitive exigencies of this particular redistricting cycle, this Court should act quickly and unequivocally to make clear that the Wisconsin courts *will* carry out their *Growe* responsibilities in the event of a political deadlock.

Time is of the essence for this Court to make clear that the Wisconsin courts will *not* "fail timely to perform th[eir] duty" in the event of a political deadlock. *Growe*, 507 U.S. at 34. As noted, *see supra* p. 1, a federal court is currently considering a lawsuit that raises equal-population-based objections to Wisconsin's congressional maps. That federal court has—even while considering a motion to dismiss—required the parties to try to come to an agreement on how to proceed quickly on the merits, given the upcoming mid-term elections and the delays in the Census Bureau's delivery of census data. *Id.* If this Court does not make clear that Wisconsin courts will timely act if a political deadlock occurs, then the federal court may feel obliged to take it upon itself to act, thereby depriving Wisconsin of a core portion of its sovereignty.

[3] Available at https://docs.legis.wisconsin.gov/misc/lrb/wisconsin_elections_project/redistricting_wisconsin_2020_1_2.pdf (all websites last accessed Sept. 7, 2021).

This Court should also act to discourage the improper "federal-state court 'forum shopping'" that the plaintiffs in the federal court action have engaged in. *Jensen*, 2002 WI 13, ¶ 24. Despite the availability of the Wisconsin state courts—and *Growe*'s and *Jensen*'s express holdings that state courts have priority over such matters—the federal plaintiffs "ma[de] an early forum-choice decision," *id.* ¶ 13, and "race[d]" to federal court to try "to beat" the Wisconsin state courts to the redistricting "finish line," *Growe*, 507 U.S. at 37. There is, of course, no serious doubt that the federal plaintiffs avoided the Wisconsin state courts specifically to sidestep this Court's involvement in any redistricting litigation, given that the lead counsel for the federal plaintiffs in *Hunter* has filed multiple equal-population challenges in state courts in this very election cycle. *See* Compl., *Carter v. Degraffenreid*, No. 132 MD 2021 (Pa. Commw. Ct., filed Apr. 26, 2021) (Pennsylvania); Compl., *English v. Ardoin*, No. 2021-03538-C § 10 (La. Civ. Dist. Ct., filed Apr. 26, 2021) (Louisiana); Compl., *Sachs v. Simon*, No. 62-CV-21-2213 (Minn. Dist. Ct., filed Apr. 26, 2021) (Minnesota); *see generally* Reid Wilson, *First Redistricting Lawsuits Filed By Democratic Group*, The Hill (Apr. 27, 2021, 10:28 AM).[4]

[4] Available at https://thehill.com/homenews/campaign/550439-first-redistricting-lawsuits-filed-by-democratic-group.

II. This Petition Presents Three Paths For Making Clear That The Wisconsin Courts Will Carry Out Their Constitutional Responsibility If A Deadlock Occurs

This Petition presents this Court with the proper vehicle for making clear that the Wisconsin courts will carry out their constitutional responsibility. The Congressmen below discuss three paths that this Court could take to make clear that Wisconsin courts will carry out their redistricting function if a political deadlock occurs.

A. This Court Should Grant The Petition And Then Stay The Case Until The Political Branches Act

1. This Court considers several factors when deciding whether to grant a petition for an original action. Wis. Const. art. VII, § 3; *see generally* Wis. Sup. Ct. IOP III. Most importantly, this Court considers whether the petition raises questions of "*publici juris*." *Petition of Heil*, 230 Wis. 428, 443–46, 284 N.W. 42 (1939). Additionally, this Court may also consider whether the Petition raises any "exigency." *Id.*

This Court has repeatedly recognized that petitions asserting redistricting claims raise questions of *publici juris*, thus readily satisfying this Court's original-jurisdiction criteria. Indeed, "this court has taken original jurisdiction in cases concerning legislative redistricting on no fewer than five previous occasions." *Jensen*, 2002 WI 13, ¶ 18 (collecting original action cases). This is because "[r]edistricting determines the political landscape for the ensuing decade and thus public policy for years beyond," *id.* ¶ 10, and also "raises

important state and federal legal and political issues that go to the heart of our system of representative democracy," *id.* ¶ 4; *accord Cunningham*, 51 N.W. at 729–30 ("highest and most sacred rights and privileges of the people;" "a matter of the highest public interest").

As to the exigency factor, redistricting disputes often require expeditious resolution because of the need for "clear, authoritative map[s] of [ ] districts going into the upcoming election season." *Jensen*, 2002 WI 13, ¶ 19. There is often a short time window between the federal government's delivery of "census enumeration" data necessary for the State to draft redistricting maps and "the official commencement of the next election season," which depends on those new maps. *See id.* ¶¶ 12, 21. So, if the Legislature and the Governor "gridlock" over the "politically sensitive task [of] redistricting" and fail to enact a plan, the court subsequently tasked with breaking that deadlock must adopt a map expeditiously, so as not to "delay and disrupt the [upcoming] election season." *Id.* ¶¶ 13, 16, 21. Notably, as *Jensen* recognized, the need for such accelerated court action could functionally prohibit this Court's review if a federal court has already begun a substantial review of an identical redistricting dispute for some time. *See id.* ¶¶ 16, 22. So, given those timing realities, this Court has recognized the need to "invoke[ ]" its jurisdiction "earlier," so that "the public interest might . . . be[ ] served by [its] hearing and deciding th[e] case." *Id.* ¶ 17.

2. The Petition plainly satisfies this Court's original-jurisdiction criteria, as it presents issues of *publici juris*: it is a "reapportionment or redistricting case," which, "by definition," implicates "the sovereign rights of the people of this state." *Jensen*, 2002 WI 13, ¶ 17. Petitioners raise three redistricting or reapportionment claims relating to the unequal population of Wisconsin's congressional districts that will result in the event of a deadlock between the Legislature and the Governor. *See* Pet.1; *Reynolds*, 22 Wis. 2d at 562–64.

The Petition also satisfies the "exigency" consideration for granting an original action petition because the people of Wisconsin are entitled to "clear, authoritative map[s] of [ ] districts going into the upcoming election season." *Jensen*, 2002 WI 13, ¶ 19. Given the delay in the Census Bureau's delivery of census data, this Court will need to act especially quickly to ensure that a constitutional congressional map is in place for the 2022 mid-term cycle, in the event of a deadlock. Pet.15–18. If this Court awaits that deadlock and only then considers and grants a new petition for original action and then adjudicates inevitable motions to intervene from interested parties (including nonparties such as the Congressmen), before reaching the merits, valuable weeks will be lost. It would be far preferable for this Court to grant this Petition now, resolve all motions to intervene, and then stay the case pending a political deadlock. This would put this Court in the best position to perform its constitutional duty, while also sending a clear signal to the federal courts

that Wisconsin courts *will* act "timely to perform th[eir] duty" in the event of a political deadlock. *Growe*, 507 U.S. at 34.

Notably, the current status of the federal litigation discussed above, *see supra* p. 1, is entirely different from the stage of the federal litigation in *Jensen*. In *Jensen*, the federal litigation had begun "over a year ago" and was "well along," with the federal court having "established a schedule that contemplate[d] discovery, pretrial submissions and [ ] trials." 2002 WI 13, ¶¶ 13–14. Here, in marked contrast, the federal litigation is in its very infancy. Thus, unlike in *Jensen*, this Court granting the Petition in this case would not involve any "unjustifiable duplication of effort and expense" of, or interference with, the federal court. *Id.* ¶ 18.

