IN THE SUPREME COURT OF WISCONSIN

No. 2023AP1399

REBECCA CLARKE, RUBEN ANTHONY, TERRY DAWSON, DANA GLASSTEIN, ANN GROVES-LLOYD, CARL HUJET, JERRY IVERSON, TIA JOHNSON, ANGIE KIRST, SELIKA LAWTON, FABIAN MALDONADO, ANNEMARIE MCCLELLAN, JAMES MCNETT, BRITTANY MURIELLO, ELA JOOSTEN (PARI) SCHILS, NATHANIEL SLACK, MARY SMITH-JOHNSON, DENISE SWEET AND GABRIELLE YOUNG,

Petitioners,

GOVERNOR TONY EVERS IN HIS OFFICIAL CAPACITY, NATHAN ATKINSON, STEPHEN JOSEPH WRIGHT, GARY KRENZ, SARAH J. HAMILTON, JEAN-LUC THIFFEAULT, SOMESH JHA, JOANNE KANE AND LEAH DUDLEY,

Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, DON MILLIS, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, CARRIE RIEPL, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS COMMISSION; MEAGAN WOLFE IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION; ANDRE JACQUE, TIM CARPENTER, ROB HUTTON, CHRIS LARSON, DEVIN LEMAHIEU, STEPHEN L. NASS, JOHN JAGLER, MARK SPREITZER, HOWARD MARKLEIN, RACHAEL CABRAL-GUEVARA, VAN H. WANGGAARD, JESSE L. JAMES, ROMAINE ROBERT QUINN, DIANNE H. HESSELBEIN, CORY TOMCZYK, JEFF SMITH AND CHRIS KAPENGA IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN SENATE,

Respondents,

WISCONSIN LEGISLATURE, BILLIE JOHNSON, CHRIS GOEBEL, ED PERKINS, ERIC O'KEEFE, JOE SANFELIPPO, TERRY MOULTON, ROBERT JENSEN, RON ZAHN, RUTH ELMER AND RUTH STRECK,

Intervenors-Respondents.

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INTEREST OF *AMICI*

Amici, identified in the Appendix, are seven legal scholars with nationally recognized expertise in state constitutional law and election law, including redistricting. They have researched and published extensively in this area and have a professional interest in the integrity of redistricting law and practice.

INTRODUCTION

Wisconsin's existing state legislative maps violate the separation of powers in two mutually reinforcing ways: They flout the judiciary's obligation to remedy a redistricting failure, and they misallocate authority between the legislature and governor. To redress these violations and advance the Wisconsin Constitution's core democratic precepts, this Court should adopt new maps that do not structurally advantage supporters of any political party.

I. As it assesses both liability and remedy, this Court should be guided by the Wisconsin Constitution's overarching commitments to popular sovereignty, political equality, and majority rule. These animating democratic principles, which permeate the document from start to finish, call for resolving constitutional controversies in ways that facilitate the people's self-rule. The Constitution creates the legislature to be responsive and accountable to popular majorities and the judiciary to curb abuses of power and preserve the people's control.

II. By distributing power among separately elected branches, the Wisconsin Constitution gives the people multiple

points of popular control and pathways to check official wrongdoing. In the redistricting context, all three branches have a role. The legislature must "district anew" each decade during its first post-census session, with the governor's involvement. And if the political branches fail to act, the judiciary must provide Wisconsinites a remedy that fully redresses the harm.

The existing maps, adopted in *Johnson v. WEC*, doubly violate this separation-of-powers regime. First, the *Johnson* maps do not fulfill this Court's constitutional duty to remedy the political branches' failure to enact post-2020 maps. The Constitution makes plain that Wisconsinites are entitled to new maps for a new decade. Yet the *Johnson* Court declined to make present-day judgments about how legislative districts should be configured. Instead, it emphatically sought to preserve the state's bygone 2011 districts to the maximum extent possible while equalizing their populations.

