No. 21A490

In the Supreme Court of the United States

GLENN GROTHMAN, UNITED STATES CONGRESSMAN, ET AL.,
APPLICANTS,
v.
WISCONSIN ELECTIONS COMMISSION, ET AL.,
RESPONDENTS.

SUPPLEMENTAL APPENDIX TO EMERGENCY APPLICATION FOR STAY

On Application For Stay, Or, In The Alternative, On Petition For A Writ Of Certiorari To The Wisconsin Supreme Court

To the Honorable Amy Coney Barrett
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Seventh Circuit

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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.

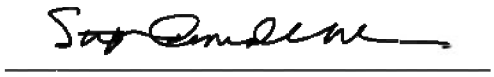
7. Wisconsin Congressional District 4 has 736,714 persons.

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-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.

REPLY BRIEF OF THE CONGRESSMEN IN SUPPORT OF THEIR PROPOSED REMEDIAL MAP

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Cases

Other Authorities

INTRODUCTION

When putting before this Court their Proposed Remedial Map, the Congressmen appreciated that there are multiple ways that a map-drawer could modify Wisconsin's current congressional districts to reach population equality, under the "least changes" approach articulated in *Johnson v. Wisconsin Elections Commission*, 2021 WI 87, ___ Wis. 2d ___, ___ N.W.2d ___. The Congressmen thus explained, in specific detail, each of the limited number of proposed changes that they propose to bring Wisconsin's Congressional districts in line with the constitutional one-person/one-vote rule. Br. Of The Congressmen Supporting Their Proposed Congressional District Map at 31–44, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 15, 2021) ("Congressmen Br."). The Congressmen grounded each of these explanations in Wisconsin's political geography, through the expert report from Mr. Tom Schreibel, who has deep experience with our State's political geography and redistricting history. Aff. of Tom Schreibel Ex. A at 5–7, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 15, 2021).

In their Response Briefs, the Governor, the Citizen Mathematicians And Scientists ("Citizen Mathematicians"), and the Hunter Petitioners did not even attempt to grapple with or rebut the Congressmen's detailed explanations of each of the Congressmen's proposed changes, other than offering an abbreviated critique of the proposed line between

Districts 3 and 7. And, notably, these parties also offered no argument or expert testimony to rebut any of Mr. Schreibel's Wisconsin-specific explanations for any of the limited changes in the Congressmen's proposed map, including as to the line between Districts 3 and 7.

Given these parties' decision not to grapple with the Congressmen's explanation of their proposed changes, as well as these parties' complete failure even to put forward *any* Wisconsin-grounded explanation for the changes in their own proposed maps, Resp. Br. Of Congressmen Regarding Proposed Congressional District Maps at 7–19, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 30, 2021) ("Congressmen Resp.Br."), the task for this Court is straightforward as it relates to the congressional districts. If this Court is convinced by the Congressmen's unrebutted, expert-based explanation of why their Proposed Remedial Map most sensibly achieves perfect population equality under the *Johnson* least-change mandate, this Court should adopt that map. If, however, this Court is convinced by the critique of the line between Districts 3 and 7 in the Congressmen's Proposed Remedial Map, or otherwise wants to adopt a map that moves fewer people, this Court should modify that line in Congressmen's Proposed Remedial Map in the manner that the Congressmen explained in their filings on December 30.

ARGUMENT

I. The Other Parties Raise No Credible Critiques Against The Congressmen's Proposed Remedial Map

The Congressmen put before this Court a proposed least-changes map that makes only targeted adjustments to Wisconsin's congressional districts, which is the same map that the Legislature recently adopted, *see* 2021 S.B. 622, and the Governor vetoed, Wis. Senate J. at 617, 105th Reg. Sess. (Nov. 18, 2021). The Congressmen explained in their Opening Brief and attached expert report why this map complies with all constitutional and statutory requirements and why it modifies Wisconsin's current congressional districts in a sensible, least-changes manner, consistent with Wisconsin's political geography. Congressmen Br.28–44.

Only the Governor, the Citizen Mathematicians, and the Hunter Petitioners criticize the Congressmen's Proposed Remedial Map, and their critiques are limited and unconvincing. As a threshold matter, these parties either concede, *see* Gov. Tony Evers's Resp. Br. On Proposed Maps at 22–26, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 30, 2021) ("Gov.Resp.Br."); Hunter Int.-Pet'rs Resp. Br. In Support Of Proposed Maps at 9–10, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 30, 2021) ("Hunter Resp.Br."), or admit by silence, *see Parsons v. Assoc. Banc-Corp*, 2017 WI 37, ¶ 39 n.8, 374 Wis. 2d 513, 893 N.W.2d 212; *see generally* Citizen Math. Resp.Br.1–20, that the Congressmen's proposal complies with

all constitutional and statutory requirements. These parties also fail completely to grapple with *any* of the Congressmen's specific, Wisconsin-grounded proposed changes, thereby forfeiting any response to these explanations. *See Parsons*, 2017 WI 37, ¶ 39 n.8; *see generally* Gov.Resp.Br.6–26; Hunter Resp.Br.9–22; Citizen Math. Resp.Br.1–20. The few critiques that these parties offer cannot withstand scrutiny.

The Governor. The Governor rests his critique largely upon the fact that his proposal moves roughly 1% fewer people overall than does the Congressmen's proposal. Gov.Resp.Br.22–23.[1] As the Congressmen read *Johnson*, including Justice Hagedorn's concurrence, if a proposed map: (1) moves a limited number of persons to achieve population equality, as *only* the Congressmen's Proposed Remedial Map (and its modified version, *see infra* Part II) and the Governor's proposed map do, *see* Letter Resp. Br. of the Johnson Petitioners at 10–11, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 30, 2021); and (2) "compl[ies] with all relevant legal requirements," as the Congressmen's Proposed Remedial Map (and its modified version, *see infra* Part II) does, Congressmen Br.28–32, and the Governor's

[1] The Governor also makes a brief reference to the line between Districts 3 and 7 in the Congressmen's proposed map, Gov.Resp.Br.25, which point the Hunter Petitioners develop more specifically and which the Congressmen address below, *see infra* pp.10–11.

proposed map would, with just a minor adjustment,[2] then this Court will decide as between any such maps based upon the parties' explanation of "how their maps are the most consistent with existing boundaries," including "other, traditional redistricting criteria" that "may prove helpful." *Johnson*, 2021 WI 87, ¶ 87 (Hagedorn, J., concurring); *accord id.* ¶¶ 72, 75 (majority op.). Given that the Governor has not attempted to offer *any* explanation for the many bizarre changes in his proposed map, while the Congressmen offered a detailed, unrebutted, Wisconsin-grounded explanation for each of the changes in their proposal, Congressmen Br.31–44, and explained in detail why the Governor's proposed changes do not make sense, Congressmen Resp.Br.8–12, the Congressmen's proposal is far preferable under *Johnson*.

Having said that, if this Court wants to adopt the map that both complies with all legal requirements and moves fewer people, then the modified version of the Congressmen's Proposed Remedial Map is clearly preferable to the Governor's proposal, given that the modified version of the

[2] The Citizen Mathematicians correctly point out that the Governor's and the Hunter Petitioners' proposed congressional maps fail to achieve perfect population equality because they do not reduce the difference between the most and least populous districts to a single person, Resp. Br. Of Citizen Mathematicians at 6, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 30, 2021) ("Citizen Math. Resp.Br."), which violates the one-person/one-vote requirement applicable to congressional redistricting, *see Johnson*, 2021 WI 87, ¶ 25.

Congressmen's proposal moves almost 2% fewer people than the Governor's proposed map. *See infra* Part II.

