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 II OF II

TO HUNTER RESPONDENTS' RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION

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

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

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

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

Counsel for Hunter Respondents

CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

Page(s)

DATED: March 15, 2022

Respectfully submitted,

s/ Abha Khanna

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

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

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

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

Counsel for Hunter Respondents

No. 2021AP1450-OA

IN THE SUPREME COURT OF WISCONSIN

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

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

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, in her official capacity as a member of the Wisconsin Elections Commission, JULIE GLANCEY, in her official capacity as a member of the Wisconsin Elections Commission, ANN JACOBS, in her official capacity as a member of the Wisconsin Elections Commission, DEAN KNUDSON, in his official capacity as a member of the Wisconsin Elections Commission, ROBERT SPINDELL, JR., in his official capacity as a member of the Wisconsin Elections Commission, AND MARK THOMSEN, in his official capacity as a member of the Wisconsin Elections Commission,
Respondents,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, in his official capacity, AND JANET BEWLEY SENATE DEMOCRATIC MINORITY LEADER, on behalf of the Senate Democratic Caucus,
Intervenors-Respondents.

BRIEF BY THE WISCONSIN LEGISLATURE

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

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

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

* *Admitted pro hac vice.*

Counsel for Intervenor-Respondent,
The Wisconsin Legislature

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

INTRODUCTION

This case challenges the constitutionality of Wisconsin's existing congressional and legislative districts. The Legislature is actively redrawing those districts based on 2020 census data. The Legislature's redistricting plans are nearly done. They have not been vetoed by the Governor. There is not yet any impasse. Even so, redistricting litigation began in state and federal courts days after the new census data was delivered.

For the reasons that follow, this Court's first task is a simple one: wait for an impasse to occur. In the event of an impasse, the Court must remedy Petitioners' malapportionment claims. That does not mean drafting new redistricting plans on a blank slate. The Court's role is more limited. The Court must "reconcil[e] the requirements of the Constitution with the goals of state political policy." *Upham v. Seamon*, 456 U.S. 37, 43 (1982). Such "reconciliation" can be achieved only if "modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect." *Id.* Redistricting decisions made by the state legislature cannot merely be cast aside. *See White v. Weiser*, 412 U.S. 783, 796 (1973). Once any existing malapportionment is remedied, the proper role of this Court is at its end. *See North Carolina v. Covington*, 138 S. Ct. 2548, 2555 (2018).

STATEMENT OF ISSUES FOR REVIEW

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

2. The petitioners ask the Court to modify existing maps using a "least-change" approach. Should the Court do so, and if not, what approach should the Court use?

3. Is the partisan makeup of districts a valid factor for the Court to consider in evaluating or creating new maps?

4. As the Court evaluates or creates new maps, what litigation process should the Court use to determine a constitutionally sufficient map?

STATEMENTS ON ORAL ARGUMENT & PUBLICATION

Given the nascency of the proceedings in this original action, the Legislature does not believe oral argument is necessary at this time. The Legislature requests that this Court publish an order deciding the issues briefed herein, which will guide any future proceedings in the event of an impasse. The Legislature requests publication of this Court's final decision in this original action.

STATEMENT OF THE CASE

A. The Power to Reapportion

1. The Wisconsin Constitution vests the Wisconsin Legislature with the power to reapportion legislative districts: "At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." Wis. Const. art. IV, §3. Likewise, the federal Constitution vests "the Legislature" with the power to determine "the manner" of elections, which necessarily includes reapportionment of electoral districts. U.S. Const. art. I, §4, cl. 1.

That power to reapportion is distinct from the Legislature's general lawmaking power. *See* Wis. Const. art. IV, §1 ("The legislative power shall be vested in a senate and assembly."). When Wisconsin was a territory, for example, the apportionment power was vested in the executive. Act of Apr. 20, 1836, ch. 54, §4, 5 Stat.

10, 12 (vesting Governor with power to "declare the number of members of the [territory's] Council and House of Representatives to which each of the counties is entitled"). Wisconsin's first constitution as a State shifted that power to the Legislature. *See* Wis. Const. art. IV, §3 (1848).

2. The time to "district anew" began again in August 2021 when new 2020 U.S. Census data arrived. Since then, the Legislature has solicited public comment on redistricting and worked to create new district lines to accommodate shifting populations.

As part of the redistricting process, the Legislature passed a joint resolution identifying the considerations important to the ongoing redistricting process. 2021 Wis. Senate Joint Res. 63. The resolution announced that "it is the public policy of this state that plans establishing legislative districts should:

1. Comply with federal and state law;
2. Give effect to the principle that every citizen's vote should count the same by creating districts with nearly equal population, having population deviations that are well below that which is required by the U.S. Constitution;
3. Retain as much as possible the core of existing districts, thus maintaining existing communities of interest, and promoting the equal opportunity to vote by minimizing disenfranchisement due to staggered Senate terms;
4. Contain districts that are compact;
5. Contain districts that are legally contiguous;
6. Respect and maintain whole communities of interest where practicable;
7. Avoid municipal splits unless unavoidable or necessary to further another principle stated

above, and when splitting municipalities, respect current municipal ward boundaries;

8. Promote continuity of representation by avoiding incumbent pairing unless necessary to further another principle stated above; and
9. Contain districts that follow natural boundaries where practicable and consistent with other principles, including geographic features such as rivers and lakes, manufactured boundaries such as major highways, and political boundaries such as county lines."

2021 Wis. Senate Joint Res. 63.

The Legislature's redistricting plans are nearly finished. Legislators have introduced the new redistricting bills into legislative committees. *See* Wis. Senate Bill Nos. 621, 622. Hearings will occur on those bills this week.[1] And legislative leadership expects that the redistricting plans will be brought to a floor vote early next month.

The Governor has the opportunity to approve or veto the redistricting plans passed by the Legislature under the Court's precedent. *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964). If the Governor vetoes the Legislature's redistricting plans, there will be what's known as an "impasse."

[1] Meanwhile, the Governor has created his own redistricting commission. Wis. Executive Order No. 66 (Jan. 27, 2020). The Governor's commission has expressed its intent to share proposed maps with the Legislature, but the maps are not yet complete. *See* "Commission's Work & Records," govstatus.egov.com/peoplesmaps/work-records; "The People's Maps Commission Criteria for Drawing Districts," People's Maps Commission, bit.ly/3C6BvrV.

The Governor has not vetoed the Legislature's redistricting plans, and there is no "impasse" at this time.

B. Procedural History

One day after census data was delivered in Wisconsin, federal plaintiffs sued for a declaration that Wisconsin's existing districts were unconstitutionally malapportioned and asked the federal court to prepare itself to redraw Wisconsin's electoral districts. Another set of federal plaintiffs filed a similar suit days later. *See Hunter v. Bostelmann*, No. 21-cv-512 (W.D. Wis.); *Black Leaders Organizing for Communities (BLOC) v. Bostelmann*, No. 21-cv-534 (W.D. Wis.). The Legislature immediately intervened in the federal suits and filed motions to dismiss for lack of federal jurisdiction. The Legislature's dismissal motions explained, *inter alia*, that redistricting is primarily the responsibility of the Legislature, not the federal court. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 34 (1993) ("[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."); *Wise v. Lipscomb*, 434 U.S. 1329, 1332 (1977) (same). The federal court denied the Legislature's motion to dismiss. The Legislature has since petitioned for a writ of mandamus or prohibition ordering that the federal suits be dismissed. *In re Wisconsin Legislature*, No. 21-474 (Sept. 24, 2021). And the federal court has stayed the federal proceedings until November 5. *See* Order, *Hunter*, No. 3:21-cv-512 (W.D. Wis. Oct. 6, 2021), ECF No. 103.

Around the same time, four Wisconsin voters filed this original action. They asked this Court to declare the existing districts malapportioned. *Johnson* Pet. ¶1(a). They asked this Court to enjoin the Wisconsin Elections Commission "from administering any [future] election" until a new apportionment plan is in place. *Id.*

¶1(b). And they asked this Court to establish a "judicial plan of apportionment" in the event there is no "amended state law with a lawful apportionment plan." *Id.* ¶1(c).

The Court granted the petition for an original action. *See* Order of Sept. 22, 2021, *as amended*, Sept. 24, 2021. As part of its order, the Court declined to immediately declare that the districts were malapportioned or to enjoin the elections commission from conducting elections until a new plan is in place. *Id.* at 3. The Court stated it was "mindful that judicial relief becomes appropriate in reapportionment cases *only* when the legislature fails to reapportion according to constitutional requisites in a timely fashion after having an adequate opportunity to do so." *Id.* at 2.

The Legislature and other parties have since intervened and filed letter briefs regarding when redistricting plans must be complete in advance of next year's elections. *See* First Order of Oct. 14, 2021.[2] The Legislature's brief indicated that the Legislature needed until at least November to have an adequate opportunity to complete its redistricting process. Legislature Letter Br. 2. The Legislature also explained that, in the event of an impasse, this Court is the proper forum to resolve all redistricting-related issues. Legislature Response Letter Br. 3-7. The State can have only one set of redistricting plans, so the time to raise any such issues will be in this forum. *Growe*, 507 U.S. at 35.

ARGUMENT

If the Legislature cannot resolve Petitioners' malapportionment claims, then this Court will need to order a remedy. In doing so, the Court's role is still that of a Court, not a Legislature. The

[2] The next scheduled primary is August 9, 2021. Wis. Stat. §5.02(12s). The nominations period for the primary begins on April 15, 2021, and ends on June 1, 2021. Wis. Stat. §8.15(1).

Court can avoid the "political thicket" of redistricting in three ways. *Gaffney v. Cummings*, 412 U.S. 735, 750 (1973). *First*, and in all events, the Court will not start from a blank slate. Instead, in recognition of the Legislature's constitutionally assigned power to redistrict, the Court can decide that the Legislature's forthcoming redistricting plans are the presumptive remedy, adjusting only if necessary to comply with state and federal law. *Second*, and alternatively, the Court can begin with the existing districts and ask the parties for proposed remedies that adjust those districts as necessary to accommodate shifting populations and to comply with state and federal law. *Third*, whatever the Court's baseline, the Court must reject any adjustments intended to achieve partisan "fairness" or otherwise consider for itself whether there is "too much" partisanship in a redistricting plan. The attempt to achieve "fairness" is a partisan choice in and of itself. Questions of what is "fair" in light of the naturally occurring partisan makeup of the State are not the sort of questions any Court is equipped to answer. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019). *Finally*, the form of the proceedings should require the parties to propose possible remedies for the Court's consideration, supported by briefing and evidence about why the parties' submissions are in furtherance of the Court's guidelines for an appropriate remedy.

I. Factors the Court should consider in evaluating or creating new maps begin with the Legislature's role and end with compliance with state and federal law.

A. The Legislature must have an adequate opportunity to reapportion.

The first factor that this Court must consider in this action is whether there has been an "adequate opportunity" for the Legislature to reapportion the existing districts. Order of Sept. 22,

2021, at 2. For two reasons, the Court cannot presume a future impasse is bound to occur and take over the reapportionment process now before the political branches have completed their task.

As an initial matter, no party can fully know the form that this action should take until the Legislature has had an opportunity to put its redistricting plans before the Governor (as required by this Court's existing precedent). *See Zimmerman*, 22 Wis. 2d at 554-55. If the Governor signs the Legislature's redistricting plans, and if Petitioners were permitted to amend, then the Court would not draw a new plan or adjust the existing plan, except to adjudicate any malapportionment in excess of state or federal limits or any other alleged violation of law. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 237 (1962); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018).

The Legislature, moreover, cannot fully participate in this original action until its redistricting plans are final and passed by both houses of the Legislature. Nor should this Court entertain proposed remedies without the Legislature's full participation. Explained more fully below, the Legislature's redistricting plans are the presumptive remedy, Part I.B, *infra*, or at least must be *a* proposed remedy from which to choose, Part II.A-B, *infra.* So first, the Legislature needs to finish that starting point.

Applied here, there has not been adequate time for the redistricting process to run its course in the Legislature. The Legislature received new census data little more than two months ago. And while the Legislative process is nearly finished, it is not complete. Importantly, "judicial relief becomes appropriate in reapportionment cases *only* when the legislature fails to reapportion according to constitutional requisites in a timely fashion after having had an adequate opportunity to do so." Order of Sept. 22, 2021, at 2. As explained in the Legislature's previously submitted letter

brief, legislative leadership intends to take up redistricting plans before the floor period ending on November 11, 2021.

The Court should not order the parties to submit plans unless there is an impasse, as determined by a gubernatorial veto or the failure of a plan to pass both houses after an adequate time for legislative consideration.

B. The Legislature's redistricting plans are the presumptive remedial plans.

If an impasse results after the Legislature has had adequate time to reapportion, then the next prevailing factor that this Court should consider in evaluating new redistricting plans is deference to the Legislature. *See Upham*, 456 U.S. 37; *Abrams v. Johnson*, 521 U.S. 74 (1997); *Perry v. Perez*, 565 U.S. 388 (2012); *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶17, 249 Wis. 2d 706, 639 N.W.2d 537 (Legislature is "ideally and most properly" the architect of any redistricting plans). Both the state and federal constitutions vest the Legislature specifically with the power to apportion. *See* Wis. Const. art. IV, §3; U.S. Const. art. I, §4, cl. 1. "[R]eapportionment is primarily a matter for legislative consideration and determination," *Reynolds*, 377 U.S. at 586, and "state legislatures have primary jurisdiction over legislative reapportionment," *White*, 412 U.S. at 795.

1. Ordinarily, a court faced with a redistricting dispute would allow the Legislature to remedy the alleged constitutional violation. *See, e.g.*, *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (Wis. 1892); *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35 (Wis. 1892). When a court "declares an existing apportionment scheme unconstitutional," it is "appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a

substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (op. of White, J.). A "legislatively enacted plan should be preferable to one drawn by the courts." *League of United Latin American Citizens v. Perry* (*LULAC*), 548 U.S. 399, 416 (2006) (op. of Kennedy, J.). And even if the Court finds itself "fashioning a reapportionment plan or … choosing among plans," it "should not pre-empt the legislative task or 'intrude upon state policy any more than necessary.'" *White*, 412 U.S. at 795 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)).

Applied here, the Legislature's redistricting plans—passed by both houses comprising the 132 elected representatives for the people of the State of Wisconsin—should be treated as the presumptive remedial plans for Petitioners' malapportionment claims. The Legislature's redistricting plans are an expression of "the policies and preferences of the State" voted upon by the duly elected representatives of the State. *White*, 412 U.S. at 795; *see Henderson v. Perry*, 399 F. Supp. 2d 756, 768 (E.D. Tex. 2005) ("Simply undoing the work of one political party for the benefit of another would have forced this court to make decisions that could not be defended against charges of partisan decision-making … for the lack of a substantive standard."), *rev'd in part on other grounds sub nom.*, *LULAC*, 548 U.S. 399. For example, legislative redistricting plans will reflect policy choices weighing whether to maximize compactness or sacrifice some compactness to follow natural boundaries, or to maximize continuity of representation and avoid pairing incumbents in the same district.[3] The Court cannot

[3] *See, e.g.*, *Sexson v. Servaas*, 33 F.3d 799, 800 (7th Cir. 1994) (consideration of geographical factors may justify drawing less mathematically compact districts); *Karcher v. Daggett*, 462 U.S. 725, 740

"unnecessarily put aside" those legislative choices about how the forthcoming, reapportioned districts ought to be reconfigured, or otherwise "displac[e] legitimate state policy judgments with the court's own preferences." *White*, 412 U.S. at 796; *Perry*, 565 U.S. at 394. Instead, the only question is whether the Legislature's proposed reapportionment solution complies with state and federal law. *Cf. Perry*, 565 U.S. at 393-94. If so, it should be adopted as this Court's remedy for malapportionment.

2. The doctrine of constitutional avoidance is yet another reason why the Court should adopt the Legislature's state legislative districts as the presumptive remedial maps for the State Senate and Assembly if the Court concludes that the plan complies with all legal requirements. *See, e.g.*, *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶64, 357 Wis. 2d 469, 851 N.W.2d 262. Here, there is a lurking constitutional question about whether the Legislature's reapportionment plans are sufficient to effectuate redistricting for the state legislative districts. This Court held in *Zimmerman* that the state legislative districts must also be signed by the Governor because both are "indispensable parts of th[at] legislative process." 22 Wis. 2d at 556-57. But *Zimmerman* is on shaky ground in light of the language of the Article IV, §3 and historical context. *See SEIU, Local 1 v. Vos*, 2020 WI 67, ¶28, 393 Wis. 2d 38, 946 N.W.2d 35 (the "text of the constitution reflects the

---

(1983); *see also White*, 412 U.S. at 792 (approving "policy frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives"); *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688 (D. Ariz. 1992) ("maintenance of incumbents provides the electorate with some continuity"), *aff'd sub nom. Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 507 U.S. 981 (1993).

policy choices of the people, and therefore constitutional interpretation … focuses primarily on the language of the constitution"); *see also State v. Halverson*, 2021 WI 7, ¶22, 395 Wis. 2d 385, 953 N.W.2d 847 ("[W]e focus on the language of the adopted text and historical evidence including "the practices at the time the constitution was adopted, debates over adoption of a given provision, and early legislative interpretation as evidenced by the first laws passed following the adoption.").

The Legislature's power to reapportion its districts is specifically enumerated in the state constitution, distinct from its lawmaking power. And while the Constitution makes the legislative power of Article IV, §1 subject to presentment and possible veto by the Governor, *see* Wis. Const. art. V, §10, the Legislature's reapportionment power does not have the same limitation. *Compare* Wis. Const. art IV, §3, *with id.* §§1, 17. The text regarding that reapportionment power states that "the legislature shall apportion and district anew the members of the senate and assembly…." *Id.* §3. It does not provide that "the legislature should *enact legislation* to apportion anew" or "the legislature shall *by law* apportion anew."[4]

[4] The absence of "by law" is especially significant since such language is used elsewhere in Wisconsin's constitution, including for the Legislature's separate power to reapportion congressional districts in Wisconsin's constitution when it was first ratified. *See* Wis. Const. art. XIV, §10 (1848) ("Two members of congress shall also be elected … and until otherwise provided *by law*, the counties … shall constitute the first congressional district"); *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes"); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but

The Court can avoid revisiting *Zimmerman* and the question of whether the Legislature has already reapportioned if the Court instead adopts the Legislature's remedial plans as the presumptive remedy for Petitioners' malapportionment claims.

C. The remaining factors to consider with respect to the Legislature's presumptive redistricting plans are whether they comply with state and federal law.

If the Court agrees that the Legislature's redistricting plans are the presumptive remedial maps, then compliance with federal and state law are the only additional factors that this Court needs to consider in adopting a remedy. *Cf. Wise*, 437 U.S. at 540 (op. of White, J.) (explaining that a new legislative plan to remedy malapportionment claim "if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution").

1. Equally apportioned. The Court will have to confirm that redistricting plans are properly apportioned, in accordance with federal and state law. The federal and state constitutions

---

omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"); *see also, e.g.*, Wis. Const. art. IV, §11 (legislative sessions to be held "at such time as shall be provided *by law*"); art. VII, §8 (describing circuit court original jurisdiction "[e]xcept as otherwise provided *by law*"); art. V, §3 (describing returns of election for governor and lieutenant governor to "be made in such manner as shall be provided *by law*"); art. V, §6 (gubernatorial pardoning power "subject to such regulations as may be provided *by law*"); art. VI, §2 (describing secretary of state compensation as "provided *by law*"); art. VII, §12(1) (describing circuit court clerk as "subject to removal as provided *by law*"); art. XIII, §12(4) (describing candidate filings for special elections "in the manner provided *by law*").

require reapportionment based on population. U.S. Const. art. I, §2, cl. 1; U.S. Const. amend. XIV; Wis. Const. art. IV, §3; *see Reynolds*, 377 U.S. at 562 ("if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted"); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (describing "equal representation for equal numbers of people [as] the fundamental goal for the House of Representatives"); *Cunningham*, 51 N.W. at 729 ("one of the highest and most sacred rights and privileges of the people of the state, guaranteed to them by ordinance of 1787 and the constitution" is "equal representation in the legislature"); *Zimmerman*, 22 Wis. 2d at 564 ("sec. 3, art. IV, Wis. Const., contains a precise standard of apportionment—the legislature shall apportion districts according to the number of inhabitants").

In Wisconsin, districts are drawn based on total population as reflected by the most recent census. *See* Wis. Const. art. IV, §3 (reapportionment based on "enumeration" and "number of inhabitants").[5] Each district will have an ideal population (taking total population divided by the number of districts).[6] Determining

[5] There are different ways to measure equality. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016). Wisconsin uses total population, *i.e.*, "the number of inhabitants." A State could theoretically redistrict based on voting-age population to better ensure that voters are not diluted *vis a vis* other voters, but the federal constitution does not command it. *Id.*

[6] Wisconsin's population based on the 2020 U.S. Census is 5,893,718 people. The ideal population for a State Assembly district based on total population is 59,533; for State Senate, 178,598; for congressional, 736,715. *See* legis.wisconsin.gov/ltsb/gis/data/.

population deviation from that ideal is determined in the aggregate: "Maximum population deviation is the sum of the percentage deviations from perfect population equality of the most- and least-populated districts. For example, if the largest district is 4.5% overpopulated, and the smallest district is 2.3% underpopulated, the map's maximum population deviation is 6.8%." *Evenwel*, 136 S. Ct. at 1124 n.2.

a. With respect to the state legislative districts, the federal Equal Protection Clause of the Fourteenth Amendment requires apportionment "on a population basis"—meaning districts must be constructed "as nearly of equal population as is practical." *Reynolds*, 377 U.S. at 577; *see also Evenwel*, 136 S. Ct. at 1131. In *Reynolds*, the Supreme Court explained that it was "a practical impossibility" at the time to achieve "an identical number of residents, or citizens, or voters" in each district. 377 U.S. at 577. But the resulting districting plan must be "based substantially on population" so that *Reynolds*'s "equal-population principle" is "not diluted in any significant way." *Id.* at 578. Whether and what amount of population deviation is acceptable will "depen[d] on the particular circumstances of the case." *Id.* In practice, population deviations require an explanation that traditional redistricting criteria (*e.g.* compactness) required some deviation. *See Karcher*, 462 U.S. at 740.

Today, there is a rebuttable presumption that a state legislative map with a total deviation of 10% or less is constitutional, but the goal is always population equality. *See, e.g.*, *Gaffney*, 412 at 750-51 (state legislative map approved with maximum deviation of 7.83% for house districts and 1.81% for senate districts); *White v. Regester*, 412 U.S. 755, 763-64 (1973) (no justification required when total deviation was 9.9%).

b. Likewise, the Wisconsin Constitution demands that districts be as close to equal as possible. Senate and Assembly districts must be "apportion[ed]" by the Legislature "according to the number of inhabitants." Wis. Const. art. IV, §3. This provision guarantees the people "equal representation in the legislature" *Cunningham*, 51 N.W. at 729.