Second, the *Johnson* maps upset the constitutional balance of legislative and gubernatorial authority: They enable legislators to enlist the courts to nullify the governor's constitutionally assigned role in redistricting. That separation-of-powers violation is especially glaring because the *Johnson* map is the very map the governor vetoed. When one political branch seeks to usurp the other's redistricting authority, this Court has a responsibility to stop it, not facilitate it.

III. To remedy these violations, this Court should adopt legally compliant, up-to-date maps that minimize partisan skews—and, in particular, that minimize the odds that a political

party will be able to transform a minority vote share into a legislative majority. Prioritizing political neutrality and majority rule accords with this Court's role as a neutral arbiter possessing equitable powers. It also respects the people's state constitutional right to politically unbiased districts—a right that is deeply rooted and enforceable, despite dicta in *Johnson* erroneously suggesting otherwise.

ARGUMENT

I. THE WISCONSIN CONSTITUTION'S BEDROCK DEMOCRATIC COMMITMENTS SHOULD INFORM THIS COURT'S ANALYSIS

As this Court considers both liability and remedy, it should attend to the Wisconsin Constitution's core democratic commitments. The Constitution's fundamental premise and promise is that the people govern themselves as political equals, aided by elected representatives who are responsive and accountable to popular majorities. In this system, electoral districting is a mechanism to facilitate popular self-rule, not to subvert it.

Through text and structure, the Wisconsin Constitution centers bedrock principles of popular sovereignty, political equality, and majority rule, and furnishes safeguards against abuses of power. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 864 (2021) (detailing how "text, history, and structure" evince "interrelated state constitutional commitments to popular sovereignty, majority rule, and political equality" that together

comprise a "democracy principle"). The Constitution's Declaration of Rights begins by affirming that governments "deriv[e] their just powers from the consent of the governed" and exist to secure the rights of the people, who "are born equally free and independent." Wis. Const. art. I, § 1; *see also id.* Preamble ("We, the people of Wisconsin, … do establish this Constitution."); *Att'y Gen. ex rel. Bashford v. Barstow*, 4 Wis. 567, 660 (1855) ("We regard it as a fundamental principle, that sovereignty resides in the people … and in them alone."); Milo M. Quaife, *The Convention of 1846*, at 288 (1919) (Charles Minton Baker) ("an axiom of government in this country [is] that the people are the source of all political power"). The Declaration proceeds to enshrine a series of rights that undergird and sustain democratic self-rule.[1] And it expressly urges "frequent recurrence to fundamental principles" to maintain "the blessings of free government." Wis. Const. art. I, § 22.

Following the Declaration—and before establishing the state's governing institutions—the Constitution devotes an entire Article to "Suffrage." This Article expressly and broadly enshrines the fundamental right to vote, making every adult resident citizen "a qualified elector," unless excluded by law due to felony conviction or adjudged incompetent in court. *Id.* art. III, §§ 1-2. This affirmative guarantee of the franchise, which goes further

[1] *E.g.*, Wis. Const. art. I, § 3 (free speech and press); § 4 (right "peaceably to assemble," "consult for the common good," and "petition the government"); § 8(1) (due process); § 9 (right to "obtain justice freely"); § 19 (freedom from "religious tests" as qualification for officeholding); § 20 ("strict subordination" of military to civil power); *see also* Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. Penn. L. Rev. 853, 926 (2022) ("state constitutional rights … prioritize and facilitate popular control over government").

than the U.S. Constitution, underscores the Wisconsin Constitution's essential democratic object: enabling political equals to rule themselves in accordance with popular will. *Cf.* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89 (2014).

The Wisconsin Constitution then puts the people at the helm of every branch. Through regular elections, voters choose who will exercise legislative, executive, and judicial authority in their name. *See* Wis. Const. art. IV, §§ 4, 5; art. V, § 3; art. VII, § 4(1); *see also* art. XIII, § 12 (recall). The idea is to ensure that those who govern remain responsive and accountable to those they serve. In this Court's words, "This is not only a popular government, but it is a representative government—one where the officers are but the *agents*, and not the *rulers*, of the people." *Bashford*, 4 Wis. at 743 (original emphasis).