The Citizen Mathematicians. The Citizens Mathematicians devote only a single, conclusory paragraph to criticizing Congressmen's Proposed Remedial Map. Citizen Math. Resp.Br.15. That paragraph merely echoes some of the meritless arguments that the Governor and the Hunter Petitioners make, *id.*, while not even attempting to address the Congressmen's detailed, expert-grounded explanation for their proposed changes, Congressmen Br.31–44.

The Hunter Petitioners. The Hunter Petitioners, in turn, offer three critiques of the Congressmen's Proposed Remedial Map, but each critique lacks merit.

First, the Hunter Petitioners criticize the Congressmen's Proposed Remedial Map for moving more landmass than other proposed maps, seeking without citation to redefine "least change" as placing equal weight on the movement of persons and of land. Hunter Resp.Br.10. But this Court is adopting a remedial map since Wisconsin's congressional districts are no longer equally populous, because, under the one-person/one-vote principle, "[l]egislators represent people, not trees or acres." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). The Hunter Petitioners do not cite any case, or any other authority, even suggesting that the number of "trees or acres" moved, *id.*, has any relevance to the remedial, least-changes inquiry, let alone equal relevance to the number of people moved, *see Johnson*, 2021

WI 87, ¶¶ 64, 81; *id.* ¶ 82 (Hagedorn, J., concurring). The least-change approach, of course, means "retaining *previous occupants* in new legislative districts," *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *1, *3 (E.D. Wis. May 30, 2002) (per curiam) (emphasis added), which also "minimizes voter confusion," *Hippert v. Ritchie*, 813 N.W.2d 374, 381 (Minn. 2012); trees and acres experience no judicially-cognizable confusion from being moved to new districts. The Governor appears to agree that the least-changes focus should be on the number of people moved. Gov.Resp.Br.7–8.

And while the movement of "trees or acres," *Reynolds*, 377 U.S. at 562, has no legal relevance, the Congressmen note, for completeness, that the modified version of their proposed map would retain 96.7% of the current congressional districts' landmass, Aff. of Kevin M. LeRoy, Ex. A, at 2.

Second, the Hunter Petitioners criticize the Congressmen's Proposed Remedial Map for its number of county, municipal, and precinct splits. Hunter Resp.Br.10–11. As a threshold matter, to the extent that this Court considers this factor, county splits are the most important Wisconsin units to look to, including because of their longstanding role of governing in this State. *See State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1892); *Jackson Cty. v. Dep't of Nat. Res.*, 2006 WI 96, ¶ 31, 293 Wis. 2d 497, 717 N.W.2d 713. Further, the Congressmen, unlike the other parties, offered Wisconsin-specific

explanations for their proposed lines, so this Court can evaluate for itself whether any particular line and attendant split makes sense under *Johnson*'s least-change approach, in light of Wisconsin's political geography. These points aside, the Congressmen's Proposed Remedial Map fares comparably to the other parties' submissions with respect to political-subdivision splits, especially when taking into proper account the number of people each map moves.

With regard to the total number of county splits, the Congressmen's Proposed Remedial Map splits 10 counties, the Hunter Petitioners' proposed map splits 11, and the Governor's proposed map splits 12. Second Aff. of Tom Schreibel Ex. A ("Schreibel Resp. Expert Rep.") at Ex. 2 at 1, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 30, 2021). Although the Citizen Mathematician's proposed map splits only 7 counties, Schreibel Resp. Expert Rep. Ex. 2 at 1, it moves significantly more people than any other proposed map, while also imposing numerous changes without offering any explanation, making the Congressmen's Proposed Remedial Map far preferable, Congressmen Resp.Br.16–20. Similarly, while the modified version of the Congressmen's Proposed Remedial Map splits 14 counties, Schreibel Resp. Expert Rep.22, that map moves significantly fewer people than do the other proposed maps, Congressmen Resp.Br.22–23.

As to the total number of municipal splits, the Hunter Petitioners' expert offers figures at odds with those presented

by other experts and nonpartisan sources, which all appear to conflict with each other, making this an unhelpful metric, as the Congressmen and their expert previously explained. Congressmen Resp.Br.20 n.2; Schreibel Resp. Expert Rep.23 n.*. While the Hunter Petitioners' expert claims that the Congressmen's proposed map splits 36 municipalities and the Governor's proposal splits 27 municipalities, Supp'l Rep. of Dr. Stephen Ansolabehere In Supp. Of Hunter Int.-Pet'rs at 12 & App'x I at Table 1, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 30, 2021) ("Ansolabehere Supp'l Expert Rep."); Hunter Resp.Br.11, the nonpartisan Legislative Reference Bureau concluded that the Congressmen's proposal splits only 16 municipalities, while the Governor's splits 25. Schreibel Resp. Expert Rep. Ex. 2 at 1.[3] The Governor's expert, in turn, estimates that his proposal splits 47 municipalities, Resp. Rep. of Jeanne Clelland In Support Of Gov. Evers's Proposed District Plans at 16–17, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 30, 2021), close to the number that the Hunter Petitioners' expert estimates for the Congressmen's Proposed Remedial Map, Ansolabehere Supp'l Expert Rep.12 & App'x I at Table 1; Hunter Resp.Br.11. Given these considerations, the number of municipal splits

[3] The Legislative Reference Bureau concluded that the modified version of the Congressmen's Proposed Remedial Map splits 22 municipalities. *See* Schreibel Resp. Expert Rep. Ex. 2 at 1.

cannot possibly justify adopting a map that moves additional people (as does every proposed map other than the Congressmen's and the Governor's), or one that makes numerous changes without the submitting party offering any explanation for those changes (as does every proposed map other than the Congressmen's).

Finally, as to precinct splits, the Hunter Petitioners do not explain why those should be given any particular weight. *See generally* Hunter Resp.Br.6–12. The Hunter Petitioners do not cite any case or authority that gives any weight to the number of precincts that a map split in drawing congressional districts, nor do they even attempt to explain why they believes this to be a "traditional redistricting criteria" that "may prove helpful," *Johnson*, 2021 WI 87, ¶ 87 (Hagedorn, J., concurring), let alone so helpful and important as to justify adopting a map that moves more people or one that makes numerous unexplained and inexplicable changes.

Third, the Hunter Petitioners—having offered no explanation whatsoever for the many unnecessary and bizarre changes in their own map, which almost moves more people than does the Congressmen's proposal—remarkably attack the Congressmen's proposed changes to the line between Districts 3 and 7 on the basis that the Congressmen's proposal moves more people in this particular part of the State. Hunter Resp.Br. 11–12. Yet, as the Congressmen explained, this proposal is sensible and consistent with *Johnson*'s "least-change" approach. After the 2020 Census,

District 2 was significantly overpopulated; thus, the Proposed Remedial Map logically moves a large portion of that overpopulation to the neighboring District 3. Congressmen Br.36–39. Then, to account for the overpopulation of District 3 resulting from that necessary adjustment, the Congressmen's Proposed Remedial Map contracts District 3's northernmost and easternmost extremities, including its long, narrow appendage into central Wisconsin. Congressmen Br.37–39. That latter adjustment eliminates four county splits by shifting Stevens Point—near the tip of District 3's long, narrow appendage—to District 7. Congressmen Br.38–39. That shift makes sense given Wisconsin's political geography because Stevens Point has far more in common with Wausau in District 7 than with Eau Claire or La Crosse in District 3. Congressmen Br.38–39. Given that none of the other parties have pointed out any fault whatsoever in those Wisconsin-grounded, expert-based explanations, these parties have forfeited any arguments to the contrary. *Parsons*, 2017 WI 37, ¶ 39 n.8.