Finally, Respondents' primary argument against this Court granting the Petition—that redistricting claims may be "fact-finding intensive," Resp.4; *see* Resp.5–15—does not support their position. As a threshold matter, this case could well not include any such factual complications if this Court adopts from the outset Petitioners' entirely sensible suggestion of simply ordering "the least amount of changes necessary to the existing maps as are necessary to meet the requirement of equal population and the remaining traditional redistricting criteria." Pet. Mem. 8. But if this Court does determine that adjudicating this original action will involve a significant number of factual disputes, this Court could always "refer issues of fact . . . to a circuit court

or referee for determination," Wis. Stat. § 751.09, thereby resolving every single one of Respondents' practical concerns.

B. Alternatively, This Court Should Convert The Petition Into A Filing Under Act 39 And Appoint A Three-Judge Panel Immediately

In enacting Act 39 in 2011, the Legislature created a special procedure for adjudicating redistricting disputes. Act 39 requires this Court to appoint a three-judge panel of circuit-court judges to hear redistricting challenges and enables litigants to petition this Court directly to review any order of that panel. 2011 Act 39, §§ 28–29 (creating Wis. Stat. §§ 751.035 & 801.50(4m)). In particular, Section 801.50(4m) states that "[v]enue of an action to challenge the apportionment of any congressional or state legislative district shall be as provided in [Wis. Stat. §] 751.035." Wis. Stat. § 801.50(4m). Section 751.035, in turn, provides that "the supreme court shall appoint a panel consisting of 3 circuit court judges to hear" any action challenging apportionment under Section 801.50(4m), with "one judge from each of 3 circuits." Wis. Stat. § 751.035(1). "An appeal from any order or decision issued by the [three-judge] panel . . . may be heard by the supreme court and may not be heard by a court of appeals for any district." Wis. Stat. § 751.035(3).

The Congressmen strongly believe that this Court should grant the Petition because this case plainly satisfies this Court's original action criteria. *Supra* Part II.A. Further, granting the Petition would allow this Court to establish the

guiding principle for any remedial map at the outset of the litigation, including potentially mandating "the least amount of changes necessary to the existing maps as are necessary to meet the requirement of equal population and the remaining traditional redistricting criteria," Pet. Mem. 8, rather than having to invalidate a court-drawn remedial map created under different, erroneous principles.

Having said that, if this Court is inclined to deny the Petition, the Congressmen respectfully submit that this Court should instead use its broad supervising authority to "issue all writs necessary in aid of its jurisdiction," Wis. Const. art. VII, § 3(2)—including "control[ing] the course of ordinary litigation in [the] inferior courts," *State ex rel. CityDeck Landing LLC v. Cir. Ct. for Brown Cty.*, 2019 WI 15, ¶ 6, 385 Wis. 2d 516, 922 N.W.2d 832 (citation omitted)—to appoint a three-judge panel under Act 39 for this dispute. In particular, if this Court would prefer that a three-judge court adjudicate Petitioners' population-based claims in the first instance, with prompt review in this Court, this Court should construe the Petition as the filing of an action under Act 39, immediately appoint a three-judge panel, and then instruct that panel to stay the case (after deciding any intervention motions) to see if a deadlock will occur. That would have many of the benefits of granting the Petition discussed above, including making clear that Wisconsin courts *will* "timely [ ] perform th[eir] duty" to adjudicate the equal-population-

based problems with the current congressional maps, in the event of a political deadlock. *Growe*, 507 U.S. at 34.

C. At The Minimum, If This Court Were To Deny The Petition, It Should Make Clear That It Will Either Grant A Similar Petition Or Appoint A Panel Under Act 39 If Deadlock Occurs

If this Court does not wish to take either of the paths described immediately above, it should—at the absolute minimum—make clear that it will grant a petition for original action and/or appoint promptly a three-judge panel under Act 39 if a political deadlock occurs. Such unambiguous clarity is *absolutely essential* given the speed with which such a redistricting case would need to be adjudicated, given the fast-approaching 2022 mid-term election cycle, as well as the reality that a federal court is considering right now whether to stay its hand under *Growe*. Again, an outcome-determinative factor for the federal court in making that decision is whether State courts will "timely [ ] perform th[eir] duty," if a political deadlock occurs. *Growe*, 507 U.S. at 34.

CONCLUSION

This Court should grant the Petition, or alternatively, take one of the other actions described above to ensure that Wisconsin courts will resolve any redistricting dispute in the event that a political deadlock occurs.

Dated: September 7, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) and this Court's August 26, 2021 Order in this case for a brief produced with a proportional serif font. *See* Order, No.2021AP1450-OA (Wis. Aug. 26, 2021). The length of this Brief is 3,020 words.

Dated: September 7, 2021.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12), AND OF SERVICE

I hereby certify that:

I have submitted an electronic copy of this Brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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: September 7, 2021.

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October 6, 2021

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Re: *Johnson v. Wisconsin Elections Commission*, No.2021AP1450-OA (Wis.)

Dear Clerk:

Pursuant to this Court's September 22, 2021 Order, proposed-Intervenor-Petitioners Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald (the "Congressmen") submit this letter brief addressing "[w]hen (identify a specific date) must a new redistricting plan be in place, and what key factors were considered to identify this date." Order at 3, *Johnson v. WEC*, No.2021AP1450-OA (Wis. *amended* Sept. 24, 2021). The Congressmen respectfully submit that the remedial redistricting plans may well be needed by **February 28, 2022**, based upon the following factors and considerations.

In *Hunter v. Bostelmann,* Nos.3:21-cv-512, *et al.* (W.D. Wis.), Respondents (collectively, the "Commission") explained their view that March 1, 2022, is the date by which they need new redistricting plans to administer the upcoming elections in 2022. *E.g.*, Answer, *Hunter*, Dkt.41 at 2. The Commission argued that such a date is needed given the various deadlines for the upcoming 2022 elections. *Id.* In particular, the period for candidates to circulate nominating petitions for those elections begins on April 15, 2022; the partisan primary for those elections is scheduled for August 9, 2022; and the elections themselves are scheduled for November 8, 2022. *Id.*; *see* Wis. Stat. § 8.15(1); Wis. Elections Comm'n, *Fall 2022 General Election*.[*]

While the Congressmen cannot independently verify whether the Commission's March 1, 2022 date is correct, the federal court in *Hunter* appears inclined to defer to the Commission on this timing, ***and so this Court issuing remedial redistricting plans by February 28—the day before March 1—may well be necessary to avoid federal court usurpation of Wisconsin's redistricting process***. *See* Order at 3, *Hunter*, Dkt.75 ("If the State enacts maps by March 1, 2022, the court may be able to refrain from issuing a judgment in this case.").[†] In particular, given

[*] Available at https://elections.wi.gov/elections-voting/2022/fall (last accessed October 6, 2022).

[†] To be clear, the Congressmen believe that any such usurpation would be unlawful, and would challenge such usurpation should it occur, including on appeal in federal court.