The Wisconsin Constitution does not require mathematical exactness but "as close an approximation to exactness as possible." *Id*. at 730.[7] After *Reynolds v. Sims*, Wisconsin policy was to equalize districts well below the "ten percent" rule of presumptive constitutionality under the federal equal protection clause. This was not accidental. In the wake of *Reynolds*, state law for the 1972 maps stated that "[a]ll senate districts, and all assembly districts, are as equal in the number of inhabitants as practicable" and "no district deviates from the state-wide average for districts of its type by more than one per cent." Wis. Stat. §4.001(1) (1972); *see also* Wis. Stat. §4.001(3) (1983) (articulating 1.72% and 1.05% population deviation benchmark); *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 851 (E.D. Wis. 2012) (finding the maximum population deviation for Assembly districts was 0.76% and for Senate districts was 0.62%).

c. With respect to congressional districts, Article I of the U.S. Constitution commands that Representatives shall be chosen "*by*

[7] Prior to *Reynolds v. Sims*, this Court approved redistricting plans with significant population deviations. *See, e.g.*, *State ex rel. Reynolds v. Zimmerman*, 23 Wis. 2d 606, 607, 128 N.W.2d 16 (1964); *State ex rel. Bowman v. Dammann*, 209 Wis. 21, 243 N.W. 481, 485 (1932). These substantial deviations were largely the result of the Court's understanding that county lines were "held inviolable"—meaning districts had to be bounded by county lines. *Zimmerman*, 23 Wis. 2d at 606; *see also Cunningham*, 51 N.W. at 730. Courts abandoned that notion that after *Reynolds v. Sims*.

the People of the several States." U.S. Const. art I, §2, cl. 1 (emphasis added). The phrase "by the People" means "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8, 17 (1964). Under the "as nearly as is practicable" standard, States must "make a good-faith effort to achieve precise mathematical equality" when drawing congressional districts. *Karcher*, 462 U.S. at 730 (citation omitted). For congressional redistricting, there is no maximum deviation percentage that can be considered *de minimis*. *See White*, 412 U.S. at 790 n.8. Absolute population equality is the "paramount objective" of congressional reapportionment. *Karcher*, 462 U.S. at 732-33.

Unavoidable population variances are permitted but there must be a "justification" for it. *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). Such justifications include nondiscriminatory application of traditional redistricting criteria, such as "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Karcher*, 462 U.S. at 740.

* * *

The Court's remedy must comply with these equal population principles. Indeed, federal courts have required population equality with more exactness for court-drawn maps. *See Chapman v. Meier*, 420 U.S. 1, 27 & n.19 (1975) (requiring "population equality with little more than de minimis variation," "unless there are persuasive justifications"). The reasons for doing so apply equally here. That higher standard "reflect[s] the unusual position of federal courts as draftsmen of reapportionment plans," *Connor v. Finch*, 431 U.S. 407, 414-15 (1977), even though Legislatures have primary responsibility for reapportionment. When a court prioritizes population equality, that avoids the "taint of arbitrariness or

discrimination" in crafting a malapportionment remedy. *Id.* at 415 (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)). For such court-drawn maps, "any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features." *Chapman*, 420 U.S. at 26. So too here—any map drawn by this Court should prioritize equal population without arbitrarily overriding other "goals of state political policy" embodied in a legislative redistricting plan. *Upham*, 456 U.S. at 43.

2. Fourteenth Amendment and the Voting Rights Act. The Court will also have to confirm that any remedy complies with the Fourteenth Amendment and the Voting Rights Act.

The Fourteenth Amendment of the U.S. Constitution prohibits a redistricting plan from subordinating traditional redistricting factors—"compactness, respect for political subdivisions, partisan advantage, what have you"—to racial considerations. *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). If "racial considerations predominated over others, the design of the district must withstand strict scrutiny"—serving a "compelling interest" and "narrowly tailored" to that end. *Id.* at 1464. One such compelling interest under current U.S. Supreme Court precedent "is complying with operative provisions of the Voting Rights Act of 1965." *Id.*

Section 2 of the Voting Rights Act requires that the political processes are "equally open to participation" for all citizens. 52 U.S.C. §10301(b); *see Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2337-38 (2021). The Court has applied that rule to single-member voting districts where there has been a "dispersal of a group's members into districts" leaving them as "an ineffective minority of voters." *Cooper*, 137 S. Ct. at 1464 (brackets omitted) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986)). Proving vote dilution starts with three threshold preconditions: (1) a

minority group must be sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district; (2) the minority group must be politically cohesive; (3) a district's white majority must vote sufficiently as a bloc to usually defeat the minority's preferred candidate. *Cooper*, 137 S. Ct. at 1470 (citing *Gingles*, 478 U.S. at 50-51). If there are "good reason[s]" to think that these preconditions are met, then there is also "good reason to believe that §2 requires drawing a majority-minority district" under current Supreme Court precedent. *Id.* (citing *Bush v. Vera*, 517 U.S. 952, 978 (1996) (plurality opinion)).

But the VRA does not give *carte blanche* authority to redistrict based on race. *See id.* at 1469-70. There must be a compelling reason for doing so, and any use of race in a reapportionment plan must be narrowly tailored to that end. *See id.*; *Ala. Leg. Black Caucus v. Alabama*, 575 U.S. 254, 279 (2015); *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (race-predominant redistricting "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls").

In these proceedings, as part of ensuring that any judicial order or reapportionment complies with both the Fourteenth Amendment and the Voting Rights Act, the Legislature (and any other party wishing to submit any alternative remedial map) will establish, with support from an expert in the field, that their proposed remedial map complies with both.

3. Number of districts. State and federal law currently provides for 8 congressional districts, 99 State Assembly districts

and 33 State Senate districts. Wis. Stat. §§3.001, 4.001; *see also* 2 U.S.C. §2a(b).[8]

4. "Nested" assembly districts. The Wisconsin Constitution requires State Senate districts to wholly encompass Assembly districts. Wis. Const. art. IV, § 5 (providing that "no assembly district shall be divided in the formation of a senate district"). Because equal apportionment applies to both Senate and Assembly districts and because of the number of Senate and Assembly districts established by law, each Senate district must comprise three Assembly districts.

5. Single-member districts. The Wisconsin Constitution requires single-member legislative districts. Wis. Const. art. IV, §§4, 5. State and federal law both require that each congressional district belongs to a single representative. 2 U.S.C. §2c; Wis. Stat. §3.001.

6. Compactness. The Wisconsin Constitution requires Assembly districts to be "in as compact form as practicable." Wis. Const. art. IV, §4. This Court has not adopted a particular measure of compactness and has observed that compactness is one measure "of securing a nearer approach to equality of representation." *Cunningham*, 53 N.W. at 58. At the same time, in certain areas, achieving a more compact district could also justify the drawing of districts that have slight population deviations. *See Zimmerman*, 23 Wis. 2d at 606-07; *see also Dammann*, 243 N.W. at 484 (perfect population equality is not possible in light of other considerations, including compactness).

---

[8] U.S. Department of Commerce, U.S. Census Bureau, "Apportionment Population and Number of Representatives By State: 2020 Census," www2.census.gov/programs-surveys/decennial/2020/data/apportionment/apportionment-2020-table01.pdf.

7. Contiguity. The Wisconsin Constitution requires Assembly and Senate districts to be contiguous. Wis. Const. art. IV, §4 (requiring Assembly districts to "consist of contiguous territory"); *id.* at §5 (requiring Senate districts to be of a "convenient contiguous territory"). Contiguity means *political* contiguity. If annexation by municipalities creates a municipal "island," the district containing detached portions of the municipality is legally contiguous even if the geography around the municipal island is part of a different district. *See, e.g.*, *Prosser v. Elections Bd.*, 793 F. Supp. 859, 866 (W.D. Wis. 1992) (rejecting argument that Wisconsin's constitution requires "literal" contiguity, and noting "that it has been the practice of the Wisconsin legislature to treat [municipal] islands as contiguous with the cities or villages to which they belong"); *see also* Wis. Stat. §5.15(1)(b), (2)(f)(3); Wis. Stat. §4.001(2) (1972) ("Island territory (territory belonging to a city, town or village but not contiguous to the main part thereof) is considered a contiguous part of its municipality.").

8. County, municipal, or ward boundaries. Last, the Wisconsin Constitution requires Assembly districts to be "bounded by county, precinct, town or ward lines." Wis. Const. art. IV, §4.

Before the U.S. Supreme Court in *Reynolds* announced the one-person-one-vote principle for state legislative districts, this Court interpreted section 4 of article IV of the Wisconsin Constitution to prohibit districts from crossing county boundaries unless the district comprised multiple whole counties. *See, e.g., Zimmerman*, 22 Wis. 2d at 565-66. This resulted in significant and unavoidable population deviations. *See Zimmerman*, 23 Wis. 2d at 623 (largest Assembly district in court drawn plan included more than twice as many inhabitants as smallest district).

After *Reynolds*, Wisconsin Attorney General Robert Warren concluded in a formal opinion that "the Wisconsin Constitution no

longer may be considered as prohibiting assembly districts from crossing county lines, in view of the emphasis the United States Supreme Court has placed upon population equality in electoral districts." 58 Wis. Op. Att'y Gen. 88, 91 (1969). In practice, courts that have subsequently remedied Wisconsin reapportionment disputes have observed that "avoiding the division of counties is no longer an inviolable principle." *Baumgart v. Wendelberger*, Nos. 01-C-1021, 02-C-0366, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002); *see also Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 635 (E.D. Wis. 1982) (calling the maintenance of county boundaries "incompatib[le] with population equality" and thus "of secondary importance").

Nevertheless, respecting municipal boundaries remains a consideration in redistricting plans. As the *Baumgart* court observed, "respect for the prerogatives of the Wisconsin Constitution dictate that wards and municipalities be kept whole where possible." 2002 WL 34127471, at *3; *see also* 60 Wis. Op. Att'y Gen. 101, 106 (1971) (concluding that "insofar as may be consistent with population equality, town and ward lines should be followed"). Accordingly, every judicial map drawn post-*Reynolds v. Sims* has followed ward boundaries. *Baumgart*, 2002 WL 34127471, at *3.

* * *

Each of these requirements have guided the Legislature's redistricting process. 2021 Wis. Senate Joint Res. 63. That is all the more reason that the Legislature's redistricting plans—the manifestation of state policy—ought to be the presumptive remedial plans and accepted as the remedy for Petitioners' malapportionment claims so long as they comply with state and federal law.

II. In the alternative, the presumptive remedial map is the existing map, adjusted as necessary for population shifts.

Alternatively, the Court could begin with the *existing* congressional and legislative districts. The Court would then invite the parties to propose remedial plans that adjust the existing districts as necessary to account for shifting populations and to otherwise ensure that new districts comply with state and federal law. The Court would then accept the remedial plan that is the "least changes" from the existing map. That approach would comport with the Court's limited role in redistricting, respect the traditional redistricting principle of core retention, and mitigate temporal vote dilution.

A. A "least changes" map is an appropriate judicial remedy in a redistricting case.

Judicial restraint must guide any redistricting-related remedy. Remedying Petitioner's malapportionment claims is not a policymaking exercise. Reapportionment—as the term suggests—ordinarily begins with the existing map. *Cf. Perry*, 565 U.S. at 393 ("To avoid being compelled to make such otherwise standardless decisions, a district court should take guidance from the State's recently enacted plan in drafting an interim plan."). Parties then propose modifications to districts as necessary to accommodate shifting population, for a "least changes" or "minimum changes"

redistricting plan to remedy Petitioners' malapportionment claims.[9]

Remedying Petitioners' malapportionment claims with a "least changes" map is consistent with traditional remedial principles. For any court in any case, it is a fundamental tenant of remedies that "[i]njunctive relief should be tailored to the necessities of the particular case." *Bubolz v. Dane Cty.*, 159 Wis. 2d 284, 296, 464 N.W.2d 67 (Ct. App. 1990); *State v. Seigel*, 163 Wis. 2d 871, 890, 472 N.W.2d 584 (Ct. App. 1991) ("because injunctive relief is preventive, not punitive, the relief ordered may not be broader than equitably necessary"). Courts must "limit the solution to the problem." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006); *see also Cunningham*, 51 N.W. at 736 (Pinney, J., concurring) ("it is to be borne in mind that the writ of injunction under our constitution is … of a strictly judicial nature" ensuring that the Court's equitable power does not become "the exercise of political power"). If a plaintiff brought a First Amendment challenge to a state law, for example, a court would not rewrite the law to remedy the plaintiff's First Amendment harm. So too here: "In fashioning a remedy in redistricting cases, courts are

---

[9] Justice Alito summarized the minimum changes approach in his separate opinion in *Cooper v. Harris*:

> When a new census requires redistricting, it is a common practice to start with the plan used in the prior map and to change the boundaries of the prior districts only as needed to comply with the one-person, one-vote mandate and to achieve other desired ends. This approach honors settled expectations and, if the prior plan survived legal challenge, minimizes the risk that the new plan will be overturned.

137 S. Ct. at 1492 (Alito, J., concurring in the judgment in part and dissenting in part).

generally limited to correcting only those unconstitutional aspects of a state's plan." *Johnson v. Miller*, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997); *see also Upham*, 456 U.S. at 42 ("The remedial powers of an equity court must be adequate to the task, but they are not unlimited." (quotation marks omitted)).

Those remedial principles are at their zenith here. Redistricting is a "political thicket." *Gaffney*, 412 U.S. at 750. It is "one of the most intensely partisan aspects of American political life," entailing inherently political decisions. *Rucho*, 139 S. Ct. at 2507. Courts must be especially careful when ordering a redistricting remedy—lest their task be transformed from a judicial one to a legislative one. *Cf. White*, 412 U.S. at 795 (when adherence to "plans proposed by the state legislature ... does not detract from the requirements of the Federal Constitution," courts "should not pre-empt the legislative task nor intrude upon state policy any more than necessary" (quotation marks omitted)); *see, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018) ("The District Court's remedial authority was accordingly limited to ensuring that the plaintiffs were relieved of the burden of voting in racially gerrymandered legislative districts."). By utilizing the existing map as a starting point, "[a] minimum change plan acts as a surrogate for the intent of the state's legislative body," which courts cannot override even in redistricting disputes. *Johnson*, 922 F. Supp. at 1559; *see White*, 412 U.S. at 796 (legislature's "decisions should not be unnecessarily put aside in the course of fashioning relief appropriate to remedy" map's legal defects); *Covington*, 138 S. Ct. at 2555 ("Once the District Court had ensured that the racial gerrymanders at issue in this case were remedied, its proper role in North Carolina's legislative districting process was at an end.").

Choosing among plans and remedying Petitioners' malapportionment claims with a "least changes" plan is not novel. Courts have long used the existing map and then made only those changes "necessary" to remedy constitutional infirmities. *See, e.g.*, *Baumgart*, 2002 WL 34127471, at *7 (describing process as "taking the 1992 reapportionment plan as a template and adjusting it for population deviations"); *Hippert v. Ritchie*, 813 N.W.2d 374, 380 (Minn. 2012) ("Because courts engaged in redistricting lack the authority to make the political decisions that the Legislature and the Governor can make through their enactment of redistricting legislation, the panel utilizes a least-change strategy where feasible."); *Martin v. Augusta-Richmond Cty., Ga., Comm'n*, No. CV 112-058, 2012 WL 2339499, at *3 (S.D. Ga. June 19, 2012) ("chang[ing] only the faulty portions of the benchmark plan, as subtly as possible, in order to make the new plan constitutional"); *Crumly v. Cobb Cty. Bd. of Elections & Voter Registration*, 892 F. Supp. 2d 1333, 1345 (N.D. Ga. 2012) (noting "Court followed the doctrine of minimum change"); *Stenger v. Kellett*, No. 4:11-cv-2230, 2012 WL 601017, at *3 (E.D. Mo. Feb. 23, 2012) ("A frequently used model in reapportioning districts is to begin with the current boundaries and change them as little as possible while making equal the population of the districts."); *Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618, 647 (D.S.C. 2002) ("altering old plans only as necessary to achieve the requisite goals of the new plan"); *Markham v. Fulton Cty. Bd. of Registrations & Elections*, No. 1:02-cv-1111, 2002 WL 32587313, at *6 (N.D. Ga. May 29, 2002) ("Keeping the minimum change doctrine in mind, the Court made only the changes it deemed necessary to guarantee substantial equality and to honor traditional redistricting concerns."); *Bodker v. Taylor*, No. 1:02-cv-999, 2002 WL 32587312, at *5 (N.D. Ga. June 5, 2002) ("The court notes ... that its plan represents only a small, though constitutionally necessary, change in the district lines in

accordance with the minimum change doctrine."); *Below v. Gardner*, 148 N.H. 1, 963 A.2d 785, 794 (2002) ("[W]e use as our benchmark the existing senate districts because the senate districting plan enacted in 1992 is the last validly enacted plan and is the 'clearest expression of the legislature's intent.'"); *Alexander v. Taylor*, 2002 OK 59, ¶23, 51 P.3d 1204 (2002) ("A court, as a general rule, should be guided by the legislative policies underlying the existing plan. The starting point for analysis, therefore, is the 1991 Plan."); *Johnson*, 922 F. Supp. at 1559; *LaComb v. Growe*, 541 F. Supp. 145, 151 (D. Minn. 1982) ("[T]he Court ... takes as the starting point the last configuration of congressional districts. The districts are modified only to serve State policy and satisfy the constitutional mandate that one person's vote shall equal another's."), *aff'd sub nom. Orwoll v. LaComb*, 456 U.S. 966 (1982); *Holmes v. Burns*, No. C.A. 82-1727, 1982 WL 609171, at *20 (R.I. Super. Aug. 29, 1982); *Md. Citizens Comm. for Fair Cong. Redistricting, Inc. v. Tawes*, 253 F. Supp. 731, 734 (D. Md. 1966) ("A basic goal has been to achieve the requirements of equality laid down in the Supreme Court decisions without doing unnecessary violence to the heart of existing districts, county lines, and district lines within the counties and ward lines in the city.").

B. A "least changes" map is necessary to mitigate temporal vote dilution.

Wisconsin's system of staggered State Senate elections is another reason for a "least changes" map for the state legislative districts in particular. The 17 odd-numbered Senate districts will be up for election in 2022 (having last been up for election in 2018), and the 16 even-numbered Senate districts will be up for election in 2024 (having last been up for election in 2020). If a redistricting plan keeps Wisconsin voters in their same districts, they stay on schedule and vote for State Senate every four years. But if a

Wisconsin voter is moved from an odd-numbered district up for election in 2022 and into an even-numbered district up for election in 2024, that voter faces a *six-year* gap between State Senate elections. Her vote has been diluted as compared to other Wisconsin voters who remain in their Senate districts. A "least changes" map mitigates the harm of such temporal vote dilution. Starting from scratch exacerbates it.

Federal courts have referred to this temporal vote dilution as "'disenfranchisement.'" *Prosser*, 793 F. Supp. at 864. The risk of disenfranchisement is a "special consideration[]" that must be kept in mind in Wisconsin redistricting and "is not something to be encouraged." *Baumgart*, 2002 WL 34127471, at *7; *Prosser*, 793 F. Supp. at 866. Because of shifting populations and the one-person-one-vote requirement, some amount of disenfranchisement is inevitable when districts are reapportioned. But this disenfranchisement should be mitigated. One way to do so is to adopt a "least changes" map. *See Baumgart*, 2002 WL 34127471, at *3 (noting that its plan, which took the existing map as the "template," produced the lowest "number of voters disenfranchised with respect to Senate elections").[10]

C. A "least changes" map appropriately prioritizes continuity of representation.

More broadly, a "least changes" map maximizes all Wisconsin voters' continuity of existing representation in the Legislature and in Congress. Continuity of representation, or "core retention,"

[10] Likewise, the Legislature's prioritizing core retention as a redistricting principle will mitigate Senate disenfranchisement. 2021 Wis. Senate Joint Res. 63.

is a long-held and undisputed traditional redistricting criteria.[11] Core retention aims to keep voters in their existing districts to allow for those voters to be represented by the same elected officials over a longer period of time. In a judicial setting, it is "the most significant" of the traditional redistricting criteria. *Martin*, 2012 WL 2339499, at *3 (citing *Upham*, 456 U.S. at 43). In *Karcher*, for example, the U.S. Supreme Court endorsed States' interest in "preserving the cores of prior districts, and avoiding contests between incumbent Representatives." 462 U.S. at 740. Similarly in *White v. Weiser*, the Court explained that States have a legitimate interest in "promot[ing] 'constituency-representative relations,' a policy frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents," among other benefits. 412 U.S. at 791-92.

Courts and social scientists have recognized that there is a societal advantage to being represented by the same individual over a period of time. This advantage is most obvious in the constituent services context:

> Voters develop relationships with their representatives. Long-term representatives have a chance to learn about and understand the unique problems of their districts and to pursue legislation that remedies those problems….the "quality" of at least one political product—namely, representation—is not necessarily improved by competition. On the contrary, novice representatives are likely to be systematically inferior to

[11] *See* Nat'l Conf. of State Legislatures, "Redistricting Criteria" (July 16, 2021), https://bit.ly/2Xv0INC (describing core retention as traditional redistricting criteria); *see also* Ronald Keith Gaddie & Charles S. Bullock, III, *From* Ashcroft *to* Larios*: Recent Redistricting Lessons from Georgia*, 34 Fordham Urb. L.J. 997, 1002 (2007).

> "entrenched" representatives when it comes to the effective representation of their constituents' views.

Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649, 671 (2002); *see also* Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131, 1136 (2005) ("[C]ourts that take account of incumbency do so in order to preserve the constituency-representative relationship that existed under the enjoined plan."). By allowing for "close representation of voter views" and "ease of identifying 'government' and 'opposition' parties," long term representation both promotes "stability in government" and democratic accountability by "mak[ing] it easier for voters to identify which party is responsible for government decisionmaking." *Vieth v. Jubelirer*, 541 U.S. 267, 357-358 (2004) (Breyer, J., dissenting) (collecting sources).

Finally, in an impasse suit, core retention best preserves the Legislature's constitutionally prescribed role in redistricting in a judicial setting. The "cores in existing districts are the clearest expression of the legislature's intent to group persons on a 'community of interest' basis." *Colleton Cty. Council*, 201 F. Supp. 2d at 649. Those legislative prerogatives cannot be overridden merely by initiating a malapportionment suit and placing redistricting into the hands of the courts. *See White*, 412 U.S. at 796; *Upham*, 456 U.S. at 43. For this reason, in past redistricting cycles, courts have recognized and employed core retention as a traditional redistricting criteria to be considered when remedying redistricting-related claims. *See Baldus v. Members of the Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012) (recognizing "core

retention" as a "traditional redistricting criteria"); *Baumgart*, 2002 WL 34127471, at *3 (same).[12]

A "least changes" approach here simultaneously maximizes core retention and minimizes the Court's involvement in the "political thicket" of redistricting by preferring a map that keeps voters in their current districts. *See, e.g.*, *Stenger*, 2012 WL 601017, at *3 ("The 'least change' method is advantageous because it maintains the continuity in representation for each district and is by far the simplest way to reapportion the county council districts.").

* * *

There will inevitably be multiple ways to adjust the existing maps to accommodate shifting populations. All other things equal, the Court should defer to the Legislature's plan. *See White*, 412 U.S. at 796. If not, then the Court itself would be rebalancing the redistricting criteria—compactness, contiguity, communities of interest, protection of incumbents, and so forth—that the Legislature already balanced as part of the redistricting process both now and ten years ago. *See* 2021 Wis. Senate Joint Res. 63; *but see*

[12] For other examples of courts considering core retention, *see, e.g.*, *Abrams*, 521 U.S. at 99-100 (affirming interest in "maintaining core districts"); *Stenger*, 2012 WL 601017, at *3; *Colleton Cty. Council*, 201 F. Supp. 2d at 647 (affirming importance of "protecting the core constituency's interest in reelecting, if they choose, an incumbent representative in whom they have placed their trust"); *Alexander*, 2002 OK 59, ¶23; *Arizonans for Fair Representation*, 828 F. Supp. at 688 ("[T]he maintenance of incumbents provides the electorate with some continuity. The voting population within a particular district is able to maintain its relationship with its particular representative and avoids accusations of political gerrymandering."); *Legislature v. Reinecke*, 10 Cal. 3d 396, 516 P.2d 6, 12 (1973) ("The state may rationally consider stability and continuity in the Senate as a desirable goal which is reasonably promoted by providing for four-year staggered terms.").

White, 412 U.S. at 796; *Covington*, 138 S. Ct. at 2554-55; *Upham*, 456 U.S. at 43.

III. The Court cannot consider partisanship when evaluating proposed remedies.

The partisan makeup of redistricting plans is not a valid factor for the Court to apply in evaluating or creating new maps. There is no judicially manageable standard for rejecting a map as overly partisan or approving a map as more "fair" or "balanced." *See Rucho*, 139 S. Ct. at 2498-2501. If there is no judicially manageable way for a court to evaluate existing redistricting plans on these partisan measures (as *Rucho* explained), then it necessarily follows that this Court cannot craft a *remedy* for Petitioners' malapportionment claim based on partisan measures.