* * *

The Congressmen thus respectfully submit that their Proposed Remedial Map—which is the only map with changes grounded in Wisconsin's existing political geography, while also moving only a small number of people to new districts—best complies with this Court's governing least-change standards in *Johnson*. 2021 WI 87, ¶¶ 64, 81; *id.* ¶¶ 82–83, 87 (Hagedorn, J., concurring). Nevertheless, if this Court is

convinced by the critique of the Congressmen's proposed line between Districts 3 and 7, or otherwise wants to adopt a map that moves fewer people, then this Court should adopt the modified version of the Congressmen's proposal.

II. If This Court Is Convinced By The Critique Of The Line Between Districts 3 And 7 In The Congressmen's Proposed Remedial Map, Or Otherwise Wants To Adopt A Map That Moves A Smaller Number Of People, This Court Should Simply Adopt The Modified Version Of The Congressmen's Proposed Remedial Map

If this Court agrees that the critique of the line between Districts 3 and 7 in the Congressmen's Proposed Remedial Map—notwithstanding the Congressmen's *unrebutted*, Wisconsin-grounded explanation for that line, *supra* pp.1–4—or otherwise wants to move fewer people, the Congressmen respectfully submit that the only viable alternative is to modify the Congressmen's Proposed Remedial Map in the manner that they explained in their Response Brief and accompanying Motion. *See* Congressmen Resp.Br.20–23; Mot. Of Congressmen To Submit Their Modified Version Of Their Proposed Remedial Congressional Map, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 30, 2021). This modified Proposed Remedial Map would move only 226,723 people, or 3.84% of the population, fewer than the changes of the other proposed maps. Schreibel Resp. Expert Rep.19; Congressmen Resp.Br.22–23. It would also make only those changes to the existing map that, as the Congressmen and their unrebutted expert report have

explained, make sense given Wisconsin's political geography (except for adopting a similar line between Districts 3 and 7 to that which the Governor, the Hunter Petitioners, and the Citizen Mathematicians propose). Congressmen Resp.Br.20–23; Schreibel Resp. Expert Rep.19–23. This modified map also complies with all constitutional and statutory requirements, for the same reasons as does the Congressmen's Proposed Remedial Map. Congressmen Resp.Br.22–23.

CONCLUSION

This Court should adopt the Congressmen's Proposed Remedial Map.

Dated: January 4, 2022.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font, as well as to this Court's November 17, 2021 Order. The length of this Brief is 2,764 words.

Dated: January 4, 2022.

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

I hereby certify that:

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

I further certify that:

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

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

Dated: January 4, 2022.

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IN THE SUPREME COURT OF WISCONSIN

No. 2021AP001450 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.

RESPONSIVE BRIEF OF INTERVENORS-PETITIONERS CITIZEN MATHEMATICIANS AND SCIENTISTS

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CASES

CONSTITUTIONAL PROVISIONS

Intervenors-Petitioners Citizen Mathematicians and Scientists respectfully submit this response brief in further support of their proposed congressional, senate, and assembly maps (the "MathSci Proposed Maps"). Unlike the other parties, the MathSci Proposed Maps carefully followed this Court's instructions in its November 30, 2021 Order ("Order"). The MathSci Proposed Maps used the existing 2011 maps as a template and changed them only as necessary to fully implement all legal requirements, most importantly population equality, which is the entire reason a judicial redistricting remedy is needed. As compared to the other parties' maps, the MathSci Proposed Maps achieve either the best or near-best scores on each applicable federal and state requirement, while still maintaining a high degree of fidelity to the existing maps.[1] Accordingly, the Citizen Mathematicians and Scientists respectfully submit that the MathSci Proposed Maps are the judicial remedy this Court should adopt.

ARGUMENT

I. THE PARTIES FAILED TO FOLLOW THE HIERARCHY OF REQUIREMENTS IN THIS COURT'S NOVEMBER 30 ORDER.

The Court's Order established a hierarchy of factors to be weighed in evaluating proposed legislative and congressional maps.

First and foremost, this Court is here to determine "a judicial remedy for malapportionment," Order ¶38, and therefore must ensure that any proposed plan achieves the degree of population equality required under Article I, Section 2 of the Federal Constitution for

[1] The accompanying report of Dr. Daryl DeFord measures all the parties' compliance with applicable legal requirements, as well as their adherence to least-change principles and application of other traditional redistricting criteria.

congressional plans and under its state "counterpart, Article IV, Section 3 of the Wisconsin Constitution." *Id.* ¶33. Thus, the Court's primary duty in this malapportionment case is to "prevent one person's vote—in an underpopulated district—from having more weight than another's in an overly populated district." *Id.*

Second, "[i]n determining a judicial remedy for malapportionment," this Court held that it "will ensure preservation of the[] justiciable and cognizable rights explicitly protected under the United States Constitution, the V[oting] R[ights] A[ct], [and] Article IV, Sections 3, 4, or 5 of the Wisconsin Constitution." *Id.* ¶38. Thus, any proposed plan must not subordinate any of these legal requirements to anything other than achieving population equality.

Third, the Court held that because its "power to issue a mandatory injunction does not encompass rewriting duly enacted law, [its] judicial remedy 'should reflect the least change' necessary" from the current enacted maps "to comport with relevant legal requirements" as described above. *Id.* ¶72 (citation omitted). Thus, the parties should use "the existing maps 'as a template' and implement[] only those remedies necessary to resolve constitutional or statutory deficiencies." *Id.*

Fourth, the concurring opinion stated that if the Court receives "multiple proposed maps that comply with all relevant legal requirements, and that have equally compelling arguments for why the proposed map most aligns with current district boundaries," it can consider other traditional neutral districting criteria such as preserving communities of interest and minimizing the number of people who must wait six years to vote for state senator. *Id.* ¶83 & n.9 (Hagedorn, J., concurring).

Finally, the Court was emphatic that it would not consider the partisan makeup of districts, nor issues of partisan fairness more generally. As the Court stated, "the standards under the Wisconsin Constitution that govern redistricting are delineated in Article IV" and to impose "additional requirements would violate axiomatic principles of interpretation, while plunging this court into the political thicket lurking beyond its constitutional boundaries." *Id.* ¶63 (citation omitted).

The maps and supporting briefs from other parties submitted on December 15 fail to follow this hierarchy. Many parties elevated "least change" from a principle of judicial modesty to an overarching legal requirement, prioritizing it over the express dictates of federal and state law. Several proposed maps do not adequately equalize district populations, as demanded by the federal and state constitutions. *See* Order ¶28. Others violate the Wisconsin Constitution's requirements that assembly districts be "bounded by county, precinct, town or ward lines," and be "in as compact form as practicable." Wis. Const. art. IV, § 4; Order ¶¶35, 37.

Strict construction of these requirements is particularly important here where maps will be adopted by the Judiciary rather than enacted by the political branches. While the latter may concern themselves with "political and policy decisions" in redistricting, this Court is concerned only with strictly following the plain text of the Constitution. Order ¶19 (quoting *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam)).

Nonetheless, several parties have invited the Court to enter the "political thicket" by arguing that this Court should consider incumbent protection. But in Wisconsin and elsewhere, incumbent protection has rightly been viewed as tied inextricably to questions of partisan fairness

and proportional representation. Repackaging incumbent protection as a measure of "least change" conflicts with this Court's Order. Likewise, the Governor's and the Legislature's assertions that their respective maps deserve special status is just an invitation to pick political winners and losers that this Court should decline.

A. Parties Wrongly Elevated "Least Change" over Express Legal Requirements.

The Order repeatedly recognized that "least change" principles should guide *how* parties satisfy federal and state constitutional requirements, not *whether* to satisfy them. *See, e.g.*, Order ¶8 (plurality op.) ("[T]his court will confine any judicial remedy to making the minimum changes necessary in order to conform the existing congressional and state legislative redistricting plans to constitutional and statutory requirements."); *id*. ¶72 (proposed maps should "reflect the least change necessary for the maps to comport with the relevant legal requirements" (internal quotation marks omitted)).