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the federal court's apparent deference to the March 1 deadline, this Court issuing its remedial redistricting plans by February 28 may be necessary to protect Wisconsinites' right to "a redistricting map drawn by an institution of state government—ideally and most properly, the legislature, secondarily, this court." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶¶ 17–18, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam). If this Court were to wait until after February 28, the federal court may well conclude—however incorrectly and without legal justification—that the State of Wisconsin has "fail[ed] timely to perform" its redistricting "duty," and proceed to adopt its own remedial maps on March 1. *Growe v. Emison*, 507 U.S. 25, 34 (1993). That would inflict grave sovereign injury on our State, as there is "no reason for Wisconsin citizens to have to rely upon the federal courts" in this area. *Jensen*, 2002 WI 13, ¶ 8 (citation omitted; emphasis omitted).

The Congressmen may well take a different approach if the federal court granted their request to dismiss, *see* Congressmen Statement, *Hunter*, Dkt.91, No.3:21-cv-512 (W.D. Wis. Oct. 1, 2021), or otherwise made clear that it would not adopt remedial maps on March 1. However, at this point, the federal court has denied the Congressmen's Motion To Dismiss, *Hunter*, Dkt.60 at 6–8, and has indicated, at least tentatively, that it will "refrain from issuing a judgment in this case" only until March 1, Order at 3, *Hunter*, Dkt.75, No.3:21-cv-512.

A February 28, 2022 date for this Court to adopt remedial redistricting plans would provide this Court with sufficient time to adjudicate this case. If the Legislature and Governor deadlock, this case will involve an undisputable violation of the "one person, one vote" principle by all of the extant maps, given the changes reported by the U.S. Census. Thus, the only meaningful proceeding will likely be over the appropriate remedial maps. To that end, this Court could set a reasonable, simultaneous briefing schedule—*far* in advance of February 28—for the parties and *amici* to submit and advocate for their proposed remedial maps, as well as provide any supporting legal arguments and other materials that those parties deem helpful. Then, this Court could provide for simultaneous response briefs from all parties and *amici* to respond soon thereafter. The Congressmen further respectfully submit that this Court's schedule would not need to permit discovery among the parties or fact-finding proceedings before a special master, Wis. Stat. § 751.09, especially if, as the Congressmen propose, this Court "undert[akes] its redistricting endeavor in the most neutral way it could conceive—by taking the [immediately previous] reapportionment plan as a template and adjusting it for population deviations," *Baumgart v. Wendelberger*, Nos.01-C-0121, 02-C-0366, 2002 WL 34127471, at *7 (E.D. Wis. May 30, 2002). That said, if this Court were to conclude that discovery and/or special-master proceedings would be helpful, the February 28 date would allow sufficient time for such proceedings.

Sincerely,

Misha Tseytlin

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DEPARTMENT OF JUSTICE

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October 6, 2021

Ms. Sheila T. Reiff
Clerk of Supreme Court
110 East Main Street, Suite 215
Madison, WI 53701-1688

Re: *Johnson v. Wisconsin Elections Commission*,
Case No. 2021AP1450-OA

Dear Ms. Reiff:

We write on behalf of Respondents, Wisconsin Elections Commission and all six commissioners in their official capacities, in response to the supreme court's September 22, 2021, order, as amended on September 24, 2021. The court directed the parties and prospective intervenors to address the following question:

> When (identify a specific date) must a new redistricting plan be in place, and what key factors were considered to identify this date?

Order, Sept. 22, 2021, as amended.

Respondents submit that, in order to enable the Commission to accurately integrate new districting data into its statewide election databases, and to timely and effectively administer the fall 2022 general election, a new redistricting plan must be in place no later than March 1, 2022. This is the same date provided to a three-judge panel of the federal district court presiding over *Hunter v. Bostelmann*, No. 21-CV-512-jdp-ajs-eec (W.D. Wis.) and *Black Leaders Organizing for Communities v. Spindell*, No. 21-CV-534-jdp-ajs-eec (W.D. Wis.), an ongoing consolidated federal redistricting case. This March 1, 2022, date is based on the following factors.

Wisconsin's congressional and state legislative districts must be reapportioned on the basis of the 2020 census data prior to any future congressional or state legislative election. *See* U.S. Const. art. I, §§ 2, 4; U.S. Const. amend. XIV, § 2; Wis. Const. art. IV, § 3.

The next general election for congressional and state legislative seats in Wisconsin is November 8, 2022; the partisan primary for that election is August 9, 2022.

State law requires the Wisconsin Elections Commission to administer elections. *See generally* Wis. Stat. ch. 5–10, 12. The Commission has no authority to draw district maps and, accordingly, takes no position in this original action as to the particulars of the maps. Nonetheless, the Commission takes its statutory charge seriously and advocates for final maps to be in place by March 1, 2022, a pragmatic date by which it believes it can properly, effectively, and timely administer the fall general election.

Administering an election requires that the Commission perform much work well before election day, especially in the year after the census data is released. Once new congressional and state legislative district boundaries have been determined, Commission staff must begin the complex process of recording these new boundaries in WisVote—the statewide election management and voter registration system. Staff must integrate the new redistricting data with existing voter registration and address data. This process includes manual review of ward map changes and parcel boundary data throughout the state of Wisconsin, to ensure accurate and efficient implementation of new redistricting data. Communication with municipal clerks about certain addresses is required because only local clerks would have such knowledge.[1] Manual review of ward map changes and parcel boundary data is a crucial task in administering an election because it ensures that each voter receives the correct ballot and is correctly located in their proper districts.

Wisconsin voters and candidates must know their proper districts far ahead of the fall general election. For instance, the period for candidates to circulate nominating petitions for the general election begins on April 15, 2022, and runs through June 1, 2022. If map boundaries are not drawn and finalized well before April

[1] While Commission staff will likely not need to contact every municipal clerk in Wisconsin, there are 1,851 clerks in the state.

15, candidates will not know in what district they reside and in turn will not know for what office they can run. And voters will not know what candidates' petitions they may properly sign. Improper residency of both a candidate and signor of a petition are bases for a challenge to a candidate's nomination papers. *See* Wis. Stat. §§ 6.10 (elector residence), 8.07 (Commission's authority to promulgate rules re validity of nomination papers), 8.30 (candidates ineligible for ballot placement), 8.40 (petition requirements); Wis. Admin. Code EL §§ 2.05 (treatment and sufficiency of nomination papers), 2.07 (challenges to nomination papers); *see also* Wis. Stat. § 8.28 (challenges to sitting office holder's residency). Therefore, before candidates can begin to prepare and circulate nomination papers, Commission staff must produce new district lists for nomination paper review. Further, both before and after the new maps are applied to the state-wide system, the Commission must perform basic quality assurance checks on the data.

Thus, the statutory foundation for Respondents' proposed March 1, 2022, deadline is the April 15, 2022, nomination paper date under Wis. Stat. § 8.15. If new maps are not in place at least 45 days before April 15, 2022, there is a significant risk that there will be errors in the statewide system and, in turn, less time for the Commission to correct those errors before circulation of nomination papers begins. The Legislature has prescribed that nomination papers for the fall general election must circulate between April 15 and June 1, 2022. The Commission must respect that statutory mandate and is in no position to advocate for delaying or shortening that time period.

Moreover, Commission staff will be performing this necessary work of recording new boundaries in WisVote while simultaneously administering the spring 2022 statewide election—for State Superintendent of Public Instruction, Court of Appeals Judge, Districts I, II and III, and Circuit Court Judge—with an election date of April 6, 2022.

For the Commission to properly, timely, and effectively administer the fall general election—which includes the nominating petition circulation process starting on April 15, 2022—a new congressional and state legislative district plan should be in place no later than March 1, 2022.

