No. 2021AP1450-OA

IN THE SUPREME COURT OF WISCONSIN

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

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

v.

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

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

BRIEF BY THE WISCONSIN LEGISLATURE

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

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

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

* *Admitted pro hac vice.*

Counsel for Intervenor-Respondent,
The Wisconsin Legislature

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INTRODUCTION

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

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

STATEMENT OF ISSUES FOR REVIEW

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

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

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

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

STATEMENTS ON ORAL ARGUMENT & PUBLICATION

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

STATEMENT OF THE CASE

A. The Power to Reapportion

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

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

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

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

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

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

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

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

2021 Wis. Senate Joint Res. 63.

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

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

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

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

B. Procedural History

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

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

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

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

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

ARGUMENT

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

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

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

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

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

The first factor that this Court must consider in this action is whether there has been an "adequate opportunity" for the Legislature to reapportion the existing districts. Order of Sept. 22, 2021, at 2. For two reasons, the Court cannot presume a future impasse is bound to occur and take over the reapportionment process now before the political branches have completed their task.

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

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

Applied here, there has not been adequate time for the redistricting process to run its course in the Legislature. The Legislature received new census data little more than two months ago. And while the Legislative process is nearly finished, it is not complete. Importantly, "judicial relief becomes appropriate in reapportionment cases *only* when the legislature fails to reapportion according to constitutional requisites in a timely fashion after having had an adequate opportunity to do so." Order of Sept. 22, 2021, at 2. As explained in the Legislature's previously submitted letter brief, legislative leadership intends to take up redistricting plans before the floor period ending on November 11, 2021.

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

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

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

1. Ordinarily, a court faced with a redistricting dispute would allow the Legislature to remedy the alleged constitutional violation. *See, e.g.*, *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (Wis. 1892); *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35 (Wis. 1892). When a court "declares an existing apportionment scheme unconstitutional," it is "appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (op. of White, J.). A "legislatively enacted plan should be preferable to one drawn by the courts." *League of United Latin American Citizens v. Perry* (*LULAC*), 548 U.S. 399, 416 (2006) (op. of Kennedy, J.). And even if the Court finds itself "fashioning a reapportionment plan or … choosing among plans," it "should not pre-empt the legislative task or 'intrude upon state policy any more than necessary.'" *White*, 412 U.S. at 795 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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The Court's remedy must comply with these equal population principles. Indeed, federal courts have required population equality with more exactness for court-drawn maps. *See Chapman v. Meier*, 420 U.S. 1, 27 & n.19 (1975) (requiring "population equality with little more than de minimis variation," "unless there are persuasive justifications"). The reasons for doing so apply equally here. That higher standard "reflect[s] the unusual position of federal courts as draftsmen of reapportionment plans," *Connor v. Finch*, 431 U.S. 407, 414-15 (1977), even though Legislatures have primary responsibility for reapportionment. When a court prioritizes population equality, that avoids the "taint of arbitrariness or discrimination" in crafting a malapportionment remedy. *Id.* at 415 (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)). For such court-drawn maps, "any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features." *Chapman*, 420 U.S. at 26. So too here—any map drawn by this Court should prioritize equal population without arbitrarily overriding other "goals of state political policy" embodied in a legislative redistricting plan. *Upham*, 456 U.S. at 43.

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

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

Section 2 of the Voting Rights Act requires that the political processes are "equally open to participation" for all citizens. 52 U.S.C. §10301(b); *see Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2337-38 (2021). The Court has applied that rule to single-member voting districts where there has been a "dispersal of a group's members into districts" leaving them as "an ineffective minority of voters." *Cooper*, 137 S. Ct. at 1464 (brackets omitted) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986)). Proving vote dilution starts with three threshold preconditions: (1) a minority group must be sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district; (2) the minority group must be politically cohesive; (3) a district's white majority must vote sufficiently as a bloc to usually defeat the minority's preferred candidate. *Cooper*, 137 S. Ct. at 1470 (citing *Gingles*, 478 U.S. at 50-51). If there are "good reason[s]" to think that these preconditions are met, then there is also "good reason to believe that §2 requires drawing a majority-minority district" under current Supreme Court precedent. *Id.* (citing *Bush v. Vera*, 517 U.S. 952, 978 (1996) (plurality opinion)).