The Order also made clear that the least-change principle is not a standalone legal requirement. Because "Article IV [is] the *exclusive* repository of state constitutional limits on redistricting," the Court properly refused to read into the Wisconsin Constitution any mandates beyond Article IV's "series of discrete requirements governing redistricting." *Id.* ¶63 (emphasis added). Further, the Order characterized least-change as an "approach" intended to "guide [the Court's] exercise of power in affording the Petitioners a remedy," not to dictate the precise scope of a proper remedy. *Id.* ¶64. Elevating least change to an end in itself—to be pursued to the same or greater degree than *actual legal requirements*—is the exact opposite of the judicial modesty that underlies the Court's least-change approach.

Most parties, however, privileged least change over nearly all other considerations. For example, the Congressmen expressly claim that, "when evaluating a proposed remedial map," "this Court should first consider whether the map follows a 'least-change' approach." Congressmen Br. 33. And the Governor repeatedly asserts that compliance with least-change is the Court's "primary concern." Governor's Br. 8, 9, 10, 19. But these statements misread the Order. Indeed, the very language from Justice Hagedorn's concurrence on which the Governor relied makes this clear: The Court's "primary concern is modifying only what we must to ensure the 2022 elections are conducted under districts *that comply with all relevant state and federal laws*." Order ¶87 (Hagedorn, J., concurring) (emphasis added).

Many of the parties treat the Constitution's express requirements only as tiebreakers when deciding where to shift lines that must be moved due to population changes. For example, the BLOC Petitioners expressly state that they used the Constitution's requirements as "decisional criteria" "[i]n choosing *how* to make necessary population shifts." BLOC Br. 51 (emphasis in original); *see also* Hunter Br. 6–7, 19–21 (treating constitutional requirements for assembly districts as "traditional redistricting criteria" and "str[i]v[ing]" to take them into account only after satisfying population equality and least change).

In keeping with the hierarchy this Court established, the MathSci Proposed Maps deploy a least-change approach, as measured by several metrics. But the MathSci Proposed Maps properly prioritize population equality first and compliance with all other applicable federal and state laws second. This is what the Order required. Other parties' adherence to a least-change approach cannot excuse their failure to achieve "as close to an approximation to exactness as possible" with respect to population equality. Order ¶28 (internal

quotation marks omitted). Nor can it excuse their failure to follow county and ward lines, or achieve compactness, as mandated by the plain text of the Constitution.

B. Parties Failed to Achieve the Required Level of Population Equality.

As this Court recognized, "the concept of equal representation by population" is enshrined in both the Federal and Wisconsin Constitutions. Order ¶¶9–11, 13. Indeed, this is the sole basis for the Court's intervention in the redistricting process. *See id.* ¶8 ("Revisions are now necessary only to remedy malapportionment produced by population shifts made apparent by the decennial census.").

"'Absolute population equality' is 'the paramount objective'" in drawing congressional districts. *Id.* ¶25 (quoting *Abrams v. Johnson*, 521 U.S. 74, 98 (1997)). There is "'no excuse for the failure to meet the objective of equal representation for equal numbers of people in congressional districting other than the practical impossibility of drawing equal districts with mathematical precision.'" *Id.* (quoting *Mahan v. Howell*, 410 U.S. 315, 322 (1973)). Yet the Governor's and Hunter's proposed plans fail to satisfy even this fundamental requirement because they exhibit more than the mathematical minimum population deviation between districts. DeFord Report 9–10.

The Wisconsin Constitution also requires "proportional representation by population," Order ¶34, by providing that legislative districts should be drawn "according to the number of inhabitants," *id.* ¶28 (quoting Wis. Const. art. IV, § 3). This provision requires "as close an approximation to *exactness* as possible" with respect to legislative-district populations. *Id.* (quoting *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 484, 51 N.W. 724 (1892)). The plain import of this constitutional demand is that population inequality between

legislative districts is permitted only as necessary to satisfy other *requirements* of state or federal law. *See Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 632 n.1 (E.D. Wis. 1982) (rejecting population inequality not "directed toward maintaining the integrity of political subdivisions").

Several parties rely on federal redistricting precedent to argue that any plan with less than 2% population deviation automatically complies with federal and state requirements. *See, e.g.*, Hunter Br. 9, 18–19. But 2% is not a safe harbor. This Court has held that the Wisconsin Constitution demands "as close an approximation to *exactness* as possible." Order ¶28 (quoting *Cunningham*, 81 Wis. at 484).

The MathSci Proposed Maps achieve a better "approximation to exactness" than any other map. The MathSci Proposed Congressional Map has only a one-person deviation, and the MathSci Proposed Senate and Assembly Maps achieve greater population equality than other proposed plans—while also complying with all federal and state requirements. The MathSci Proposed Maps thus provide the best remedy here.

C. Parties Misunderstood the Requirements of the Voting Rights Act

The Voting Rights Act ("VRA") requires that members of a racial or language-minority group must have an adequate opportunity to nominate and elect representatives of their choice in a number of districts roughly proportional to their share of the State's adult citizen population. *See Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994). What matters, however, is that the districts are effective for racial and language-minority voters, not whether the districts reach some specific demographic threshold, such as "majority-minority"

status. Indeed, arbitrarily seeking to create majority-minority districts without first determining whether a district is effective for minority voters risks an excessive focus on race that could violate the Fourteenth Amendment. *See Cooper v. Harris*, 137 S. Ct. 1455, 1469–72 (2017).

Thus, the Citizen Mathematicians and Scientists agree with the Legislature that districts need not be majority-minority to be effective for minority voters. *See* Alford Report ¶¶24–26 & n.9. Unlike the BLOC Petitioners, who drew all their VRA districts as majority-minority, the MathSci Proposed Senate and Assembly Maps draw districts at a range of percentages, some below 50%, but all solidly effective for minority voters. *See* DeFord Report 5–6 . The MathSci Proposed Senate and Assembly Maps thus avoid an excessive focus on race.

However, the Citizen Mathematicians and Scientists part ways with the Legislature and almost all the other parties with respect to the number of districts that would provide a safe harbor against potential Voting Rights Act liability. Given the growth in the Black population over the past decade, a seventh assembly district that is effective for Black voters is appropriate and would avoid potential federal lawsuits. Accordingly, the MathSci Proposed Assembly Map contains seven Milwaukee County assembly districts that are effective for Black voters. *See* DeFord Report 17–18.

D. Parties Failed to Comply with the Constitution's Directive to Follow County, Town, and Ward Lines in Drawing Assembly Districts.

Several parties failed to adhere to the Constitution's requirement that assembly districts "be bounded by county, precinct, town or ward lines." Wis. Const. art. IV, § 4; Order ¶35. This requirement applies equally to senate districts, given the need for nesting, and has been

recognized as a traditional redistricting principle for congressional districts. *See, e.g.*, *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002) (three-judge court), *amended*, 2002 WL 34127473 (E.D. Wis. July 11, 2002).

The Legislature and the BLOC Petitioners suggest that following ward or municipal lines is sufficient. *See* Legislature Br. 31 (touting that "every district follows 2020 ward boundaries"); BLOC Br. 50 (stating that Wisconsin Constitution requires "respecting municipal and ward boundaries"). That is inconsistent with the plain text of the Constitution. As two concurring justices in the seminal *Cunningham* case separately explained, if district boundaries need only follow town or ward lines, "the word 'county' would have been superfluous, because county lines are in all cases identical with town or ward lines." *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 514, 51 N.W. 724 (1892) (Pinney, J., concurring); *see also id.* at 521 (Lyon, C.J., concurring).