Time and again, courts have refused to referee lawsuits challenging the use of political considerations as unlawful. There are "no legal standards to limit and direct" judicial decisionmaking in this "most intensely partisan aspect[] of American political life." *Id.* at 2507; *see Gill v. Whitford*, 138 S. Ct. 1916, 1926-29 (2018). Considerations of partisanship in redistricting has been "lawful and common practice" dating back to the Founding. *Vieth*, 541 U.S. at 286 (plurality op.); *see Rucho*, 139 S. Ct. at 2494-96. Even if it weren't, whether a redistricting map is "too partisan" or "fair enough" cannot be "judged in terms of simple arithmetic." *Fortson v. Dorsey*, 379 U.S. 433, 440 (1965) (Harlan, J., concurring). Courts cannot "even begin to answer the determinative question": "How much" partisan influence "is too much?" *Rucho*, 139 S. Ct. at 2501.

Importantly, "fairness" is not a component of any state or federal equal protection analysis. *See F.C.C. v. Beach Comms., Inc.*, 508 U.S. 307, 313 (1993) ("equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative

choices"); *Mayo v. Wis. Injured Patients & Families Compensation Fund*, 2018 WI 78, ¶41, 383 Wis. 2d 1, 914 N.W.2d 678. The equal protection clause does not, for example, "require[] proportional representation" or require "district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote would be." *Rucho*, 139 S. Ct. at 2499 (quoting *Davis v. Bandemer*, 478 U.S. 109, 130 (1986) (plurality op.)). Numerous other standards for evaluating partisan "unfairness" have been rejected as well. *See id.* at 2496-98, 2502-04; *Gill*, 138 S. Ct. at 1926-29 (cataloguing rejected standards).

Moreover, "political fairness" is an impossible standard by which to evaluate redistricting maps because "it is not even clear what fairness looks like" in the context of reapportionment. *Rucho*, 139 S. Ct. at 2500. A "large measure of 'unfairness'" is baked into single-member, winner-take-all districts. *Id.* Voters tend to live around like-minded voters, meaning individual districts will not necessarily replicate the partisan makeup of Wisconsin state-wide. *See Bandemer*, 478 U.S. at 130 (plurality op.); *Vieth*, 541 U.S. at 289-90 (plurality op.).

Without a legal standard to evaluate "fairness," there is no principal to apply that would "meaningfully constrain the discretion of courts." *Rucho*, 139 S. Ct. at 2500 (quoting *Vieth*, 541 U.S. at 291 (plurality op.)). Evaluating remedial plans for partisan fairness requires the court to make a policy determination reserved exclusively for legislatures, *see id.* at 2494-97, and one that is "of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. There is simply no constitutional standard authorizing "courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end." *Rucho*, 139 S. Ct. at 2499.

Applied here, there no reason for this Court to consider partisanship in remedying a malapportionment claim. *White*, 412 U.S. at 795 (cautioning courts not to "pre-empt" or "intrude" upon state policy). Nor would there be any judicially manageable way for this Court to do so. *Rucho*, 139 S. Ct. at 2500-01. If this Court were to attempt to consider partisanship—even "fairness"—it would be plunging unnecessarily into the political thicket of redistricting. *See Gaffney*, 412 U.S. at 749 (cautioning against removing redistricting from "legislative hands," such that it is recurringly "performed by federal courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan"). It should not be a factor considered by this Court in remedying Petitioners' claims.

IV. Nature of the proceedings.

A. Timing of proceedings

For the reasons stated in the Legislature's letter brief regarding timing, there is ample time remaining for this court to review and approve redistricting plans. Right now, the Legislature needs time for the redistricting process—which is near completion—to finish. Once the Legislature's redistricting process is complete, and if there is an impasse, the Legislature and the other parties will need time to prepare their remedial submissions, a proposal for which is detailed more fully below.

B. Form of proceedings

As in most redistricting disputes, the Court can choose among remedies proposed by the parties. That will entail remedial submissions by the parties. It could also necessitate a short hearing limited to any disputed facts regarding the proposed remedial

plans. That hearing could be overseen by this Court or a special master. *See* Wis. Stat. §§751.09, 805.06; *see also* Non-Party Br. of Daniel Suhr at 8 (Sept. 7, 2021) (collecting examples). Depending on the Court's resolution of the questions presented here, those submissions could take one two forms—

If the Court agrees that the Legislature's redistricting plans are the presumptive remedy, then the submissions will entail (A) the Legislature's redistricting plans, supported by briefing and expert declarations or reports that detail their compliance with state and federal law; (B) other parties' responses, supported by briefing and expert declarations or reports detailing why adjustments are necessary to comply with state and federal law.

If the Court instead begins with the existing redistricting plans, then the submissions will entail (A) any party's proposed "least changes" map, supported by briefing and expert declarations or reports detailing adherence to a "least changes" remedy and compliance with state and federal law; (B) any party's responsive submissions addressing other proposed plans' adherence to a "least changes" remedy and compliance with state and federal law. The Court would then choose between the proposed "least changes" remedies.

With respect to the timing of those submissions and any potential hearing, the Legislature proposes the following:

1. November 4: Parties submit joint stipulation of facts and law and identify anticipated disputed facts.
2. By December 1, and only in the event of an impasse: This Court issues an interim order providing guidance on the questions briefed herein. That order will give the parties a framework for their subsequent submissions.

3. December 21: Parties' opening submission. The opening submission shall comprise: (a) short pre-hearing brief (< 3,300 words), (b) remedial map (if applicable), (c) expert witness declarations or reports in support of any remedial map. Any party who proposes a remedial map (or any alternative to the Legislature's map) must support that proposed remedy with argument and expert declaration(s) or report(s) explaining the proposed plans' compliance with state and federal law.[13]

4. January 12: Parties' responsive submission. The responsive submission shall comprise: (a) short pre-hearing response brief (< 5,000 words), (b) responsive expert declaration(s) or report(s) regarding other proposed remedial maps.

5. January 14: Parties submit supplemental joint stipulation of facts and law and disputed facts.

6. January 21: Parties submit written direct examination of any expert witness or other fact witness to testify at hearing before the Court or a referee, if any. Any witness would then be made available for live cross-examination and re-direct at hearing.

7. January 25 to 28: Hearing limited to disputed issues of fact, if any.

[13] If the Court agrees that the Legislature's map is the presumptive remedial map, then any alternative districting proposals must be supported by evidence and argument that a deviation from the Legislature's presumptive plans is necessary to comply with state or federal law.

8. February 1: Short post-hearing briefs (simultaneous) on disputed issues of fact, if any.

9. February 8: Closing arguments regarding disputed issues of fact, if any.

10. February 18: Decision resolving disputed issues of fact, if any.

11. February 25: Supplemental briefs (simultaneous), if necessary.

12. Week of March 7: Argument, if necessary.

13. Week of April 4 or earlier: Final order and decision.

CONCLUSION

For the foregoing reasons, the Legislature should be permitted to complete the redistricting process to determine whether there will be an impasse. Once that occurs, and if there is an impasse, then the Legislature's redistricting plans should be the presumptive remedial plan for any malapportionment claim, so long as those redistricting plans comply with state and federal law. In the alternative, the existing districts should be the starting point for any remedial map, to be adjusted as necessary to accommodate the shifting population and to comply with state and federal law.

Dated this 25th day of October, 2021.

Respectfully submitted,

Electronically Signed By
Kevin M. St. John

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

** Admitted pro hac vice*
*** Admitted pro hac vice; licensed to practice in Ill. & D.C.*
**** Admitted pro hac vice; licensed to practice in Mass.*

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

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

Attorneys for Intervenor-Respondent, The Wisconsin Legislature

CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c) for a brief. This brief uses a proportionally spaced serif font, with margins and line spacing greater than or equal to that specified by rule. Excluding the caption, table of contents, table of authorities, signatures, and these certifications, the length of this brief is 10,285 words as calculated by Microsoft Word.

Dated this 25th day of October, 2021.

Respectfully submitted,

Electronically Signed by
Kevin M. St. John

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

Attorney for the
Wisconsin Legislature

CERTIFICATION OF FILING AND SERVICE

I certify that I caused the foregoing brief to be filed with the Court as attachments to an email to clerk@wicourts.gov, sent on or before 12:00 noon and dated this day. I further certify that I will cause a paper original and 10 copies of these materials with a notation that "This document was previously filed via email" to be filed with the clerk no later than 12:00 noon on Tuesday, October 26, 2021.

I further certify that on this day, I caused service copies of these documents to be sent by email to all counsel of record who have consented to service by email. I caused service copies to be sent by U.S. mail and email to all counsel of record who have not consented to service by email.

Dated this 25th day of October, 2021.

Respectfully submitted,

Electronically Signed by
Kevin M. St. John

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

Attorney for the
Wisconsin Legislature

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

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

(Counsel for the Congressmen listed on the following page)

MISHA TSEYTLIN
Counsel of Record
State Bar No. 1102199
KEVIN M. LEROY
State Bar No. 1105053
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

Counsel for Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

INTRODUCTION[1]

The Congressmen's Initial Brief explained that this Court should adopt a "least-change" approach to drawing a remedial map, consistent with bedrock remedial and equitable principles. Certain other parties now oppose this approach, offering a grab-bag of objections, while proposing their own approaches. These parties are wrong as a matter of law, especially because they do not purport to explain what source of equitable authority permits a wholesale judicial rewriting of a congressional map that was enacted by the Legislature and signed by the Governor in 2011, when the only violation alleged is due to population changes in the last decennial. In any event, all of these alternative approaches are nonstarters because they would require this Court to adopt a map according to these parties' policy preference.

[1] Given that this Court ordered the parties to file their Initial Briefs simultaneously, *see* Order, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Oct. 14, 2021), the Congressmen present this Response Brief in a typical reply-brief format, for the benefit of this Court, so that they may more closely respond to the parties' various positions on the four Issues Presented.

ARGUMENT

I. The Parties Generally Agree On The State- And Federal-Law Requirements Governing This Court's Adoption Of A Remedial Map, Although Some Parties Misunderstand The Scope Of The Voting Rights Act

As all parties appear to agree, *see generally* Johnson Br.8–21; BLOC Br.3–22; Hunter Br.1–13; Citizen Math. Br.4–19; Leg. Br.16–31; Gov. Br.5–8; Bewley Br.9–14, any remedial congressional map must comply with the following legal mandates: (A) the one-person/one-vote rule found in Article I, Section 1 and Article IV of the Wisconsin Constitution, as well as in Article I, Section 2 of the U.S. Constitution and the Fourteenth Amendment's Equal Protection Clause, *see* Congressmen Br.8–11; (B) the anti-racial-gerrymandering principle in the U.S. Constitution and the Wisconsin Constitution, *see* Congressmen Br.11–12; and (C) Section 2 of the Voting Rights Act ("VRA"), *see* Congressman Br.13–14.

Some parties erroneously suggest that the VRA either requires or permits drawing district lines according to race even where this would not produce a majority-minority district under *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986). *See* Hunter Br.21–22; BLOC Br.8–9; Citizen Math. Br.10–11. This is legally wrong. The VRA prohibits minority "vote dilution" through the "dispersal of a group's members into districts in which they constitute an ineffective minority of voters." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (quoting *Gingles*, 478 U.S. at 46 n.11) (alteration omitted).

Accordingly, a necessary "threshold condition[ ]" for a Section 2 vote-dilution claim is the presence of a politically cohesive minority group that could form a *majority* "in some reasonably configured legislative district." *Id.* at 1470. Thus, Section 2 does not extend to situations where a politically cohesive minority group cannot form a voting majority. *See League of United Latin American Citizens v. Perry (LULAC)*, 548 U.S. 399, 445–46 (2006) (controlling op. of Kennedy, J.); *Bartlett v. Strickland*, 556 U.S. 1, 12–17, 23 (2009) (controlling op. of Kennedy, J.). Any other conclusion "would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *LULAC*, 548 U.S. at 445–46 (controlling op. of Kennedy, J.); *accord Bartlett*, 556 U.S. at 22 (controlling op. of Kennedy, J.).

II. The "Least-Change" Approach Follows From This Court's Remedial And Equitable Authority, And The Parties Opposing This Approach Fail To Refute That

As the Congressmen explained, bedrock remedial and equitable principles compel the "least-change" approach to drawing any remedial congressional maps. Congressmen Br.15–19. The "least-change" approach also comports with this Court's role in our constitutional order, as it is a neutral rule guiding the completion of the redistricting process. Congressmen Br.19–22. This would also minimize voter confusion and maximize core retention. Congressmen Br.22–

23. Finally, the "least-change" approach will allow this Court to adopt a remedial map efficiently. Congressmen Br.23.

The *Hunter* Petitioners, the *BLOC* Petitioners, the Governor, Minority Leader Bewley, and the Citizen Mathematicians all oppose the "least-change" approach. Hunter Br.20; BLOC Br.22; Bewley Br.14; Citizen Math. Br.20. However, none of these parties refute the fundamental argument: that core remedial and equitable principles compel this Court to follow the "least-change" approach, given the nature of the alleged legal violation. In any event, the arguments that these parties make against the "least-change" approach are all unpersuasive, *infra* Part II.A.1–4, and they offer only their preferred policy preferences as an alternative to guide this Court, *infra* Part II.B.[2]

---

[2] While the Legislature supports the "least-change" approach, its primary position is that this Court should defer to the maps that it adopts, if vetoed by the Governor. Leg. Br.12, 16, 18–20. The Legislature's position has substantial merit given that redistricting is "an inherently . . . legislative" task, "entrusted . . . to the legislative branch," *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam), and that this Court should defer to the Legislature's choices when considering alternative "least-change" remedies for congressional district lines. Having said that, so long as this Court retains its decision in *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964), the Congressmen could imagine a situation where a future Legislature could adopt a congressional map entirely different from the existing map, which map the Governor may veto. *See id.* at 557, 570 (holding that the Governor may exercise his veto power over the Legislature's approved maps). In that hypothetical circumstance, the Congressmen doubt that this Court's remedial and equitable authority would allow it to adopt such a wildly different map, as a remedy for a one-person/one-vote violation in the existing map. This Court need not deal with this hypothetical in this case, however, given

A. The Parties Challenging The "Least-Change" Approach Offer Only Unpersuasive Arguments

1. The "Least-Change" Approach Is Legally Sound

Various parties challenging the "least-change" approach raise meritless constitutional arguments against it and/or baseless claims that it will trigger other statutory violations. None of these arguments has merit.

The *BLOC* Petitioners argue that the Wisconsin Constitution precludes the least-change approach under the *expressio unius* canon, since Article IV, Section 4 explicitly lists compactness, contiguity, and respect for political boundaries as mandatory redistricting criteria that the Legislature must follow with respect to the state legislative districts. *See* BLOC Br.27–28 & n.6 (citing Wis. Const. art. IV, § 4 and *State v. Lickes*, 2021 WI 60, ¶ 24, 960 N.W.2d 855, among other authorities); *accord* Whitford Am.Br.4–5. This argument is fundamentally confused because the question here is how *this Court* should remedy a one-person/one-vote violation. Congressmen Br.7, 15–16. That is, this Court's role is to adopt a remedy that is "appropriately tailored to" the equal-population "violation." Congressmen Br.16–19 (quoting *Serv. Emps. Int'l Union, Loc. 1 ("SEIU") v. Vos*, 2020

---

that the Legislature has already committed to adopting a "least-change" congressional map, meaning that both the "least-change" approach and the Legislature's primary approach will likely converge in their entirety here. *See* Leg. Br.12 (discussing 2021 Wis. Senate Joint Res. 63).

WI 67, ¶ 47, 393 Wis. 2d 38, 946 N.W.2d 35)). The "least-change" approach is the most "fitting remedy" for that constitutional violation, as it adjusts the existing district lines only to account for population changes. Congressmen Br.16–19 (quoting *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam)).

Regardless, even if these parties were correct that this Court should essentially sit as the Legislature in drawing the remedial congressional map, Article IV, Section 4 does not limit what the Legislature may consider when completing the redistricting process. Article IV, Section 4 simply lists the *minimum requirements* for the State's legislative districts, *see* Wis. Const. art. IV, § 4, leaving the Legislature to make other "political and policy decisions" once those requirements are met, *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam). Indeed, each of the parties criticizing the "least-change" approach—including the *BLOC* Petitioners—recognize this, since each of them urge this Court to follow one redistricting principle or another not specifically enumerated in Article IV, Section 4. *See, e.g.*, BLOC Br.15–19 (advocating for consideration of "preservation of communities of interest," "[i]ncumbents' [r]esidences," and "partisan makeup of districts"); Hunter Br.11–13 ("measures of partisan bias"); Gov. Br.7 ("maintaining traditional communities of interest"; "avoiding unnecessary pairing of incumbents"); Bewley Br.13–14 ("preserving identifiable communities of interest";

"account[ing] for . . . partisan influence"); Citizen Math. Br.4 ("partisan fairness"; "competitiveness or responsiveness").

The *BLOC* Petitioners' additional constitutional argument—that Article IV, Section 3 prohibits the "least-change" approach because it states that "the legislature shall apportion and district *anew*"—makes no sense. Wis. Const. art. IV, § 3 (emphasis added); *see* BLOC Br.30–36; *see also* Whitford Am. Br.5–6. According to the *BLOC* Petitioners, Article IV, Section 3's use of "anew" means that the State cannot use the "least-change" approach because that approach "enshrine[s] the old" redistricting map for the State, rather than redistricting the State "anew." BLOC Br.32. To begin, this argument suffers from the same fundamental flaw as the argument just discussed above, as the question here is how this Court should adopt a *remedial* map, following applicable remedial and equitable principles. *See supra* pp. 3–4. In any event, this argument ignores the full constitutional text of Article IV, Section 3, which requires the Legislature to "*apportion* and *district* anew," Wis. Const. art. IV, § 3 (emphases added). "Anew" modifies the verbs "apportion" and "district," meaning that the Legislature need only readjust existing district lines as needed to rebalance the districts' populations. *See Apportion*, Oxford English Dictionary (Sept. 2021) ("[t]o assign in proper portions or

shares");[3] *District*, Oxford English Dictionary (Sept. 2021) ("[t]o divide or organize into districts").[4]

The Governor, for his part, claims that the "least-change" approach would impermissibly elevate the retention of the existing district lines over other binding constitutional and statutory requirements. Gov.Br.8–10. Here again, this confuses the issue before this Court: how *this Court* should remedy a one-person/one-vote violation. Congressmen Br.7, 15–16; *supra* pp. 3–4. Foundational remedial and equitable principles directly support following the least-change approach here, as it narrowly remedies the only legal violation at issue, the malapportionment of the existing districts. Congressmen Br.16–19; *supra* pp. 3–4.

Finally, the *Hunter* Petitioners claim that the "least-change" approach would "expand the scope of this litigation" by requiring this Court to adjudicate "other [legal] deficiencies in the existing maps," including "violations of article I of the Wisconsin Constitution and Section 2 of the Voting Rights Act." Hunter Br.14. But again, this Court's task is only to remedy a one-person/one-vote violation. Congressmen Br.7, 15–18. This Court would *not* further concern itself with any other alleged legal "deficiencies in the existing maps," contrary to the *Hunter* Petitioners'

[3] Accessed at www.oed.com/view/Entry/9748 (all websites last accessed Oct. 31, 2021).

[4] Accessed at www.oed.com/view/Entry/55797.

suggestion. Hunter Br.14. While this Court must ensure that this remedial map complies with all state and federal requirements, *see* Congressmen Br.7, that same inquiry is required for *any* remedial map that this Court adopts under *any* of the parties' proposed approaches, including under the "least-change" approach. The *only* difference is that the "least-change" map is *less* likely to contravene state or federal requirements as compared to a map generated under any other approach, since it largely carries forward the existing congressional boundaries, which boundaries have withstood a decade of litigation. Congressmen Br.15–16, 27–29.

2. The "Least-Change" Approach Is Easily Administrable

Multiple parties argue that this Court should not follow the "least-change" approach because it is too "abstract," BLOC Br.23, or "nebulous," Bewley Br.14–15, leaving this Court "only to guess" how to apply it here, Hunter Br.13–14. These parties' criticisms are incorrect.

As the Congressmen explained, the "least-change" approach requires this Court to adopt a remedial map by making "minor or obvious adjustments" to the existing map to account for "shifts in [Wisconsin's] population," as expressed in the 2020 Census. Congressmen Br.15–16 (quoting *Perry v. Perez*, 565 U.S. 388, 392 (2012)). This is a simple, concrete approach providing specific guidance for this Court to follow, *contra* BLOC Br.23; Bewley Br.14–15; Hunter

Br.13–14, which is why courts across the country, including the U.S. Supreme Court, have endorsed it, *see* Congressmen Br.15–23 (citing four cases endorsing the "least-change" approach, including *Upham v. Seamon*, 456 U.S. 37, 43 (1982), and *White v. Weiser*, 412 U.S. 783, 795 (1973)); *see also* Leg. Br.35–36 (collecting over ten additional cases using the "least-change" approach).[5] And while Professor Whitford's amicus argues that the U.S. Supreme Court "rebuked a court" for following the "least-change" approach in *LULAC*, 548 U.S. 399, that is incorrect. Whitford Am. Br.15. *LULAC* reviewed a mid-decade redistricting map drawn by a legislature, and it merely described in its background section (without rebuke) that a district court had previously adopted a "least-change" map for the State. *LULAC*, 548 U.S. at 412–13; *compare Upham*, 456 U.S. at 43 (endorsing the "least-change" approach); *White*, 412 U.S. at 795 (same).

Of course, this Court must exercise some limited discretion under a "least-change" approach when determining precisely how to adjust existing district lines to achieve population equality, since there is no one way to accomplish

[5] The *BLOC* Petitioners argue that this Court should not follow the "least-change" approach because no previous court has "applied such an approach" when adopting a remedial map for Wisconsin. BLOC Br.36–37. That is wrong, since *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam), followed precisely this approach—"taking the [existing] reapportionment plan as a template and adjusting it for population deviations" to create a remedial map. *Id.* at *7 (describing this approach as "the most neutral way [the court] could conceive"); *contra* BLOC Br.36–37.

this goal. As the Congressmen have explained, traditional redistricting principles would guide the exercise of that limited discretion. *See* Congressmen Br.14–15, 27. Thus, if a given district were underpopulated—such that the "least-change" remedial map needed to add more people to that district—traditional redistricting principles would counsel in favor of adjusting the district's lines in a manner that eliminates county or municipal splits and/or makes the district more compact. *See* Congressmen Br.14–15 (identifying these as traditional redistricting principles). And within this narrow band of discretion under the "least-change" approach, this Court should defer to the Legislature's reasonable judgments on how to adjust the existing lines, consistent with this Court's recognition that redistricting is an "inherently . . . legislative task." *Jensen*, 2002 WI 13, ¶ 10; *see supra* p. 4 n.2.

The *BLOC* Petitioners', the *Hunter* Petitioners', and Minority Leader Bewley's criticisms of the "least-change" approach as giving insufficient clarity to this Court are deeply ironic, as each of these parties offer only opaque alternatives in its place, as explained below. *Infra* Part II.B. Further, the *Hunter* Petitioners in particular must understand that the "least-change" approach does provide sufficiently clear guidance. They ask this Court to follow this *exact same approach* when adjusting the existing boundaries of certain Assembly Districts that fall within the scope of Section 2 of the VRA. Hunter Br.21 (asking this Court to make only

"minor adjustments . . . to account for population change" with respect to Assembly Districts 8 and 9). The *Hunter* Petitioners do not attempt to explain why this Court could follow this approach with respect to those particular Assembly Districts, but not with respect to each of the congressional districts, as it adopts a remedial map for the entire State. *See generally* Hunter Br.13–14, 21.