Sincerely,

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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

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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

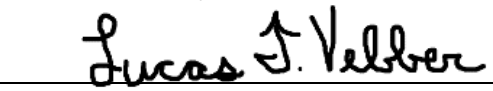
would either select one of the parties' proposals, or draw its own (ideally in a manner that makes the least changes from the adopted maps in current law). If it thought that there were factual issues in need of resolution, it could refer the matter to a referee to take testimony.

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.



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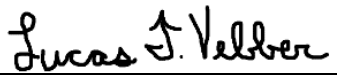
CERTIFICATIONS

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,



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I hereby certify that:

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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.

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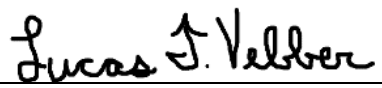

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No. 2021AP1450-OA

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.

On Petition To The Supreme Court To
Take Jurisdiction Of An Original Action

INITIAL BRIEF OF THE CONGRESSMEN, PER THIS COURT'S OCTOBER 14, 2021 ORDER, ADDRESSING FOUR QUESTIONS

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ISSUES PRESENTED

This Court's October 14, 2021 Order ordered all parties to address the following questions:

1. Under the relevant state and federal laws, what factors should this Court consider in evaluating or creating remedial maps.

2. Whether this Court should use the "least-change" approach when adopting a remedial map and modify the existing maps only to comply with the equal-population principle. And, if not, what approach should this Court use.

3. Whether the partisan makeup of districts is a valid factor for this Court to consider in evaluating or creating remedial maps.

4. What litigation process this Court should use to determine a constitutionally sufficient map, as it evaluates or creates remedial maps.

INTRODUCTION

This Court has taken jurisdiction over Petitioners' and Intervenor-Petitioners' claims that Wisconsin's existing congressional districts are malapportioned, in violation of the Wisconsin Constitution, and this Court will thus need to adopt a remedial congressional map if the Legislature and Governor fail to do so. Should such a political deadlock occur, this Court would then have the responsibility of adopting a remedial map that alters *existing* district lines as needed to cure the legal violation of the one-person/one-vote mandate, using the "least changes" approach. That follows from the principle that a court's remedy should do no more and no less than addressing the violation that the petitioner or plaintiff has shown in the extant law, while also respecting this Court's role in our constitutional order. This "least-change" approach thus leaves no room for consideration of the partisan makeup of the map (which consideration has, in any event, no legal relevance under either state or federal law). And this approach could well empower this Court to adopt a remedial map based solely on the submissions of the parties/amici, without need for factfinding proceedings.

STATEMENT OF THE CASE

Intervenor-Petitioners Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald (hereinafter "the Congressmen") are the duly elected Representatives to the U.S. House of Representatives

from five of Wisconsin's eight congressional districts, who all intend to run for reelection to the House in 2022. Omnibus Amended Original Action Petition at ¶¶ 43–48 ("Omnibus Pet."). This Court granted the Congressmen's Motion To Intervene as Petitioners in this original action. *See* Order Granting Mots. To Intervene at 2–3, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Oct. 14, 2021). On October 14, 2021, this Court ordered all parties and intervenors to submit simultaneous briefing on four questions. Order at 2, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Oct. 14, 2021).

SUMMARY OF ARGUMENT

I. Any remedial congressional map that this Court adopts must comply with three state and federal-law requirements. Thereafter, this Court may also consider the traditional redistricting criteria, but only where consistent with the "least-change" approach.

A. Any remedial map must comply with the Wisconsin Constitution's and the U.S. Constitution's equal-population requirement, apportioning congressional districts as close to perfect equality as possible. The U.S. Supreme Court has grounded this requirement in Article I, Section 2, of the U.S. Constitution, and the federal Equal Protection Clause imposes this same requirement. The Wisconsin Constitution embodies this same equal-population requirement under both Article I, Section 1, and Article IV.

B. A remedial map must also comply with the Wisconsin Constitution's and the U.S. Constitution's anti-racial-gerrymandering principle. The federal Equal Protection Clause prohibits States from drawing district lines with race as the predominant intent, unless the State can pass strict scrutiny. Wisconsin's Article I, Section 1, imposes the same anti-racial-gerrymandering requirement.

C. Finally, any remedial map must comply with Section 2 of the Voting Rights Act ("VRA"). Section 2 prohibits States from adopting a redistricting map that dilutes the voting power of a politically cohesive minority group. Where such a group exists, under the elements identified in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the State may not disperse that group across multiple districts or excessively concentrate that group in a single district.

D. This Court may only consider traditional redistricting principles—like compactness, contiguity, respect for political boundaries, and core retention—as it evaluates remedial maps to the extent that those principles are consistent with the "least-change" approach.

II. This Court should use the "least-change" approach in adopting a remedial congressional map.

A. Most fundamentally, the "least-change" approach follows from the bedrock remedial and equitable principle that the proven legal violation in a case shapes the appropriate scope of any court-ordered relief. Here, the only legal violation that Petitioners and Intervenor-Petitioners

allege with respect to the *existing* map is of the equal-population principle. Therefore, this Court has the equitable and remedial authority to adjust the existing congressional maps only as necessary to remedy this equal-population violation.

B. The "least-change" approach also best aligns with this Court's role in our constitutional order. The process of redistricting is an inherently political task. When this Court must complete the task of redistricting, however, it must do so according to neutral, predictable rules—consistent with its role as an impartial arbiter of disputes. The "least-change" approach is the most neutral legal principle for adopting a remedial map as a remedy for a violation of the one-person/one-vote rule since it generally carries forward the political and policy decisions in the existing map and corrects it only to equally reapportion the population.

C. The "least-change" approach would both minimize voter confusion and maximize core retention, since it limits the total number of people moved into a new district.

D. Finally, the "least-change" approach would also best position this Court to adopt a remedial map quickly, as it may well allow this Court to evaluate proposed maps based solely on the parties'/amici's submissions to this Court.

III. This Court should not consider the partisan makeup of the congressional districts as it evaluates or creates a remedial map. Petitioners and Intervenor-Petitioners have only challenged the existing congressional map on equal-

population grounds, thus this Court's remedial and equitable authority here would extend only to adopting a map that remedies that malapportionment. This Court's authority would *not* extend to adjusting the existing district lines to address partisan-makeup concerns. And neither the Wisconsin Constitution nor the U.S. Constitution makes consideration of partisanship legally relevant to redistricting.

IV. If this Court follows the "least-change" approach, then it may well be able to adopt a remedial map based solely on the parties'/amici's submissions to this Court, without referring this case to any factfinding proceedings before a special master. The threshold requirement under the "least-change" approach is that the remedial map equally apportions the congressional districts. This Court may well be able to resolve that question based on the parties'/amici's submission of their proposed maps, which would provide the necessary population data and explain any adjustments to the existing district lines. Further, the "least-change" approach could well avoid factual disputes over the traditional redistricting criteria, since the existing congressional map fully complies with those criteria. Finally, in the context of the congressional map at issue in this case, the "least-change" approach is also unlikely to raise factfinding disputes with respect to the remedial map's compliance with the anti-racial-gerrymandering principle or Section 2 of the VRA.

ARGUMENT

I. When This Court Adopts Remedial Congressional Districts, Those Districts Must Comply With All State And Federal Laws, And This Court May Then Consider Traditional Redistricting Criteria Only Where Consistent With The "Least-Change" Approach

If the Legislature fails to enact an equally populous congressional map that the Governor signs, then this Court must adopt a remedial map. Order at 2, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. *amend.* Sept. 24, 2021).