The singular importance of county lines (over even town and ward lines) in redistricting is grounded in Wisconsin's history, as well as Article IV's text. Counties are the basic unit of local government in Wisconsin, and their boundaries (unlike town and ward boundaries) are stable and thus provide a neutral criterion for map-drawing. *See* MathSci Br. 19–21.[2] Indeed, until 1964, Wisconsin county lines were considered "inviolable." *Id.* at 21–22 (quoting *Wis. State AFL-CIO*, 543 F. Supp. at 635).

Other parties' suggestion that all "municipal" lines have the same status under the Wisconsin Constitution is misguided. The

[2] Hunter emphasizes their map's respect for "precinct" boundaries. Hunter Br. 20. But the "precincts" referenced in Article IV are not modern-day voting precincts and ceased to exist long ago. *See Cunningham*, 81 Wis. at 520 (Lyon, C.J., concurring).

borders of cities and villages were omitted from Article IV precisely because those borders (unlike towns') crossed county lines, and thus respecting those borders would have required "the disregarding of county lines, and the dismembering of counties." *Cunningham*, 81 Wis. at 521 (Lyon, C.J., concurring). While more recent federal cases have considered city and village splits when assessing maps, a lower number of city or village splits cannot compensate for unnecessarily split counties. *See, e.g., Wis. State AFL-CIO*, 543 F. Supp. at 635 (recognizing that preserving city and village lines, while laudable, is not constitutionally required).

The MathSci Proposed Maps best comply with these legal requirements, by far. The MathSci Proposed Maps split fewer counties than any other proposed plans. And because they are composed of whole wards, they do not split any wards for legislative plans and split fewer wards than any other congressional plan with perfect population equality.

E. Parties Failed to Make Assembly Districts "as Compact as Practicable."

Some parties also failed to prioritize geographic compactness. *See* Wis. Const. art. IV, § 4 (requiring that assembly districts be "in as compact form as practicable"); Wis. Const. art. IV, § 5 (requiring that senators be elected from "convenient … territory"); *see also, Baumgart*, 2002 WL 34127471, at *3 (compactness is a traditional neutral redistricting principle applicable to congressional districts). Although this Court has "never adopted a particular measure of compactness," Order ¶37, the parties here all used Polsby-Popper and Reock scores to measure compactness.

The MathSci Proposed Legislative Maps achieve the constitutional requirement to be "in as compact form as practicable."

Wis. Const. art. IV, § 4. The MathSci Proposed Assembly Map has Polsby-Popper and Reock scores second only to that of Hunter, which has a far greater population deviation and splits more counties. The MathSci Proposed Senate Map has the second-best Polsby-Popper and the best Reock score.

F. Parties Ignored the Court's Directive to Avoid the Political Thicket.

This Court was express that it would not consider partisanship when imposing a judicial remedy. Yet several parties invite the Court to do so. In particular, the Legislature, Bewley, and the Governor assert that the Court should select maps that protect incumbents, as an aspect of the "least change" analysis. Legislature Br. 28–30; Bewley Br. 8; Governor Br. 18. This Court did not include incumbent protection among the requirements in its Order, and with good reason. Considering incumbency would "plung[e] this court into the political thicket lurking beyond its constitutional boundaries." Order ¶63.

The Court should reject the invitation to reward or penalize existing officeholders. *See* Order ¶61 ("[N]one of our cases establishes an individual's right to have a fair shot at winning." (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 205 (2008) (internal quotation marks omitted))). Minimizing incumbent pairing is an inherently political question akin to the partisan makeup of districts, which the Court has disavowed considering. *See* Order ¶¶39–63.

Neither the Legislature, the Governor, nor Bewley provides support for the proposition that incumbent protection should be repackaged as an aspect of "least change." The U.S. Supreme Court cases cited by the Legislature simply state that incumbent protection can be a legitimate aim of the *political* branches. *See Karcher v Daggett*, 462 U.S. 725, 740 (1983) (listing "avoiding contests between

incumbent Representatives" among legitimate "legislative policies"); *White v. Weiser*, 412 U.S. 783, 791 (1973) ("not disparag[ing]" state's interest in "maintaining existing relationships between incumbent congressmen and their constituents"); *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966) (stating that map's minimization of incumbent pairing "does not in and of itself establish invidiousness"). But the separation of powers requires this Court to refrain from the types of political considerations that the Legislature might take into account. Order ¶65. While the Legislature might be free to pick and choose political winners and losers, that is not the Judiciary's role.

Likewise, the Court should avoid choosing sides between the Governor and the Legislature. The Governor boasts that he "most squarely represents the people's interests in redistricting," Governor's Br. 7, but ignores that the Constitution assigns the task of redistricting to the Legislature. *See* Order ¶19. And the Legislature trumpets its submissions as "the true people's maps," Legislature's Br. 6, 37, but ignores that they were vetoed by a directly elected Governor.[3] The reality is that the political process reached an impasse, and neither political branch is entitled to any deference here. *See* Order ¶18.

G. Parties Did Not Properly Account for Other Traditional Neutral Redistricting Criteria.

Given "the equitable nature of a judicial remedy in redistricting," courts evaluating proposed maps often consider, in addition to legal requirements, "appropriate, useful, and neutral" factors such as "communities of interest." *See* Order ¶¶82–83 & n.4 (Hagedorn, J., concurring). Compliance with the Constitution's

[3] This Court has already rejected one attempt by the Legislature to claim the mantle of "'the polic[y] and preferences of the State,'" rightly holding that the "argument fails because the recent legislation did not survive the political process." Order ¶72 n.8 (quoting Legislature Br. 19).

requirement of preserving political subdivisions is one way to preserve communities of interest. DeFord Report 8.

Another neutral criterion the Court may consider is minimizing voters moved from odd-numbered to even-numbered senate districts, who must wait six years between senate elections. *See* Order ¶83 n.9 (Hagedorn, J., concurring). Contrary to the Legislature's assertion, however, this is not an aspect of least change. Legislature Br. 25–28. Justice Hagedorn expressly identified it as "a traditional and neutral redistricting criterion that may assist [the Court], but does not implicate a legal right per se." Order ¶83 n.9 (Hagedorn, J., concurring).

II. THE MATHSCI PROPOSED MAPS FULLY IMPLEMENT THE ORDER'S DIRECTIVES.

The Citizen Mathematicians and Scientists used the 2011 maps as a template and engaged in a computational process to develop proposed maps that—when compared to the other parties'—achieved the best or near-best scores on each one of the legal requirements.

A. The MathSci Proposed Congressional Map Best Complies with the Order.

The MathSci Proposed Congressional Map best complies with the Order. It achieves perfect population equality by limiting deviation among congressional districts to a single person, DeFord Report 9-10; complies with the VRA by creating one Black opportunity district, *id.* 10; and applies the least-change approach, achieving an average core retention of 91.5%, and only 3.0% area moved, *id.* 11.

Moreover, the MathSci Proposed Map significantly outperforms other parties' proposed maps on traditional redistricting criteria adopted from the Wisconsin Constitution. It splits the fewest counties (7), the fewest municipalities (13), and the fewest wards (8). *Id.* It is

also the most compact map, with a mean Polsby-Popper score of 0.305 and a mean Reock score of 0.464. *Id.* 12.