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

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

3. Number of districts. State and federal law currently provides for 8 congressional districts, 99 State Assembly districts and 33 State Senate districts. Wis. Stat. §§3.001, 4.001; *see also* 2 U.S.C. §2a(b).[8]

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

Judicial restraint must guide any redistricting-related remedy. Remedying Petitioner's malapportionment claims is not a policymaking exercise. Reapportionment—as the term suggests—ordinarily begins with the existing map. *Cf. Perry*, 565 U.S. at 393 ("To avoid being compelled to make such otherwise standardless decisions, a district court should take guidance from the State's recently enacted plan in drafting an interim plan."). Parties then propose modifications to districts as necessary to accommodate shifting population, for a "least changes" or "minimum changes" redistricting plan to remedy Petitioners' malapportionment claims.[9]

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

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

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

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

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

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

Choosing among plans and remedying Petitioners' malapportionment claims with a "least changes" plan is not novel. Courts have long used the existing map and then made only those changes "necessary" to remedy constitutional infirmities. *See, e.g.*, *Baumgart*, 2002 WL 34127471, at *7 (describing process as "taking the 1992 reapportionment plan as a template and adjusting it for population deviations"); *Hippert v. Ritchie*, 813 N.W.2d 374, 380 (Minn. 2012) ("Because courts engaged in redistricting lack the authority to make the political decisions that the Legislature and the Governor can make through their enactment of redistricting legislation, the panel utilizes a least-change strategy where feasible."); *Martin v. Augusta-Richmond Cty., Ga., Comm'n*, No. CV 112-058, 2012 WL 2339499, at *3 (S.D. Ga. June 19, 2012) ("chang[ing] only the faulty portions of the benchmark plan, as subtly as possible, in order to make the new plan constitutional"); *Crumly v. Cobb Cty. Bd. of Elections & Voter Registration*, 892 F. Supp. 2d 1333, 1345 (N.D. Ga. 2012) (noting "Court followed the doctrine of minimum change"); *Stenger v. Kellett*, No. 4:11-cv-2230, 2012 WL 601017, at *3 (E.D. Mo. Feb. 23, 2012) ("A frequently used model in reapportioning districts is to begin with the current boundaries and change them as little as possible while making equal the population of the districts."); *Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618, 647 (D.S.C. 2002) ("altering old plans only as necessary to achieve the requisite goals of the new plan"); *Markham v. Fulton Cty. Bd. of Registrations & Elections*, No. 1:02-cv-1111, 2002 WL 32587313, at *6 (N.D. Ga. May 29, 2002) ("Keeping the minimum change doctrine in mind, the Court made only the changes it deemed necessary to guarantee substantial equality and to honor traditional redistricting concerns."); *Bodker v. Taylor*, No. 1:02-cv-999, 2002 WL 32587312, at *5 (N.D. Ga. June 5, 2002) ("The court notes ... that its plan represents only a small, though constitutionally necessary, change in the district lines in accordance with the minimum change doctrine."); *Below v. Gardner*, 148 N.H. 1, 963 A.2d 785, 794 (2002) ("[W]e use as our benchmark the existing senate districts because the senate districting plan enacted in 1992 is the last validly enacted plan and is the 'clearest expression of the legislature's intent.'"); *Alexander v. Taylor*, 2002 OK 59, ¶23, 51 P.3d 1204 (2002) ("A court, as a general rule, should be guided by the legislative policies underlying the existing plan. The starting point for analysis, therefore, is the 1991 Plan."); *Johnson*, 922 F. Supp. at 1559; *LaComb v. Growe*, 541 F. Supp. 145, 151 (D. Minn. 1982) ("[T]he Court ... takes as the starting point the last configuration of congressional districts. The districts are modified only to serve State policy and satisfy the constitutional mandate that one person's vote shall equal another's."), *aff'd sub nom. Orwoll v. LaComb*, 456 U.S. 966 (1982); *Holmes v. Burns*, No. C.A. 82-1727, 1982 WL 609171, at *20 (R.I. Super. Aug. 29, 1982); *Md. Citizens Comm. for Fair Cong. Redistricting, Inc. v. Tawes*, 253 F. Supp. 731, 734 (D. Md. 1966) ("A basic goal has been to achieve the requirements of equality laid down in the Supreme Court decisions without doing unnecessary violence to the heart of existing districts, county lines, and district lines within the counties and ward lines in the city.").