For the legislature, the Constitution provides for elections through single-member districts, allowing voters to choose representatives attentive to local needs and preferences. *See* Wis. Const. art. IV, §§ 4-5. Of course, while individual lawmakers represent district-level constituencies, the legislature has statewide responsibilities and acts on behalf of all Wisconsinites. *See id.* § 17(1) ("The style of all laws of the state shall be 'The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:'."). The Constitution thus recognizes the need to align legislative representation with the imperatives of political equality and majority rule. *See State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 729 (1892) (describing

"equal representation in the legislature" as "one of the highest and most sacred rights and privileges of the people of this state"). To this end, the Constitution requires equally populated districts and imposes an affirmative duty on the legislature to "district anew" each decade to avoid unequal and outmoded districts. Wis. Const. art. IV, § 3.

As for the judiciary, the Wisconsin Constitution embraces popular elections to foster both independence and accountability. The Framers worried that if judges were appointed by the governor or legislators, they could too easily become beholden to them. They believed a popularly elected judiciary would more reliably check the other branches and "secure[] the blessings of equal laws and impartial justice." Milo M. Quaife, *The Attainment of Statehood* 655 (1928) (James Taylor Lewis); *see also* Quaife, *The Convention of 1846*, at 288-89 (Charles Minton Baker) (explaining that an elected judiciary, "wholly independent" from the other branches rather than "dependent for existence upon the executive or legislative will," honors the "spirit and genius" of a government in which "all power resides in and should flow from the people").

At the same time, recognizing the judiciary's distinctive role, the Constitution also insulates judges to some extent from temporary public passions and political pressures. Supreme Court justices are elected on a staggered basis to ten-year terms, separately from "the partisan general election" for other offices. *See* Wis. Const. art. VII, §§ 4(1), 9. This design makes the judiciary especially well positioned to temper the partisan excesses of other actors and to safeguard the Constitution's core democratic values.

II. SEPARATION-OF-POWERS PRINCIPLES CALL FOR NEW LEGISLATIVE MAPS

The Wisconsin Constitution allocates authority among the branches as part of its overarching democratic design. The idea is to prevent any one branch from wielding "unchecked power" and insulating itself from public accountability. *State v. Washington*, 83 Wis. 2d 808, 826, 266 N.W.2d 597 (1978); *see also* Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 Duke L.J. (forthcoming 2023) (manuscript at 6) (explaining that "the 'public accountability' rationale for the separation of powers … is at the core of state constitutional design"). By establishing multiple independently elected institutions, the Constitution gives the people more pathways to resist "capture by political elites" and keep government in their hands. Marshfield, *supra*, at 7; *see also id.* at 60 ("[S]tate constitutions affirmatively enlist the separation of powers as an instrument of popular control.").

Separation-of-powers disputes should be analyzed accordingly, particularly in the redistricting context. In this Court's words, the Constitution's redistricting provisions should be construed "in the most reasonable manner in relation to the fundamental purpose of the constitution as a whole, to wit: to create and define the institutions whereby a representative democratic form of government may effectively function." *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 555, 126 N.W.2d 551, 558 (1964). As detailed below, the existing maps pose separation-of-powers problems that implicate every branch. First, the maps improperly abdicate judicial responsibility for remedying the

political branches' redistricting failure. Second, the maps upset the balance of legislative and gubernatorial redistricting authority, aggrandizing the former at the latter's expense.