Table 1: Proposed Congressional Maps[4]

Criteria	**Metric**[5]	**Congressmen's Map**	**Governor's Map**	**Hunter Map**	**MathSci Map**
Population Equality	*Population deviation (min to max)*	1	2	2	1
The Voting Rights Act	Minority opportunity districts	1	1	1	1
Least Change	Core retention	93.5%	94.5%	93.0%	91.5%
	Population moved	384,456 (6.5%)	324,415 (5.5%)	411,777 (7.0%)	500,785 (8.5%)
	Area Percent moved	9.1%	1.5%	3.4%	3.0%
	Preserved internal edges	486,746	487,087	487,245	487,096
	County overlap	8/8	8/8	8/8	8/8
	District overlap	8/8	8/8	8/8	8/8
	Average buffer distance	11.5	4.8	9.6	5.1
Respect for County, Municipal, and Ward Lines	*County splits*	10	12	11	7
	Municipal splits	24	30	20	13
	Ward splits	48	32	18	8

[4] DeFord Report 9–13.
[5] Italics indicates metrics where a lower number is better.

Table 1: Proposed Congressional Maps[4]					
Criteria	**Metric[5]**	**Congressmen's Map**	**Governor's Map**	**Hunter Map**	**MathSci Map**
Compactness	Mean Polsby-Popper	0.280	0.243	0.272	0.305
	Mean Reock	0.456	0.458	0.425	0.464
	Mean convex hull ratio	0.779	0.758	0.733	0.776
	Cut edges	3,410	3,774	3,661	3,228

The other proposed maps fall well short:

- The Congressmen's map does not achieve "least change." It is far behind all other parties in terms of areal displacement, moving 6.1 percentage points more of the state's area than the MathSci Map and 7.6 percentage points more than the Governor's Map. *Id.* 11. With respect to core retention, the Congressmen's map moves about 60,000 more people than the Governor's Map. *Id*. The Congressmen's map underperforms on traditional redistricting criteria, splitting 3 more counties and 11 more municipalities than the MathSci map and by far the most wards (48) of any proposed congressional map. *Id*. 12.
- The Governor's and Hunter maps fail to achieve maximum population equality, because each exhibits a two-person deviation. *Id.* 10. This should be disqualifying, since maximum population equality is a constitutional requirement. The Governor's Map splits the most counties (12) and municipalities (30) of any Proposed Congressional Map. *Id.* 12. The Hunter map splits almost as many counties as the Governor's Proposed Map (11), and nearly as many municipalities as the Governor's

(20). *Id*. With respect to compactness, the Governor's map has the lowest mean Polsby-Popper score, and the Hunter map has the lowest mean Reock score of all the proposed Congressional maps. *Id.* 12.

B. The MathSci Proposed Legislative Maps Best Comply with the Order.

The MathSci Proposed Legislative Maps best comply with the Order. Specifically, they:

- achieve the smallest population deviation for both senate and assembly of any proposed map. *Id.* 13, 17.
- comply with the requirements of the VRA. *Id.* 14, 18.
- far outperform all the other maps on county lines, splitting 10 fewer counties than the next closest assembly map and 14 fewer than the next closest senate map. *Id.* 15, 18.
- split zero wards and the second-smallest number of municipalities. *Id.*
- are as compact as practicable, achieving the best mean Reock and the second-best mean Polsby-Popper scores among proposed senate maps and the second-best mean Reock and mean Polsby-Popper scores among proposed assembly maps. *Id.* 16, 19.

TABLE 2: Proposed Legislative Maps[6]

Criteria	Metric[7]	Bewley Maps	BLOC Maps	Governor Maps	Hunter Maps	Legislature's Maps	MathSci Maps
Population Equality	*Population deviation (min to max)*	Senate: 2,871 (1.608%) Assembly: 1,104 (1.854%)	Senate: 1,719 (0.962%) Assembly: 784 (1.317%)	Senate: 2, 138 (1.197%) Assembly: 1,121 (1.883%)	Senate: 1,698 (0.951%) Assembly: 1,083 (1.819%)	Senate: 1,026 (0.574%) Assembly: 452 (0.759%)	Senate: 895 (0.501%) Assembly: 438 (0.736%)
The Voting Rights Act	Black opportunity districts	Senate: 2 Assembly: 6	Senate: 2 Assembly: 7	Senate: 2 Assembly: 7	Senate: 2 Assembly: 7	Senate: 2 Assembly: 6	Senate: 2 Assembly: 7
	Latino opportunity districts	Senate: 1 Assembly: 2	Senate: 1 Assembly: 2	Senate: 1 Assembly: 2	Senate: 1 Assembly: 2	Senate: 1 Assembly: 2	Senate: 1 Assembly: 2
Respect for County, Municipal, and Ward Lines	*County splits*	Senate: 48 Assembly: 55	Senate: 42 Assembly: 53	Senate: 45 Assembly: 53	Senate: 42 Assembly: 50	Senate: 42 Assembly: 53	Senate: 28 Assembly: 40
	Municipal splits	Senate: 67 Assembly: 99	Senate: 73 Assembly: 104	Senate: 117 Assembly: 175	Senate: 109 Assembly: 181	Senate: 28 Assembly: 48	Senate: 31 Assembly: 70
	Ward splits	Senate: 161 Assembly: 285	Senate: 65 Assembly: 94	Senate: 179 Assembly: 258	Senate: 132 Assembly: 257	Senate: 0 Assembly: 0	Senate: 0 Assembly: 0
Compactness	Mean Polsby-Popper	Senate: 0.213 Assembly: 0.253	Senate: 0.197 Assembly: 0.227	Senate: 0.217 Assembly: 0.251	Senate: 0.268 Assembly: 0.340	Senate: 0.224 Assembly: 0.243	Senate: 0.260 Assembly: 0.282

[6] DeFord Report 13–19. The Duchin Report submitted on December 15, 2021 contained two inadvertent errors that have been corrected here and in the DeFord Report. The first error was with regard to the population deviation of the Legislature's Proposed Assembly Map (reporting 456 rather than 452). The second error was the number of county overlaps for the MathSci Proposed Assembly Map (reporting 87 rather than 93 overlaps).

[7] Italics indicates metrics where a lower number is better.

TABLE 2: Proposed Legislative Maps[6]

Criteria	Metric[7]	Bewley Maps	BLOC Maps	Governor Maps	Hunter Maps	Legislature's Maps	MathSci Maps
	Mean Reock	Senate: 0.401 Assembly: 0.405	Senate: 0.395 Assembly: 0.374	Senate: 0.392 Assembly: 0.397	Senate: 0.397 Assembly: 0.442	Senate: 0.395 Assembly: 0.379	Senate: 0.402 Assembly: 0.406
	Mean convex hull ratio	Senate: 0.717 Assembly: 0.734	Senate: 0.695 Assembly: 0.698	Senate: 0.710 Assembly: 0.720	Senate: 0.739 Assembly: 0.783	Senate: 0.710 Assembly: 0.717	Senate: 0.735 Assembly: 0.736
	Cut edges	Senate: 10,688 Assembly: 18,420	Senate: 11,776 Assembly: 20,096	Senate: 11,147 Assembly: 18,441	Senate: 9,565 Assembly: 15,353	Senate: 10,785 Assembly: 19,196	Senate: 9,754 Assembly: 17,781
Least Change	Core retention	Senate: 90.2% Assembly: 83.3%	Senate: 89.6% Assembly: 84.1%	Senate: 92.2% Assembly: 85.8%	Senate: 80.8% Assembly: 73.1%	Senate: 92.2% Assembly: 84.2%	Senate: 74.3% Assembly: 61.0%
	Population moved	Senate: 576,321 (9.8%) Assembly: 984,336 (16.7%)	Senate: 610,568 (10.4%) Assembly: 939,513 (15.9%)	Senate: 461,228 (7.8%) Assembly: 837,659 (14.2%)	Senate: 1,128,878 (19.2%) Assembly: 1,586,059 (26.9%)	Senate: 459,061 (7.8%) Assembly: 933,604 (15.8%)	Senate: 1,513,824 (25.7%) Assembly: 2,299,625 (39.0%)
	Percent area moved	Senate: 9.8% Assembly: 16.8%	Senate: 6.1% Assembly: 9.6%	Senate: 5.0% Assembly: 11.3%	Senate: 14.0% Assembly: 18.2%	Senate: 7.1% Assembly: 16.5%	Senate: 29.1% Assembly: 38.5%
	Preserved internal edges	Senate: 476,575 Assembly: 465,157	Senate: 476,621 Assembly: 466,205	Senate: 477,745 Assembly: 467,562	Senate: 476,482 Assembly: 466,597	Senate: 477,558 Assembly: 466,249	Senate: 477,230 Assembly: 465,050
	County overlap	Senate: 33/33 Assembly: 99/99	Senate: 33/33 Assembly: 99/99	Senate: 33/33 Assembly: 99/99	Senate: 33/33 Assembly: 99/99	Senate: 33/33 Assembly: 99/99	Senate: 33/33 Assembly: 93/99
	District overlap	Senate: 33/33 Assembly: 98/99	Senate: 33/33 Assembly: 99/99	Senate: 33/33 Assembly: 99/99	Senate: 33/33 Assembly: 99/99	Senate: 33/33 Assembly: 99/99	Senate: 33/33 Assembly: 85/99