As a threshold matter, this Court must first find that Wisconsin's *existing* congressional district map is unlawful. *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 564–69, 126 N.W.2d 551 (1964). But given that the current districts are malapportioned after the 2020 U.S. Census, in violation of the Wisconsin Constitution's one-person/one-vote principle, *see* Omnibus Pet. ¶¶ 8, 90–95, this Court need only enter a declaration that the existing congressional map now violates this requirement. Indeed, in light of the unambiguous Census data, it should be undisputed here that Wisconsin's existing congressional districts are no longer equally populous, as the Wisconsin Constitution requires.

Once this Court turns to creating a *remedial* map for Wisconsin's congressional districts, it must comply with three requirements from both state and federal law. Specifically, those requirements are the one-person/one-vote principle,

infra Part I.A, the prohibition against racial gerrymandering, *infra* Part I.B, and the requirements found within Section 2 of the Voting Rights Act, *infra* Part I.C. And while traditional redistricting criteria may also play a role in evaluating or drawing a remedial map generally, this Court may only consider those criteria to the extent that they are consistent with the "least-change" approach. *Infra* Part I.D.

A. The U.S. Constitution And The Wisconsin Constitution Both Require That Remedial Congressional Districts Be Of Equal Population

The U.S. Constitution and the Wisconsin Constitution require Wisconsin to draw congressional districts with as close to perfect population equality as possible.

Under the U.S. Constitution, "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 (1964). Thus, as a federal constitutional requirement, States must draw their congressional districts "with populations as close to perfect equality as possible." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016). While the U.S. Supreme Court has grounded this equal-population principle for congressional districts in Article I, Section 2, *see* U.S. Const. art. I, § 2; *Wesberry*, 376 U.S. at 7–8, the Equal Protection Clause of the Fourteenth Amendment also embodies this same requirement for congressional districts, *see Karcher v. Daggett*, 462 U.S. 725, 747 (1983) (Stevens, J., concurring); *see also Evenwel*,

136 S. Ct. at 1124. That is, "[e]ven if Article I, § 2 were wholly disregarded, the 'one person one vote' rule would unquestionably apply to action by state officials defining congressional districts just as it does to state action defining state legislative districts" by virtue of the federal Equal Protection Clause. *Karcher*, 462 U.S. at 747 (Stevens, J., concurring); *see also Evenwel*, 136 S. Ct. at 1123–24.

The Wisconsin Constitution also requires population equality between congressional districts in the State, and this requirement flows from two state-constitutional provisions.

First, Article I, Section 1 of the Wisconsin Constitution imposes an equal-population principle for Wisconsin's congressional districts. Article I, Section 1 is Wisconsin's state-analog to the federal Equal Protection Clause, providing that "[a]ll people are born equally free and independent, and have certain inherent rights . . . [and] to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const. art. I, § 1. As this Court has held, Article I, Section 1 offers "essentially the same" protection as does the federal Equal Protection Clause. *Cty. of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 393–94, 588 N.W.2d 236 (1999). Therefore, like its federal counterpart, Article I, Section 1 also requires the State to draw all districts, including congressional districts "with populations as close to perfect equality as possible." *Evenwel*, 136 S. Ct. at 1124; *Karcher*, 462 U.S. at 747 (Stevens, J., concurring); *see also Zimmerman*, 22 Wis. 2d at 564.

Any contrary conclusion—that the Equal Protection Clause and Article I, Section 1 require only equally populous state-legislative districts, but not congressional districts—would make no sense. "[T]he fundamental principle of representative government in this country," which principle the Equal Protection Clause and Article I, Section 1 secure, "is one of equal representation for equal numbers of people." *Reynolds v. Sims*, 377 U.S. 533, 560–561 (1964); *accord C & S Mgmt.*, 223 Wis. 2d at 393–94. That fundamental principle logically applies to state-legislative and congressional districts for the same exact reasons. *See Reynolds*, 377 U.S. at 560–62; *accord C & S Mgmt.*, 223 Wis. 2d at 393–94. There could be no possible justification for restricting this principle to state-legislative districts only, thereby permitting the State to "effectively dilute[ ]" the votes of some of its citizens for their representative in Congress. *Reynolds*, 377 U.S. at 562; *accord C & S Mgmt.*, 223 Wis. 2d at 393–94.

Second, Article IV of the Wisconsin Constitution imposes this same equal-population principle for Wisconsin's congressional districts. Under Article IV, Section 3, "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 (emphasis added); *Zimmerman*, 22 Wis. 2d at 564. Although Section 3 only expressly refers to the state-legislative districts, its identical application to Wisconsin's congressional districts is "the most reasonable manner [to read this provision] in relation to [its]

fundamental purpose"—"to create and define the institutions whereby a representative democratic form of government may effectively function." *Zimmerman*, 22 Wis. 2d at 555.

B. The U.S. Constitution And The Wisconsin Constitution Both Require That Remedial Maps Not Be Racially Gerrymandered

Both the U.S. Constitution and the Wisconsin Constitution also prohibit racial gerrymandering when drawing remedial congressional districts.

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws," U.S. Const., amend. XIV, § 1, and it "prevent[s] the States from purposefully discriminating between individuals on the basis of race," *Shaw v. Reno*, 509 U.S. 630, 642 (1993). "[T]hese equal protection principles govern a State's drawing of congressional districts," *Miller v. Johnson*, 515 U.S. 900, 905 (1995), prohibiting a State from "separat[ing] its citizens into different voting districts on the basis of race," unless it can satisfy strict scrutiny, *id.* at 911, 920; *see Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017).

In particular, the Equal Protection Clause prohibits a State from subordinating any traditional redistricting considerations to considerations of race. *Cooper*, 137 S. Ct. at 1463–64. That is, the State may not make race a "predominant factor motivating [its] decision to place a significant number of voters within or without a particular district," unless the State can satisfy strict scrutiny. *Id.*

(quoting *Miller*, 515 U.S. at 916). The U.S. Supreme Court has thus far held only that mandatory compliance with the "operative provisions of the Voting Rights Act" is compelling enough to justify a State's "race-based sorting" in redistricting. *Id.* at 1464.

The Wisconsin Constitution likewise prohibits racial gerrymandering in redistricting, by virtue of Article I, Section 1. As noted above, that provision states that "[a]ll people are born equally free and independent, and have certain inherent rights," Wis. Const. art. I, § 1, which this Court interprets to impose "essentially the same" or "substantially equivalent" requirements as its federal counterpart, *C & S Mgmt.*, 223 Wis. 2d at 393–94. So, like the U.S. Constitution, the Wisconsin Constitution subjects "[c]lassifications based on a suspect class, such as . . . race, . . . to strict scrutiny." *State v. Post*, 197 Wis. 2d 279, 319, 541 N.W.2d 115, 129 (1995); *see also State v. Villamil*, 2017 WI 74, ¶ 5, 377 Wis. 2d 1, 898 N.W.2d 482 ("unjustifiable standard such as race"). Thus, the Wisconsin Constitution prohibits the drawing of district lines based on race—subordinating traditional redistricting considerations to race during the redistricting process—unless the State can pass strict scrutiny by demonstrating that such lines were required by the VRA. *Cooper*, 137 S. Ct. at 1463–64; *see C & S Mgmt.*, 588 N.W.2d at 246.