3. Whether The Legislature Used The "Least-Change" Approach In Prior Redistricting Cycles Does Not Alter This Court's Remedial Authority

Multiple parties argue that this Court should not follow the "least-change" approach because, they claim, the Legislature did not adhere to it when adopting Wisconsin's existing congressional map in 2011. Hunter Br.15–16; Gov. Br.9–10; Bewley Br.16–17; Whitford Am. Br.8. This criticism reflects a fundamental misunderstanding of this Court's role vis-à-vis that of the Legislature. When the Legislature exercises its constitutional redistricting power, it has the authority to redraw districts based on "political and policy decisions," given that redistricting is an "inherently political and legislative task." *Jensen*, 2002 WI 13, ¶ 10; *Zimmerman*, 22 Wis. 2d at 570; *State ex rel. Bowman v. Dammann*, 209 Wis. 21, 243 N.W. 481, 485 (1932); *see* Congressmen Br.24. The only "limits" on the Legislature's discretionary "choices" in this sphere are those found in federal and state constitutional and statutory requirements. *Zimmerman*, 22

Wis. 2d at 570; *see* Congressmen Br.7–15, 20. Thus the Legislature has the authority to choose to adopt wholly new maps, as it pursues the public policy that it thinks best for the State. This Court's role in redistricting is decidedly different, as it is only remedying an equal-population violation. Congressmen Br.15–19, 21.

4. The "Least-Change" Approach Does Not Undermine Political Incentives

Multiple parties argue that this Court following the "least-change" approach would incentivize the Legislature and the Governor not to adopt a compromise redistricting map in the future. BLOC Br.43–45; Hunter Br.17; Citizen Math. Br.27. This misses the mark. As noted immediately above, the Legislature may desire to make substantial changes to the map to achieve political or policy objectives apart from mere re-equalizing the districts. *Supra* Part II.A.3; *Jensen*, 2002 WI 13, ¶ 10. If the Legislature and Governor do not reach a compromise and end up deadlocking, their ability to achieve those political or policy goals through a redistricting action would be frustrated. This is because, under the "least-change" approach, this Court would only make those minor adjustments to the existing map necessary to correct a malapportionment. Thus, if the Legislature and Governor wish to achieve any portion of their political- or policy-based redistricting goals by substantially altering the

existing map, the only way would be to complete the redistricting task themselves, through a political compromise.

B. The Parties Challenging The "Least-Change" Approach Only Offer Their Preferred Policy Preferences As Alternatives

All of the parties who reject the "least-change" approach fail to offer a satisfactory alternative to guide this Court's remedial-map-drawing efforts. Instead, each would simply have this Court redistrict the State according to these parties' own preferred policies. *See generally* Hunter Br.13–18, 26; BLOC Br.23–24, 46, 49; Gov. Br.8–13; Citizen Math. Br.19–29; Bewley Br.14–19. Thus, even if these parties' critiques of the "least-change" approach had some merit, which they plainly do not, *see* Part II.A, their failure to offer a viable alternative counsels in favor of following the "least-change" approach here, *see Rucho v. Common Cause*, 139 S. Ct. 2484, 2502–06 (2019) (considering and rejecting plaintiffs' multiple proposed standards for adjudicating their partisan-gerrymandering claims); Honorable Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 Case W. Reserve L. Rev. 905, 918–19 (2016).

The Congressmen briefly address each of the proposed approaches of the *Hunter* Petitioners, the *BLOC* Petitioners, the Governor, Minority Leader Bewley, and the Citizen Mathematicians immediately below, explaining how each approach invites this Court to adopt a map according to

unguided policy preferences, which are incompatible with this Court's role in our constitutional order.

Beginning with the *Hunter* Petitioners, they propose that this Court adopt a remedial map by "examin[ing]" proposed maps submitted by the parties/amici, "analyz[ing] how they serve relevant redistricting criteria," and then choosing "a redistricting plan that best serves the *myriad of competing considerations that go into redistricting*." Hunter Br.18 (emphasis added). The *Hunter* Petitioners offer no principled rule for how this Court may balance these "myriad of competing considerations," *id.*, only that such balancing must also "consider[ ] . . . partisan performance" and "create neutral, fair maps"—an additional balancing act for which they offer no further legal guidance. Hunter Br.7, 18.

The *BLOC* Petitioners' approach is equally unbounded. They propose that this Court adopt a remedial map by following the criteria that it "*must* consider," then "sometimes also weighing factors [it] *may* consider," while "avoiding the criteria [it] *must not* consider." BLOC Br.23–24. And somewhere in this unbounded framework, this Court "must [also] consider the partisan effects of the maps it imposes"—"analyz[ing] that question in light of justice, moderation, temperance, and respect for democratic principles." BLOC Br.46, 49. This too reduces only to policy preference, as the *BLOC* Petitioners offer no coherent rule for how this Court should "sometimes" weigh the "may-consider" factors or

sufficiently pursue their lofty (and lengthy) list of values that a remedial map must also somehow embody.

As for the Governor, he proposes that this Court adopt a remedial map that, in addition to "comply[ing] with federal and state constitutional and statutory requirements," also "include[s] other considerations, if appropriate under the circumstances and not in conflict with the binding requirements." Gov. Br.8. And "[p]artisan makeup . . . can be, and should be," one of those other considerations, so as "to help ensure maps are fair and balanced." Gov. Br.8, 14. Here again, the Governor offers no principled rule for applying the largely unnamed "considerations" and "circumstances" that he champions, let alone a discernible standard for when a map would be "fair and balanced." Gov. Br.8, 14.

Minority Leader Bewley recommends that this Court adopt a remedial plan "designed to do 'best possible' service to principles of fair representation embodied in the governing federal and state law, and as supported by traditional redistricting principles." Bewley Br.19. This approach lacks coherent legal principles for its application, and it is *admittedly* driven by judicial policy preferences, as Minority Leader Bewley wants this Court to "*apply its own values and put its own thumb on the scale*." Bewley Br.18 (emphasis added).

Finally, the Citizen Mathematicians argue that this Court "should adopt a 'best map' approach," which requires balancing "at least eleven traditional, neutral redistricting

principles," such as "partisan fairness," "competitiveness or responsiveness," and "stability." Citizen Math. Br.4, 18, 20. The Citizen Mathematicians admit that these factors may be "hard to measure," will "inevitably" raise questions of "how much is enough," and—"[p]erhaps hardest of all"—require "tradeoffs" between one factor as opposed to another. Citizen Math. Br.18. This approach is composed of policy choices from beginning to end—starting with deciding which factors are the relevant considerations; moving to how those factors are measured, weighed, and prioritized; and ending with the selection of the "best map." And while the Citizen Mathematicians do elaborate on their own ranking of the factors, they simply assume that their ranking is normatively correct, *see* Citizen Math. Br.24–26, rather than grounding the ranking in any coherent, predictable legal principles.

III. This Court Should Not Consider Partisan Makeup When Adopting A Remedial Map

A. The Congressmen explained that this Court should not consider a remedial map's partisan makeup here for two fundamental reasons. First, this Court considering such political concerns would exceed its remedial and equitable authority to adopt a remedial map. Congressmen Br.23–24. Second, nothing in either the Wisconsin Constitution or the U.S. Constitution makes partisan considerations relevant to a redistricting map's legality, including because redistricting is an "inherently political . . . task" that requires the

Legislature to make "political and policy decisions." *Jensen*, 2002 WI 13, ¶ 10 (emphasis added); Congressmen Br.23–24.

B. While the *Hunter* Petitioners, the *BLOC* Petitioners, the Governor, Minority Leader Bewley, and the Citizen Mathematicians all argue that this Court should consider partisan makeup in its remedial map, none of these parties even attempt to explain how such considerations could fall within this Court's equitable authority to remedy the malapportionment violation at issue here, which should be the end of the issue. *See generally* BLOC Br.46–57; Hunter Br.1–13; Citizen Math. Br.29–36; Gov. Br.14–15; Bewley Br.19–21. In any event, as explained below, the arguments that these parties muster fail to show how either the state or the federal constitutions allow this Court to consider partisanship in its remedial-map-drawing process. *Infra* Part III.B.1. Nor do these parties' arguments provide any judicially administrable standard for deciding when a map's partisan makeup is "too much." *Infra* Part III.B.2.

1. None of the parties advocating for consideration of partisan makeup shows that the Wisconsin Constitution or the U.S. Constitution would support such considerations. That failure is not surprising, given this Court's decision in *Jensen*, 2002 WI 13, and the U.S. Supreme Court's decision in *Rucho*, 139 S. Ct. 2484. *See* Congressmen Br.24–25.

a. Beginning with the Wisconsin Constitution, the *BLOC* Petitioners argue that this Court recognized partisan-gerrymandering claims in the *Cunningham* cases. *See* BLOC

Br.50–51 (discussing *State ex rel Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892), and *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35 (1892)). But the *Cunningham* cases rested on the equal-population principle, not on a rule against partisan gerrymandering, as this Court was adjudicating only claims that the "disparity in the number of inhabitants in the legislative districts" drawn by the Legislature was "so great" as to be "a direct and palpable violation of the constitution." *Cunningham*, 53 N.W. at 55. Or, as this Court explained in *Zimmerman*, 22 Wis. 2d 544, "the malapportionment present in [*Cunningham*] was not found to be a 'gerrymander' as that term is generally understood"; instead, *Cunningham* considered a map with a "substantial deviation from per capita equality of representation." *Id.* at 566–67.

Next, the Citizen Mathematicians claim that *Jensen* requires this Court to consider partisan makeup, since *Jensen* quoted favorably from *Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992). *See* Citizen Math. Br.31–32; *accord* Hunter Br.8–9 (favorably citing *Prosser*); Gov. Br.14–15 (same). The Citizen Mathematicians overread *Jensen*'s reliance on *Prosser*. While this Court in *Jensen* quoted some passages from *Prosser*, it did so *only* to explain that it was "in a position similar to that in which [*Prosser*] found itself"—specifically, it was called upon to adopt a remedial redistricting map without the benefit of "an enacted plan," just like the *Prosser* court. *Jensen*, 2002 WI 13, ¶ 12 (quoting

Prosser, 793 F. Supp. at 867). *Jensen* did *not* rely on *Prosser* for the proposition that this Court's role when adopting a remedial map is to balance the partisan makeup, contrary to the Citizen Mathematician's claim. *Compare id.*, *with* Citizen Math. Br.31–32. Indeed, such a leap would put *Jensen* in tension with itself, given that this Court recognized in that case that redistricting is "inherently political" and raises "critical legal and political issues." 2002 WI 13, ¶¶ 10, 18.

In any event, both *Jensen* and *Prosser* are factually distinguishable here. In both those cases, this Court and the federal court dealt with a redistricting challenge to then-existing, *court-drawn* maps. *See Jensen*, 2002 WI 13, ¶ 12 (considering challenge to 1992 court-drawn map); *Prosser*, 793 F. Supp. at 861–62 (considering challenge to 1982 court-drawn map); *see generally Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 844 (E.D. Wis. 2012) ("In 1982, 1992, and 2002, Wisconsin's legislative districts were drawn by a three-judge court."). Here, the Petitioners and Intervenor-Petitioners challenge the legislatively enacted map from 2011, Omnibus Amended Original Action Pet. ¶ 72—a map that has, in *Prosser*'s words, "the virtue of political legitimacy," 793 F. Supp. at 867.

The *BLOC* Petitioners briefly argue that Article I, Section 22 of the Wisconsin Constitution independently requires this Court to consider partisan makeup. BLOC Br.46–50. This argument goes nowhere. Article I, Section 22 provides that "[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. This Court interprets this provision to offer the same protections as the Fourteenth Amendment. *See Chicago & N.W. Ry. Co. v. La Follette*, 43 Wis. 2d 631, 642–43, 169 N.W.2d 441 (1969). The Fourteenth Amendment, however, does not permit federal courts to engage in partisan balancing during the redistricting process, *see Rucho*, 139 S. Ct. at 2491, 2499; thus, Article I, Section 22 would not permit this Court to engage in such balancing either, *contra* BLOC Br.46–50.

The *Hunter* Petitioners assert that the Wisconsin Constitution "embodies a respect for political equality," from which they conclude, apparently, that this Court must balance the partisan makeup of a remedial congressional map. Hunter Br.13; *see* Bewley Br.19 (arguing that "principles of fair representation [are] embodied in the governing federal and state law," without identifying a specific source of such law); Citizen Math. Br.33 (asserting that "logic suggests" that a map should embody proportional representation). This is mere *ipse dixit*, as the *Hunter* Petitioners cite no constitutional text establishing this redistricting principle, let alone translating that principle into a requirement that binds this Court's remedial-map-drawing efforts. *See* Hunter Br.13; *accord* Bewley Br.19; Citizen Math. Br.33. This lack of support in our State's

Constitution is understandable, given that redistricting is an "inherently political . . . task," *Jensen*, 2002 WI 13, ¶ 10.

b. Moving to the U.S. Constitution, multiple parties simply refuse to accept that *Rucho* expressly held that the U.S. Constitution permits state legislatures to employ political considerations in redistricting and prohibits federal courts from "reallocat[ing] political power" by adjusting district lines based on partisan concerns. Congressmen Br.25 (quoting *Rucho*, 139 S. Ct. at 2498, 2506–07).

The Governor argues that the U.S. Constitution empowers this Court to consider partisan makeup in a remedial map by relying on *Gaffney v. Cummings*, 412 U.S. 735 (1973), while ignoring *Rucho*. Gov. Br.14–15. But *Gaffney* only explained that such considerations could be proper for a State's redistricting body tasked with drawing new maps, not for a court tasked with adopting a remedial map in the event of a political gridlock. *See Gaffney*, 412 U.S. at 736, 754 (considering map drawn by "a three-man bipartisan Board"). And, of course, *Rucho* removes all doubt that the U.S. Constitution could support a court taking such partisan-balancing concerns into account when selecting a remedial map. *See Rucho*, 139 S. Ct. at 2498, 2506–07.

Similarly, Minority Leader Bewley argues that this Court must consider the partisan makeup of the districts in a remedial map in order to "vindicat[e]" the "First Amendment rights of the citizens of Wisconsin." Yet, she too only cites pre-*Rucho* precedent for that claim, Bewley Br.21, which

precedent obviously cannot override *Rucho*'s more-recent, express holdings to the contrary.

Finally, the Citizen Mathematicians argue that *Chapman v. Meier*, 420 U.S. 1 (1975), imposes "higher standards" on courts than on state legislatures when completing the redistricting process, which they interpret to mean that courts must ensure that their remedial maps are politically balanced, as a matter of federal constitutional law. *See* Citizen Math. Br.33 (citing *Chapman*, 420 U.S. at 26). Again, that argument cannot possibly survive *Rucho*, which was decided far more recently than *Chapman*. In any event, *Chapman*'s "higher standards" holding relates *only* to the one-person/one-vote rule, requiring court-drawn maps to limit "deviation[s] from approximate population equality" to a greater extent than legislature-drawn plans. *Chapman*, 420 U.S. at 26; *accord* Hunter Br.19 (explaining that *Chapman*'s "higher standards" apply to apportionment). And, if anything, *Chapman* supports this Court not considering partisan makeup in a redial map, since *Chapman* imposed its more stringent equal-population standard on court-drawn maps precisely because courts "lack[ ] the political authoritativeness" to "compromise sometimes conflicting state apportionment policies in the people's name." *Connor v. Finch*, 431 U.S. 407, 415 (1977); *Chapman*, 420 U.S. at 26–27.

2. These parties have also failed to identify a judicially manageable standard with which to reliably judge partisanship in a redistricting map, which is why *Rucho*

rejected any partisan gerrymandering claim at the federal level. 139 S. Ct. at 2499–502, 2508.

While the *Hunter* Petitioners, the *BLOC* Petitioners, the Governor, Minority Leader Bewley, and the Citizen Mathematicians all want this Court to consider whether a map is "too partisan," none of these parties put forward an objective, judicially administrable standard for when a map exceeds permissible partisanship thresholds. *See* Hunter Br.1–13; BLOC Br.46–57; Gov. Br.14–15; Bewley Br.19–21; Citizen Math. Br.29–36. Instead, these parties just assert that this Court's remedial map must not have "excessively partisan effects," Citizen Math. Br.29 (capitalization altered), or must not be a "severe partisan gerrymander," BLOC Br.56, "aggressive[ly]" partisan, Hunter Br.10, or "improperly promote unfair partisan advantage," Gov. Br.14. That is, none of these parties identify any "coherent legal test" to judge with any "measure of predictability," *Horst v. Deere & Co.*, 2009 WI 75, ¶ 71, 319 Wis. 2d 147, 769 N.W.2d 536, when a map has "too much" partisanship, *see* Gov. Br.14–15 (failing to discuss an administrable test); BLOC Br.46–57 (same); Bewley Br.19–21 (same); Citizen Math. Br.29–36 (same); *accord* Hunter Br.11–12 (claiming that it is "premature at this stage to recommend *how* the Court should measure and analyze partisan bias"). And while some of the parties cite a grab bag of social-science metrics that would purportedly quantify partisanship, *see* Hunter Br.12; *accord* BLOC Br.43–44, those metrics do not identify the tolerable limits of

partisanship, *accord Rucho*, 130 S. Ct. at 2501; *Gill v. Whitford*, 138 S. Ct. 1916, 1932–33 (2018).

The parties' failure to put forward a coherent standard for measuring excessive partisanship is the same fatal flaw that doomed partisan gerrymandering claims in *Rucho*. As *Rucho* explained, for a court to declare that a map is impermissibly partisan, it must first have "a standard for deciding how much partisan dominance is too much." 139 S. Ct. at 2498 (citation omitted). Otherwise, the court would issue its judgment "with uncertain limits," thus "risk[ing] assuming political, not legal, responsibility" over the redistricting process. *Id.* (citations omitted). So, unless the parties here present this Court with a coherent standard to measure excess partisanship, this Court cannot "even begin to answer the determinative question: 'How much [partisanship] is too much?'" *Id.* at 2501.

With no coherent legal test to judge whether Wisconsin's existing maps are impermissibly partisan, *Horst*, 2009 WI 75, ¶ 71, the various parties simply assert that this is so, heavily relying on the district-court decisions in *Baldus v. Members of Wisconsin Government Accountability Board*, 849 F. Supp. 2d 840 (E.D. Wis. 2012), and *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018). *See* Hunter Br.3–5; Gov. Br.10–11; Bewley Br.17; *accord* BLOC Br.21, 39, 53–54. Yet *Whitford* involved no challenge to congressional districts, and the partisan-gerrymandering claims against the congressional

districts in *Baldus* went nowhere, as the court observed that these districts resulted from a bipartisan process. *Whitford*, 218 F. Supp. 3d at 843–44; *Baldus*, 849 F. Supp. 2d at 854 (ultimately dismissing claim for plaintiffs' failure to present judicially manageable standard). And while these parties focus on the state legislative districts, the U.S. Supreme Court vacated the *Whitford* district-court decision in whole, *Gill*, 138 S. Ct. at 1934, and then the parties dismissed the case after *Rucho*, *see Whitford v. Gill*, 402 F. Supp. 3d 529, 531 (W.D. Wis. 2019).

IV. The "Least-Change" Approach May Well Allow This Court To Adopt A Remedial Map Based Solely On Submissions To This Court, Without Need For Factfinding Or Discovery Proceedings Proposed By Some Of The Parties

Finally, as the Congressmen previously explained, the "least-change" approach may well allow this Court to adopt a remedial congressional map based solely on submissions from the parties/amici. Congressmen Br.25–29. Specifically, if this Court were to follow the "least-change" approach, the parties/amici would submit their proposed maps to this Court, along with all necessary population data and explanations for the adjustments to the existing district lines. Congressmen Br.26–27. Based on these submissions, this Court may well be able to choose a "least-change" remedial congressional map without need for further factfinding—including as to the map's compliance with the other state and federal-law

requirements—using the traditional redistricting criteria to guide the selection of the most fitting changes, while deferring to the Legislature's reasonable judgments as appropriate. Congressmen Br.26–29; *supra* p. 4 n.2. This is notably unlike many of the other approaches put forward by some of the parties, which depend upon factfinding or discovery procedures. *See* BLOC Br.57–66; Gov. Br.15–16; Bewley Br.21–22; *see also* Hunter Br.32–33.

The "least-change" approach would also empower this Court to adopt a remedial map expeditiously, as the Congressmen previous explained in their letter briefs to this Court. Congressmen Letter Br., *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Oct. 6, 2021) ("Congressmen Oct. 6 Letter"); Congressmen Resp. Letter Br., *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Oct. 13, 2021) ("Congressmen Oct. 13 Letter"). Specifically, the Congressmen's approach would allow this Court to adopt a remedial plan by **February 28, 2022**, one day in advance of **March 1, 2022** deadline that the federal court in *Hunter v. Bostelmann*, Dkt. 75, Nos. 3:21-cv-512, *et al.* (W.D. Wis.), has apparently set, *see* Congressmen Oct. 6 Letter at 1–2; Congressmen Oct. 13 Letter at 1–2. Below is an example schedule that this Court could follow to adopt a remedial map by the Congressmen's proposed **February 28** date:

- If the Legislature approves new redistricting maps by the close of its next available floor period, **November 11, 2021**, the Governor will have until

November 18, 2021 to approve or veto the maps. Wis. Const. art. V, § 10(1)(b), (3);

- Then, if the Governor were to veto the proposed maps on **November 18**, this Court could immediately declare that Wisconsin's existing congressional and state-legislative maps are malapportioned, in violation of the Wisconsin Constitution;

- Next, this Court could order all parties/amici to simultaneously submit their proposed "least-change" maps and accompanying briefs/materials by **December 24, 2021**, with simultaneous response briefs due by **January 7, 2022**;

- Finally, after the Court reviews those submissions, it could either enter its decision adopting redistricting maps for the State based on the parties' submissions or order limited fact-finding procedures, if necessary, and then order all parties/amici to submit simultaneous supplemental memoranda by **January 28, 2022**, with the Court entering its final relief by **February 28, 2022**.

Congressmen Oct. 13 Letter at 2–3; *see* Congressmen Oct. 6 Letter at 2.

CONCLUSION

The Congressmen respectfully submit that this Court should approach this matter as described above and, in the Congressmen's Initial Brief.

Dated: November 1, 2021.

Respectfully submitted,

MISHA TSEYTLIN
Counsel of Record
State Bar No. 1102199
KEVIN M. LEROY
State Bar No. 1105053
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

Counsel for Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald

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 6,419 words.

Dated: November 1, 2021.

MISHA TSEYTLIN
State Bar No. 1102199
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

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: November 1, 2021.

MISHA TSEYTLIN
State Bar No. 1102199
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

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.

HUNTER INTERVENOR-PETITIONERS' RESPONSE BRIEF ADDRESSING PARTIES' OCTOBER 25, 2021 BRIEFS

Charles G. Curtis, Jr.
Bar No. 1013075
PERKINS COIE LLP
33 E Main St, Ste 201
Madison, Wisconsin 53703-3095
(608) 663-7460
CCurtis@perkinscoie.com
Attorney for Hunter Intervenor-Petitioners

Aria C. Branch*
Jacob D. Shelly*
Christina A. Ford*
William K. Hancock*
ELIAS LAW GROUP LLP
10 G St., NE, Suite 600
Washington, D.C. 20002
(202) 968-4490
ABranch@elias.law
JShelly@elias.law
CFord@elias.law
WHancock@elias.law
Attorneys for Hunter Intervenor-Petitioners

*Admitted *Pro Hac Vice*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

This Court has a choice to make: Affirmatively perpetuate one of the country's most extreme gerrymanders, or adopt a neutral map befitting an impartial judiciary. Rhetoric from the Legislature aside, this Court is not required to maintain the existing gerrymander; if it does so, it is only by choice.

This Court owes no special deference to a now outdated and unconstitutional map from the 2010 redistricting cycle. Unlike other redistricting cases in which courts are called upon to remedy one or two districts in a contemporaneously enacted map, impasse litigation, by definition, means *there is no enacted plan* that this Court could defer to that reflects the elected branches' policy choices in light of the 2020 Census.