TABLE 2: Proposed Legislative Maps[6]							
Criteria	**Metric[7]**	**Bewley Maps**	**BLOC Maps**	**Governor Maps**	**Hunter Maps**	**Legislature's Maps**	**MathSci Maps**
	Average buffer distance	Senate: 6.7 Assembly: 5.4	Senate: 6.2 Assembly: 4.9	Senate: 5.4 Assembly: 4.8	Senate: 8.5 Assembly: 6.0	Senate: 6.5 Assembly: 6.0	Senate: 17.0 Assembly: 13.0
Traditional Redistricting Criteria	*Number of people moved from odd to even senate districts*	137,084 (2.3%)	177,698 (3.0%)	139,677 (2.4%)	240,593 (4.1%)	138,753 (2.4%)	422,492 (7.2%)

The other proposed maps fall well short of these standards:

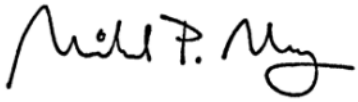
- The Legislature's Proposed Maps underperform on population deviation and compactness in comparison to the MathSci Proposed Maps. *See id.* 13, 16, 17, 19. Further, the Legislature's Proposed Senate and Assembly Maps split more counties than the MathSci Maps (14 more for Senate and 13 for Assembly). *Id.* 15, 18.
- The Governor's Proposed Maps are also weak on population deviation, with a deviation percentage 0.696 points higher than the MathSci Proposed Senate Map, and the worst population deviation of all assembly maps (1.883%). *Id.* 13, 17. The Governor splits more counties than the MathSci Senate Map or Assembly Map (17 and 13 more, respectively). *Id.* 15, 18. It also splits an unacceptable number of wards in both maps. *Id.* The Governor's Maps are also insufficiently compact, with the Governor's Senate Map having the lowest mean Reock score of any senate map. *Id.* 16, 19.

- The Bewley Senate Map has the worst population deviation, and their Assembly Map the second-worst population deviation. *Id.* 13, 17. The Bewley Maps also split the most counties of any proposed maps. *Id.* 15, 18.
- The Hunter Senate Map splits 14 more counties than the MathSci Map, and the Hunter Assembly Map splits 10 more counties than the MathSci Map. *Id.* The Hunter Maps also split the second most municipalities of any of the proposed senate plans and the most of any of the proposed assembly plans (109 and 181 splits, respectively). *Id.* And the Hunter Proposed Maps fail to respect ward lines, splitting 132 wards in their Senate Map and 257 in their Assembly Map. *Id.* The Hunter Proposed Maps also sacrifice population equality. Their Senate Map has 0.45 percentage points greater population deviation than the MathSci map, and their Assembly Map has 1.083 percentage points greater population deviation than the MathSci Map. *Id.* 13, 17.
- Finally, the BLOC Senate Map splits 14 more counties and 42 more municipalities than the MathSci Senate Map. *Id.* 15. The BLOC Assembly Map similarly splits 13 more counties and 34 more municipalities than the MathSci Assembly Map. *Id.* 18. The BLOC Senate Map splits 65 wards and the Assembly Map splits 94 wards, when no split wards were necessary. *Id.* 15, 18. The BLOC Senate Map also has the worst mean Polsby-Popper score, and the BLOC Proposed Assembly Map performs the worst on mean Polsby-Popper and mean Reock. *Id.* 16, 19.

CONCLUSION

The Citizen Mathematicians and Scientists urge the Court to adopt their proposed maps for Congress, the Senate, and the Assembly. Dated this 30th day of December 2021.

BOARDMAN & CLARK LLP
By



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FORM & LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,071 words.

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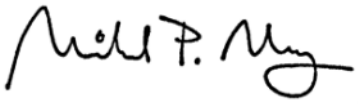

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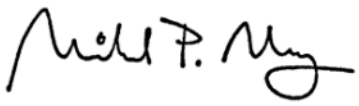

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No. 2021AP1450-OA

In the Supreme Court of Wisconsin

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

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

v.

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

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, IN HIS OFFICIAL CAPACITY, *and* JANET BEWLEY SENATE DEMOCRATIC MINORITY LEADER, ON BEHALF OF THE SENATE DEMOCRATIC CAUCUS,
INTERVENORS-RESPONDENTS.

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

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

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ISSUES PRESENTED

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

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

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

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

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

INTRODUCTION

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

STATEMENT OF THE CASE

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

Under the U.S. Constitution, "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964). Thus, as a federal constitutional requirement, States must draw their congressional districts "with populations as close to perfect equality as possible." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016). While the U.S. Supreme Court has grounded this equal-population principle for congressional districts in Article I, Section 2, *see* U.S. Const. art. I, § 2; *Wesberry*, 376 U.S. at 7–8, the Equal Protection Clause of the Fourteenth Amendment also embodies this same requirement for congressional districts, *see Karcher v. Daggett*, 462 U.S. 725, 747 (1983) (Stevens, J., concurring); *see also Evenwel*,

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

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

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

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

Second, Article IV of the Wisconsin Constitution imposes this same equal-population principle for Wisconsin's congressional districts. Under Article IV, Section 3, "the legislature shall apportion and district anew the members of the senate and assembly, *according to the number of inhabitants*." Wis. Const. art. IV, § 3 (emphasis added); *Zimmerman*, 22 Wis. 2d at 564. Although Section 3 only expressly refers to the state-legislative districts, its identical application to Wisconsin's congressional districts is "the most reasonable manner [to read this provision] in relation to [its]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This bedrock remedial and equitable principle applies in full to redistricting cases. "Relief in redistricting cases is fashioned in light of the well-known principles of equity," as the U.S. Supreme Court, this Court, and others have recognized. *See North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam); *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 729 (1892); *see also, e.g.*, *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *1, *8 (E.D. Wis. May 30, 2002) (per curiam) (issuing equitable remedies of declarations and injunctions). Therefore, as in all cases, a redistricting court must "select a fitting remedy for the legal violations it has identified," *Covington*, 137 S. Ct. at 1625, "limit[ing]" the "modifications of a state plan" only to "those necessary to cure any constitutional or statutory defect," *Upham v. Seamon*, 456 U.S. 37, 43 (1982). Thus, "[i]n fashioning a remedy in redistricting cases, courts are generally limited to correcting only those unconstitutional aspects of a state's plan." *Johnson v. Miller*, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997); *accord SEIU*, 2020 WI 67, ¶ 47; *Memmel*, 75 Wis. 2d at 288–89; *In Interest of E.C.*, 130 Wis. 2d at 388.