C. Section 2 Of The VRA Prohibits The Remedial Map From Diluting The Votes Of Members Of Protected Classes

Finally, any remedial map must comply with Section 2 of the VRA. *See Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 16, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam).

Under Section 2, no State may impose or apply any voting practice or procedures that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a); *see generally Gingles*, 478 U.S. at 71 (explaining that Section 2, as amended, does not require "discriminatory intent"). As it relates to redistricting, Section 2 prohibits a State from "diluting" the "voting power" of "[a] politically cohesive minority group" through "the manipulation of district lines." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993).

In order for a redistricting plan to implicate Section 2, certain threshold requirements defined by the U.S. Supreme Court in *Gingles*, 478 U.S. 30, must first be met: (1) a minority group must be sufficiently large and geographically compact to create a majority-minority district; (2) the minority group must be politically cohesive in terms of voting patterns; and (3) voting must be racially polarized, such that the majority group can block a minority's candidate from winning election. *Id.* at 44–45; *see also, e.g.*, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 854 (E.D. Wis. 2012).

If the *Gingles* threshold requirements are met, then a redistricting plan will violate Section 2 when, under "the totality of the circumstances," it denies a politically cohesive minority group an equal opportunity to participate in the political process and elect candidates of its choice. 52 U.S.C. § 10301(b). "In the context of single-member districts," such a denial may occur when the redistricting plan: (a) disperses a minority group "into districts in which they constitute an ineffective minority of voters," or (b) concentrates a minority group "into districts where they constitute an excessive majority." *Voinovich*, 507 U.S. at 154 (citation omitted).

D. After Complying With State And Federal Requirements, This Court May Consider Traditional Redistricting Criteria Only Where Consistent With The "Least-Change" Approach

When redistricting, map drawers often consider whether a congressional map complies with traditional redistricting criteria. Those criteria include, for example, whether proposed remedial districts are sufficiently compact, contiguous, respect preexisting political boundaries, and retain the core of the existing districts. *See Harris v. Arizona Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306 (2016); *League of Women Voters of Chicago v. City of Chicago*, 757 F.3d 722, 726 (7th Cir. 2014); *Baldus*, 862 F. Supp. 2d at 862; *Prosser v. Elections Bd.*, 793 F. Supp. 859, 863 (W.D. Wis.

1992) (per curiam); Wis. Const. art. IV, §§ 3–4; *see generally Zimmerman*, 22 Wis. 2d at 556, 570.

When adopting a remedial congressional map, this Court may consider these same traditional redistricting criteria *to the extent that they are consistent with the "least-change" approach*. That is because, as explained below, when crafting a remedial congressional map, remedial and equitable principles limit this Court only to curing the legal violation in the *existing* map—specifically, here, a violation of the equal-population principle. *Infra* Part II; *see* Omnibus Pet. ¶¶ 125–27, 139–40. That said, if parties or amici present this Court with multiple proposed remedial maps that satisfy the "least-change" approach (as well as all federal and state constitutional and statutory requirements), then this Court will need to consider those proposed maps' comparative compliance with the traditional redistricting criteria in deciding from among these proposed, "least-change" maps.

II. This Court Should Use The "Least-Change" Approach In Adopting A Remedial Congressional Map

This Court should carry out its obligation to draw a remedial congressional map, in the event of a deadlock between the Legislature and the Governor, by following the "least-change" approach. Under that approach, this Court would complete the redistricting process by starting with "the State's existing districts"—here, the congressional map adopted by the Legislature in 2011—and "mak[ing] only

minor or obvious adjustments" to account for "shifts in [Wisconsin's] population," thereby updating the 2011 map to comply with the equal-population principle after the 2020 Census. *Perry v. Perez*, 565 U.S. 388, 392 (2012).

Four principles support this Court following the "least-change" approach here.

A. Most fundamentally, the "least-change" approach follows from the bedrock equitable and remedial principles governing the grant of any form of relief.

When a court grants any relief, the legal violation that empowers the court to act necessarily shapes the appropriate scope of relief. That is, a court must "fashion relief for the parties injured" according to "the act and practices involved in th[e] action," *In Interest of E.C.*, 130 Wis. 2d 376, 388, 387 N.W.2d 72 (1986) (citation omitted), ensuring that it "craft[s] a remedy appropriately tailored to any [legal] violation," *Serv. Emps. Int'l Union, Loc. 1 ("SEIU") v. Vos*, 2020 WI 67, ¶ 47, 393 Wis. 2d 38, 946 N.W.2d 35; *see also State v. Webb*, 160 Wis. 2d 622, 630, 467 N.W.2d 108 (1991). Put another way, "[t]he relief that a court grants [ ] must be in response to the invasion of legally protected rights," *In Interest of E.C.*, 130 Wis. 2d at 389, and it "may not properly exceed the effect of the [legal] violation," *State ex rel. Memmel v. Mundy*, 75 Wis. 2d 276, 288–89, 249 N.W.2d 573 (1977) (citations omitted; brackets omitted); *accord Bowen v. Kendrick*, 487 U.S. 589, 620 (1988).

This bedrock remedial and equitable principle applies in full to redistricting cases. "Relief in redistricting cases is fashioned in light of the well-known principles of equity," as the U.S. Supreme Court, this Court, and others have recognized. *See North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam); *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 729 (1892); *see also, e.g.*, *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *1, *8 (E.D. Wis. May 30, 2002) (per curiam) (issuing equitable remedies of declarations and injunctions). Therefore, as in all cases, a redistricting court must "select a fitting remedy for the legal violations it has identified," *Covington*, 137 S. Ct. at 1625, "limit[ing]" the "modifications of a state plan" only to "those necessary to cure any constitutional or statutory defect," *Upham v. Seamon*, 456 U.S. 37, 43 (1982). Thus, "[i]n fashioning a remedy in redistricting cases, courts are 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); *accord SEIU*, 2020 WI 67, ¶ 47; *Memmel*, 75 Wis. 2d at 288–89; *In Interest of E.C.*, 130 Wis. 2d at 388.

Here, if this Court were to adopt a remedial map after Petitioners and Intervenor-Petitioners prevail on their malapportionment claims, this same foundational, equitable and remedial principle requires a "least-change" approach. That is the most "fitting remedy," *Covington*, 137 S. Ct. at

1625, "in response to" the equal-population violation at issue here, *In Interest of E.C.*, 130 Wis. 2d at 389, as it is tailored to equally reapportioning the existing congressional map without disrupting entirely lawful aspects of that plan, *SEIU*, 2020 WI 67, ¶ 47; *Memmel*, 75 Wis. 2d at 288–89.

After all, the *only* legal violation with respect to the existing congressional map that Petitioners and Intervenor-Petitioners assert here is a violation of the one-person/one-vote requirement. Omnibus Pet. ¶¶ 125–27, 139–40; *see supra* Part I.A (discussing this requirement). That is, Petitioners and Intervenor-Petitioners claim that Wisconsin's *existing* congressional districts are unlawful because they are malapportioned in light of the 2020 Census, not because they violate any other state or federal requirement. Omnibus Pet. ¶¶ 125–27, 139–40; *compare supra* Part I.B–C.