A. The 2022 Maps Do Not Satisfy the Judiciary's Constitutional Duty to Remedy a Failure to Redistrict.

When the political branches breach their state constitutional duty to redistrict, it becomes the judiciary's responsibility to act. Under Article IV, § 3, the legislature—with either gubernatorial assent or a veto-proof supermajority—must "district anew" during "its first session" following each decennial federal census. Beyond guaranteeing equal numerical representation in response to population shifts, this decennial redistricting requirement promises Wisconsinites that the myriad choices underlying electoral district configurations will be periodically revisited. After all, the world changes, and decade-old line-drawing decisions become obsolete. When the "give-and-take" of this "decennial exercise" fails, the political branches do not merely deprive the people of equally populated districts; they also deny their right to *current* districts—that is, districts that reflect contemporary judgments about present-day circumstances. *Jensen v. Wis. Elections Bd.*, 249 Wis. 2d 706, 713, 639 N.W.2d 537, 540 (2002).

In such a situation, the judiciary does not meet its constitutional obligations by preserving the state's old maps with only the bare minimum adjustments necessary to equalize district populations. Instead, to honor the people's "constitutional right … to an equitable apportionment," the judiciary must provide new

maps reflecting a fresh application districting criteria and principles of equal justice. *State ex rel. Reynolds v. Smith*, 19 Wis. 2d 577, 586, 120 N.W.2d 664 (1963).

The maps adopted in *Johnson v. WEC* do not fit the bill. Addressing a claim that the state's 2011 districts had become unlawfully malapportioned, the *Johnson* Court refused to "mak[e] significant policy decisions or weigh[] competing policy criteria" to craft a new map for the post-2020 world. *Johnson v. WEC (Johnson II)*, 2022 WI 14, 400 Wis. 2d 626, 634, 971 N.W.2d 402 *rev'd on other grounds sub. nom. Wis. Legis. v. WEC*, 142 S. Ct. 1245 (2022); *see also Johnson v. WEC (Johnson I)*, 2021 WI 87, 399 Wis. 2d 623, 634, 967 N.W.2d 469 (eschewing "policy choices"). The Court instead sought to preserve the state's obsolete 2011 maps to the maximum extent legally possible—a so-called "least change" approach. *Johnson I*, 399 Wis. 2d at 661; *Johnson v. WEC (Johnson III)*, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559, 586. In other words, by the Court's own admission, the 2022 maps do not reflect the up-to-date judgments about district configurations that the Constitution decennially guarantees. For this reason (and others ably articulated in the *Johnson I and III* dissents), the Court's least-change approach was unsound from the start. When courts redress a redistricting failure, it simply does not suffice to perpetuate outdated maps. *See generally* Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. Rev. 985 (2022).

While *Johnson*'s flawed least-change analysis deserves repudiation, the 2022 maps violate separation-of-powers principles even accepting *Johnson* on its own terms. The sole claim in

Johnson was that the state's 2011 districts were no longer equally populated, and the Court did only what it deemed necessary to remedy "*that* inequality." *Johnson I*, 399 Wis. 2d at 631 (emphasis added). When *Johnson III* was decided in April 2022, the legislature and governor had failed to agree on new districts, necessitating judicial action ahead of the 2022 election. But the legislature had not yet defaulted on its constitutional obligation to "district anew" during its "first session" after the federal census. Wis. Const. art. IV, § 3. That legislative session ran until January 2023, leaving the legislature many more months to act. *See* 2021 Senate Joint Resolution 1, § 1(1) (2021-2022 biennial session "ends … January 3, 2023"). For its part, the *Johnson* Court made clear that its decision had not relieved lawmakers of their "affirmative duty" to redistrict. *Johnson I*, 399 Wis. 2d at 636.

Today's situation thus differs materially from *Johnson*. Even if least-change maps can redress discrete population inequality claims litigated *during* the legislature's first post-census session, such maps do not satisfy separation-of-powers principles *after* the legislature defaults on its Article IV, § 3 redistricting obligation. To remedy the legislature's post-2022 derogation of its constitutional duty to establish new maps, the judiciary now has a responsibility—its own duty to the people of Wisconsin—to adopt maps that account for present-day conditions.

B. The 2022 Maps Do Not Strike a Lawful Balance Between Legislative and Gubernatorial Power.

New maps are necessary not only to fulfill the judiciary's duty to redress the political branches' redistricting failure, but also

to ensure a proper balance of power between the legislature and governor. From the beginning, redistricting in Wisconsin has occurred through lawmaking, which requires both legislative and executive approval (unless legislators can override a gubernatorial veto). As this Court has recognized, this dual-branch involvement is an important democratic safeguard. Giving the legislature unchecked power to redistrict itself would be a recipe for self-dealing and entrenchment. The governor's participation ensures that the redistricting process includes "the one institution guaranteed to represent the majority of the voting inhabitants of the state." *Zimmerman*, 22 Wis. 2d at 556-57; *see also id.* at 556 ("it would be unreasonable to hold that the framers of the constitution intended to exclude … the Governor").

The 2022 maps unlawfully aggrandize the legislature at the governor's expense. The central problem derives from *Johnson*'s insistence on maximal conformity with the prior maps. *Johnson*'s least-change approach enables the legislature to circumvent the governor whenever lawmakers like the prior maps and want to carry them forward. Even if the governor, acting on behalf of a statewide electoral majority, objects to the legislature's preference for least-change maps, the legislature can get its way in court, evading the requirement of gubernatorial assent. Allowing the legislature to perpetuate the status quo despite gubernatorial opposition is especially problematic because, in practice, legislators often seek to preserve old maps in an anti-competitive attempt to maintain political advantage. *See* Yablon, *supra* at 994 ("[P]olitical actors commonly seek to get their way not through

ostentatious overhauls, but rather through the less eye-catching means of carrying forward advantageous prior maps.").[2]

The separation-of-powers problem here is even more glaring for two related reasons. First, the 2022 maps are the exact maps the legislature passed and the governor vetoed prior to *Johnson I*. The legislature, in other words, did not develop those maps to satisfy judicially announced remedial criteria; it created them—and approved them along partisan lines—pursuant to its own preferences as a "political body." *Johnson I*, 399 Wis. 2d at 473. By adopting those maps, the *Johnson* Court effectively nullified the governor's veto, enabling legislators to achieve the same outcome they desired but could not achieve through lawmaking. The result was to convert the redistricting process from one requiring the political branches' mutual assent to one in which the legislature enjoys unilateral authority—precisely the system this Court rejected decades ago in *Zimmerman*. 22 Wis. 2d at 557.

Second, the 2022 maps removed any incentive for legislators to pursue the "give-and-take" that the Constitution's two-branch allocation of redistricting responsibility is meant to encourage. *Jensen*, 249 Wis. 2d at 713. Despite breaching their constitutional duty to establish new maps, legislators got exactly the maps they wanted. *Cf. R.H. Stearns Co. v. United States*, 291 U.S. 54, 62 (1934) (noting the equitable precept that a party breaching a legal duty should not be allowed to "take advantage of [its] own wrong").

[2] Although perpetuating prior districts is typically a legislative rather than gubernatorial preference, *Johnson*'s least-change rule could also upset the balance of power by enabling a governor who wants maximal continuity to get it despite legislative opposition.

Although the *Johnson* Court indicated that its ruling did not relieve the political branches of their redistricting responsibilities, that was precisely its effect. The remainder of the legislature's first post-census session passed with no meaningful effort to comply with Article IV, § 3.

III. REMEDIAL MAPS FROM THIS COURT SHOULD PRIORITIZE THE PRINCIPLES OF POLITICAL NEUTRALITY AND MAJORITY RULE.

This Court should adopt new maps that make Wisconsinites whole for lawmakers' failure to redistrict and that honor principles of judicial independence and neutrality. Given the nature of the separation-of-powers problems identified above, a least-change approach plainly will not do. Least-change is the problem here, not the solution.

Specifically, this Court's maps should reflect present-day judgments about how to apply constitutionally enumerated redistricting criteria (population equality, contiguity, compactness, and avoiding excessive political subdivision splits), while also respecting communities of interest. Within the universe of maps lawful along these dimensions, this Court should prioritize avoiding partisan skews. Doing so aligns with the Court's institutional obligations and respects the right of Wisconsinites to unbiased districts.

A. As a Neutral Adjudicator, this Court Must Avoid Adopting Maps with a Partisan Skew.

In Wisconsin and around the country, courts establishing remedial maps have long been attentive to partisan equity. They

recognize that adopting politically slanted maps is contrary to their institutional obligation to act neutrally and evenhandedly. This Court has expressly endorsed the principle that judges "should not select a plan that seeks partisan advantage." *Jensen*, 249 Wis. 2d at 714 (quoting *Prosser v. Elections Bd.*, 793 F. Supp. 859, 867 (W.D. Wis. 1992)); *cf. La Rosa v. Hess*, 258 Wis. 557, 560, 46 N.W.2d 737, 738 (1951) (explaining, in another context, that equitable remedies should not produce an "unfair advantage" or operate as "an instrument of injustice"). The federal courts that redistricted Wisconsin in past decades likewise warned against partisan deck-stacking. *See Baumgart v. Wendelberger*, No. 01–C–0121, 2002 WL 34127471, *3-4, *6 (E.D. Wis. May 30, 2002) (decrying the "evident" "partisan origins" of litigants' proposals and stressing obligation to "avoid[] the creation of partisan advantage"); *Prosser*, 793 F. Supp. at 865 (rejecting proposals "bear[ing] the marks of their partisan origins"); *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 634, 638 (E.D. Wis. 1982) (rejecting party-proposed plans and noting suspicions about their "political end[s]"). Even courts that "pay little heed to cries of gerrymandering" in legislatively drawn maps routinely hold that they are dutybound to guard against political bias when they adopt maps themselves. *Prosser*, 793 F. Supp. at 867.[3]

[3] *See, e.g.*, *Wilson v. Eu*, 823 P.2d 545, 576-77 (Cal. 1992) (considering itself "compelled to reject" legislator-drawn plans with "calculated partisan political consequences"); *Peterson v. Borst*, 786 N.E.2d 668, 673 (Ind. 2003) (adopting plans "uniformly endorsed by members of one party and uniformly rejected by members of the other, does not conform to applicable principles of judicial independence and neutrality"); *Burling v. Chandler*, 804 A.2d 471, 483 (N.H. 2002) (discussing duty to reject plans embodying their drafters' "political

As it operationalizes the imperative of politically equitable districts, this Court should focus on minimizing the likelihood that a map will allow a political party's supporters to convert a minority of the statewide vote into a majority of legislative seats. At a basic level, the constitutional order is undermined when a minority of the citizenry wields legislative power at the majority's expense. In the words of an influential participant in Wisconsin's statehood debates, if "the minority rules the majority," "we no longer have a people's government" and "the fundamental principle of our government is violated." Milo M. Quaife, *The Struggle Over Ratification* 236 (1920) (Marshall M. Strong). A minoritarian legislature plainly does not accord with the promise of a government that gives voice to the popular will. *Cf.* Marshfield, *America's Other Separation-of-Powers*, *supra*, at 37 ("State constitutions are structured principally to empower democratic majorities and regulate government officials.").

That supporters of one party may be more geographically clustered than supporters of another is generally no excuse for minority rule. As this Court has written in a related context, "the basic principle of representative government is that the weight of a citizen's vote cannot be made to depend on where he lives." *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 55, 132 N.W.2d 249, 255 (1965); *cf. Reynolds v. Sims*, 377 U.S. 533, 562, 568 (1964) ("Legislators represent people, not trees or acres," and "[a] citizen, a qualified voter, is no more nor no less so because he lives in the

agendas"); *Maestas v. Hall*, 274 P.3d 66, 76, 77 (N.M. 2012) (consistent with "the principle judicial independence and neutrality," "courts should not select a plan that seeks partisan advantage").

city or on the farm."). If, despite partisan geographical differences, it is possible to create maps that (1) comply with the state's enumerated districting criteria and (2) treat each major party's supporters symmetrically in their ability to translate votes into legislative representation, then this Court should favor such maps over alternatives expected to produce greater disparities between each party's electoral support and legislative seat share.

B. Wisconsinites Have a State Constitutional Right to Politically Unbiased Electoral Districts.

None of the above analysis depends on there being an affirmative constitutional right to partisan fairness in districting. It instead hinges on this Court's duties as an impartial adjudicator tasked with delivering an equitable remedy. That said, there is indeed such a right, and its existence reinforces this Court's obligation to produce evenhanded maps. The *Johnson* Court's contrary suggestions are mere dicta—no one there brought a partisan gerrymandering claim, and the parties never aired the relevant arguments. Even if the Court here does not formally recognize a Wisconsin constitutional right to be free from partisan gerrymandering, it should at least make clear that *Johnson*'s gratuitous statements on the subject have no precedential force.

As discussed in Part I, the Wisconsin Constitution establishes a system in which the people govern themselves, acting through representatives who must serve as their faithful agents. Consistent with the Constitution's democratic structure, the legislature's duty to redistrict is properly characterized as a representation-facilitating authority. Lawmakers are tasked with

establishing districts that faithfully translate popular will into legislative representation. When they instead enact maps that distort representation and diminish their own accountability and responsiveness, they step outside their constitutionally prescribed role and violate the people's "right to a fair apportionment of the aggregate of the political power." *Cunningham*, 81 Wis. at 735 (Pinney, J., concurring); *cf. Bashford*, 4 Wis. at 743 (explaining that, in adopting the Constitution, "the people—the rightful source of all political power"—granted each branch only such power "as they thought necessary to [e]nsure domestic tranquility and promote the general welfare").

This understanding is deeply rooted. The Constitution's drafters established guardrails designed to prevent lawmakers from misusing their redistricting authority for self-serving or oppressive ends, including by requiring single-member districts and enumerating certain redistricting criteria. As this Court has long recognized, these provisions "were supported and adopted upon the express ground that they would prevent the legislature from gerrymandering the state." *Cunningham*, 81 Wis. at 730. Founding-era Wisconsinites sought to "prevent[] all or almost all gerrymandering," allowing the majority to prevail while also providing the minority fair representation. Quaife, *The Struggle Over Ratification* 438 ("Single District System," Racine *Advocate*); *see also* Milo M. Quaife, *The Movement for Statehood* 300 (1918) ("Single Districts," Racine *Advocate*) (stating that an "advantage of the district system is that it prevents what is called gerrymandering" and assures "the minority in politics … as nearly

as possible its proper number of delegates"). Notably, this Court has for years conveyed to the public that its 1892 *Cunningham* decisions "outlawed gerrymandering; that is, drawing creative legislative districts to preserve partisan political advantage." *Famous Cases of the Supreme Court*, https://www.wicourts.gov/courts/supreme/famouscases.htm. While those public-facing statements are not binding precedent, they are nonetheless instructive.

Of course, since the nineteenth century, lawmakers' gerrymandering techniques and capabilities have become much more sophisticated, enabling them to evade the initial line of anti-gerrymandering defenses set out in Article IV. As a result, it is now more important than ever to recognize and enforce the people's underlying right to politically unbiased maps—a right embedded in the redistricting provisions of Article IV, and buttressed by the equality, speech, and assembly guarantees of the Declaration of Rights and by the Constitution's thoroughgoing structural commitment to democracy.

CONCLUSION

The Court should hold that Wisconsin's existing legislative maps are unlawful and adopt remedial maps consistent with the principles above.

Dated this 8th day of November, 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8) (b), (bm), and (c) for a brief, as modified by this court's order on Oct. 6, 2023, specifying that "any proposed non-party brief shall not exceed 20 pages if a monospaced font is used or 4,400 words if a proportional serif font is used." The length of this brief is 4,384 words.

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