Nor should the Court give into the Legislature's brazen request that it directly implement the Legislature's preferred map even if that map does not survive a gubernatorial veto. This entire litigation is premised on the expectation that the Republican-controlled Legislature will be unwilling and unable to pass redistricting plans that will be acceptable to Wisconsin's Democratic Governor. Doing as the Legislature requests would be deeply antidemocratic. It also has no basis in law or

precedent: this Court owes *no deference* to the Legislature's preferred redistricting plan after impasse.

In refashioning Wisconsin's reapportionment plans for the next decade, this Court should strive to draw districts that return Wisconsin to a place where Wisconsin's voters have a fair shot at influencing the composition of their legislature. This is what Wisconsin voters themselves have clearly indicated they want. And *Rucho v. Common Cause* does not require otherwise. While several parties lean on *Rucho* to argue this Court should not consider the partisan implications of any remedial map, *Rucho* does not require courts to be willfully blind to the existence of partisan gerrymanders, and it most certainly does not encourage courts to actively perpetuate them. To the contrary, *Rucho* recognizes partisan gerrymanders as "'incompatible with democratic principles." 139 S. Ct. 2484, 2506 (2019). *Rucho* simply found that a partisan gerrymandering challenge under the federal Constitution to an enacted map exceeded the jurisdictional reach of federal courts. Notably, state courts are not so bound. But, in any event, this case does not ask this Court to decide whether a duly enacted map is an unconstitutional partisan gerrymander; instead, where the political branches have been unable to agree on a map, the Court is required to choose one. As many

courts have recognized, in this role, the judiciary should strive for fair and neutral maps.

For all of these reasons, as well as those set forth below, this Court should not adopt a "least-change" approach to Wisconsin's new districts. While the Legislature and others contend that such an approach would "mirror[]" what Wisconsin courts historically have done after impasse, no court in Wisconsin's history has used a least-change approach to lock in an extreme gerrymander. This Court should reject the invitation to lend its imprimatur to highly partisan maps, whether they are the Legislature's past or proposed gerrymander of Wisconsin's electoral districts.[1]

ARGUMENT

I. There is no legal basis for the Court to pursue a least-change approach.

A. The Court's remedial powers are not limited to a least-change approach.

Every ten years, Wisconsin's legislative and congressional districts must be redrawn. Under the Wisconsin Constitution, this task is

[1] In their Opening Brief, the Hunter Intervenor-Petitioners recommended this Court make use of a special master. After evaluating the other parties' briefs, the Hunter-Intervenor Petitioners wish to make clear that they do not recommend that this Court use a special master to draw new maps. Instead, should this Court choose to use a special master at all, that individual might be used to evaluate the proposed maps and identify the submission that best complies with the prescribed criteria. In any event, final decision-making should of course rest with this Court, who are elected by the people of Wisconsin.

assigned to the political branches in the first instance. This redistricting cycle, however, it is clear the political branches will not enact a redistricting plan. As a result, that task now falls to this Court—a task unlike any of this Court's ordinary disputes, and one that requires a wholesale remedy. While other parties to this action have suggested this Court need only relieve a simple malapportionment violation, this argument misunderstands the nature of the task before this Court, ignores the unique scope of impasse cases, and belies the critical distinction between this Court's original jurisdiction and other courts sitting in equity.

First, this Court is not called upon to remedy a minor technicality, but rather a wholesale failure of the political branches. There is no doubt that the political branches have a legal duty to reapportion Wisconsin's legislative and congressional districts, regardless of population change. Even if Wisconsin's population was unchanged between 2010 and 2020, the Wisconsin Constitution still requires that state legislative districts be apportioned "anew" after each Census. Wis. Const. art. IV, § 3. Similarly, the U.S. Constitution requires that representatives be apportioned according to an enumeration made every ten years. U.S. Const. art. I, § 2, cl. 3.

Second, impasse litigation is not like other kinds of redistricting cases that challenge specific portions of a recently enacted map for alleged legal violations. Instead, impasse litigation seeks a court-ordered remedy to the legislature's failure to enact a map in the first instance by asking the Court to take up the pen. In that way, the case before the Court implicates the entire map. The far-reaching scope of the violation calls for a comprehensive remedy.

Third, the argument that this Court has limited remedial powers in this case misunderstands the role of this Court when exercising its original jurisdiction. Whatever the limits on the remedial powers of lower Wisconsin courts or federal courts, there are no such limits on *this* Court. The judicial power of federal courts, for example, is limited to adjudicating "cases or controversies," and their remedial power is limited to what is necessary to resolve those controversies. *See United States v. Raines*, 362 U.S. 17, 21 (1960) ("This Court, as is the case with all federal courts, has no jurisdiction to pronounce any statute, either of a state or of the United States, void … except as it is called upon to adjudge the legal rights of litigants in actual controversies.") (quotations omitted). Similarly, the equitable power of Wisconsin circuit courts is limited to responding to "the invasion of legally protected rights." *In Interest of E.C.*, 130 Wis. 2d 376, 389, 387 N.W.2d 72, 77 (1986) (explaining the

circuit court "may provide complete justice only where there is a wrong"). But neither the Wisconsin Constitution nor any legal precedent places any such limits on this Court's original jurisdiction; it is simply permitted to "hear original actions and proceedings." Wis. Const. art. VII, § 3. Indeed, as this Court has recognized, the question over whether to accept an original action is one of "judicial policy rather than one relating to the power of this court." *State v. Grimm*, 208 Wis. 366, 243 N.W. 763, 765 (1932).

As a question of judicial policy, there can be no doubt that it is appropriate for this Court to take up the task of redistricting in full. This Court has previously recognized that redistricting cases warrant original jurisdiction because any redistricting case "is, by definition, *publici juris*, implicating the sovereign rights of the people of this state." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 17, 249 Wis. 2d 706, 717, 639 N.W.2d 537, 542. Indeed, this Court recognized that decennial redistricting is not akin to correcting a legal violation but resembles a form of "judicially legislating." *Id.* ¶ 10.

The cases identified by other parties—where federal courts are limited in the relief they can grant—only serve to further illustrate the propriety of this Court developing an independent redistricting plan. As the U.S. Supreme Court recognized in *Growe v. Emison*, the reason for

deferring to state courts is because redistricting is a "highly political task" that is "primarily the duty and responsibility of the State" through either its legislature *or* its courts. 507 U.S. 25, 33-34 (1993). If the question presented in this suit, or in *Growe*, were simply a question of correcting a legal violation, it would be just as appropriate for federal courts to address that issue in the first instance.

In sum, there is no limit on this Court's remedial power to provide Wisconsin voters a materially different reapportionment plan from the now-defunct plan they had in the prior decade. Though there may be sound reasons for *other* courts to narrow the scope of their review, this Court is well positioned to fully take up the task of redistricting in lieu of the political branches.

B. There is no rule of deference to a decade-old map.

Wisconsin is not the same as it was ten years ago. The 2020 Census reflects a decade of change and growth, posing the question: how should Wisconsin, *as it exists today*, be represented in Congress and the Legislature? The answer involves policy decisions that, under the Wisconsin Constitution, are left to the political branches in the first instance. Indeed, if the political branches were to agree on an answer to the policy questions posed by Wisconsin's growth over the last decade, their enacted map would warrant deference. But this case is before the

Court precisely because the political branches have not—and likely will not—supply the answer.

Other parties to this case, hoping this Court will adopt Wisconsin's reapportionment plans from the last decade, distort numerous cases from the U.S. Supreme Court for the alleged proposition that this Court must defer to a decade-old map. But the cases they cite exclusively concern judicial deference to maps *actually enacted* through ordinary political processes after the most recent census. In *Upham v. Seamon*, for example, the Supreme Court's statement that any modifications to the challenged districting plan should be "limited to those necessary to cure any constitutional or statutory defect" referred to a redistricting plan that had been enacted by Texas's legislature in the wake of the 1980 Census, in which only two districts were in contention. 456 U.S. 37, 38, 43 (1982). Similarly, in *White v. Weiser*, when the Supreme Court instructed courts to "follow the policies and preferences […] in the reapportionment plans proposed by the state legislature," it was referring to a duly enacted law that had been signed by Texas's governor in the wake of the 1970 Census. 412 U.S. 783, 795 (1973). The same is true of *North Carolina v. Covington,* which evaluated a racial

gerrymandering challenge to a handful of districts in another duly enacted map. 138 S. Ct. 2548 (2018).[2]

Moreover, *Perry v. Perez*, which the other parties repeatedly cite, further illustrates that courts adjudicating impasse cases are not bound to the policy choices of a decade-old legislature. *Perry* clarified that *Upham* deference only applies to "recently enacted plan[s]" because they reflect "the State's policy judgments on where to place new districts and how to shift existing ones in response to massive population growth." 565 U.S. 388, 393 (2012).[3] If that were not clear enough, the Supreme Court also distinguished the *Upham* line of cases from *Balderas v. Texas*, 2001 WL 36403750 (E.D. Tex. Nov 14, 2001), *summarily aff'd*, 536 U.S. 919 (2002), an impasse case where no redistricting plan had been enacted

[2] Indeed, even where plaintiffs are challenging aspects of a recently-enacted map, courts are not bound by a least-change approach. In *Abrams v. Johnson*, for instance, the Supreme Court *rejected* the invocation of *Upham* deference because its remedial plan was required to address "a large geographic area of the State." 521 U.S. 74, 86 (1997). Under those circumstances, the court "was justified in making substantial changes to the existing plan." *Id.*

[3] This distinction in *Perry*—that courts should not defer to a decade-old map—has been the consistent approach of federal courts. *See, e.g.*, *Smith v. Clark*, 189 F. Supp. 2d 529, 539 (S.D. Miss. 2002) (holding that where the state "failed to enact a congressional redistricting plan … there is no expression, certainly no clear expression, of state policy on congressional redistricting to which we must defer"); *O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982) ("In the circumstances before us, with the 1971 Kansas redistricting plan being constitutionally unacceptable and the legislature having failed to enact a new redistricting plan, our powers are broad."); *Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982) (affording no deference because vetoed redistricting plan was only the "proffered current policy rather than clear expressions of state policy") (citations omitted).

since the most recent Census. *Perry*, 565 U.S. at 396. As the Court explained, because "there was no recently enacted state plan," the *Balderas* court was "compelled to design an interim map based on its own notion of the public good." *Id.*

Balderas is particularly instructive here. There, the political branches had failed to enact a state redistricting plan to account for the 2000 Census. *See* 2001 WL 36403750 at *2. As a result, the court set out to "draw a redistricting plan according to neutral redistricting factors, including compactness, contiguity, and respecting county and municipal boundaries." *Id.* (cleaned up). Instead of looking at vetoed maps or decade-old maps, the starting point was traditional redistricting criteria—including drawing majority-minority districts required by the Voting Rights Act. *Id.* After using neutral criteria to develop a map, the Court "checked [their] plan against the test of general partisan outcome" using prior election results, describing it as a "traditional last check upon the rationality of any congressional redistricting plan." *Id.* at *3. Once it was shown that "the plan is likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state," the court was satisfied with the plan. *Id.*

Balderas's approach—rejecting a proposed least-change approach and explicitly considering partisan outcomes—is particularly important

when the existing map is grossly gerrymandered. Like Wisconsin's now outdated map, the prior map before the *Balderas* court "sabotaged traditional redistricting principles." *Vera v. Richards*, 861 F. Supp. 1304, 1334 (S.D. Tex. 1994), *aff'd sub nom*. *Bush v. Vera*, 517 U.S. 952 (1996). "For the sake of maintaining or winning seats … [incumbents had] shed hostile groups and potential opponents by fencing them out of their districts." *Id.* The map was excoriated as "not one in which the people select their representatives, but in which the representatives have selected the people." *Id.*

Faced with the prospect of placing the court's imprimatur on a gerrymandered map, the *Balderas* court rejected any suggestion of pursuing a least-change approach. Instead, the court took direct aim at the issue, and found that "political gerrymandering, a purely partisan exercise, is inappropriate for a federal court drawing a congressional redistricting map." *Balderas*, 2001 WL 36403750 at *4. The court described gerrymandering as "an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good." *Id.* The Supreme Court summarily affirmed that approach in *Balderas,* 536 U.S. 919 (2002), and it should serve as a guide in this litigation.

Devoid of support for their position from U.S. Supreme Court precedent, the Johnson Petitioners attempt to find support elsewhere, but cannot. The Johnson Petitioners confidently assert that least-change "is the legal rule in Minnesota," based on a single case. Johnson Br. at 23 (citing *Hippert v. Ritchie*, 813 N.W.2d 374 (Minn. 2012)). But that case does not support what the Johnson Petitioners ask this Court to do: adopt a least-change approach *and* ignore considerations of partisan outcome. *Hippert* adopted a least-change approach, but—crucially—it did so with a cognizance of political outcomes. Specifically, the court "consider[ed] the impact of redistricting on incumbent officeholders to determine whether a plan results in either undue incumbent protection or excessive incumbent conflicts." *Hippert*, 813 N.W.2d at 386. The court only finalized its plan after comparing incumbent conflicts between "legislators of the same political party, and legislators of different parties." *Id.*

Moreover, the *Hippert* court was not faced with the same challenge before this Court and the *Balderas* court—developing a redistricting plan after a decade of extreme partisan gerrymandering. In *Hippert*, the least-change approach only placed the court's imprimatur on another map enacted by *another Minnesota court* ten years prior. *Id.* at 378 (citing *Zachman v. Kiffmeyer*, No. C0–01–160 (Minn. Special

Redistricting Panel Mar. 19, 2002) (Final Order Adopting a Legislative Redistricting Plan)). Thus, read in its proper context, *Hippert*, too, supports the conclusion that multiple other courts (including the U.S. Supreme Court) have announced: no court should adopt a least-change approach when it would function to implement a partisan gerrymander.

C. There is no basis for deference to a vetoed bill.

The Legislature's extraordinary contention that the Court should defer to the Legislature's forthcoming redistricting plan even if it is not duly enacted into law—beyond being deeply antidemocratic—has no basis in law or precedent. Courts owe *no deference* to the Legislature's preferred redistricting plan after impasse.

This argument—that a vetoed bill with no force of law deserves deference in a redistricting case—has been rejected many times, including in a prior impasse case in Wisconsin. *See Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 632 (E.D. Wis. 1982) ("The vetoed plan has been submitted to us for our consideration and, after reviewing it, we conclude that it is one of the worst efforts before us and for that reason we decline to adopt it. The plan has, in our opinion, no redeeming value."); *O'Sullivan*, 540 F. Supp. at 1202 ("[W]e are not required to defer to any plan that has not survived the full legislative process to become law."); *Cartens*, 543 F. Supp. at 79 (explaining that a vetoed legislative

plan "cannot represent current state policy any more than the Governor's proposal"); *Hippert*, 813.N.W.2d at 379 n.6 ("[B]ecause the Minnesota Legislature's redistricting plan was never enacted into law, it is not entitled to [*Upham*] deference.") (citing *Perry*, 565 U.S. at 392-96). As the U.S. Supreme Court has explained, a legislative reapportionment plan that has been vetoed by the Governor represents little more than the legislature's "proffered" plan, and certainly does not reflect "the State's policy" where the Governor has a contrary recommendation. *Sixty-Seventh Minn. State Senate v. Beens,* 406 U.S. 187, 197 (1972).

Recognizing, as it must, that *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964), explicitly requires any legislative redistricting plan to be signed by the governor (or have his veto overridden) to receive the force of law, the Legislature pushes its antidemocratic agenda one step further by asking this Court to discard its own on-point precedent. The Legislature suggests that "*Zimmerman* is on shaky ground in light of the language of Article IV, § 3 and historical context." Leg. Br. at 20. But there can be no serious doubt the Court was well aware of this language and historical context when it concluded in *Zimmerman* that "it would be unreasonable to hold that the framers of the constitution intended to exclude from the reapportionment process

the one institution guaranteed to represent the majority of the voting inhabitants of the state, the Governor." 22 Wis. 2d at 556-57.

In perhaps its wildest leap, the Legislature argues that the principle of constitutional avoidance would be served by deferring to their prospective bill—thereby overruling *Zimmerman* implicitly, rather than explicitly. *See* Leg. Br. at 22. Suffice it to say, requiring the Governor's signature on laws reapportioning the state has been the rule in Wisconsin for over 100 years, and nothing could be on shakier ground than the Legislature's own contentions. *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1892) (holding "the apportionment act is like any other act of the legislature, and is passed by the legislature in the exercise of its legislative power"); Wis. Const. art. V, § 10 ("Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor.").

II. A least-change approach entrenches extreme partisan advantage.

A. *Rucho* does not require this Court to be willfully blind to the partisan impact of a map.

As the Hunter Intervenor-Petitioners explained in their Opening Brief, the judiciary's institutional credibility as a nonpartisan and independent actor depends on a reapportionment process that ensures Wisconsin's new redistricting plans are not stacked in favor of one party

from the outset. *See* Hunter Br. at 2. While the Legislature argues that a "least-changes" plan would "minimize" this Court's involvement in the "political thicket," Leg. Br. at 40, adopting the basic outlines of maps that Wisconsin voters know to be the most gerrymandered in the country does not shield this Court from the political thicket; it thrusts the Court into it. While both the Legislature and Republican Congressmen lean on *Rucho v. Common Cause* to argue this Court should not consider the partisan implications of any remedial map, *Rucho* does not require courts to be willfully blind to the existence of partisan gerrymanders. To the contrary, *Rucho* recognized that that "[partisan] gerrymandering is "'incompatible with democratic principles." 139 S. Ct. at 2506 (citing *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015)). The issue in *Rucho* was what federal courts should do when faced with an argument that a duly enacted state map was *too* gerrymandered under the federal Constitution. *See id.* at 2484, 2497 ("The 'central problem' is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is 'determining when political gerrymandering has gone too far.'") (citing *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004)).

Petitioners are *not* asking this Court to rule on whether Wisconsin's outgoing reapportionment plans would be struck down as

unconstitutional partisan gerrymanders, or even more to the point, to determine *at what point* the extreme political gerrymandering in the map crossed over the constitutional line. Petitioners simply ask that in drawing maps for Wisconsin voters to select their representatives in coming elections, the Court decline to operate as a Republican-controlled arm of government, and instead do as other courts that have been similarly tasked have done: apply neutral redistricting principles, and consider whether the likely partisan outcome of the plan "is likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state." *Balderas*, 2001 WL 36403750 at *3.

In other words, this Court cannot and should not ignore that Wisconsin's Legislature created some of the most extreme and effective gerrymanders in the country in the last redistricting cycle. *See, e.g.*, *Whitford v. Gill*, 218 F. Supp. 3d 837, 890-96, 898-99 (W.D. Wis. 2016) (three-judge panel), *vacated for lack of standing*, 138 S. Ct. 1916 (2018). Regardless of whether that abuse could have been actionable under Wisconsin's Constitution—a question not present in this case because the previous decade's maps have already been rendered unconstitutional by population changes—adopting a least-change approach would calcify that gerrymander into existence indefinitely. It would also put this Court's stamp of approval on those extreme political gerrymanders—a

choice that would be wholly inappropriate for a judicially drawn map—and risk eroding the people's confidence in the judiciary as a neutral and fair arbiter. *See*, *e.g.*, *Balderas*, 2001 WL 36403750 at *4.

This is precisely why many courts tasked with drawing reapportionment plans have sought to draw politically neutral maps, even if the state itself does not prohibit the political branches from engaging in partisan gerrymandering. *See* Hunter Br. at 9-10. This approach makes sense: "A court-ordered plan [] must be held to higher standards than a State's own plan." *Chapman v. Meier*, 420 U.S. 1, 26 (1975). *Rucho* does not change this. It simply determines that federal courts are ill-equipped to determine whether a duly enacted state plan is an unconstitutional partisan gerrymander. 139 S. Ct. at 2508. It says nothing about whether courts may consider partisan implications of a map when tasked with drawing it in the first instance. Indeed they should, because, as *Rucho* recognized, partisan gerrymandering is inherently undemocratic. *Id.* at 2506. This Court should seize the opportunity to ensure that, for the first time in ten years, Wisconsin voters have a redistricting plan that is consistent with democratic principles.

B. No court in Wisconsin's history has used a least-change approach to lock in an extreme gerrymander.

While the Johnson Petitioners suggest that a least-change approach is "consistent" with what previous federal Wisconsin impasse courts have done, Johnson Br. at 24-26, this argument obscures crucial differences between the circumstances in those redistricting cycles and the circumstances here.

To start, the federal panels tasked with drawing new maps for Wisconsin in both *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471 (E.D. Wis. May 30, 2002), and *Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992), did not begin with baseline maps that were widely recognized as partisan gerrymanders. To the contrary, both *Baumgart* and *Prosser* built new maps for Wisconsin based on maps that had been drawn by neutral courts—not by partisan actors—in the previous redistricting cycle. The *Baumgart* panel drew Wisconsin's legislative maps for the 2000 redistricting cycle based on maps the *Prosser* panel had drawn when Wisconsin was at an impasse in the 1990 redistricting cycle. And the *Prosser* panel, which consisted of Judges Posner, Crabb, and Curran, specifically sought to "*not* select a plan that seeks partisan advantage." 793 F. Supp. at 867 (emphasis added). It ultimately drew Wisconsin's legislative maps for the 1990 redistricting

cycle based on maps the 1980 federal impasse panel had drawn on its own when Wisconsin was at an impasse in the 1980 redistricting cycle. *See Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982).

The upshot is that no court is Wisconsin's modern history has used a least-change approach when doing so would lock in a map adopted by partisan actors, let alone when that map was a partisan gerrymander. Instead, those courts used prior courts' plans as a baseline because, under the circumstances, doing so would help ensure a "neutral" outcome for the state. *See Baumgart,* 2002 WL 34127471, at *7. It is not plausible that any of those panels would have accepted a least-change approach had they been confronted with the baseline map that this Court faces today. The *Baumgart* panel, for instance, specifically chastised plan submissions that had clear "partisan origins" or were "riddled with [] partisan marks." *Id.* at *4. The *Prosser* panel, too, specifically disclaimed plans that sought "partisan advantage" and refused to draw a map that would enable "one party [to] do better than it would do under a plan drawn up by persons having no political agenda." 793 F. Supp. at 867.

While the Johnson Petitioners once again point to Minnesota as a state where courts use a "least-changes" approach, *see* Johnson Br. at 23-24 (citing *Hippert*, 813 N.W.2d at 380), they fail to point out that

Minnesota courts—not Minnesota's political branches—have been drawing reapportionment plans for decades. For that reason, when the *Hippert* panel used a least-change approach in the 2010 redistricting cycle, it too had as its baseline a map that a neutral court had drawn in the previous redistricting cycle. *See Zachman v. Kiffmeyer*, No. C0-01-160 (Minn. Special Redistricting Panel Mar. 19, 2002).

Ultimately, those in favor of a least-change approach for this redistricting cycle cite no precedent in which a court used such an approach to lock in an aggressive partisan gerrymander. If anything, such an approach in this case would be flatly inconsistent with the stated values and goals of Wisconsin's prior impasse courts to achieve a neutral map.

C. The Court should not prioritize redistricting factors that will have the effect of locking in a gerrymandered map.

This Court also should not use (or at a minimum, should not prioritize) two factors—core retention and incumbency protection—that will have the obvious effect of perpetuating the current gerrymandered maps despite the Governor's anticipated veto over a plan that retains the core of the gerrymandered plan. Those two factors' inherent ability to lock-in existing gerrymanders is so notorious that it has a name—"gerrylaundering"—a term that describes when otherwise neutral-

sounding redistricting criteria are used to give an existing gerrymandered map a veneer of legitimacy. *See, e.g.*, Robert Yablon, *Gerrylaundering*, Univ. of Wis. L. Studies Research Paper No. 1708, p. 15 (Aug. 23, 2021), 97 N.Y.U. L. Rev. (forthcoming 2022), *available at* https://ssrn.com/abstract=3910061. In practice, "gerrylaunders" are just as antidemocratic as traditional gerrymanders; both deprive a state's citizens of representatives responsive to the will of the electorate.