The "least-change" approach is the most "fitting" and precisely tailored "remedy" to resolve the one-person/one-vote "legal violation[ ]" that Petitioners and Intervenor-Petitioners have alleged (and almost certainly will prove) here. *Covington*, 137 S. Ct. at 1625; *accord SEIU*, 2020 WI 67, ¶ 47; *Memmel*, 75 Wis. 2d at 288–89; *In Interest of E.C.*, 130 Wis. 2d at 389. As described above, the "least-change" approach would have this Court adopt a remedial map by beginning with the "existing [congressional] districts" and then "mak[ing] only minor or obvious adjustments" to the lines to reestablish equal apportionment among the districts, in light of the "shifts in [Wisconsin's] population" as reflected in the

2020 Census. *Perry*, 565 U.S. at 392. Once equal apportionment is achieved (and this Court assures itself that the remedial map would not violate any federal or state constitutional or statutory requirement), this Court would not make further adjustments to pursue any traditional redistricting criteria or other values. *See id.*; *Memmel*, 75 Wis. 2d at 288–89. So, by adjusting the lines only to reestablish equal populations, this Court's "modification[s]" to the congressional districts would be "limited to those necessary to cure" the "constitutional or statutory defect" established here—the violation of the of equal-population principle. *Upham*, 456 U.S. at 43; *see also Johnson*, 922 F. Supp. at 1559; *accord SEIU*, 2020 WI 67, ¶ 47; *Memmel*, 75 Wis. 2d at 288–89; *In Interest of E.C.*, 130 Wis. 2d at 389.

B. The "least-change" approach also best comports with this Court's role in our constitutional order, as it supplies a neutral rule for this Court to apply in this delicate area.

This Court is a "neutral, impartial, and nonpartisan" institution, *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶ 16, 307 Wis. 2d 1, 745 N.W.2d 1, whose role is to "say[ ] what the law is and not what [it] may wish it to be," *State v. Lickes*, 2021 WI 60, ¶ 3 n.4, 960 N.W.2d 855; *accord Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 37, 376 Wis. 2d 147, 897 N.W.2d 384. Accordingly, this Court must issue its judgments under coherent and predictable legal tests and principles, *Horst v. Deere & Co.*, 2009 WI 75, ¶ 71, 319 Wis. 2d 147, 769 N.W.2d 536 (citing Antonin Scalia, *The Rule Of Law As A Law*

Of Rules, 56 U. Chi. L. Rev. 1175, 1179 (1989)), rather than based upon "policy choices" or "preference[s]," *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 529, 576 N.W.2d 245 (1998).

The redistricting process is, "[b]eyond question, . . . an exercise of legislative power," *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35, 56 (1892), which requires innumerable "political and policy decisions" to complete, *Jensen*, 2002 WI 13, ¶ 10; *accord Perry*, 565 U.S. at 392–93, 396. That is, even after accounting for the various state and federal requirements for district maps, *see* Part I, there "is no single plan which the constitution, as a matter of law, requires to be adopted to the exclusion of all others," *Zimmerman*, 22 Wis. 2d at 570. Rather, "there are choices which can validly be made within constitutional limits" regarding the contours of the map that are not reducible to neutral, predictable legal rules for courts to apply. *See id.*; *Horst*, 2009 WI 75, ¶ 71. So, given the vast discretion inherent in redistricting, "[t]he 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*, 2002 WI 13, ¶ 10.

Although redistricting is "an inherently political and legislative—not judicial—task," *id.*, this Court must "embark on th[is] task" itself if "the Legislature and the Governor [fail] to accomplish their constitutional responsibilities," Order at

2, *Johnson*, No.2021AP1450-OA (Wis. *amend.* Sept. 24, 2021). But when this Court is required to complete redistricting, it does not take the place of the political branches. Instead, it adheres to its "neutral, impartial, and nonpartisan" role, *Helgeland*, 2008 WI 9, ¶ 16, applying "neutral legal principles" in adopting a remedial map, *Perry*, 565 U.S. at 393; *Upham*, 456 U.S. at 42; *accord Horst*, 2009 WI 75, ¶ 71.

The "least-change" approach is the most "neutral legal principle[ ] in this area," *Perry*, 565 U.S. at 393, allowing this Court to issue a remedial map in an objective, predictable manner that reduces "political and policy decisions," *Jensen*, 2002 WI 13, ¶ 10. This approach carries forward the discretionary decisions made by the political branches in the prior decade, *infra* pp. 27–28, freeing this Court of the need to make such "inherently political and legislative" choices, *Jensen*, 2002 WI 13, ¶ 10; *see, e.g.*, *Perry*, 565 U.S. at 396 (directing courts not to "substitute" their "own concept of 'the collective public good' for the [ ] Legislature's" when adjudicating redistricting disputes); *White v. Weiser*, 412 U.S. 783, 795 (1973) (holding that "a district court should similarly honor state policies in the context of congressional reapportionment" when "fashioning a reapportionment plan or in choosing among plans"); *Upham*, 456 U.S. at 42 ("The only limits on judicial deference to state apportionment policy . . . [are] the substantive constitutional and statutory standards to which such state plans are subject."); *Hippert v. Ritchie*, 813 N.W.2d 391, 397 (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 plan established by the panel is a least-change plan to the extent feasible."); *Johnson*, 922 F. Supp. at 1559 ("A minimum change plan acts as a surrogate for the intent of the state's legislative body."); Katharine Inglis Butler, *Redistricting In A Post-Shaw Era: A Small Treatise Accompanied By Districting Guidelines For Legislators, Litigants, And Courts*, 36 U. Rich. L. Rev. 137, 222 (2002).

C. The "least-change" approach would simultaneously "minimize[ ] voter confusion," *Hippert v. Ritchie*, 813 N.W.2d 374, 381 (Minn. 2012), and maximize "core retention," *Baumgart*, 2002 WL 34127471, at *3, *7, by limiting the number of people placed in different congressional districts. That reduces voter confusion by decreasing the number of people forced to vote in elections for unfamiliar congressional candidates, after a switch to a new district. And it furthers core retention by preserving the "relations" between representatives and their "constituents" in the existing districts, promoting "continuity" and "stability." Jon M. Anderson, *Politics and Purpose: Hide and Seek in the Gerrymandering Thicket After* Davis v. Bandemer, 136 U. Pa. L. Rev. 183, 234 (1987); *accord Cunningham*, 51 N.W. at 730. Pursuing these benefits in this redistricting cycle, in particular, is especially warranted, as the shortened

redistricting timeline caused by the 2020 Census delay would magnify any disruption caused from any shift in district lines.

D. Finally, the "least-change" approach would also best position this Court to adopt a remedial congressional district map quickly, giving clarity to the people of this State. As explained below, the "least-change" approach would very likely accelerate this Court's adoption of a redistricting map, enabling this Court to evaluate proposed remedial maps based solely on the submissions of the parties/amici, without need for a factfinding hearing (or, if any factfinding were to occur, it would be exceedingly limited). *Infra* Part IV.

III. This Court Should Not Consider The Partisan Makeup Of Districts In Evaluating Or Creating Remedial Congressional Maps

For many of the same reasons that this Court should follow the "least-change" approach, it should also refrain from considering partisan makeup as it evaluates or creates a remedial congressional map. As explained above, the remedial and equitable principles that control the grant of any relief require courts to "craft a remedy appropriately tailored to any [legal] violation," *SEIU*, 2020 WI 67, ¶ 47, such that it "respon[ds]" only to "the invasion of legally protected rights," *In Interest of E.C.*, 130 Wis. 2d at 389. Here, Petitioners and Intervenor-Petitioners have only alleged that Wisconsin's *existing* congressional districts violate the equal-population principle. *See supra* pp. 18–19. Thus, the scope of this Court's authority to remedy that violation extends to

correcting this violation by adopting a map that equally reapportions the existing districts. *See* Part II. This Court's authority would not extend to changing existing district lines in a remedial map based upon partisan-makeup concerns.