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

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

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

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

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

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

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

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

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

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

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

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

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

Finally, in an impasse suit, core retention best preserves the Legislature's constitutionally prescribed role in redistricting in a judicial setting. The "cores in existing districts are the clearest expression of the legislature's intent to group persons on a 'community of interest' basis." *Colleton Cty. Council*, 201 F. Supp. 2d at 649. Those legislative prerogatives cannot be overridden merely by initiating a malapportionment suit and placing redistricting into the hands of the courts. *See White*, 412 U.S. at 796; *Upham*, 456 U.S. at 43. For this reason, in past redistricting cycles, courts have recognized and employed core retention as a traditional redistricting criteria to be considered when remedying redistricting-related claims. *See Baldus v. Members of the Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012) (recognizing "core retention" as a "traditional redistricting criteria"); *Baumgart*, 2002 WL 34127471, at *3 (same).[12]

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

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

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

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

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

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

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

Importantly, "fairness" is not a component of any state or federal equal protection analysis. *See F.C.C. v. Beach Comms., Inc.*, 508 U.S. 307, 313 (1993) ("equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices"); *Mayo v. Wis. Injured Patients & Families Compensation Fund*, 2018 WI 78, ¶41, 383 Wis. 2d 1, 914 N.W.2d 678. The equal protection clause does not, for example, "require[] proportional representation" or require "district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote would be." *Rucho*, 139 S. Ct. at 2499 (quoting *Davis v. Bandemer*, 478 U.S. 109, 130 (1986) (plurality op.)). Numerous other standards for evaluating partisan "unfairness" have been rejected as well. *See id.* at 2496-98, 2502-04; *Gill*, 138 S. Ct. at 1926-29 (cataloguing rejected standards).

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

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

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

IV. Nature of the proceedings.

A. Timing of proceedings

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

B. Form of proceedings

As in most redistricting disputes, the Court can choose among remedies proposed by the parties. That will entail remedial submissions by the parties. It could also necessitate a short hearing limited to any disputed facts regarding the proposed remedial plans. That hearing could be overseen by this Court or a special master. *See* Wis. Stat. §§751.09, 805.06; *see also* Non-Party Br. of Daniel Suhr at 8 (Sept. 7, 2021) (collecting examples). Depending on the Court's resolution of the questions presented here, those submissions could take one two forms—

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

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

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

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

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

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

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

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

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

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

8. February 1: Short post-hearing briefs (simultaneous) on disputed issues of fact, if any.
9. February 8: Closing arguments regarding disputed issues of fact, if any.
10. February 18: Decision resolving disputed issues of fact, if any.
11. February 25: Supplemental briefs (simultaneous), if necessary.
12. Week of March 7: Argument, if necessary.
13. Week of April 4 or earlier: Final order and decision.

CONCLUSION

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

Dated this 25th day of October, 2021.

Respectfully submitted,

Electronically Signed By
Kevin M. St. John

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

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

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

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

Attorneys for Intervenor-Respondent,
The Wisconsin Legislature

CERTIFICATION REGARDING FORM AND LENGTH

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

Dated this 25th day of October, 2021.

Respectfully submitted,

Electronically Signed by
Kevin M. St. John

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

Attorney for the
Wisconsin Legislature

CERTIFICATION OF FILING AND SERVICE

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

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

Dated this 25th day of October, 2021.

Respectfully submitted,

Electronically Signed by
Kevin M. St. John

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

Attorney for the
Wisconsin Legislature