While the Legislature describes "core retention," "continuity of representation," and "incumbent protection" as "undisputed traditional redistricting criteria," Leg. Br. at 37-38, the Wisconsin Constitution makes no mention of these criteria. Nor is "continuity of representation" or "core retention" required in many other states; to the contrary, many more states *prohibit* reapportionment plans that entrench the status quo than those that require it. *See* Yablon, *Gerrylaundering* at 23-24 (conducting 50-state survey). The same is true of incumbency protection. *See id.* (describing at least 10 states that prohibit considering incumbent addresses or drawing maps that protect incumbents and few, if any, that require it).

Notably, many courts tasked with redistricting after an impasse have specifically chosen to eschew continuity of representation or incumbency protection as a factor to consider in drawing apportionment

plans even when the Legislature would not be prevented from doing so in the first instance. *See, e.g.*, *Wis. State AFL-CIO*, 543 F. Supp. at 638 (Wisconsin panel refusing to consider incumbency protection in drawing Wisconsin's reapportionment plans after impasse); *Hippert*, 813 N.W.2d at 385–86 (Minnesota court refusing to prioritize incumbency protection in drawing reapportionment plans after impasse); *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223, at *7 (E.D.N.Y. Mar. 19, 2012) (New York court refusing to consider incumbency protection in drawing reapportionment plans after impasse). This is not surprising. As the Fifth Circuit explained long ago, "[m]any factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts." *Wyche v. Madison Par. Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985). Because the goal of "protecting incumbents [] enshrines a particular partisan distribution," *Rucho*, 139 S. Ct. at 2500, this Court should decline to consider it in creating new maps for Wisconsin.

Finally, this Court should not be swayed by arguments that core retention or continuity of representation must be prioritized to avoid "temporal vote dilution" in state senate elections. *See* Leg. Br. at 36. The Hunter Intervenor-Petitioners do not deny that moving voters outside of their existing senate districts will have a temporary adverse effect on

some voters' ability to participate in senate elections in the next election. (Indeed, this is true of every new redistricting plan, whether adopted by the Legislature or a court.) But the alternative—locking in a partisan gerrymander—deprives *all* Wisconsin voters of a fair map for at least the next ten years, a far worse outcome. And as the *Baldus* panel recognized last cycle, this effect "in the wake of redistricting is seen as inevitable, and thus as presumptively constitutional, so long as no particular group is uniquely burdened." *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 852 (E.D. Wis. 2012).

Perhaps most importantly, this Court should not reward the Legislature with a least-change map on this basis when the Legislature itself moved an extraordinary number of voters outside of their existing senate districts to accomplish its gerrymander in the 2010 redistricting cycle. As the BLOC Intervenor-Petitioners explain, the Wisconsin Legislature moved over 1,200,000 Wisconsin voters out of their existing senate districts in that redistricting cycle when it could have moved just a fraction of those voters to account for population changes. *See* BLOC Br. at 40. Simply put, the Legislature did not feel hamstrung by the need to minimize temporal vote dilution in 2011, belying its contention that the Court is somehow bound by this principle now.

Dated this 1st day of November, 2021.

Respectfully Submitted,

Charles G. Curtis, Jr.
Bar No. 1013075
PERKINS COIE LLP
33 E Main St, Ste 201
Madison, Wisconsin 53703-3095
(608) 663-7460
CCurtis@perkinscoie.com
Attorney for Hunter Intervenor-Petitioners

Aria C. Branch*
Jacob D. Shelly*
Christina A. Ford*
William K. Hancock*
ELIAS LAW GROUP LLP
10 G St., NE, Suite 600
Washington, D.C. 20002
(202) 968-4490
ABranch@elias.law
JShelly@elias.law
CFord@elias.law
WHancock@elias.law
Attorneys for Hunter Intervenor-Petitioners

*Admitted *Pro Hac Vice*

FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 5,365 words.

Dated: November 1, 2021

Aria C. Branch

CERTIFICATE OF SERVICE

I certify that on this 1st day of November, 2021, I caused a copy of this brief to be served upon counsel for each of the parties via e-mail.

Dated: November 1, 2021

Aria C. Branch

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,
Intervenor-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,
Intervenor-Respondents.

HUNTER INTERVENOR-PETITIONERS' RESPONSE BRIEF IN SUPPORT OF PROPOSED MAPS

Charles G. Curtis, Jr.
Bar No. 1013075
PERKINS COIE LLP
33 E Main St, Ste 201
Madison, Wisconsin 53703-3095
(608) 663-7460
CCurtis@perkinscoie.com

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

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

Attorneys for Hunter Intervenor-Petitioners

*Admitted *Pro Hac Vice*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

This Court has explained that its role in this case is to "simply remedy the malapportionment claims" with a "neutral standard" that eschews "subjective preferences of judges." Nov. 30 Order ¶¶ 76, 78, 80. Accordingly, the Hunter Intervenors and their expert, Dr. Stephen Ansolabehere, have reviewed the parties' submissions according to neutral, objective criteria that identify each proposed plan's adherence to the Court's "least change" mandate, compliance with state and federal law, and consistency with traditional redistricting criteria.

The Hunter Intervenors' analysis reveals that Governor Evers's proposed congressional map adheres most closely to the "least change" requirement by keeping nearly 95% of Wisconsinites in their current congressional districts and retaining 98% of the geography of the current districts. The Hunter Intervenors' congressional map is close behind, retaining approximately 93% of population and 97% of geography. Both maps also comply with federal and Wisconsin law, in addition to making significant improvements over the enacted map in the traditional redistricting criteria of municipality splits and compactness. In sharp contrast, the Congressmen's proposed map (the same map proposed by the Legislature) has the highest percentage of population and geographic changes and splits far more municipalities than any of the other proposed maps. Objective application of the "least-change" and traditional redistricting criteria set forth in the November 30 Order plainly requires rejecting that map.

With respect to the assembly and senate maps, Governor Evers's proposed maps again retain the highest percentages of population and geography, just ahead of the maps submitted by BLOC. Critically, the

assembly maps submitted by the Governor, BLOC, and the Hunter Intervenors create a seventh Black opportunity district in the Milwaukee area—as compared to the six in the enacted map—as is required by Section 2 of the Voting Rights Act ("VRA"). Moreover, these maps do not unlawfully pack Black voters into supermajority districts in violation of the Equal Protection Clause of the Fourteenth Amendment, which is a fatal flaw in the assembly maps submitted by the Legislature and Citizen Scientists. The Governor's and BLOC's legislative maps also fare well under the application of traditional redistricting principles.

The combination of compliance with the least-change mandate, the VRA, the Fourteenth Amendment, and redistricting principles establishes that the Governor's legislative maps are most consistent with the criteria in the Court's November 30 Order. BLOC's legislative maps are similarly consistent and are a lawful alternative.

The Hunter Intervenors respectfully request that the Court adopt new maps consistent with the analysis that follows.

MAP COMPARISON METHODOLOGY

A. The proposed maps' compliance with the Court's criteria can be evaluated objectively.

Dr. Ansolabehere reviewed the parties' submissions according to the following objective criteria and methodology[1]:

1. ***Least changes.*** Justice Hagedorn's controlling concurrence instructed parties to explain how their proposed maps "are the most consistent with existing boundaries." Nov. 30 Order ¶ 87 (Hagedorn, J.,

[1] Figures reported in Dr. Ansolabehere's supplemental report may differ slightly from figures reported in parties' opening briefs and reports because of methodological differences in the treatment of Wisconsin's water areas and how the mapping files project onto the earth's curvature. These differences do not change the overall conclusions presented here. *See* Exhibit 1.

concurring). There are two main ways that consistency with existing boundaries may objectively be measured. First, maps can be compared according to the percentage of *population* that is assigned to the same district in the proposed map as in the enacted map. Second, maps can be compared according to the percentage of *geography* that is assigned to the same district in the proposed map as in the enacted map. A high population retention score establishes that a proposed map does not move more people than necessary from their current districts. A high geographic retention score, in turn, indicates that a map does not go searching for new voters any further than necessary from the current district lines. Because these two measures best capture a proposed map's consistency with existing boundaries, the average of each proposed map's population retention percentage and geographic retention percentage—a "core retention" score—is highly probative of a map's adherence to the "least change" requirement.

2. *Population equality.* The population deviation of a proposed map is measured by dividing the difference in population between the most- and least-populated district by the ideal district population.

3. *Equal Protection Clause.* The Fourteenth Amendment's "Equal Protection Clause prohibits a State, without sufficient justification, from 'separating its citizens into different voting districts on the basis of race.'" *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

4. *Voting Rights Act.* A proposed map must comply with Section 2 of the VRA. Section 2 prohibits "any standard, practice or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of" race, color, or membership in a

language minority group. 52 U.S.C. §§ 10301(a), 10301(f)(2). In particular, it must not deprive racial minorities of the opportunity to elect candidates of their choice by creating fewer minority opportunity districts than is necessary.

5. *Local Boundaries.* A proposed map's consistency with local boundaries can be quantified according to the number of counties, towns, and precincts that are split by district lines. Thus, a simple "boundary preservation score" can be calculated by averaging the total number of splits. Proposed maps are likely to deviate to the greatest extent in the number of times they split towns and counties, and those differences will be most apparent in the computed average. This approach is consistent with the Court's recognition that preserving the boundaries of smaller political subdivisions should be easiest to achieve. *See* Nov. 30 Order ¶ 35.

6. *Compactness.* There are two main ways of calculating a district's compactness. The Reock measure compares a district's area relative to the most compact circle that has the same length as the district. The Polsby-Popper measure, in turn, computes the area of a district relative to the area of a circle with the same perimeter. Both measures provide a score between 0 and 1, with higher scores indicating more compactness. Because these measures use the same scale, they can be averaged together to calculate a plan's overall compactness score.

7. *Delayed voting.* People who are reassigned from odd-numbered senate districts to even-numbered senate districts will have to wait an additional two years before voting in senate elections. The total number of people who will be subject to this additional wait can be divided by Wisconsin's total population to compute each plan's delayed voting score.

B. The Court should adopt the maps with the highest core retention scores that comply with all state and federal law.

Consistent with the November 30 Order, the Court should adopt the maps with the highest core retention scores that comply with the Fourteenth Amendment, Section 2 of the VRA, and Wisconsin law. Because the parties' proposed maps with the highest core retention scores also offer significant improvements on traditional redistricting principles, those maps allow maintaining the cores of districts without compromising boundary splits, compactness, and other traditional, neutral redistricting criteria.

ANALYSIS

I. The Governor's and the Hunter Intervenors' congressional maps make the least changes to the enacted map and comply with all relevant state and federal law.

The Hunter Intervenors, Governor Evers, Citizen Scientists, and Congressmen proposed congressional maps.[2] All four maps achieve the minimum population deviation mathematically possible, with each district within one person of the ideal population of 736,715.[3] All four

[2] The Legislature proposed the same congressional map as the Congressmen, and it offered no separate argument or analysis in support of that map.

[3] Congressional maps proposed by the Hunter Intervenors and Governor include districts that are one person below and one person above the ideal population, while the congressional maps proposed by the Citizen Scientists and Congressmen include districts that are one person below the ideal population. Because it is mathematically impossible to draw eight districts that exactly contain the ideal population, and because all proposed maps minimize deviations from the ideal to the mathematical minimum of one person, there is no basis to attach any significance to whether districts are one person above or one person below the ideal population. If the Court believes otherwise, the Hunter Intervenors respectfully request notice so they may seek leave to amend their map to make any technical change the Court believes necessary.

maps also comply with Section 2 of the VRA. The relevant differences between the four maps, then, are as follows:

A. The Governor's and the Hunter Intervenors' congressional maps best achieve "least change."

As illustrated in Table 1 below, the Governor's and the Hunter Intervenors' proposed congressional maps achieve the least change in population and geography from the enacted map. The Governor's map aggregate core retention score is 2.5% higher than the retention score for the Citizen Scientists' map and a full 4.1% higher than the same score for the Congressmen's map. The Hunter map's aggregate core retention score is 1.4% higher than the Citizen Scientists' score and 3.0% higher than the Congressmen's score.

Table 1: Congressional Map Core Retention Scores

	Hunter	**Governor**	**Citizen Scientists**	**Congressmen**
Pop. Retention%	93.0%	94.5%	91.5%	93.5%
Geo. Retention%	97.1%	98.5%	95.9%	90.6%
Average	**95.1%**	**96.5%**	**93.7%**	**92.1%**

B. The congressional maps of the Governor, the Hunter Intervenors, and the Citizen Scientists best comport with traditional redistricting criteria.

1. The Citizen Scientists and Hunter congressional maps split the fewest subdivisions.

As illustrated in Table 2 below, the Hunter Intervenors, the Governor, and the Citizen Scientists each match or improve on the enacted map's division of counties, municipalities, and precincts. The Congressmen's map, in contrast, splits more municipalities and

precincts than the enacted map. The Citizen Scientists' proposed map does the best overall at minimizing boundary splits, followed by the Hunter Intervenors' proposed map.

Table 2: Congressional Map Subdivision Splits					
	Enacted	**Hunter**	**Governor**	**Citizen Scientists**	**Congressmen**
County	12	11	12	7	10[4]
Municipal	29	29	27	21	36
Precinct	42	19	33	13	50
Average	**27.7**	**19.7**	**24**	**12.7**	**32**

The Congressmen's proposed map reduced county splits in a manner that blatantly violates the Court's "least change" mandate. Specifically, the Congressmen's map eliminated county splits in CD-3 and CD-7 by making changes that were not necessary to remedy any malapportionment. CD-3 is underpopulated by only 3,131 people, and the Hunter Intervenors' map illustrates that minor tweaks to these districts can cure the deviation. The Hunter map moves 983 people out of CD-3 and 4,645 people into CD-3 to account for the district's underpopulation. By contrast, the Congressmen's map moves *238,929 people* – 117,899 out of CD-3 and 121,030 into CD-3. There is no legitimate justification for this massive relocation under a "least change" approach.

[4] Technically, the Congressmen's map splits 12 counties. Two of those splits—of Manitowoc and Ozaukee Counties—occur in water and do not divide any population. The Hunter Intervenors have decided to ignore these splits for the purposes of the calculations presented here.

The Congressmen's map takes the same approach to CD-7. That district is underpopulated by only 4,133 people, yet the Congressmen's map moves *159,361 people* out of and into the district. In comparison, the Governor's map removes three people from the district and adds 4,136. Again, this approach cannot be justified under the Court's "least change" mandate.

The most significant malapportionment in the enacted congressional map is CD-2's overpopulation and CD-4's underpopulation, but the task of transferring population from CD-2 to CD-4 does not require any changes to CDs 3 or 7, neither of which is in between CDs 2 and 4. Thus, the Congressmen's proposal to move Clark County from entirely within CD-7 to entirely within CD-3 is untethered to the "least change" mandate. The Congressmen's map also creates two additional county splits—of Dunn and Portage Counties—that are not present in the enacted map and unnecessary to remedy any malapportionment. This problem is not limited to county splits. The Congressmen's map splits more municipalities and precincts than the enacted map.

2. All four proposed congressional maps are more compact than the enacted map.

As illustrated in Table 3 below, there is substantial similarity in the compactness of the proposed congressional maps of the Congressman, the Citizen Scientists, and the Hunter Intervenors, with the Congressman's map having the highest average compactness score, followed by the Citizen Scientists and the Hunter Intervenors. While the Governor's map has the lowest compactness score, it is still more compact than the enacted map.

Table 3: Congressional Map Compactness Scores					
	Enacted	**Hunter**	**Governor**	**Citizen Scientists**	**GOP Congressmen**
Reock	0.453	0.451	0.449	0.473	0.483
Polsby-Popper	0.292	0.362	0.306	0.371	0.373
Average	**0.373**	**0.407**	**0.378**	**0.422**	**0.428**

C. Congressional map conclusion

The Governor's and the Hunter Intervenors' proposed congressional maps best minimize changes to core populations and geographies; they comply with all relevant state and federal law; and they improve upon the enacted map on subdivision splits and compactness. Based on the criteria established in the November 30 Order, the Court should select the Governor's map based on its minimal changes or, alternatively, the Hunter map.

While the Citizen Scientists' map scores well with splits and compactness, its relatively low core retention score makes it less compliant with the "least-change" approach than either the Governor's or the Hunter Intervenor's map.

The Congressmen's map is clearly the most non-compliant with the November 30 Order of all four maps. It makes the most population and geographic changes to the enacted map, while also resulting in the highest number of splits of municipalities and precincts among the proposed maps. Objective application of the "least-change" and traditional redistricting criteria set forth in the November 30 order plainly requires rejecting the Congressman's map.

II. The Governor's legislative maps make the least changes to the enacted map and comply with all relevant state and federal law.

The Hunter Intervenors, BLOC, Governor Evers, Senator Bewley, the Citizen Scientists, and the Legislature proposed legislative maps. All six parties proposed assembly and senate maps that minimize total population deviations below 2%, consistent with the established standard for legislative redistricting in Wisconsin. *See AFL–CIO v. Elections Bd.*, 543 F. Supp. 630, 634 (E.D. Wis. 1982). While all six parties proposed senate maps that comply with the VRA, only the Hunter Intervenors, BLOC, and the Governor proposed assembly districts that comply with the Fourteenth Amendment and the VRA.

The relevant differences between the proposed legislative maps are as follows:

A. *The Governor's legislative maps best achieve "least-change."*

As illustrated in Table 4 below, the Governor's proposed assembly map achieves the least change in population from the enacted map, while BLOC's proposed assembly map achieves the least change in geography from the enacted map. The average of these two measures reveals that the Governor's proposed assembly map narrowly achieves the least changes overall.

Table 4: Assembly Map Core Retention Scores						
	Hunter	**BLOC**	**Gov.**	**Sen. Bewley**	**Cit. Sci.**	**Leg.**
Pop. Retention %	73.1%	84.1%	85.8%	83.3%	61.0%	84.5%
Geo. Retention %	79.6%	86.5%	85.2%	80.6%	61.0%	81.1%
Average	**76.4%**	**85.3%**	**85.5%**	**82.0%**	**61.0%**	**82.8%**

As illustrated in Table 5 below, the Governor's proposed senate map achieves both the highest population retention (92.210% compared to the Legislature's 92.207%) and the highest geographic retention.

Table 5: Senate Map Core Retention Scores						
	Hunter	**BLOC**	**Gov.**	**Sen. Bewley**	**Cit. Sci.**	**Leg.**
Pop. Retention %	80.8%	89.6%	92.2%	90.2%	74.3%	92.2%
Geo. Retention %	87.6%	93.9%	94.9%	90.1%	71.0%	92.7%
Average	**84.2%**	**91.8%**	**93.6%**	**90.2%**	**72.7%**	**92.5%**

Table 6 provides the average population retention score for each party's proposed assembly and senate map and the average geographic retention score for each party's proposed assembly and senate map, which averages the score for both the senate and assembly maps proposed by each party. These averages are then averaged together to

provide an overall legislative map core retention score. As Table 6 shows, the Governor's legislative maps do the best overall at population retention, and BLOC's legislative maps do the best overall at geographic retention. Averaging these measures together, the Governor's proposed legislative maps best comply with the least-change requirement, with BLOC's maps coming in second. Because the legislative chambers are nested, wholesale adoption of one party's assembly map necessitates choosing its companion senate map. Thus, this average measure across both chambers is the best measure of least-change, overall among all the legislative maps proposed by the parties.

Table 6: Legislative Map Core Retention Scores

	Hunter	**BLOC**	**Gov.**	**Sen. Bewley**	**Cit. Sci.**	**Leg.**
Pop. Retention %	77.0%	86.8%	89.0%	86.8%	67.7%	88.2%
Geo. Retention %	83.6%	90.2%	90.1%	85.4%	66.0%	86.9%
Average	**80.3%**	**88.5%**	**89.6%**	**86.1%**	**66.9%**	**87.6%**

B. The proposed legislative maps optimize on traditional redistricting criteria to various degrees.

1. BLOC's legislative maps best minimize subdivision splits.

As illustrated in Table 7 below, all parties proposed assembly maps that improve on the enacted map's division of political subdivisions. BLOC's proposed assembly map does the best overall at minimizing boundary splits.

Table 7: Assembly Map Subdivision Splits							
	Enacted	**Hunter**	**BLOC**	**Gov.**	**Sen. Bewley**	**Cit. Sci.**	**Leg.**
Cnty.	58	50	53	53	55	40	53
Munic.	113	114	70	110	69	75	45
Prec.	394	223	122	228	368	159	180
Avg.	**188**	**129**	**82**	**130**	**164**	**91**	**93**

Table 8 shows that BLOC and the Citizen Scientists do the best at minimizing splits among the proposed senate maps. Again, all parties achieve significant improvements across the board relative to the enacted map.

Table 8: Senate Map Subdivision Splits							
	Enacted	**Hunter**	**BLOC**	**Gov.**	**Sen. Bewley**	**Cit. Sci.**	**Leg.**
Cnty.	46	42	42	45	48	28	42
Munic.	125	76	54	75	51	44	31
Prec.	228	117	55	144	199	75	86
Avg.	**133**	**78**	**50**	**88**	**99**	**49**	**53**

Table 9 computes the average subdivision splits across parties' assembly and senate maps. BLOC's proposed legislative maps do the best overall at preserving political subdivisions.

Table 9: Legislative Map Subdivision Splits							
	Enacted	**Hunter**	**BLOC**	**Gov.**	**Sen. Bewley**	**Cit. Sci.**	**Leg.**
Cnty.	52	46	48	49	52	34	48
Munic.	119	95	62	93	60	60	38
Prec.	311	170	89	186	284	117	133
Avg.	**161**	**104**	**66**	**109**	**132**	**70**	**73**

2. The Hunter Intervenors' legislative districts are the most compact.

As illustrated in Table 10 below, the Hunter Intervenors proposed the assembly map with both the most compact Reock score and the most compact Polsby-Popper score. All proposed assembly maps except the Legislature's and BLOC's achieve better compactness than the enacted map.

Table 10: Assembly Map Compactness Scores							
	Enacted	**Hunter**	**BLOC**	**Gov.**	**Sen. Bewley**	**Cit. Sci.**	**Leg.**
Reock	.401	.447	.381	.405	.412	.411	.384
Pol.-Pop.	.277	.359	.247	.272	.276	.303	.262
Avg.	**.339**	**.403**	**.314**	**.339**	**.344**	**.357**	**.323**

Table 11 shows that the Governor's and Legislature's proposed senate maps achieve the highest Reock score, while the Hunter Intervenors' proposed senate map does best on the Polsby-Popper measure. Overall, only the Hunter Intervenors and Citizen Scientists submitted senate maps that are more compact than the enacted map.

Table 11: Senate Map Compactness Scores							
	Enacted	**Hunter**	**BLOC**	**Gov.**	**Sen. Bewley**	**Cit. Sci.**	**Leg.**
Reock	.411	.407	.402	.410	.413	.403	.410
Pol.-Pop.	.265	.303	.225	.257	.253	.287	.257
Avg.	**.338**	**.356**	**.314**	**.334**	**.334**	**.345**	**.334**

The parties' combined assembly and senate compactness scores are presented in Table 12. The Hunter Intervenors' legislative maps score best on Reock compactness, best on Polsby-Popper compactness, and, thus, best on compactness overall.

Table 12: Legislative Map Compactness Scores							
	Enacted	**Hunter**	**BLOC**	**Gov.**	**Sen. Bewley**	**Cit. Sci.**	**Leg.**
Reock	.405	.428	.393	.408	.415	.409	.399
Pol.-Pop.	.271	.332	.236	.265	.265	.295	.260
Avg.	**.338**	**.380**	**.314**	**.336**	**.340**	**.352**	**.329**

3. Senator Bewley's map best minimizes delayed senate voting.

A final consideration is which proposed senate map will require the fewest people to wait six years, rather than the customary four years, in between senate elections. Table 13 reports these figures as a percentage of Wisconsin's population. Senator Bewley's map performs best at minimizing the percentage of Wisconsinites who will be moved from an odd-numbered to an even-numbered district and be forced to wait six years between senate elections.