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

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

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

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

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

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

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

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

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

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

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

The "least-change" approach is the most "neutral legal principle[ ] in this area," *Perry*, 565 U.S. at 393, allowing this Court to issue a remedial map in an objective, predictable manner that reduces "political and policy decisions," *Jensen*, 2002 WI 13, ¶ 10. This approach carries forward the discretionary decisions made by the political branches in the prior decade, *infra* pp. 27–28, freeing this Court of the need to make such "inherently political and legislative" choices, *Jensen*, 2002 WI 13, ¶ 10; *see, e.g.*, *Perry*, 565 U.S. at 396 (directing courts not to "substitute" their "own concept of 'the collective public good' for the [ ] Legislature's" when adjudicating redistricting disputes); *White v. Weiser*, 412 U.S. 783, 795 (1973) (holding that "a district court should similarly honor state policies in the context of congressional reapportionment" when "fashioning a reapportionment plan or in choosing among plans"); *Upham*, 456 U.S. at 42 ("The only limits on judicial deference to state apportionment policy . . . [are] the substantive constitutional and statutory standards to which such state plans are subject."); *Hippert v. Ritchie*, 813 N.W.2d 391, 397 (Minn. 2012) ("Because courts

engaged in redistricting lack the authority to make the political decisions that the Legislature and the Governor can make through their enactment of redistricting legislation, the plan established by the panel is a least-change plan to the extent feasible."); *Johnson*, 922 F. Supp. at 1559 ("A minimum change plan acts as a surrogate for the intent of the state's legislative body."); Katharine Inglis Butler, *Redistricting In A Post-Shaw Era: A Small Treatise Accompanied By Districting Guidelines For Legislators, Litigants, And Courts*, 36 U. Rich. L. Rev. 137, 222 (2002).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

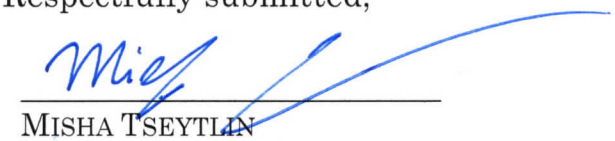
CONCLUSION

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

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

Dated: October 25, 2021.

Respectfully submitted,



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CERTIFICATION

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

Dated: October 25, 2021.

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

I hereby certify that:

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

I further certify that:

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

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

Dated: October 25, 2021.

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October 14, 2021

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You are hereby notified that the Court has entered the following order:

No. 2021AP1450-OA Johnson v. Wisconsin Elections Commission

On September 22, 2021, this court granted the petition for leave to commence an original action filed by petitioners Billie Johnson, et al., and invited intervention motions to be filed no later than October 6, 2021.

On September 24, 2021, the court received a notice of motion and unopposed motion to intervene as petitioners filed by Black Leaders Organizing for Communities, et al. (plaintiffs in Black Leaders Organizing for Communities v. Spindell, No. 21-CV-534 (W.D. Wis. Aug. 23, 2021), consolidated with Case No. 21-CV-512) together with a supporting brief.

On October 6, 2021, the court received additional intervention motions and supporting documents from proposed-intervenor-petitioners Congressmen Glenn Grothman, Mike Gallagher, Brian Steil, Tom Tiffany, and Scott Fitzgerald ("Congressmen"); proposed-intervenor-petitioners Gary Krenz, Sarah J. Hamilton, Stephen Joseph Wright, Jean-Luc Thiffeault, and Somesh Jha (a group of Wisconsin voters who identify themselves as the "Citizen Mathematicians and

Scientists"); proposed-intervenor-petitioners Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, and Kathleen Qualheim (plaintiffs in Hunter v. Bostelmann, No. 21-CV-512 (W.D. Wis. Aug. 13, 2021)); proposed-intervenor-respondent the Wisconsin Legislature; proposed-intervenor-respondent Governor Tony Evers, in his official capacity; and proposed-intervenor-respondent Janet Bewley, Senate Democratic Minority Leader, on behalf of the Senate Democratic Caucus.

On October 13, 2021, the court received responses pertaining to the intervention motions from the petitioners Billie Johnson, et al.; proposed-intervenor-petitioners Congressmen; proposed-intervenor-petitioners Citizen Mathematicians and Scientists; proposed-intervenor-petitioners Lisa Hunter, et al.; and proposed-intervenor-respondent the Wisconsin Legislature.[1]

Wisconsin courts view intervention favorably as a tool for "disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." See Helgeland v. Wis. Municipalities, 2008 WI 9, ¶38, 307 Wis. 2d 1, 9, ¶44, 745 N.W.2d 1 (quoting State ex rel. Bilder v. Delavan Twp., 112 Wis. 2d 539, 548-49, 334 N.W.2d 252 (1983)). We have evaluated each intervention motion and determined that all are timely; each movant claims an interest relating to the subject of this redistricting action; each is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and that each movant has demonstrated that its interest is not adequately represented by existing parties. See Wis. Stat. § 803.09. Therefore,

IT IS ORDERED that each of the pending motions to intervene is granted;

The intervenor-petitioners have each submitted with their motions to intervene a proposed complaint for declaratory and injunctive relief/petition for original action. The court wishes to have one controlling petition, rather than multiple petitions in this action. Therefore, no later than 12:00 noon on October 21, 2021, the petitioners and the intervenor-petitioners shall file a single omnibus amended petition that, in numbered paragraph form, restates the previously asserted allegations and claims advanced by petitioners Billie Johnson, et al., and states the allegations and claims of each intervening petitioner as provided in its proposed complaints/petition, with those claims and allegations consolidated to the extent possible. No additional memorandum of law shall accompany the omnibus amended petition. This omnibus amended petition shall supersede the previously filed petition in this action;

IT IS FURTHER ORDERED that no later than 12:00 noon on October 28, 2021, the respondents and intervenor-respondents shall each file an answer to the omnibus amended petition;

[1] The court also received letter briefs responding to the question of the timing of a new redistricting plan from the petitioners Billie Johnson, et al.; respondents Wisconsin Elections Commission, et al.; proposed-intervenor-petitioners Congressmen; proposed-intervenor-petitioners Black Leaders Organizing for Communities, et al.; proposed-intervenor-petitioners Citizen Mathematicians and Scientists; proposed-intervenor-petitioners Lisa Hunter, et al.; and proposed-intervenor-respondent the Wisconsin Legislature.

IT IS FURTHER ORDERED that no later than 12:00 noon on November 4, 2021, the petitioners, intervenor-petitioners, respondents, and intervenor-respondents shall prepare and submit a joint stipulation of facts and law; and shall identify and list disputed facts, if any, and suggest a procedure for resolving them; and

IT IS FURTHER ORDERED that all filings in this matter shall be filed as an attachment in pdf format to an email addressed to clerk@wicourts.gov. See, Wis. Stat. §§ 809.14, 809.70, 809.80, and 809.81. A paper original and 10 copies of each filed document must be received by the clerk of this court by 12:00 p.m. of the business day following submission by email, with the document bearing the following notation on the top of the first page: "This document was previously filed via email;" and

IT IS FURTHER ORDERED that requests for additional briefing or extensions will be viewed with disfavor.

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Clerk of Supreme Court

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No. 2021AP1450-OA

In the Supreme Court of Wisconsin

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

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

v.

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

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, IN HIS OFFICIAL CAPACITY, *and* JANET BEWLEY SENATE DEMOCRATIC MINORITY LEADER, ON BEHALF OF THE SENATE DEMOCRATIC CAUCUS,
INTERVENORS-RESPONDENTS.

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

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

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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]

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[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

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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'

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[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

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[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,

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font, as well as to this Court's October 14, 2021 Order. The length of this Brief is 6,419 words.

Dated: November 1, 2021.

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

I hereby certify that:

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

I further certify that:

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

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

Dated: November 1, 2021.

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