Notably, nothing in Wisconsin or federal law makes political considerations relevant to the legality of a map, including a remedial map.

This Court has expressly held that the Legislature and Governor legally may—and inevitably will—draw district lines according to political considerations, as redistricting is an "*inherently* political . . . task." *Jensen*, 2002 WI 13, ¶ 10 (emphasis added). This is because redistricting "raises important . . . political issues that go to the heart of our system of representative democracy," *id.*, ¶ 4, as it "determines the political landscape for the ensuing decade and thus public policy for years beyond," *id.* ¶ 10. For this reason, "[t]he framers [of the Wisconsin Constitution] 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." *Id.* (emphasis added); *accord* Order at 2, *Johnson*, No.2021AP1450-OA (Wis. *amend.* Sept. 24, 2021) ("We cannot emphasize strongly enough that our Constitution places primary responsibility for the apportionment of Wisconsin legislative districts on the legislature."); *State ex rel. Bowman v. Dammann*, 209 Wis. 21,

243 N.W. 481, 485 (1932). Therefore, the Legislature and Governor making "precisely these sorts of political and policy decisions" when redistricting could not possibly violate Wisconsin law. *Jensen*, 2002 WI 13, ¶ 10.

Federal law is in accord. The U.S. Supreme Court has now expressly held that States may constitutionally draw their redistricting maps with partisan considerations in mind, and that, accordingly, "partisan gerrymandering claims" are "beyond the federal courts," as the courts have "no plausible grant of authority in the Constitution" to "reallocate political power" by adjusting district lines for partisan concerns. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498, 2506–07 (2019) (citations omitted).

IV. Assuming This Court Adopts The "Least-Change" Approach, It May Well Be Able To Adopt A Remedial Congressional Map Based Solely On Submissions To This Court Without The Need For Factfinding

Under the "least-change" approach, this Court would adopt a remedial congressional map by beginning with the existing congressional districts adopted by the Legislature in 2011 and then making those adjustments necessary to equally reapportion the districts. *Supra* Part II. If this Court were to follow that approach here, then it may well be able to complete the remedial congressional redistricting process based solely on the submissions of the parties/amici, thereby avoiding the need to resort to factfinding or a special master.

Under the "least-change" approach, the most salient question for whether a proposed, remedial congressional map for this State would be constitutionally sufficient is whether it apportions the districts "with populations as close to perfect equality as possible," *Evenwel*, 136 S. Ct. at 1124, while also making "only minor or obvious adjustments" to account for "shifts in [Wisconsin's] population" since 2011, *Perry*, 565 U.S. at 392. To assist this Court in conducting this inquiry, the parties/amici would submit proposed remedial maps to this Court, demonstrating the number of people that they would place in each district. *See Prosser*, 793 F. Supp. at 862, 865–67 (discussing these metrics for proposed plans, based on the submissions of the parties). The parties/amici will also explain where they made the changes from the prior map and the rationales for such changes, which explanations would assist this Court in adopting a "least-change" map. Notably, the required population-change data is readily and easily gathered from the map-drawing software used to craft a proposed map and the 2020 Census results. *See generally Baldus*, 849 F. Supp. 2d at 846, 849; U.S. Census Bureau, *Decennial Census P.L. 94-171 Redistricting Data* (Aug. 12, 2021) (Census data).* And given the accuracy and objectivity of this population-based data, it appears unlikely that any

* Available at https://www.census.gov/programs-surveys/decennial-census/about/rdo/summary-files.html (all websites last accessed on Oct. 24, 2021).

party could mount a plausible factual challenge on this front, *accord Rucho*, 139 S. Ct. at 2501, leading to factual disputes and/or resort to a special master, Wis. Stat. § 751.09.

The least-change approach would relieve this Court of the "daunting task" of "design[ing] a reapportionment plan" from scratch; thus, factual disputes with respect to those criteria would not likely arise either. *Prosser*, 793 F. Supp. at 864; *supra* Part I.D. That is, the Legislature in 2011 already determined that the existing congressional map *already* fully complied with the relevant traditional redistricting factors, *Baldus*, 849 F. Supp. 2d at 848, 853–54, and this Court would carry that compliance forward by using those districts as the basis for a remedial map under the "least change" approach. And, again, if multiple proposed remedial maps submitted to this Court qualify as "least-change" maps, this Court could determine which of those limited submissions best satisfies the traditional redistricting criteria based on explanations submitted by the proposed remedial map's proponents.

Of course, this Court would need to assure itself that any "least-change" remedial map that it ultimately adopts complies with all federal and state law requirements—beyond the requirements of the one-person/one-vote principle that the "least-changes" approach addresses directly, *see supra* pp. 18–19—but that is likely to be an unchallenging endeavor for any remedial congressional map in this case.

As for the anti-racial-gerrymandering constitutional requirement in the U.S. Constitution and the Wisconsin

Constitution, *supra* Part I.B, the "least-change" approach is exceedingly unlikely to raise factual disputes regarding compliance with this constitutional rule. Under this requirement, the State may not draw district lines with race as a "predominant factor motivating [its] decision to place a significant number of voters within or without a particular district," thereby subordinating traditional redistricting considerations to racial considerations—unless it can satisfy strict scrutiny. *Cooper*, 137 S. Ct. at 1463–64 (citation omitted); *accord C & S Mgmt.*, 588 N.W.2d at 246. There is no suggestion that any of the *existing* congressional district lines impermissibly subordinated traditional redistricting criteria to racial considerations. Indeed, Wisconsin has conducted congressional elections under the existing map for the past decade, with no party arguing that any of those districts were somehow racially gerrymandered. It is hard to see how following the "least-change" approach to adopt a remedial map could give rise to a plausible racial-gerrymandering claim, thereby necessitating factfinding hearings, since the predominant intent in drawing that remedial map would be to achieve population equality.

Finally, with respect to Section 2 of the VRA, *supra* Part I.C, the "least-change" approach to a remedial congressional map is unlikely to raise factual disputes over this federal-law requirement either. Section 2 prohibits diluting a politically cohesive minority group's voting power by, as relevant to single-member districts, dispersing the

group across districts or excessively concentrating it into a single district. *Gingles*, 478 U.S. at 50–51; *Voinovich*, 507 U.S. at 154; *Baldus*, 849 F. Supp. 2d at 854. Here, Wisconsin's existing congressional district map recognized one majority-minority congressional district in the State, *see* App'x to SB-149 at 1, *Statistics And Maps* (2011–2012) (listing, as part of the 2011 redistricting drafting file, that Congressional District 4 has a majority-minority population);† and there appears to be no argument that Section 2 would require recognition of any other such district under *Gingles*. Therefore, this Court largely carrying the boundaries of the existing districts forward in a remedial congressional map, under the "least-change" approach, is exceedingly unlikely to trigger any plausible Section 2 claim, requiring resolution of any factual dispute before a special master.

CONCLUSION

The Congressmen respectfully submit that this Court should approach this matter as described above.

† Available at https://docs.legis.wisconsin.gov/2011/related/rd/sb149.pdf.

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font, as well as to this Court's October 14, 2021 Order. The length of this Brief is 6,550 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12), AND OF SERVICE

I hereby certify that:

I have submitted an electronic copy of this Brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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.

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