Table 13: Senate Map Delayed Voting					
Hunter	**BLOC**	**Governor**	**Sen. Bewley**	**Citizen Scientists**	**Legislature**
4.1%	3.0%	2.4%	2.3%	7.2%	2.4%

C. State Assembly maps must create a seventh Black opportunity district.

Under the currently malapportioned map, there are six Black opportunity districts in the Milwaukee area. Given the shifts in Wisconsin's population over the last decade, it is now possible—and necessary—to create a seventh Black opportunity district in the Milwaukee area. The Hunter Intervenors, BLOC, and the Governor all proposed assembly maps with seven districts where Black voters can elect a candidate of their choice. In contrast, the assembly maps proposed by Senator Bewley, the Citizen Scientists, and the Legislature ignore the changes in Wisconsin's population and retain only six Black opportunity districts.

Table 14: Black Opportunity Districts in Milwaukee							
	Now	**Hunter**	**BLOC**	**Gov.**	**Sen. Bewley**	**Cit. Sci.**	**Leg.**
>50% Black VAP Districts	6	5	7	7	6	3	5
Black Opp. Districts <50% BVAP	0	2	0	0	0	3	1

To ensure compliance with the VRA and the Fourteenth Amendment, the Court should adopt an assembly map that creates seven

Black opportunity districts in the Milwaukee area. The assembly maps proposed by Senator Bewley, the Citizen Scientists, and the Legislature deprive Black voters in the outer lying areas of Milwaukee the opportunity to elect a candidate of their choice, in violation of Section 2. This fact alone should disqualify each of these maps from consideration.

In addition, the assembly maps proposed by the Citizen Scientists and the Legislature violate the Equal Protection Clause of the Fourteenth Amendment because they pack Black voters into a supermajority district. In the Legislature's proposed map, AD-11 has a Black voting-age population over 70%. Even worse, the Citizen Scientists proposed AD-11 has a Black voting-age population over 82%.[5] *See, e.g.*, *Cooper v. Harris*, 137 S.Ct. 1455, 1479 (2017) (explaining that if state officials "instruct[ed] their mapmaker to pack as many black voters as possible into a district, or t[old] him to make sure its BVAP hit 75% […], a court could find that racial rather than political factors dominated in a district's design.").

D. Legislative map conclusion

The Governor's legislative maps best minimize changes to existing boundaries, effectively minimize senate delayed voting, comply with all relevant state and federal law, achieve significant improvements over the enacted maps on subdivision splits, and essentially match the enacted maps on compactness.

Legislative maps proposed by the Hunter Intervenors and BLOC also deserve consideration. Both sets of proposed maps comply with all

[5] The Citizen Scientists propose an Assembly map where two of the proposed Black opportunity districts have a Black voting-age population below 40%—Assembly District 17 has a BVAP of 39.6% and Assembly District 12 has a BVAP of only 36.3%. It is unclear whether those districts would sufficiently enable Black voters to elect a candidate of their choice.

relevant state and federal law. BLOC's maps do well on least changes, delayed voting, and subdivision splits, while the Hunter Intervenors do best among all the proposals on compactness.

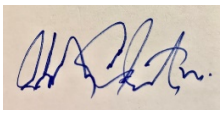
The legislative maps proposed by Senator Bewley, the Citizen Scientists, and the Legislature violate Section 2 of the VRA and the Fourteenth Amendment and must be rejected.

CONCLUSION

The Court should adopt congressional, assembly, and senate maps consistent with the foregoing analysis.

Dated this 30th day of December, 2021.

Respectfully Submitted,



Charles G. Curtis, Jr.
Bar No. 1013075
PERKINS COIE LLP
33 E Main St, Ste 201
Madison, Wisconsin 53703-3095
(608) 663-7460
CCurtis@perkinscoie.com

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

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

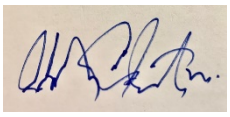
Attorneys for Hunter Intervenor-Petitioners

*Admitted *Pro Hac Vice*

FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 3,883 words.

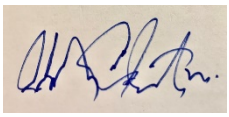
Dated: December 30, 2021



Charles G. Curtis, Jr.

CERTIFICATE OF SERVICE

I certify that on this 30th day of December, 2021, I caused a copy of this brief to be served upon counsel for each of the parties via e-mail.



Dated: December 30, 2021

Charles G. Curtis, Jr.

[J-20-2022] [MO: Baer, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAROL ANN CARTER, MONICA PARRILLA, REBECCA POYOUROW, WILLIAM TUNG, ROSEANNE MILAZZO, BURT SIEGEL, SUSAN CASSANELLI, LEE CASSANELLI, LYNN WACHMAN, MICHAEL GUTTMAN, MAYA FONKEU, BRADY HILL, MARY ELLEN BALCHUNIS, TOM DEWALL, STEPHANIE MCNULTY AND JANET TEMIN,	:	No. 7 MM 2022
Petitioners	:	ARGUED: February 18, 2022
v.	:	
LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS THE ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA; JESSICA MATHIS, IN HER OFFICIAL CAPACITY AS DIRECTOR FOR THE PENNSYLVANIA BUREAU OF ELECTION SERVICES AND NOTARIES,	:	
Respondents	:	
---	:	
PHILIP T. GRESSMAN; RON Y. DONAGI; KRISTOPHER R. TAPP; PAMELA GORKIN; DAVID P. MARSH; JAMES L. ROSENBERGER; AMY MYERS; EUGENE BOMAN; GARY GORDON; LIZ MCMAHON; TIMOTHY G. FEEMAN; AND GARTH ISAAK,	:	
Petitioners	:	
v.	:	

LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS THE ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA; JESSICA MATHIS, IN HER OFFICIAL CAPACITY AS DIRECTOR FOR THE PENNSYLVANIA BUREAU OF ELECTION SERVICES AND NOTARIES,	:
Respondents	:

CONCURRING OPINION

JUSTICE WECHT

I join the Court's adoption of the Carter Plan as the Commonwealth's 2022 Congressional Redistricting Plan, as well as its opinion in support thereof. I write separately to further explain why I found a number of exceptions to the Special Master's Report and Recommendation to be meritorious, and also to offer a more detailed discussion regarding the "least-change" approach, the "subordinate historical consideration" that tipped the scales in favor of the Carter Plan.

Although "the primary responsibility and authority for drawing" the Commonwealth's congressional districts "rests squarely" with the General Assembly,[1] the long-standing practice of the state and federal courts counsels judicial intervention when the political branches fail to timely enact a congressional districting plan and "when further delay" threatens to "disrupt the election process."[2] As the recent flurry of activity involving

[1] *League of Women Voters v. Commonwealth*, 178 A.3d 737, 821 (Pa. 2018) ("*LWV II*").

[2] *Branch v. Smith*, 538 U.S. 254, 279 (2003) (plurality); *cf. LWV II*, 178 A.3d at 822 ("When . . . the legislature is unable or chooses not to act, it becomes the judiciary's role to determine the appropriate redistricting plan."); *Scott v. Germano*, 381 U.S. 407, 409 (1965) (*per curiam*) ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but (continued…)

requested modifications to the primary election calendar demonstrates, delaying our consideration of this case any longer likely would have impeded the orderly administration of this year's elections to the detriment of voters and candidates alike. Alas, though our task may be an "unwelcome" one,[3] it is not unfamiliar to this Court.[4]

Preliminarily, I concur with the Court's evaluation of the pertinent systemic exceptions taken by a number of Parties and *Amicus* Participants to the Special Master's Report and Recommendation ("Report"). Chief among those exceptions, in my view, is the Special Master's treatment of House Bill 2146 as "functionally tantamount to the voice and will of the People,"[5] which fundamentally misapprehends the Governor's role as "an integral part of the lawmaking power of the state."[6]

With respect to the redistricting process, it is well-settled that the authority vested in each State's Legislature to prescribe "[t]he Times, Places and Manner of holding

---

appropriate action by the States in such cases has been specifically encouraged."); *Growe v. Emison*, 507 U.S. 25, 33-34 (1993) (observing that, "[i]n the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself," and instructing federal courts to "neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it" "[a]bsent evidence that these state branches will fail timely to perform that duty") (emphasis in original); *Butcher v. Bloom*, 216 A.2d 457, 459 (Pa. 1966) (noting that the Court selected redistricting plans for the Pennsylvania House and Senate after "[t]he deadline set forth in our earlier opinion passed without [the] enactment of the required legislation").

3 *LWV II*, 178 A.3d at 823 (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)).

4 *See generally LWV II*, *supra* note 1; *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992) (assuming plenary jurisdiction of redistricting impasse litigation arising from the political branches' failure to cure malapportioned congressional map in the wake of the Commonwealth's loss of two congressional seats following the 1990 decennial census).

5 Report at 214-15.

6 *Commonwealth ex rel. Attorney General v. Barnett*, 48 A. 976, 976 (Pa. 1901).

Elections for . . . Representatives"—which remains subject to Congress' plenary power to "make or alter such Regulations" "at any time by Law"[7]—"involves lawmaking in its essential features and most important aspect."[8] As such, the United States Supreme Court has admonished that "the exercise of th[at] authority must be in accordance with the method which the state has prescribed for legislative enactments."[9] In other words, the Legislature has no "power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted."[10]

Unlike those jurisdictions that have enshrined certain aspects of the congressional redistricting process in their respective state constitutions,[11] Pennsylvania's charter is silent on the subject. As in most States, redistricting in Pennsylvania typically is carried out through the traditional legislative process.[12] That is significant, because the

---

7 U.S. CONST. art. I, § 4 (hereinafter, "Elections Clause").

8 *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

9 *Id.* at 367; *see also Hawke v. Smith*, 253 U.S. 221, 230 (1920) (distinguishing the "power to ratify a proposed amendment to the" U.S. Constitution, which a State "derives" from the Fifth Article thereof, from "the power to legislate in the enactment of the laws of a state," which "is derived from the people of the state").

10 *Smiley*, 285 U.S. at 367-68.

11 *See, e.g.*, ARIZ. CONST. art. IV, pt. 2, § 1; CAL. CONST. art. XXI; COLO. CONST. art. V, §§ 44-48; HAW. CONST. art. IV, § 2; IDAHO CONST. art. III, § 2; MICH. CONST. art. IV, § 6; MONT. CONST. art. V, § 14; N.J. CONST. art. II, § II; N.Y. CONST. art. III, § 4; OHIO CONST. art. XIX; UTAH CONST. art. IX, § 1; VA. CONST. art. II, §§ 6, 6-A; WASH. CONST. art. II, § 43.

12 The High Court considered the validity of non-traditional exercises of legislative power in the redistricting sphere in *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), which concerned a challenge to a 1912 amendment to the Constitution of Ohio that expressly reserved to the people of that State the concurrent right to exercise the legislative power "by way of referendum"—*i.e.*, "to approve or disapprove by popular vote any law enacted by the [G]eneral [A]ssembly." *Id.* at 566. In May 1915, the Ohio General Assembly passed, and the Governor of Ohio signed into law, an act redistricting the State into twenty-two congressional districts. When voters subsequently disapproved of the act (continued…)

Governor's constitutionally designated role in the legislative process ought not to be treated as an afterthought. More specifically, the Presentment Clause and the

---

in a statewide referendum, challengers unsuccessfully sought a writ of *mandamus* from the Supreme Court of Ohio directing election officials to disregard the vote on the grounds that it violated the Elections Clause and thus was void. *See id.* at 567.

The U.S. Supreme Court affirmed the denial of relief for three interrelated reasons. First, the Court explained that "the referendum constituted a part of the state Constitution and laws," and therefore "was contained within the legislative power" of the State. *Id.* at 568. Next, it observed that in 1911, Congress had, by statute,

> expressly modified the phraseology of the previous acts relating to [redistricting] by inserting a clause [which directed that redistricting should be performed by a State 'in the manner provided by the laws thereof'] plainly intended to provide that where, by the state Constitution and laws, the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law.

Id. Lastly, the Court reasoned that any contention that Congress exceeded its constitutional authority in sanctioning use of the referendum

> for the purpose of apportionment . . . must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government, and causes a state where such condition exists to be not republican in form, in violation of the guaranty of the Constitution . . . [which] presents no justiciable controversy.

Id. at 569 (citing U.S. CONST. art. 4, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."); *cf. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 795 n.3 (2015) ("The people's sovereign right to incorporate themselves into a State's lawmaking apparatus, by reserving for themselves the power to adopt laws and to veto measures passed by elected representatives, is one this Court has ranked a nonjusticiable political matter."). In short, neither Ohioans' decision to overrule a duly enacted congressional redistricting plan by statewide vote, nor Congress' recognition of their authority to do so in 1911, were "repugnant" to the Constitution. *Id.* As far as I am aware, Pennsylvania has not utilized referenda for redistricting purposes.

gubernatorial veto[13] have been critical features of our Commonwealth's tripartite system of government for nearly two-and-a-half centuries.[14]

---

[13] *Compare* PA. CONST. art. IV, § 15 ("Every bill which shall have passed both Houses shall be presented to the Governor; if he approves he shall sign it, but if he shall not approve he shall return it with his objections to the House in which it shall have originated . . . ."), *with* PA. CONST. (1790) art. I, § 22 ("Every bill which shall have passed both Houses, shall be presented to the Governor; if he approve, he shall sign it; but if he shall not approve it, he shall return it, with his objections, to the House in which it shall have originated . . . ."). As this Court has explained,

> The veto power is a survival of the lawmaking authority vested in the king as a constituent if not a controlling third body of the parliament, in which he might and not infrequently did sit in person. With the growth of free ideas and institutions, and the aggressive spirit of the popular branch of the parliament in the affairs of government, it lost its vitality as a real power in England. . . . But in the colonies it not only existed, but was an active power, absolute in character, and so constantly exercised that . . . the Declaration of Independence set forth first among the grievances of the colonies, "He has refused his Assent to Laws, the most wholesome and necessary for the public good."
>
> * * *
>
> From the colonies the power passed, with various limitations, into nearly all the American constitutions, state and national. Originally intended mainly as a means of self-protection by the executive against the encroachments of the legislative branch, it has steadily grown in favor with the increasing multitude and complexity of modern laws, as a check upon hasty and inconsiderate as well as unconstitutional legislation.

Barnett, 48 A. at 976-77 (quotation from Declaration of Independence modified).

[14] While the classical view of the separation of powers might regard the veto power as an inherent feature of our system of checks and balances, this was not always the case. By the time the United States Constitution was ratified in 1789, "it appears that only two states had provided for a veto upon the passage of legislative bills; Massachusetts, through the Governor, and New York, through a council of revision." *Smiley*, 285 U.S. at 368. In fact, not only did Pennsylvania's "radically democratic" founding era constitution, which governed from 1776 to 1790, fail to provide a mechanism for contemporaneous disapproval of laws passed by the unicameral legislature, it vested the "supreme executive power" in a council of twelve people. *LWV II*, 178 A.3d at 802 (quoting Ken Gormley, *Overview of Pennsylvania Constitutional Law*, as appearing in Ken Gormley, ed., THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES, 3 (2004)); PA. CONST. (1776) ch. II, § 4 ("The supreme executive power shall be vested in a president and council").

Reflecting on the redistricting process early in the twentieth century, in *Smiley*, the Supreme Court observed that "the uniform practice" among the States in such matters "has been to provide for congressional districts by the enactment of statutes with the participation of the Governor wherever the state Constitution provided for such participation as part of the process of making laws."[15] To that end, the Court has observed:

> [W]hether the Governor of the State, through the veto power, shall have a part in the making of state laws, is a matter of state polity. Article I, Section 4 of the Federal Constitution neither requires nor excludes such participation. And provision for it, as a check in the legislative process, cannot be regarded as repugnant to the grant of legislative authority. . . . That the state Legislature might be subject to such a limitation, either [at the time of the adoption of the Federal Constitution] or thereafter imposed as the several states might think wise, was no more incongruous with the grant of legislative authority to regulate congressional elections than the fact that the Congress in making its regulations under the same provision would be subject to the veto power of the President, as provided in Article I, Section 7. The latter consequence was not expressed, but there is no question that it was necessarily implied, as the Congress was to act by law; and there is no intimation, either in the debates in the Federal Convention or in contemporaneous exposition, of a purpose to exclude a similar restriction imposed by state Constitutions upon state Legislatures when exercising the lawmaking power.[16]

---

[15] *Smiley*, 285 U.S. at 370.

[16] *Id.* at 368-69 (cleaned up). Regarding the particular role of the Elections Clause in our federal system, the High Court offered the following:

> The practical construction of Article I, Section 4 is impressive. General acquiescence cannot justify departure from the law, but long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political rights, and hence subject to constant and careful scrutiny. Certainly, the terms of the constitutional provision furnish no such clear and definite support for a contrary construction as to justify disregard of the established practice in the States. That practice is eloquent of the conviction of the people of the States, and of their representatives in state Legislatures and executive

(continued…)

The Supreme Court reaffirmed the validity of these and other state constitutional constraints on the congressional redistricting process most recently in *Arizona State Legislature v. Arizona Independent Redistricting Commission*. There, the Court relied upon the Elections Clause and 2 U.S.C. § 2a(c), the successor statute to the 1911 Act at issue in *Hildebrant*, in rejecting a challenge to a provision of the Arizona Constitution, adopted in 2000 via citizen initiative, that "remove[d] redistricting authority from the Arizona Legislature and vest[ed] that authority in an independent commission."[17] Tracing the history of the federal statutes, the Court explained:

> From 1862 through 1901, the decennial congressional apportionment Acts provided that a State would be required to follow federally prescribed procedures for redistricting unless "the legislature" of the State drew district lines. In drafting the 1911 Act, Congress focused on the fact that several States had supplemented the representative legislature mode of lawmaking with a direct lawmaking role for the people, through the process of initiative (positive legislation by the electorate) and referendum (approval or disapproval of legislation by the electorate). To accommodate that development, the 1911 Act eliminated the statutory reference to redistricting by the state "legislature" and instead directed that, if a State's apportionment of Representatives increased, the State should use the Act's default procedures for redistricting "until such State shall be redistricted *in the manner provided by the laws thereof*."[18]

> office, that in providing for congressional elections and for the districts in which they were to be held, these Legislatures were exercising the lawmaking power and thus subject, where the state Constitution so provided, to the veto of the Governor as a part of the legislative process.

Id. (citations omitted).

17 576 U.S. at 792.

18 *Id.* at 809 (cleaned up; emphasis in original). "The 1911 Act also required States to comply with certain federally prescribed districting rules—namely that Representatives be elected 'by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants.'" *Id.* at 809 n.19 (quoting Act of Aug. 8, 1911, ch. 5, § 3, 37 Stat. 14); *see also id.* ("The 1911 Act did not address (continued…)

Because the "lawmaking power in Arizona include[d] the initiative process," the establishment of an independent commission for purposes of congressional redistricting offended neither the Elections Clause nor Section 2a(c).[19]

Taken together, the foregoing authority undercuts the Special Master's suggestion that House Bill 2146 should be entitled to some special consideration, let alone "revere[nce],"[20] simply by virtue of its adoption by the General Assembly. As I see it, there is no better embodiment of the People's will than the language of the Constitution itself, and that text is clear: without the Governor's signature or a two-thirds vote of the House

---

redistricting in the event a State's apportionment of Representatives decreased, likely because no State faced a decrease following the 1910 census.").

Notably, requirements virtually identical to those enumerated in the 1911 Act had been added to Pennsylvania's Constitution by statewide referendum in 1874 to govern the redistricting process for state legislative districts, which at that time was handled by the General Assembly directly. *See* PA. CONST. (1874) art. II, §§ 16, 17; *LWV II*, 178 A.3d at 815. In 1968, Pennsylvania's voters overhauled the legislative redistricting process by amending the Constitution to commit the power to redraw those districts to the newly constituted Legislative Reapportionment Commission. By its terms, our Constitution presently requires the Commission to draw legislative districts "composed of compact and contiguous territory as nearly equal in population as practicable," and instructs that "no county, city, incorporated town, borough, township or ward shall be divided in forming" such districts "[u]nless absolutely necessary." *See* PA. CONST. art. II, § 16. In *LWV II*, we effectively incorporated a slightly modified version of those requirements into the Free and Equal Elections Clause, *id.* art. I, § 5, as "neutral criteria" to measure the constitutionality of congressional redistricting plans. *LWV II*, 178 A.3d at 816-17 (holding that "an essential part of such an inquiry is an examination of whether the congressional districts created under a redistricting plan are: 'composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population'"). "These neutral criteria provide a 'floor' of protection for an individual against the dilution of his or her vote in the creation of such districts." *Id.* at 817.

19 *Id.* at 793.

20 Report at 215.

and Senate to override his veto, it is axiomatic that House Bill 2146 is "just a bill."[21] While the House Bill undoubtedly encompasses the current Legislature's policy *goals*, it does not have the force of law and therefore does not constitute state policy.[22] Were this Court to treat it as anything more than a proposal on an equal footing with the other submitted plans, we would subvert the executive power in favor of the legislative power, elevating one coordinate branch of our government over another without a historical basis. This we cannot do.

Apart from the deference question, I also find the piecemeal treatment of discrete features of any given map as disqualifying to be problematic. For instance, while the Special Master considered the division of Pittsburgh to be suspect, her Report says nothing about House Bill 2146's treatment of Philadelphia. Given its size, Philadelphia is the only county in Pennsylvania that can support two ideally populated congressional districts by itself, with the remainder of its surplus population added to a third district anchored in a neighboring county. However, House Bill 2146 is the *only* submission among the thirteen before us that divides Philadelphia into *four* districts—again without any justification along the lines of what the Special Master demanded of maps that split Pittsburgh. Likewise, the Special Master deemed maps that "divide[d] Bucks County for the first time since the 1860s" to be "[in]appropriate choice[s]."[23] But similar concerns were absent with respect to Dauphin County, for instance, which historically had been

---

21 SCHOOLHOUSE ROCK!, I'M JUST A BILL (1975).

22 *See Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 197 (1972).

23 Report at 195.

kept whole before recent redistricting cycles. Where the 2018 Remedial Map reunified the county, the House Bill would have distributed its populace among three districts.

Moreover, notwithstanding the Constitution's command that "no county, city, incorporated town, borough, township or ward shall be divided in forming" districts "[u]nless absolutely necessary," there are only three counties (one of which is coterminous with a city) in Pennsylvania that "absolutely" must be split to account for current population estimates.[24] Beyond that, the Constitution does not create a hierarchy of political subdivisions to consistently guide the evaluation of a plan's performance on this measure. Nor does it set forth intelligible standards by which courts can conclude that the integrity of some municipal boundaries are sacrosanct, while others are not. Consequently, we must choose among proposed maps without a constitutionally-prescribed basis by which to resolve citizens' pleas that certain municipalities or "communities of interest" should be kept together. Ultimately, those questions are inherently political.

While historical practices might be a helpful starting point for a court to employ when it comes to scrutinizing political subdivisions, by no means do they create what one *Amicus* Participant cleverly chided as "cartographic *stare decisis*."[25] In that vein, the Special Master erred in asserting that certain plans "propose to split the City of Pittsburgh into two districts, apparently for the first time in [Pennsylvania's] history."[26] To the contrary, Pittsburgh historically had been split between multiple congressional districts for

---

[24] Those counties are Allegheny, Montgomery, and Philadelphia.

[25] Br. of *Amici* Participants Khalif Ali, *et al.*, 2/14/2022, at 20.

[26] Report at 194.

the better part of the previous century and beyond, including four districts in 1931, five in 1943, four again in 1951, and three between 1962 and 1982, to summarize just a few maps that the Legislative Reapportionment Commission conveniently has made publicly available on its website.[27] In fact, Pittsburgh has only comprised a single congressional district since 1982. That said, while the Constitution does not require a justification for each and every split (or any, for that matter), absent compelling reasons not present in this record, whether and how to divide Pennsylvania's second-largest city for the first time in four decades are questions best left to the political branches, which possess the institutional competencies to survey the Commonwealth, conduct fact-finding, and weigh amorphous and constitutionally-undefined concepts like "communities of interest" in deciding where lines should be drawn.

To be clear, I do not believe that any of the maps before us should be disqualified based upon discrete line-drawing decisions. The creation of a districting plan requires balancing a number of factors, some quantitative, others qualitative. Necessarily, maximizing a plan's performance with respect to one factor (compactness, say) will complicate one's ability to minimize the results of another (*e.g.*, raw political subdivision splits). In exercising our "equitable discretion" to choose one plan from an array of options, [28] this Court's first responsibility is to ensure that a given plan satisfies the constitutional requirements of equal population, contiguity, compactness, and preservation of political subdivisions. As others have noted, using the 2018 Remedial

---

27 *See* https://www.redistricting.state.pa.us/Maps/.

28 *Connor*, 431 U.S. at 415.

Plan as a baseline, each of the submitted maps arguably satisfies these neutral criteria.[29] This is a good problem to have, as it appears that the days of "Goofy kicking Donald Duck" are over.[30] Given that reality, our inquiry must turn to other considerations.

Some would have us look immediately to a variety of "partisan fairness" metrics, a number of which have been scrutinized at length by the parties and their experts. Respectfully, I see less value in that order of operations. Though I reaffirm the proposition

> that there exists the possibility that advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these neutral 'floor' criteria, nevertheless operate to unfairly dilute the power of a particular group's vote for a congressional representative,[31]

I also bear in mind that we are in a fundamentally different posture than when we recognized the justiciability of partisan gerrymandering claims in *LWV II*. Because that case began as a challenge to an existing map that had been drawn by the Legislature and signed into law by the Governor, the litigants had the benefit of six years' worth of election data by which to analyze that plan's actual performance. While we found those

---

[29] Majority Op. at 27-33; Concurring Op. (Dougherty, J.) at 2; *see* Report at 192 ("On their face, . . . all the maps in the proposed plans contain districts that are comprised within a contiguous territory and comply with the 'contiguity' requirement of the Pennsylvania Constitution."); *id.* ("Each and every proposed plan satisfies the command in the Free and Equal Elections Clause that congressional districts be created 'as nearly equal in in population as practicable.'"). Among the submissions, the Khalif Ali *Amici* Participants alone utilized the Legislative Reapportionment Commission's alternative, prisoner-adjusted data set. While this choice is not disqualifying, it makes comparing *Amici*'s plan to the other submissions somewhat more difficult. Absent a claim that such adjustments constitutionally are required, which *Amici* do not advance here, whether to use the prisoner-adjusted data set is a policy decision reserved to the discretion of policymakers.

[30] *See LWV II*, 178 A.3d at 819 (relating the derisive moniker given to Congressional District 7 in the 2011 Plan).

[31] *Id.* at 817.

computations to be instructive, we did not need to rely on them in striking down the 2011 Plan because its subordination of the neutral redistricting criteria was manifest, particularly with regard to the compactness criteria. Here, by contrast, we do not confront a challenge to an existing map. Consequently, the partisan fairness metrics used to evaluate the thirteen submitted maps are useful heuristics to approximate partisan outcomes under conditions that have never occurred—*i.e.*, elections held under proposed lines. For that reason, I caution against surrendering to the allure of those metrics at the front end of an analysis. The numbers are no doubt helpful to a comprehensive examination, but they must not be dispositive. They serve better as a gut-check at the culmination of the process, rather than as a gatekeeping function at the start.

Aside from partisan fairness, in *LWV II*, "[w]e recognize[d] that other factors have historically played a role in the drawing of legislative districts, such as the preservation of prior district lines, protection of incumbents, or the maintenance of the political balance which existed after the prior reapportionment."[32] We designated these factors as "wholly subordinate to the neutral criteria" identified above, but available for consideration nonetheless.[33] I find inquiries about incumbent "protection" and maintaining "political balance" to be less appropriate or amenable to objective analysis in the context of a court-

---

[32] *Id.*; *cf. Holt v. 2011 Legislative Reapportionment Comm'n*, 67 A.3d 1211, 1235 (Pa. 2013) ("*Holt II*") (explaining that, as a constitutional matter, "there is nothing at all to prevent a particular reapportionment commission from considering political factors, including the preservation of existing legislative districts, protection of incumbents, avoiding situations where incumbent legislators would be forced to compete for the same new seat, *etc.*, in drawing new maps to reflect population changes, . . . so long as they do not do violence to the constitutional constraints" expressed in the neutral criteria); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (identifying "preserving the cores of prior districts" to be a "legitimate objective").

[33] *Id.*

drawn or court-selected map. Preserving prior district lines, however, readily can be assessed using straightforward quantitative metrics. Accordingly, I agree with Justice Dougherty's sentiments that, compared to the other subordinate historical considerations, what courts have referred to in modern parlance as the "least-change" approach offers several virtues for a court engaged in the selection of a plan.[34]

For one thing, the least-change approach constrains the Court's exercise of its "equitable discretion," limiting the amount of judicial tinkering with existing district lines to the degree necessary to bring a malapportioned plan into compliance with constitutional requirements. For another, prioritizing least-change promotes "continuity for the vast majority of Pennsylvania residents,"[35] curbing the tumult that might ensue with an indiscriminate overhaul of existing districts. Furthermore, least-change offers a few objective measurements by which to compare competing submissions head-to-head. The "preeminent" metric for a least-change analysis is "core retention," which can be derived by comparing the existing district boundaries to the proposed district boundaries and then calculating the share of the population that would be retained in the overlapping portions.[36] The larger the percentage, the better a plan performs on the core retention metric. Alternatively, one can calculate a "displacement score" by identifying the share

---

[34] *See* Concurring Op. (Dougherty, J.) at 3.

[35] *Id.* at 4.

[36] *Johnson v. Wis. Elections Comm'n*, ___ N.W.2d ___, 2022 WL 621082, *4, *7 (Wis. March 1, 2022) ("Core retention represents the percentage of people on average [who] remain in the same district they were in previously. It is thus a spot-on indicator of least change statewide, aggregating the many district-by-district choices a mapmaker has to make. Core retention . . . is central to a least change review.").

of the population in each proposed district that was not in the prior district, with smaller numbers indicating superior performance.[37]

On the core-retention metric, the submitted plans perform as follows:[38]

Table 1: Retained Population Share in 14 Submitted PA Congressional Plans

Plan	Retained Population Share
Carter	86.6
CCFD	76.1
Citizen Voters	82.4
HB2146	78.5
Draw the Lines PA	78.8
GMS	72.8
Governor Wolf	81.2
Ali	81.5
PA House Dem. Caucus	73.3
Reschenthaler 1	76.5
Reschenthaler 2	76.5
Senate Dem. Plan 1	72.5
Senate Dem. Plan 2	72.5
Voters of PA	80.6

With a Retained Population Share of 86.6%, the Carter Plan significantly exceeds most submitted plans on this metric, with only the Citizen-Voters Plan coming within 5%. When asked at argument what significance should be given to these percentages, counsel for

---

[37] In *Johnson*, the Wisconsin Supreme Court rejected the state legislature's argument that the Court "should weigh as a measure of least change the total number of counties and municipalities split under each proposal." *Id.* The Majority "fail[ed] to see why this [wa]s a relevant least-change metric," in light of the fact that "[i]f a municipality was split under the maps adopted in 2011, reuniting that municipality now—laudable though it may be—would produce more change, not less." *Id.* Although the Court suggested that "[p]articularized data about how many counties or municipalities remain unified or split may be a useful indicator of least change," it did not evaluate the proposed plans on that basis because none of the parties "saw fit to provide that data." *Id.* (emphasis in original). Similar data were not submitted in this case either.

[38] *See* Carter Petitioners' Response Br. in Support of Proposed Congressional Redistricting Plan, 1/26/2022, Ex. 1 (Expert Report of Jonathan Rodden, 1/26/2022, at 2).

the Carter Petitioners explained that the difference between 86% and 76% on this measurement is roughly one million more people who would remain in their current districts. Broken down by district, eleven of the seventeen proposed districts in the Carter Plan have core retention scores exceeding 89%:[39]

Table 3: Share of Population in Each Proposed District that Will be in the Same District as in the 2018 Plan

District	Share of population in previous version of district
1	93.26%
2	95.84%
3	94.17%
4	81.65%
5	89.74%
6	98.44%
7	90.56%
8	92.10%
9	65.54%
10	96.20%
11	96.91%
12(18)	85.50%
13	73.39%
14	75.65%
15	59.61%
16	89.95%
17	93.63%

As the Governor's expert put it, the Carter Plan "just laps [the] field when it comes to least change."[40]

In criticizing the Carter Plan, the Special Master erroneously contended that this Court rejected the least-change approach in *Holt I*, and therefore the Carter Plan was

---

39 Carter Petitioners' Br. in Support of Proposed Congressional Redistricting Plan, 1/24/2022, Ex. 1 (Expert Report of Jonathan Rodden, 1/24/2022, at 3).

40 Notes of Testimony, 1/27/2022, at 409 (testimony of Moon Duchin, Ph.D.).

"developed in contravention of controlling precedent."[41] But least-change was not at issue in that case. Read in context, the cited passage concerned this Court's standard and scope of review of the Legislative Reapportionment Commission's 2011 Final Plan. The Commission argued that the Court's "*de novo* review is to be constrained by the specifics of prior reapportionment plans 'approved' by the Court."[42] That was so because the Commission mistakenly believed that this Court's prior redistricting decisions essentially pre-approved certain raw numbers of split political subdivisions and population deviation levels.[43] In rejecting that approach, the Court clarified that those prior appeals only resolved challenges actually raised by the parties; they did not "insulate" the Commission's Final Plan "from attack . . . unless a materially indistinguishable challenge was raised and rejected in those decisions."[44]

Here, the Carter Petitioners do not suggest that the bulk of the 2018 Remedial Plan must be blindly re-adopted because it previously was approved by this Court. Rather, they believe that it is a reasonable starting point for drawing a new plan that also complies with all other traditional criteria. I agree. Moreover, preferring the least-change approach would not inoculate future plans from challenges, as the Special Master

---

41 Report at 187 (citing *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 735 (Pa. 2012) ("*Holt I*")).

42 *Holt I*, 38 A.3d at 735.

43 *Id.*

44 *Id.* at 736; *see also id.* at 735 (explaining that "prior 'approvals' of plans do not establish that those plans survived not only the challenges actually made, but all possible challenges").

evidently feared.[45] The political branches are not bound by a least-change approach when drawing districts through the typical legislative process. The United States and Pennsylvania Constitutions give the General Assembly ample latitude to draw new maps from scratch based upon its preferred policy considerations, limited only by constitutional constraints and federal statutes such as the Voting Rights Act. Thus, the Legislature may replace wholesale the Carter Plan with a plan of its own devising in a future redistricting cycle, and any challenges to that plan would have to be evaluated independently on their merits.

To be sure, the least-change approach has its own shortcomings. The utility of such an approach might be diminished significantly if our point of reference—*i.e.*, the thing to be changed the least—is a grossly gerrymandered map, as was the case with the 2011 Plan, whose deficiencies were pervasive. In that instance, it would not have been prudent to require mapmakers to measure their proposals against manifestly unconstitutional lines.[46]

Although I would not declare that least-change should be *the* "tie-breaker" for all court-selected plans, my views on this subject align more closely with Justice

---

[45] *See* Report at 188 ("This Court is deeply troubled by the prospect of any court, let alone a court of this Commonwealth, applying the 'Least Change' doctrine, where the existing plan was drafted by that court itself, because that court could theoretically continuously adopt features of its prior plans, effectively rendering impossible any future challenge to the plan.").

[46] That being said, utilizing a least-change approach where a prior map's constitutional shortcomings are confined to a few districts is not beyond the realm of possibility. In that case, all other things being equal, least-change might still present the most restrained approach to judicial selection among several proposed maps.

Dougherty's.[47] In exercising our constitutional and equitable powers, we must recognize that redistricting is more art than science. Every line reflects a value judgment to some community or individual. Nonetheless, we should endeavor to resolve redistricting disputes by elevating as many "objective" criteria above "subjective" considerations as possible. To that end, I consider a plan's least-change score to be a weighty plus-factor that parties to future impasse litigation would be wise to keep in mind when submitting plans for selection by a court. Given that the other plans before us largely satisfy the threshold neutral criteria, the Carter Plan's superior performance on the least-change metric weighs heavily in its favor. For that reason, I join the Court in adopting it as the Commonwealth's 2022 Congressional Redistricting Plan.

---

47 *See* Concurring Op. (Dougherty, J.) at 3 ("In my view, the critical factor that sets the Carter Plan apart—the 'tie-breaker,' so to speak—is that the Carter Plan yields the least change from the Court's 2018 congressional redistricting plan.").

EXHIBIT 1

DECLARATION OF DR. STEPHEN ANSOLABEHERE

I, Stephen Ansolabehere, do hereby declare as follows:

1. I am over the age of 18 and I make this declaration based upon my personal knowledge and experience.

2. I previously served as an expert to the Hunter Intervenor-Petitioners in this matter. I have been asked by counsel in this matter to provide information about the total populations in each of Wisconsin's eight congressional districts under the map chosen by the Wisconsin Supreme Court on March 3, 2022.

3. Using the data files from Wisconsin Legislative Technology Services Bureau for the Evers Congressional District Map, available at https://data-ltsb.opendata.arcgis.com/search?q=Districts, I conclude the population of each of the districts is as follows:

4. Wisconsin Congressional District 1 has 736,715 persons.

5. Wisconsin Congressional District 2 has 736,715 persons.

6. Wisconsin Congressional District 3 has 736,716 persons.

7. Wisconsin Congressional District 4 has 736,714 persons.

8. Wisconsin Congressional District 5 has 736,715 persons.

9. Wisconsin Congressional District 6 has 736,714 persons.

10. Wisconsin Congressional District 7 has 736,715 persons.

11. Wisconsin Congressional District 8 has 736,714 persons

Executed this 9th day of March, 2022. 

Stephen Ansolabehere

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

PROPOSED PETITION FOR ORIGINAL ACTION OF PROPOSED INTERVENOR-PETITIONERS CONGRESSMEN GLENN GROTHMAN, MIKE GALLAGHER, BRYAN STEIL, TOM TIFFANY, AND SCOTT FITZGERALD

MISHA TSEYTLIN
Counsel of Record
State Bar No. 1102199
KEVIN M. LEROY
State Bar No. 1105053
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

Counsel for Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald

ISSUES PRESENTED BY THE CONTROVERSY

1. If the Legislature and Governor fail to timely adopt a new congressional district map for Wisconsin, whether Wisconsin's current congressional map is malapportioned, in violation of the Wisconsin Constitution.

2. If the Legislature and Governor fail to timely adopt a new congressional district map for Wisconsin, what congressional district map should this Court adopt.

TABLE OF CONTENTS

INTRODUCTION

1. Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald (hereinafter the "Congressmen"), who all intend to run for reelection in 2022, submit this proposed Petition For Original Action along with their Motion To Intervene in this case, per Wis. Stat. § (Rule) 803.09(3)'s requirement that any motion to intervene "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." Wis. Stat. § (Rule) 803.09(3); *see* Order Granting Petition at 3, No.2021AP1450-OA (Wis. *amended* Sept. 24, 2021) (hereinafter "*Johnson* Order").

THE PARTIES

I. The Petitioners

2. Upon information and belief, Petitioners are all Wisconsin residents and voters. *See* Pet. ¶ 13.

3. Upon information and belief, Petitioner Billie Johnson resides at 2313 Ravenswood Road in Madison, WI 53711, within the Second Congressional District, State Assembly District 78, and State Senate District 26. Pet. ¶ 14.

4. Upon information and belief, Petitioner Eric O'Keefe resides at 5367 County Road C in Spring Green, WI 53588, within the Second Congressional District, State Assembly District 51, and State Senate District 17. Pet. ¶ 15.

5. Upon information and belief, Petitioner Ed Perkins resides at 4486 N. Whitehawk Drive in Grand Chute, WI 54913, within the Eighth Congressional District, State Assembly District 56, and State Senate District 19. Pet.¶ 16.

6. Upon information and belief, Petitioner Ronald Zahn resides at 287 Royal Saint Pats Drive in Wrightstown, WI 54180, within the Eighth Congressional District, State Assembly District 2, and State Senate District 1. Pet. ¶ 17.

II. The Respondents

7. Respondent Wisconsin Elections Commission is a governmental agency authorized under Wis. Stat. § 5.05 and is responsible for administering Chapters 5 and 6 of the Wisconsin Statutes. Pet. ¶ 18. The Wisconsin Elections Commission is principally located at 212 E. Washington Avenue, 3rd Floor, Madison, WI 53703. Pet. ¶ 18.

8. Respondents Marge Bostelmann, Julie Glancey, Ann Jacobs, Dean Knudson, Robert Spindell, and Mark Thomsen, all sued only in their official capacities here, serve as the Commissioners of the Commission. Pet. ¶ 19. (This proposed Petition will hereinafter refer to all Respondents collectively as "the Commission".)

III. The Congressmen

9. Congressman Glenn Grothman is the duly elected U.S. Representative representing Wisconsin's Sixth Congressional District, where he also resides.

10. Congressman Mike Gallagher is the duly elected U.S. Representative representing Wisconsin's Eighth Congressional District, where he also resides.

11. Congressman Bryan Steil is the duly elected U.S. Representative representing Wisconsin's First Congressional District, where he also resides.

12. Congressman Tom Tiffany is the duly elected U.S. Representative representing Wisconsin's Seventh Congressional District, where he also resides.

13. Congressman Scott Fitzgerald is the duly elected U.S. Representative representing Wisconsin's Fifth Congressional District, where he also resides.

14. The Congressmen all intend to be candidates for reelection in 2022, thereby continuing to serve their respective districts if reelected.

STATEMENT OF THE FACTS

I. Congressional Redistricting Principles

15. The Wisconsin Constitution requires equal apportionment for Wisconsin's congressional districts, including, but not limited to: (a) the equal-protection clause found in Article I, § I, *see County of Kenosha v. C. & S. Management, Inc.*, 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999) (explaining that Article I, § 1 offers "essentially the same" protection as does the U.S. Constitution's Equal Protection Clause); *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016); and (b) Article IV, Wis. Const. art. IV, § 3; *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 564, 126 N.W.2d 551 (1964).

16. The Legislature has the primary authority to conduct congressional redistricting and must submit its approved plans to the Governor for his approval or veto. *See Johnson* Order at 2; Wis. Const. art. IV, §§ 3, 4; *Zimmerman*, 22 Wis. 2d at 558.

17. If the Legislature and the Governor "fail[ ] to reapportion according to constitutional requisites in a timely fashion after having had an adequate opportunity to do so," then this Court has the duty to adopt a congressional redistricting plan for the State. *Johnson* Order at 2.

II. The Current Decennial Redistricting Cycle For Wisconsin's Congressional Districts, And This Court's Grant Of The Petition In *Johnson*

18. Based on the results of the U.S. Census Bureau's 2020 census results, all of Wisconsin's current congressional districts are now malapportioned, in violation of the Wisconsin Constitution, including Article I, § 1 and Article IV.

19. The Legislature has begun drawing a new map for these congressional districts, in light of the 2020 census.

20. On August 23, 2021, Petitioners filed their Petition For Original Action with this Court, which Petition:

(a) "claim[ed] that the results of the 2020 census show that Wisconsin's congressional and state legislative districts——including the voters' districts——are malapportioned and no longer meet the requirements of the Wisconsin Constitution"; and (b) asked this Court to "assume original jurisdiction" and "adopt a new apportionment plan" "if the legislative process fails." *Johnson* Order at 1.

21. This Court granted Petitioners' Petition and accepted this case for consideration in its original jurisdiction. *Johnson* Order at 2–3; *see infra* ¶¶ 28–29.

III. The Congressmen Have A Significant, Direct Interest In Congressional Redistricting

22. The Congressmen have the solemn duty to "promote and protect their [constituents'] interests," which duty requires them to kindle "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).

23. Consistent with this duty, each Congressman has invested substantial time and resources to understand the needs of the constituents in the districts that they represent.

24. The Congressmen's solemn relationship with their constituents and their intent to run for reelection in 2022 give them a substantial interest in the ongoing redistricting process for Wisconsin's congressional districts.

25. The Congressmen have such a substantial interest because the "contours of" Congressional Districts "determin[e] which constituents the Congressmen must court for votes and represent in the legislature," so any change to those contours "affect[s] the Congressmen directly and substantially." *League of Women Voters of Michigan v. Johnson*, 902 F.3d 572, 579 (6th Cir. 2018).

STATEMENT OF RELIEF SOUGHT

26. As the Congressmen explain more fully in their simultaneously filed Motion To Intervene and supporting papers, the Congressmen respectfully request that this Court grant their Motion To intervene as Petitioners and accept this proposed Petition For Original Action for filing.

27. Further, if the Legislature and Governor do not adopt a new congressional district map in a timely fashion, the Congressmen respectfully request that:

a. This Court declare that Wisconsin's congressional district map is malapportioned, in violation of the Wisconsin Constitution, including Article I, § 1, and Article IV;

b. Draw a new redistricting map for Wisconsin's congressional districts that: (i) complies with the equal-population requirements of the Wisconsin Constitution, including Article I, § 1, and Article IV; (ii) complies with all other applicable state and federal redistricting requirements; and (iii) follows "the most neutral" redistricting principle of "taking the [immediately previous] reapportionment plan as a template and adjusting it for population deviations." *Baumgart v. Wendelberger*, 2002 WL 34127471, at *7 (E.D. Wis. May 30, 2002).

c. Adopt this new redistricting map for Wisconsin's congressional districts by February 28, 2022, so that the new map will govern Wisconsin's 2022 congressional elections.

STATEMENT OF REASONS WHY THIS COURT SHOULD TAKE JURISDICTION

28. As noted above, this Court has already granted Petitioners' Petition and accepted this case for consideration in its original jurisdiction, explaining, as relevant here, that Petitioners claim that "the results of the 2020 census show that Wisconsin's congressional . . . districts . . . are malapportioned and no longer meet the requirements of the Wisconsin Constitution." *Johnson* Order at 1.

29. Among other things, this Court's Order granting the Petition explained that "[t]his court has long deemed redistricting challenges a proper subject for the court's exercise of its original jurisdiction," as "'any redistricting case is, by definition, *publici juris*, implicating the sovereign rights of the people of this state.'" *Johnson* Order at 2 (quoting *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶ 17, 249 Wis. 2d 706, 639 N.W.2d 537 (2002) (per curiam)).

30. This Court should grant the Congressmen's proposed Petition for the same reasons, and for the reasons that the Congressmen discuss in their simultaneously filed Motion To Intervene and supporting papers.

31. Notably, this proposed Petition raises the common question with the Petition of whether Wisconsin's existing congressional districts violate the equal-population principle found in the Wisconsin Constitution, including Article I, § 1, and Article IV. That is consistent with this Court's Order granting the Petition, as that Order covers all provisions "of the Wisconsin Constitution" relevant to whether the congressional districts are unconstitutionally "malapportioned." *Johnson* Order at 1.

CONCLUSION

32. This Court should grant the Congressmen's proposed Petition For Original Action and accept it for filing.

Dated: October 6, 2021.

Respectfully submitted,

MISHA TSEYTLIN
Counsel of Record
State Bar No. 1102199
KEVIN M. LEROY
State Bar No. 1105053
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1938 (KL)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
kevin.leroy@troutman.com

Counsel for Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald