IN THE SUPREME COURT OF WISCONSIN
No. 2021AP1450-OA

Billie Johnson, Eric O'Keefe, Ed Perkins and Ronald Zahn,
Petitioners,
Black Leaders Organizing for Communities, Voces de la Frontera, League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson, Rebecca Alwin, Congressman Glenn Grothman, Congressman Mike Gallagher, Congressman Bryan Steil, Congressman Tom Tiffany, Congressman Scott Fitzgerald, Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, Kathleen Qualheim, Gary Krenz, Sarah J. Hamilton, Stephen Joseph Wright, Jean-Luc Thiffeault, and Somesh Jha,
Intervenors-Petitioners,
v.
Wisconsin Elections Commission, Marge Bostelmann in her official capacity as a member of the Wisconsin Elections Commission, Julie Glancey in her official capacity as a member of the Wisconsin Elections Commission, Ann Jacobs in her official capacity as a member of the Wisconsin Elections Commission, Dean Knudson in his official capacity as a member of the Wisconsin Elections Commission, Robert Spindell, Jr. in his official capacity as a member of the Wisconsin Elections Commission and Mark Thomsen in his official capacity as a member of the Wisconsin Elections Commission,
Respondents,
The Wisconsin Legislature, Governor Tony Evers, in his official capacity, and Janet Bewley Senate Democratic Minority Leader, on behalf of the Senate Democratic Caucus,
Intervenors-Respondents.

Original Action in the Wisconsin Supreme Court

BRIEF OF INTERVENOR-PETITIONERS BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, REBECCA ALWIN

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ISSUES PRESENTED

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

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

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

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

INTRODUCTION

This Court asked all parties to address the four issues set forth above. Below, the BLOC Petitioners address each issue in turn. In short:

Section I outlines the various factors this Court is required to consider (subsection A), those it should consider (subsection B), and then those it may not or should not consider (subsection C).

Section II explains why this Court should reject Petitioners' proposed least-change approach. Petitioners' invitation is irreconcilable with the text of the Wisconsin Constitution (subsections A and B), finds no support in precedent or history (subsection C), and creates perverse and undesirable incentives (subsection D).

Section III explains why it is essential that this Court consider the partisan effects of any maps it evaluates. The BLOC Petitioners represent nonpartisan interests and seek fair maps that promote fundamental small-d democratic values. Article 1, section 22 of the Wisconsin Constitution compels fair maps. The Court cannot adhere to the guardrails of that provision if it ignores the political data that demonstrate

whether the maps this Court imposes reflect the political will of Wisconsin's voters.

Section IV lays out the BLOC Petitioners' proposed process and schedule for litigating this case. This includes managing expedited discovery (subsection A), and holding a short trial that allows for the efficient presentation of evidence and testing of that evidence through the essential crucible of adversarial litigation (subsection B). It also explains how to mesh a workable schedule for trial in this Court with the anticipated trail before the federal court, scheduled to begin on January 31, 2022 (subsection C).

ARGUMENT

I. The Court *Must* Consider The State And Federal Constitutional And Statutory Criteria Governing Apportionment Of State Legislative Districts; It *May* Consider Other Traditional Redistricting Criteria.

Under relevant state and federal law, in evaluating or creating new state legislative districts, the Court ***must*** consider

(1) population equality, (2) compliance with the federal Voting Rights Act, (3) compactness, (4) contiguity, and (5) preservation of the unity of political subdivisions.

Federal authority also teaches that the Court ***may*** consider so-called "traditional redistricting criteria," including (1) preservation of communities of interest, (2) the partisan makeup of districts, and (3) incumbents' residences. Most of these considerations are included in the Guidebook to Redistricting in Wisconsin 2020, written by the nonpartisan Legislative Reference Bureau (LRB).[1] The Legislature itself cites this as a resource, demonstrating these considerations'

[1] *See* 2020 Wis. Legislative Reference Bureau, *Redistricting in Wisconsin 2020: The LRB Guidebook* 5-22 (2020), *available at* http://legis.wisconsin.gov/misc/lrb/wisconsin_elections_project/redistricting_wisconsin_2020_1_2.pdf (hereinafter "LRB Guidebook"). The Legislature's "Draw Your District Wisconsin" webpage, which includes information about the redistricting process, provides a link to this Guide, stating that the Guide "explain[s] the law, principles, and process of redistricting in Wisconsin." *See* About, Draw Your District Wisconsin, https://drawyourdistrict.legis.wisconsin.gov/About (last visited Oct. 25, 2021).

general acceptance and use in the Wisconsin redistricting process.

There are also criteria that the Court ***may not*** or ***should not*** consider, including excessive and unjustified use of race, unfairly or arbitrarily advantaging one political party, and retention of core populations from existing districts.

A. Factors that the Court Must Consider

1. Population Equality

The United States Constitution and the Wisconsin Constitution require members of Congress and of the Wisconsin Legislature to be elected on the basis of equal representation. U.S. Const. art. I, § 2; Wis. Const. art. IV, § 3. Accordingly, this Court must ensure population equality among districts in evaluating or creating new maps.

The U.S. Constitution mandates population equality across districts under the "one person, one vote" principle for both congressional representatives, *Wesberry v. Sanders*, 376

U.S. 1, 18 (1964), and state legislators, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). This requirement has been directly applied by federal courts redrawing Wisconsin's districts. *See, e.g.*, *Arrington v. Elections Bd*., 173 F. Supp. 2d 856, 860 (E.D. Wis. 2001). This Court has interpreted the Wisconsin Constitution to likewise guarantee that each citizen shall have substantially equal legislative representation. *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 564, 126 N.W.2d 551 (1964).

States must draw congressional districts with populations as close to perfect equality as possible. *Evenwel v. Abbott*, 578 U.S. 54, 136 S. Ct. 1120, 1124 (2016). For state and local districts, minor deviations are permissible to accommodate legitimate traditional districting objectives. *Id*.; *see also Brown v. Thomson*, 462 U.S. 835, 842 (1983); *Connor v. Finch*, 431 U.S. 407, 418 (1977); *White v. Regester*, 412 U.S. 755, 764 (1973).

2. Compliance with the Voting Rights Act

In evaluating or creating new maps, this Court must also consider whether those maps comply with Section 2 of the Voting Rights Act. Section 2 prohibits any "standard, practice, or procedure" that, interacting with social and historical conditions, impairs a protected minority group's ability to elect its candidates of choice on an equal basis to other voters. *See* 52 U.S.C. § 10301; *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). One such practice or procedure includes establishing electoral districts that dilute minority voters' power. *Thornburg v. Gingles*, 478 U.S. 30, 47-51 (1986) (applying Section 2 to invalidate multi-member districts); *accord League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 495-96 (2006) (Roberts, C.J., concurring) (recognizing "that 'manipulation of [single-member] district lines' could also dilute minority voting power if it packed minority voters in a few districts when they might control more, or dispersed them

among districts when they might control some" (quoting *Voinovich*, 507 U.S. at 153-54)). Dilution of minority voting strength "may be caused by the dispersal of [minority voters] into districts in which they constitute an ineffective minority of voters or from the concentration of [minority voters] into districts where they constitute an excessive majority." *Gingles*, 478 U.S. at 46 n.11. The *Gingles* Court identified three preconditions for Section 2 obligations:

> (1) Whether the minority group is "sufficiently large and geographically compact as to constitute a majority in a single-member district";
>
> (2) Whether the minority group is "politically cohesive"; and
>
> (3) Whether the white majority votes "sufficiently as a bloc to enable it—in the absence of special circumstances…—to usually to defeat the minority's preferred candidate."

Id. at 50-51.

For plaintiffs to prove Section 2 *liability*, they must prove that it is possible to draw a district with over 50% of the relevant voting age population. *Bartlett v. Strickland*, 556 U.S.

1, 19-20 (2009). But maps enacted by states, or imposed by courts, need not include "majority minority" districts to achieve Section 2 compliance; that inquiry turns on a functional analysis of a district's electoral performance for the minority community, not any arbitrary demographic threshold. *Id.* at 23 (stating that "§ 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts" (internal citations omitted)); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017). Assessing prongs two and three of the *Gingles* test requires a statistical analysis of election results to determine the degree of racially polarized voting.

The Court might also assess whether, under the totality of the circumstances, members of any racial groups in question have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. 52 U.S.C. § 10301(b). The factors to be

considered under a totality-of-the-circumstances assessment include:

> (1) "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process";
>
> (2) "the extent to which voting in the elections of the state or political subdivision is racially polarized";
>
> (3) "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group";
>
> (4) "if there is a candidate slating process, whether the members of the minority group have been denied access to that process";
>
> (5) "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process";
>
> (6) "whether political campaigns have been characterized by overt or subtle racial appeals";
>
> (7) the extent to which members of the minority group have been elected to public office in the jurisdiction";
>
> (8) "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group";

> (9) "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous."

Gingles, 478 U.S. at 36-37 (quoting S. Rep. No. 90-417, at 28–29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07).

Failure to conduct the required Section 2 analysis—or an erroneous determination under that analysis—risks the invalidation of a map approved or created by this Court for noncompliance with federal law.

3. Compactness

This Court ***must*** consider compactness for Assembly districts and ***may*** consider compactness for Wisconsin Senate and congressional districts. Compactness is "the principle that districts should be reasonably geographically compact, meaning that the distance between all parts of a district is minimized." LRB Guidebook at 14. The Wisconsin Constitution explicitly requires Assembly districts "be in as compact form as practicable," Wis. Const. art. IV, § 4, thereby

necessitating consideration of compactness in evaluating Assembly maps. There are a number of different metrics for measuring compactness. Two examples are the Reock and Polsby-Popper measures.[2]

There is no requirement, under federal or state law, to consider compactness for Wisconsin Senate or congressional districts. *See Shaw v. Reno*, 509 U.S. 630, 647 (1993). However, the U.S. Supreme Court has recognized compactness as a traditional districting principle, an objective factor that might "serve to defeat a claim that a district has been gerrymandered on racial lines." *Id*.

Accordingly, this Court must consider compactness for state Assembly maps and may elect to do so for state Senate and maps.

[2] *See, e.g.*, *What Are Measures of Compactness?*, Caliper, https://www.caliper.com/glossary/what-are-measures-of-compactness.htm (last visited October 25, 2021).

4. Contiguity

This Court must consider contiguity for Wisconsin legislative districts and may consider contiguity for congressional districts. The Wisconsin Constitution requires that Assembly and Senate districts be made up of contiguous territory, Wis. Const. art. IV, §§ 4-5, meaning that such districts may not be divided into discrete pieces, except for islands and municipal islands, Wis. Stat. § 5.15(2)(f)3.

Accordingly, this Court must consider contiguity for state legislative maps.

5. Preservation of the Unity of Political Subdivisions

This Court must consider the preservation of political subdivisions for Assembly districts and may consider such preservation for state Senate and congressional districts. The Wisconsin Constitution requires that Assembly districts "be bounded by county, precinct, town or ward lines." Wis. Const. art. IV, § 4. This requirement has historically been considered

when assessing maps' population deviation. *See Zimmerman*, 22 Wis. 2d at 564. However, at times, "splitting [] municipal boundaries is necessary to adhere to the one person, one vote, principle." *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 636 (E.D. Wis. 1982).

Accordingly, this Court must consider whether any Assembly maps evaluated or created might fracture county, precinct, town, or ward political subdivisions.

Related to the consideration of political subdivisions, per the Wisconsin Constitution, "no assembly district shall be divided in the formation of a senate district." Wis. Const. art. IV, § 5. Therefore, in evaluating or creating Wisconsin Senate maps, this Court must ensure not to bisect a single Assembly district into multiple Senate districts.

B. Factors That The Court May Consider.

1. Preservation of Communities of Interest

This Court may also consider the preservation of communities of interest in evaluating or creating new maps. Considering the preservation of communities of interest dovetails with the above Section 2 Voting Rights Act requirement, because "[o]ne important aspect of this concern is avoiding any dilution in the voting strength of racial and ethnic minorities." *See Wis. State AFL-CIO*, 543 F. Supp at 636. Federal courts have previously recognized the importance of considering communities of interest in Wisconsin, including the communities of Black residents in Milwaukee County. *Id*; *Baumgart v. Wendelberger*, Nos. 01-C-0121 & 02-C-0366, 2002 WL 34127471, *7 (E.D. Wis. May 30, 2002) (respecting "traditional communities of interest in the City of Milwaukee"), *amended*, 2002 WL 34127473 (E.D. Wis. July 11, 2002).

The preservation of communities of interest reaches beyond racial and ethnic communities to include other communities. Accordingly, beyond concerns with violating the Voting Rights Act, preserving communities of interest is a traditional districting principle consistently enumerated by the U.S. Supreme Court. *See, e.g.*, *Evenwel*, 578 U.S. 54, 136 S. Ct. at 1124. The LRB also recognizes the preservation of communities of interest as a traditional redistricting principle. LRB Handbook at 17. Therefore, this Court ought to consider the preservation of communities of interest in its evaluation or creation of maps.

2. Incumbents' Residences

This Court may consider incumbency when evaluating or creating maps, but there is no federal or state requirement that incumbency protection be considered in districting. *See, e.g.*, *Baumgart*, 2002 WL 34127471 at *3. The LRB

recognized as much, excluding incumbency from the list of traditional redistricting criteria included in its guide.

When the benchmark map is *not* an unfair partisan gerrymander, proposed new maps that include numerous paired incumbents may indicate an effort to provide one party with an unfair advantage. *See id.* at *4. But where, as here, *see infra*, Section III, the benchmark plan is an unfair partisan gerrymander, a neutral new plan will by necessity pair some incumbents. *See* Robert Yablon, *Gerrylaundering*, Univ. of Wis. L. Studies Research Paper No. 1708, p. 15 (Aug. 23, 2021), 97 N.Y.U. L. Rev. (forthcoming 2022)[3] In that circumstance, the pairing of incumbents will be evidence of a plan whose aim is *not* to unfairly benefit one political party.

[3] *Available* at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3910061 (last accessed Oct. 25, 2021). As Professor Yablon explains, a tool of creating a gerrymander is to "shack" multiple incumbents from the disfavored party into a single district, and a tool of preserving the gerrymandering is to "stock" new districts with incumbents and most of their existing constituents, separate from each other.

3. Partisan Makeup of Districts

As discussed in depth below, *see infra*, Section III, this Court should consider partisan makeup of districts in evaluating or creating new maps. Article I, section 22 of the Wisconsin Constitution requires this Court to ensure that any map it imposes adheres to principles of justice, moderation, temperance, and foundational democratic principles. The U.S. Supreme Court has explained that partisan gerrymanders are unjust and incompatible with democratic principles. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) ("Excessive partisanship in districting . . . 'is incompatible with democratic principles' . . . ." (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015))). This Court is obligated to ensure that it does not—intentionally or unwittingly—impose a plan with unfair partisan advantage. The Court can do so only by analyzing the plans' partisan

implications in light of the established voting preferences of Wisconsin voters.

C. Factors That The Court May Not Or Should Not Consider.

1. Excessive and Unjustified Use of Race

The Court may not engage in excessive and unjustified use of race in drawing maps and must assess if there was excessive and unjustified use of race if it evaluates maps. *See Shaw*, 509 U.S. at 647-49. Race cannot predominate as the factor motivating a map in the absence of a compelling reason, such as compliance with the Voting Rights Act. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). The Court can avoid race predominating by considering concerns relevant to Section 2 of the Voting Rights Act and racial and ethnic communities of interest, along with the race-neutral factors listed above.

2. Unfairly or Arbitrarily Advantaging One Political Party

Courts have recognized the need to avoid unfairly or arbitrarily advantaging one political party over another. "Judges should not select a plan that seeks partisan advantage" and must not impose a plan where "one party can do better than it would do under a plan drawn up by persons having no political agenda." *Prosser v. Elections Bd.*, 793 F. Supp. 859, 867 (W.D. Wis. 1992).

3. Core Retention

"Core retention" is the practice of "retaining previous occupants in new legislative districts." *Baumgart*, 2002 WL 34127471, *3 (citing *Karcher v. Daggett*, 462 U.S. 725, 740 (1983)). While core retention has been acknowledged at-times as a valid consideration for districting, *see, e.g.*, *Karcher*, 462 U.S. at 740-41, it should not weigh heavily in this Court's evaluation or creation of maps. Core retention is frequently *not* included in lists of traditional districting criteria. *See, e.g.*,

Shaw, 509 U.S. at 647. The LRB also excluded core retention from the list of traditional redistricting criteria included in its guide.

Underscoring this conclusion, this Court held long ago that

> The requirement that such apportionment shall be made at the first session of the legislature after the taking of such census very clearly indicates that the census so taken is to be the basis of such apportionment; otherwise the apportionment might as well be made the year prior to the taking of such census as the first session of the legislature thereafter.

State ex rel. Lamb v. Cunningham, 83 Wis. 90, 149, 53 N.W. 35 (1892). In addition, as discussed further below, *see infra*, Section III, given that the maps enacted last decade implemented extreme partisan gerrymanders, *Whitford v. Gill*, 218 F. Supp. 3d 837, 910 (W.D. Wis. 2016), *vacated and remanded on standing grounds by Gill v. Whitford*, 138 S. Ct. 1916 (2018)), consideration of core retention would only replicate and further entrench the skewed nature of

Wisconsin's maps. *See* Nicholas O. Stephanopoulos, *The Consequences of Consequentialist Criteria*, 3 U.C. Irvine L. Rev. 669, 706 (2013) ("[R]espect for prior district cores … has only adverse effects. The requirement increased partisan bias and the average margin of victory and decreased the share of competitive districts and the level of electoral responsiveness in state legislative elections.").[4] Accordingly, and consistent with *Lamb*, this Court should consider Wisconsin as it is now, not as it was a decade ago.

II. The "Least Change" Approach Suggested By The Petitioners Is Constitutionally Infirm.

Petitioners ask this Court to take an approach to deciding this case that is unprecedented as a matter of Wisconsin law and that is unjustified and inappropriate here. They propose that the Court employ a method for adopting new

[4] *Available* at: https://scholarship.law.uci.edu/ucilr/vol3/iss3/10 (last accessed Oct. 25, 2021).

state legislative districts, the so-called "least-change" approach, that not only has no support in Wisconsin law, but that if employed, would radically depart from this Court's extensive precedent in interpreting and applying the express language of state statutes and the Wisconsin Constitution. That approach would wreak extraordinary damage on fundamental democratic principles reflected in the Wisconsin Constitution and statutes, and disturb fundamental tenets of judicial interpretation.

As explained below, Petitioners' suggestion that the Court elevate and prioritize a single criterion found nowhere in the constitutional provisions governing apportionment—the abstract principle of minimizing changes to existing district boundaries—should be rejected. Instead, the Court should follow the same approach it undertakes in all other contexts: it should identify and apply the controlling law, including the express text of the state constitutional provisions governing

apportionment, to the case at hand. The Court should approach the task of adopting new state-legislative districts by following the criteria expressly set forth in law. *See supra*, Section I. Courts have engaged in this analysis—applying the constitutional and statutory criteria courts ***must*** consider, sometimes also weighing factors courts ***may*** consider, but avoiding the criteria courts ***must not*** consider—for decades in Wisconsin. Federal courts were called on to draw state legislative maps following the 1980 Census, (*Wis. State AFL-CIO*), the 1990 Census (*Prosser*), and the 2000 Census (*Baumgart*). The redistricting approach employed by the federal courts provides a roadmap for this Court, which must apply all the same constitutional and statutory criteria.

When construing state statutes and the Wisconsin Constitution, this Court must follow the express language that the Legislature (in the case of statutes) or the People (in the case of the Constitution) chose to include. Courts may not add

to the express language nor subtract from it; they must give effect to every word, and not interpret and apply statutes and constitutional provisions in a way that renders express language meaningless. Petitioners' request that this Court apply a "least change" approach to imposing new state legislative districts violates that fundamental rule. It would write into the Constitution language that is not there, and it would render express language that does appear meaningless. This Court should reject that approach for the reasons identified below.

A. Petitioners' Approach Would Write Into The Wisconsin Constitution A "Least Change" Requirement That Does Not Exist In The Text.

Article IV, section 3 of the Wisconsin Constitution governs this Court's task in adopting state legislative districts. Courts interpreting and applying the Wisconsin Constitution "first look at the plain language and meaning" of the

constitutional provision, *Appling v. Walker*, 2014 WI 96, ¶22, 358 Wis. 2d 132, 154, 853 N.W.2d 888, and the "authoritative, and usually final, indicator of the meaning of a provision is the text—the actual words used," *Coulee Cath. Sch. v. LIRC*, 2009 WI 88, ¶57, 320 Wis. 2d 275, 768 N.W.2d 868. Courts may also consider "the constitutional debates and the practices in existence at the time of the writing of the constitution; and the earliest interpretation of the provision by the legislature as manifested in the first law passed following adoption." *State v. City of Oak Creek,* 2000 WI 9, ¶18, 232 Wis. 2d 612, 605 N.W.2d 526 (quoted source omitted). But no Wisconsin authority permits courts to write into the written words of our laws language that is not there.[5] Just as these principles apply

[5] *See , e.g.*, *Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶11, 394 Wis. 2d 33, 949 N.W.2d 423 (rejecting proffered interpretation that "adds words to the statute"); *State v. Schultz*, 2020 WI 24, ¶52, 390 Wis. 2d 570, 939 N.W.2d 519 ("We do not read words into the statute that the legislature did not write."); *Cnty. of Dane v. LIRC*, 2009 WI 9, ¶33, 315 Wis. 2d 293, 759 N.W.2d 571 ("We will not read into the statute a limitation the plain language does not evidence."); *Interior Woodwork Co.*

to statutory interpretation, they apply with equal, if not greater, force to constitutional interpretation. *See, e.g.*, *Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶28, 393 Wis. 2d 38, 946 N.W.2d 35 ("The text of the constitution reflects the policy choices of the people, and therefore constitutional interpretation similarly focuses primarily on the language of the constitution.").

Article IV, section 3 of the Wisconsin Constitution contains several clear, affirmative directives for apportioning state legislative districts: districts must be compact, contiguous, and consistent with local district boundaries. Of equal import is that the Constitution does not mention preservation of past districts, in any form. Petitioners' proffered least-change criterion is wholly absent from the

v. Hackett, Hoff & Thierman, 157 N.W. 772, 773 (1916) ("This court has no right or power to amend the statutes either by the insertion of one word or many words"); *In the Int. of G. & L.P.*, 119 Wis. 2d 349, 354, 349 N.W.2d 743 (Ct. App. 1984)("We have no right or power to amend a statute by the insertion of additional language").

constitutional text. It follows that, were this Court to accept Petitioners' invitation to adopt a least-change approach to apportionment, it would be inserting into the Constitution words that neither the framers nor the people have placed there. Such an insertion would violate one of the most fundamental, bedrock canons of constitutional and statutory interpretation, which every current Justice on this Supreme Court has previously applied.[6] The Court has also recognized that legal

[6] *State v. Lickes*, 2021 WI 60, ¶24, --- Wis. 2d ---, 960 N.W.2d 855 ("[C]ourts may not add to the text. It is a fundamental maxim of statutory interpretation that we do not 'read into [a] statute language that the legislature did not put in.'") (quoted source omitted); *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶25, 394 Wis. 2d 602, 951 N.W.2d 556 ("We will not add words into a statute that the legislature did not see fit to employ."); *State v. Wiedmeyer*, 2016 WI App 46, ¶13, 370 Wis. 2d 187, 881 N.W.2d 805 ("It is not up to the courts to rewrite the plain words of statutes to further the public policy goals the legislature hopes to accomplish."); *Accord, e.g.*, *Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶14, 316 Wis. 2d 47, 762 N.W.2d 652 ("we will not insert [] words into the statute to create [] a result"); *Wis. Legislature v. Palm*, 2020 WI 42, ¶145, 391 Wis. 2d 497, 942 N.W.2d 900 (Dallet, J., dissenting) ("The Legislature asks the court to read in language that simply is not there. … We will not read into a statute words the legislature did not see fit to write.") (internal citations omitted); *Stroede v. Soc'y Ins.*, 2021 WI 43, ¶18, 397 Wis. 2d 17, 959 N.W.2d 305 ("Reading the statute so broadly…would negate the other specific terms provided (owner, lessee, and tenant) because it would swallow those terms whole. Such a broad

scholars share this view. *See, e.g.*, *State ex rel. Lopez-Quintero v. Dittmann*, 2019 WI 58, ¶18, 387 Wis. 2d 50, 928 N.W.2d 480 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012) ("Nothing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered.")

This Court should decline Petitioners' invitation to adopt a least-change criterion that necessarily reads into article IV, section 3, words foreign to the text of the Constitution.

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definition … would also render the legislature's selected terms and the word 'possessor' meaningless …"); *Southwest Airlines Co. v. DOR*, 2021 WI 54, ¶27, 397 Wis. 2d 431, 960 N.W.2d 384 ("Reading a statute 'strictly but reasonably' still does not allow us to read language into the statute that is not present.").

B. Petitioners' Approach would Render Express Language of the Wisconsin Constitution Superfluous or Meaningless.

Petitioners' suggested least-change approach violates a second and equally established doctrine of constitutional interpretation: Constitutional language is to be read, whenever possible, to give reasonable effect to every word, in order to avoid surplusage. *Wagner v. Milwaukee Cnty. Elections Comm'n*, 2003 WI 103, ¶33, 263 Wis. 2d 709, 666 N.W.2d 816 (quoting *Cnty. of Columbia v. Bylewski*, 94 Wis. 2d 153, 164, 288 N.W.2d 129 (1980)) (statutes and constitutional provisions should be construed to give effect "to each and every word, clause and sentence" and "a construction that would result in any portion of a statute being superfluous should be avoided wherever possible").

Adopting Petitioners' least-change approach to judicial creation of new state legislative districts would affront the

Wisconsin Constitution by rendering express language meaningless or superfluous.

The Constitution sets a simple charge for the legislative session immediately following each decennial federal census: "the legislature shall apportion and district ***anew*** the members of the senate and assembly, according to the number of inhabitants." Wis. Const. art. IV, § 3 (emphasis added). The words "district anew"— and, in particular, the word "anew"— must be given meaning. Absent inclusion of a contrary definition, words are given their "common, ordinary, and accepted meaning" *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110; *accord* Wis. Stat. § 990.01(1). The Constitution does not define "anew," but its common and accepted definition is:

> 1. Over again; once more; afresh <let's start anew>. 2. In a new and changed form <let's fashion this book anew>.

Anew, Black's Law Dictionary (11th ed. 2019).

Petitioners' suggested least-change approach inverts the common meaning of the constitutional text. Whereas applying either the first common meaning of the word "anew" ("afresh") or the second ("in a new and changed form") requires districts to be drawn in a fresh, new form, Petitioners' approach would reverse this, preserving districts in the same form as previously composed. Rather than apportion anew, Petitioners would have this Court enshrine the old. In doing so, Petitioners' approach would not only render the word "anew" a nullity, but even worse, would impose upon article IV, section 3 a meaning that is diametrically opposed to the plain meaning the people intended by including the word "anew." Petitioners' approach would therefore read out of the constitutional text the term "anew," which the framers *expressly included*, in favor of implicitly adding by fiat a least-change requirement that the Constitution does not contain and that is incompatible with the text. This the Court cannot do.

Petitioners may argue that this Court should look to the other common meaning of the word "anew": "Over again; once more." But even under that common meaning of the word "anew," Petitioners' least-change approach still would violate canons of constitutional interpretation. As a threshold matter, the *Black's Law Dictionary* definition of "anew" ties the meaning of "over again; once more" to "afresh," indicating that the repetitive act is intended to be different from the previous act.

Moreover, importing such a definition to article IV, section 3 would render constitutional text superfluous. Article IV, section 3 clearly prescribes when the Legislature must apportion new state legislative districts: "At its first session after each enumeration made by the authority of the United States." This express language requires a new apportionment after each decennial census—that is, every ten years. Courts have consistently interpreted this language to mean just that.

See, e.g., *Wis. State AFL-CIO*, 543 F. Supp. at 631-32; *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 843 (E.D. Wis. 2012); *Whitford*, 218 F. Supp. 3d at 844.

Article IV, section 3—and indeed the very sentence containing the word "anew"—already clearly commands the Legislature to apportion state legislative districts every decade. It follows that the word "anew" must add something else to the text. If "anew" is understood to convey its secondary meaning of "again" or "once more," that would make it redundant of the introductory clause at the beginning of article IV, section 3, rendering it surplusage. And that would violate a cardinal canon of constitutional interpretation. *Wagner*, 2003 WI 103, §33.

Accordingly, the only reasonable meaning of the term "anew" that applies here is the common meaning—"in a new or different form." That meaning is irreconcilable with Petitioners' least-change approach to apportionment, which

would write "anew" out of the Constitution and would replace it with a term that has the opposite meaning.

This reading is underscored by article IV, section 3's title, "Apportionment." Though the process of decennially apportioning state legislative districts is commonly referred to as "redistricting," our constitutional provision governing this task is entitled simply, "Apportionment." The absence of a prefix makes clear that the act prescribed has no tie to any previous apportionment but starts on a clean slate. The common meaning of "apportionment," the word selected by Wisconsin's constitutional drafters, does not contemplate a reference to past districts. *See* Merriam-Webster Dictionary Online ("apportion—to divide and share out according to a plan …"); Noah Webster, *An American Dictionary of the English Language* at 62 (1850) ("Apportionment, n. The act of apportioning; a dividing into just proportions or shares;

a dividing and assigning to each proprietor his just portion of an undivided right or property").

C. Neither Precedent Nor History Supports Petitioners' Least-Change Approach.

Nothing in Wisconsin law or previous Wisconsin litigation over the composition of state legislative districts authorizes or justifies adopting Petitioners' proposed least-change approach here. This is not surprising: "excessive continuity in electoral districting can be as problematic as opportunistic change. Recall that when the Supreme Court first confronted complaints about electoral districts, the issue was not active manipulation but rather inaction." Yablon, *Gerrylaundering*, *supra*, at p. 8.

Previous courts called upon to apportion Wisconsin's legislative districts due to political impasse have always applied the mandatory constitutional and statutory directives to create districts. *See Prosser*, 793 F. Supp. 859; *Wis. State AFL-*

CIO, 543 F. Supp. 630; *Baumgart*, 2002 WL 34127471, *amended*, 2002 WL 34127473. No previous court has read a least-change directive into the law or even applied such an approach. To the extent Petitioners suggest otherwise in their original petition, they misread history. (Pet. ¶35) The last three decades are particularly illuminating.

In 2002, the *Baumgart* court applied the constitutional and statutory factors required by law. *Baumgart*, 2002 WL 34127471 at *7. The court (inaccurately) cited "core retention" as one of the traditional redistricting criteria, like preserving communities of interest, that courts had previously relied upon to justify "some deviation from perfect population equality."[7]

[7] Even if core retention is understood as a traditional redistricting criterion, *see supra*, Section I.C.3, it is *not* synonymous with Petitioner's least-change approach. Core retention is an additional (tertiary) consideration courts may entertain after mandatory criteria are met: It is not a starting place. How much retention of core district populations is possible or advisable can only be determined after meeting the other, primary and secondary, criteria. *See* Yablon, *Gerrylaundering* at 23. A least-changes approach would necessarily invert the order of the Court's

Id. at *3. But the court did *not* adopt the proposed map with the highest core-retention score, even though that plan also had the lowest population deviation and highest levels of compactness of any of the plans submitted. *Id.* at *4. Instead, the *Baumgart* court took all of the criteria into account; the result was not a least-change map.

The *Baumgart* court never contended that it was required to begin by working from the previous decade's maps. It simply noted that in the instant case, this was "the most neutral way it could conceive" to undertake its work. *Id.* at *7. There was greater neutrality there, because the previous decade's maps had been drawn by a court, without the partisan implications that characterize Wisconsin's current legislative maps in Wisconsin. Those maps have been found by a federal

work, asking the Court to *start* with maximizing retention of the previous districts before considering the mandatory redistricting criteria.

court to be one of the most extreme partisan gerrymanders in the country, which is why the current legislature—created by that gerrymander—wants to perpetuate them. *See infra*, Section III; *Whitford*, 218 F. Supp. 3d at 898, 910. Given the 2011 maps' stark departure from mandatory and traditional redistricting criteria, it would be inappropriate, and contrary to legal requirements, to use them as a template for a new apportionment. *Id.* at 912.

Petitioners' original petition also quotes *Prosser*, 793 F. Supp. 859, in support of a least-change approach. (Pet. ¶35) But the *Prosser* court described its approach as one that "creates the least perturbation in the political balance of the state" because comparing party submissions lead the court to conclude "that the court plan is the least partisan," *id.* at 871, not because it had the greatest core retention. Indeed, neither the phrase "least-change" nor "core-retention" appears in the *Prosser* opinion.

Finally, the court opinion evaluating the state legislative districts adopted in 2011 provides no support for Petitioners' least-change approach. The *Baldus* court lamented the massive changes wrought by 2011 Wisconsin Act 43 (the current state legislative district plan in effect) from the previous decade's plan drawn by the *Baumgart* court:

> Only 323,026 people needed to be moved from one assembly district to another in order to equalize the populations numerically, but instead Act 43 moves more than seven times that number—2,357,592 people—for a net change that results in districts that are roughly equal in size. Similarly, only 231,341 people needed to move in order to create equal senate districts, but Act 43 moves 1,205,216–more than five times as many. Even accepting the argument urged by the [Government Accountability Board] that one cannot change one district without affecting another, these are striking numbers.

Baldus, 849 F. Supp. 2d at 849. Notwithstanding Act 43's abject rejection of core retention,[8] the *Baldus* court found Act

[8] Act 43's overall retention rate of the core populations of districts adopted by the *Baumgart* court in 2002 was between 64.8% and 66.3%, *see* I.P. App. at 069 ¶267, 099 ¶402, whereas the core retention rate under S.B. 621 is 84.14%, Memorandum, LRB-5017/1 and LRB-5071/1 State Legislative Data (Oct. 20, 2021), https://drawyourdistrict.legis.wisconsin.gov/download/Sen_LeMahieu_a

43 legally sufficient, save for two Assembly districts in Milwaukee that violated Section 2 of the Voting Rights Act. *See id.* at 859. In other words, *Baldus* embodies an approach that consciously did not maximize core retention, and therefore provides no support for Petitioners' least-change approach.[9]

If this Court determines it is desirable to consider current district boundaries and core retention (as a potential traditional redistricting criterion) in reapportioning

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nd_Speaker_Vos_LRB_5017_and_5071.pdf (last accessed Oct. 24, 2021).

[9] It is accurate that moving individuals between districts can result in some staggered-term disenfranchisement of Senate voters, because odd- and even-numbered districts elect Senators in different years, and that this issue can be somewhat reduced by keeping voters in their previous Senate districts, or at least a correspondingly odd- or even-numbered district. But courts drawing legislative districts in Wisconsin have weighed this reality, and it has not led them to jettison express state constitutional requirements in favor of a least-change, or even a least-staggered-term disenfranchisement, approach. *See Baldus*, 849 F. Supp. 2d at 852 (citing *Donatelli v. Mitchell*, 2 F.3d 508, 515-16 (3d Cir. 1993); *Republican Party of Or. v. Keisling*, 959 F.2d 144, 145-46 (9th Cir. 1992)) ("Some degree of temporary disenfranchisement in the wake of redistricting is seen as inevitable, and thus as presumptively constitutional, so long as no particular group is uniquely burdened.").

Wisconsin's legislative maps, it can do so only ***after*** satisfying the mandatory constitutional and statutory criteria. *See supra*, Section I.A. Any other approach would erase these mandates from the law and insert—absent any textual grounding—a new approach in their place.

It is also wholly incorrect that a least-change approach is sufficient to satisfy the decennial reapportionment requirement, which, absent action by the political branches, falls to the courts. "[R]epresentative democracy cannot be achieved merely by assuring population equality across districts … factors like homogeneity of needs and interests, compactness, contiguity, and avoidance of breaking up counties, towns, villages, wards, and neighborhoods are all necessary to achieve this end." *Baldus*, 849 F. Supp. 2d at 850 (citing *Prosser*, 793 F. Supp. at 863) (internal quotation marks omitted).

D. Endorsing A Least-Change Approach Gives The Political Branches An Incentive To Shirk Their Constitutional Duties.

Finally, should the Court be tempted to consider a "least-change" approach, it should consider the long-term implications of setting such a precedent. Adopting a continuation of the status quo will disincentivize compromise and action on this topic by the political branches.[10] Any actor that believes a court will be more inclined to hold in its favor—whether that actor is a legislative chamber or a governor—will be encouraged to seek impasse and pass the redistricting buck to this Court or to the federal courts, confident that the judicial branch will provide it with greater partisan advantage than would a negotiated political process. *See* Nicholas O.

[10] *See, e.g.*, Justice Prosser's concerns about disincentivizing political compromise in redistricting process: "We would be saying, 'Legislature, we want you to do your thing, but we are here and ready to take over if you fail.' That's almost like an invitation to fail."Wisconsin Supreme Court Open Administrative Conference on April 8, 2008, at 1:58:10. Available at https://wiseye.org/2008/04/08/supreme-court-rules-hearing-and-open-administrative-conference-part-3-of-4/.

Stephanopoulos, *Arizona and Anti-Reform*, 2015 U. Chi. Legal F. 477, 499, 501 Figure 1 (2015) ("In every model, the presence of divided government is linked to a statistically significant (and reasonably large) decrease in the absolute value of the efficiency gap.").[11]

Enabling—or, more accurately, guaranteeing—such a calculus would nearly ensure that the courts must step in and handle redistricting every decade. *See* Yablon, *supra*, p. 54.

Further exacerbating the problem, a political actor incentivized to resist any compromise and press the courts to perpetuate its advantage for another decade will achieve its desired result without a need to accept political responsibility for that result. Instead, it will be this Court that gets saddled with any public blowback for both incentivizing political

[11] *Available* at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=12153&context=journal_articles (last accessed Oct. 25, 2021).

impasse and then adopting maps slanted in the same way as the prior maps were. If the Court seeks to remove itself or the federal courts from the business of adopting new state legislative districts, in favor of the political branches working together to find a negotiated compromise on maps in future cycles, it should not make the results of impasse predictable, thereby removing all risk for political actors that fail to meet their charge under the Wisconsin Constitution.

* * *

In sum, the text of the Wisconsin Constitution, settled canons of construction, precedent, and policy concerns all point in the same direction: this Court should reject Petitioners' request to radically alter Wisconsin law by adopting a least-change approach.

III. The Court Must Consider Partisanship Because It Is Obligated To Ensure It Neither Intentionally Nor Unintentionally Imposes A Partisan Gerrymander.

This Court must consider the partisan effects of the maps it imposes. Doing so is necessary to discharge the Court's obligation to ensure it does not impose a partisan gerrymander—intentionally or not.

The Wisconsin Constitution guarantees Wisconsin citizens that "[t]he blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." Wis. Const. art. I, § 22. As this Court has held, the guardrails against governmental action contained in section 22 of the Declaration of Rights are not mere puffery, but rather "an 'implied inhibition' against governmental action" that is unjust, immoderate, intemperate, contrary to frugality and virtue, and antithetical to the fundamental principles of democracy. *Jacobs v. Major*, 139 Wis. 2d 492,

508-09, 407 N.W.2d 832 (1987). That this inhibition is "implied" does not mean it is weak; rather section 22's limits operate "with quite as much efficiency as would express limitation, as this court has often held." *Id*. (quoted source omitted).

Wisconsin law requires redistricting to occur "anew," Wis. Const. art. IV, § 3, each decade, and whether that task falls to the Legislature and Governor or to this Court, "justice, moderation, … [and] recurrence to fundamental principles," Wis. Const. art. I, § 22, compel a concerted effort to avoid a map that bakes in a benefit for one political party. This is so, as the U.S. Supreme Court has repeatedly said, because "[e]xcessive partisanship in districting leads to results that reasonably seem unjust," *Rucho*, 139 S. Ct. at 2506,[12] and

[12] The *Rucho* Court's conclusion that federal courts lack Article III jurisdiction to adjudicate partisan gerrymandering claims under the First or Fourteenth Amendment neither limits federal courts' obligations to ensure they do not impose remedial plans that function as partisan gerrymanders nor constrains the power of state courts to enforce the

"partisan gerrymanders ... are incompatible with democratic principles," *Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 791. Democracy fails when elected representatives choose their voters to perpetuate their own election and lose any "habitual recollection of their dependence on the people." *Id*. at 824 (quoting The Federalist No. 57, at 350 (J. Madison)); *see also* Wis. Const. art. I, § 1 (recognizing that governments "deriv[e] their just powers from the consent of the governed"). This Court must ensure that it does not judicially sanction a plan that sorts voters by their political beliefs, cracking and packing voters of one party to the benefit of the other party.

This Court must not—intentionally or otherwise—favor one viewpoint over another in exercising the power to define

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guarantees of either the federal or state constitutions. Indeed, this Court has held that, in enforcing article I, section 22 of the Wisconsin Constitution, "the judiciary is the judge as to what is beyond the boundaries of reasonable regulation and in the domain of destruction." *State ex rel. Milwaukee Med. Coll. v. Chittenden*, 127 Wis. 468, 107 N.W. 500, 518 (1906), cited in *Jacobs*, 139 Wis. 2d at 508-09.

the groundrules under which the state will be governed for the next decade. The guardrails that the framers of Wisconsin's Constitution (echoing George Mason) paid homage to in article I, section 22—adherence to justice, moderation, temperance, frugality, and fundamental democratic principles—require this Court not to ignore how the redistricting plans it considers and adopts will affect the ability of Wisconsinites to translate their votes into electoral outcomes. To the contrary, section 22 compels this Court to analyze that question in light of justice, moderation, temperance, and respect for democratic principles.

A conclusion that this Court should be willfully blind to the partisan implications of maps before it would be an abject abdication of the obligation to ensure the "[m]aintentance of free government." Wis. Const. art. I, § 22. Indeed, section 22's limits on governmental power are at their apex in reviewing and imposing apportionment plans. Through decennial apportionment a state defines how the first branch of

government will be elected and whether representation will be real or distorted; a "firm adherence" to the principles of section 22 in the redistricting context, more so than any other governmental action, is necessary to ensure "the blessings of a free government." *Id.*

Indeed, this Court and other courts have routinely assessed the partisan effects of plans to ensure the judiciary does not wittingly or unwittingly lend its imprimatur—and subject the citizens whose equality and liberty they serve—to a partisan gerrymander. In this Court's earliest forays into judicial review of apportionment decisions, it assessed the partisan motivations animating a malapportioned districting plan. In surveying that history, the Court summarized almost 60 years ago: "It is true that the court in the *Cunningham* Cases found that the scheme of apportionment, held to be inconsistent with art. IV, was designed to preserve the power of the majority party." *Zimmerman*, 22 Wis. 2d at 566 (citing *Lamb*, 83 Wis.

at 146; *State ex rel Atty. Gen. v. Cunningham*, 81 Wis. 440, 484, 51 N.W. 724 (1892)). While in that case the ultimate violation was of the requirement to have as equal population among districts as possible, the Court considered the partisan purpose of that violation in its assessment. *Id*.

Courts across the country seek to avoid partisan unfairness by considering the partisan makeup of districts when creating districts to remedy malapportionment violations. *See, e.g.*, *Avalos v. Davidson*, No. 01CV2897, 2002 WL 1895406, at *8 (D. Colo. Jan. 25, 2002); *Balderas v. Texas*, No. 6:01CV158, 2001 WL 36403750, at *3 (E.D. Tex. Nov. 14, 2001); *Diaz v. Silver*, 978 F. Supp. 96, 102-04 (E.D. N.Y. 1997); *Good v. Austin*, 800 F. Supp. 557, 566 (E.D & W.D. Mich. 1992); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 659 (N.D. Ill. 1991).

So, too, in Wisconsin. In the *Prosser* case, a federal court was charged with creating maps to remedy a

malapportionment violation in our state. In doing so, the court considered the partisan effects of the maps submitted by the parties and the theoretical map it might create. The *Prosser* court emphasized the specific duty of courts when they "are not reviewing an enacted plan" but are instead "comparing submitted plans with a view to picking the one (or devising [their] own) most consistent with judicial neutrality." 793 F. Supp. at 867. At bottom, "[j]udges should not select a plan that seeks partisan advantage," and must not favor a plan that ensure "that one party can do better than it would do under a plan drawn up by persons having no political agenda." *Id*; *see also Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 629 (D.S.C. 2002) ("[I]t is inappropriate for the court to engage in political gerrymandering."). Ultimately, the *Prosser* court crafted its own map for Wisconsin, highlighting that such an approach seemed "least partisan." 793 F. Supp. at 871.

It is essential that this Court not blind itself to the partisan effects of maps it considers and adopts. The unsubtle elephant in the courtroom is the fact that Wisconsin's existing legislative maps comprise extreme partisan gerrymanders in favor of Republican politicians. Indeed, no one—probably not even the Legislature—would contend that the existing state Assembly and Senate district lines reflect an exercise in "moderation," "temperance," or frugality." Wis. Const. art. I, § 22. Indeed, the map-drawers named the GIS files "assertive" and "aggressive" to reflect the magnitude of their skew in favor of Republicans, *Whitford*, 218 F. Supp. 3d at 849. The current state Assembly plan was found by a three-judge federal court, whose findings regarding the map were never overturned, to be an intentional, severe partisan gerrymander. *Id.* at 910. ("[T]he plaintiffs have established, by a preponderance of the evidence, that Act 43 burdens the representational rights of Democratic voters in Wisconsin by impeding their ability to translate their

votes into legislative seats, not simply for one election but throughout the life of Act 43.").

Consider just one stark example of the gerrymander's impact: President Biden, who won the state of Wisconsin by 20,682 votes in his 2020 election,[13] carried only 37 of the 99 Assembly districts under the current maps. Accordingly, were this Court to decline to consider the partisan makeup of districts in evaluating enacted or proposed maps, it would risk approving a clear partisan gerrymander.

Last week, the Legislature unveiled proposed maps (S.B. 621) that would exacerbate the existing gerrymander. Under this new map, President Biden would have carried just 35 of the 99 seats—two fewer than under the current map. And while the Legislature contends that "least change" and "core

[13] Wisconsin Elections Commission Canvass Reporting System, County by County Report 2020 General Election 5, *available at* https://elections.wi.gov/sites/elections.wi.gov/files/County%20by%20County%20Report%20-%20President%20of%20the%20United%20States%20post%20recount.pdf.

retention" are districting principles to which it adheres, 2011 Act 43 flagrantly departed from both of these concepts to create the existing gerrymander. The Legislature now advances least-change and core-retention arguments only when doing so would advance its partisan interests. Indeed, even now the Legislature jettisons those professed principles; to flip Districts 14 and 24 from seats won by President Biden to seats former President Trump would have carried, S.B. 621 would retain just 40.3% of District 14's existing geography and 55.1% of District 24's. For the current residents of those districts, this proposal is anything but a least-change or core-retention approach.

If this Court declines to consider partisan effects while redistricting, there could be significant undemocratic consequences regardless of the intention. "It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality

without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). In addition to the risk of creating a partisan gerrymander by adopting maps drawn anew without partisan consideration, it is almost certain that a partisan gerrymander will result if this Court adopts maps only slightly altered from the maps currently in effect. *See supra*, Section II.

As the prior paragraphs discuss, Wisconsin's current district plan is a severe partisan gerrymander, as is the map most recently put forward by the Legislature. The adoption of a plan like that proffered in S.B. 621 would be a judicial cementing of a partisan gerrymander in violation of court redistricting principles, *see Prosser*, 793 F. Supp. at 867, and the Wisconsin Constitution, *see* Wis. Const. art I, § 22.

Justice is not blind when courts blind themselves to facts. Especially when it is no secret what those facts reveal.

To fulfill its obligations under the Wisconsin Constitution, and to ensure judicial neutrality, the Court must invite information about the political facts presented by the maps it considers and must acknowledge the practical implications of any maps the Court ultimately blesses or adopts.

IV. Any Litigation Process Must Allow For Developing Evidence And Holding A Trial.

Any litigation process this Court adopts for this case must be geared towards an eventual trial on the merits before the Court. It must also allow adequate time for the Court to adopt maps before the currently scheduled federal trial.

This Court should adopt a process that allows for a trial on the merits to the Court the week of January 10, 2022, and a final decision no later than January 21, 2022. To accomplish a mid-January trial, the BLOC Petitioners propose the following schedule:

Substantive Action	Date
Court Issues Determination of Factors to Evaluate Maps	11/15/2021
Discovery Commences	11/19/2021
Expert Reports Due	12/3/2021
Rebuttal Expert Reports Due	12/24/2021
Discovery Closes	12/30/2021
Pre-Trial Briefs Due	1/7/2022
Trial	1/10/2022 through 1/14/2022
Court Approves Final Legislative Maps	1/21/2022

Below is an explanation of each recommended action and timeline.

A. The Court Must Allow The Parties To Develop Evidence.

Discovery is a necessary precondition for a trial that will attempt to discern facts through the crucible of public, adversarial litigation. A truncated discovery schedule will allow all parties to test and evaluate any proposed maps. That, in turn, will lead to a more efficient and comprehensive presentation of evidence for the Court.

Before discovery can commence, this Court should determine the criteria it will use to evaluate maps so that the parties can focus their discovery, especially of the other parties' experts, on those criteria. This Court's October 14, 2021 Order requested briefing on the four questions addressed in this brief. In light of briefing on the first three questions, the Court should determine the evaluative factors it will use and notify the parties of its determinations before discovery begins. That will allow all parties to plan for trial during the discovery process. The BLOC Petitioners propose that the Court declare its criteria no later than November 15, 2021. That date permits all parties to review their maps in accordance with Court-mandated criteria and make necessary adjustments prior to discovery and trial.

After identifying the evaluative factors, discovery can commence. Assuming the Court determines its evaluation criteria on November 15, 2021, the BLOC Petitioners propose

that discovery commence on November 19, 2021, and close on December 30, 2021. Given the brief discovery window and limited time to prepare for trial, parties should be prepared to respond to discovery demands on an expedited basis. Discovery must include disclosure of proposed maps and any underlying data used to draw those maps. The underlying data will be critical for each party to understand how other parties' proposed maps were drawn, how those processes align with (or deviate from) the Court-delineated factors, and to properly advise the Court of the perceived strengths and weaknesses of each proposed map.

Multiple parties will assuredly propose maps for this Court's consideration. Any proposed map must be supported by an expert opinion. To ensure an orderly discovery process, the BLOC Petitioners propose that parties would submit expert reports by December 3, 2021. Depositions of those experts presumably would occur as soon as possible after reports are

exchanged, but no later than December 20, 2021. All parties would be permitted to submit rebuttal expert reports by December 24, 2021.

To aid the Court's review of all the proposed maps, the BLOC Petitioners suggest that parties submit pre-trial briefs by January 7, 2022. These briefs would support the merits of a party's proposed maps, and critique maps submitted by other parties.

B. The Court Should Hold a Trial on the Merits the Week of January 10, 2022.

The BLOC Petitioners propose a trial to the Court the week of January 10, 2022. A trial of between three and five days, with special procedures, would provide sufficient time for all parties to present maps and cross-examine experts.

For the presentation of evidence at the trial, the BLOC Petitioners propose that all expert reports and maps be admitted without any direct examination. Rather, the reports and maps

themselves would serve as each expert's direct testimony. However, any parties proposing maps must subject their experts to cross-examination by the Court and all parties. The federal panel in *Baumgart* used a similar process for its redistricting trial in 2002.[14] Judge Conley recently used this method of admitting expert testimony in a spring of 2020 election case. *See Democratic Nat'l Comm. v. Bostelmann*, 488 F. Supp. 3d 776 (W.D. Wis. 2020). By allowing expert reports in lieu of direct examination, the Court will save countless hours of testimony and allow the parties to focus only on cross-examining other experts.

It is anticipated that a majority of the nine parties to this proceeding will present their own maps and proffer one or more experts to testify in support of the maps. Assuming that

[14] The *Baumgart* decision does not explicitly state how it conducted the trial, except one reference to an expert testifying by affidavit. But counsel for the BLOC Petitioners are familiar with how the federal court conducted this proceeding.

the Wisconsin Elections Commission does not propose any maps, that leaves potentially at least eight experts to testify at trial. Testimony could be taken for eight hours each day, with time allotted for each party to cross-examine each expert, and for the Court to ask questions of each expert. This proposal properly balances the need for an efficient trial, while also allowing every party the opportunity to test maps through the crucible of litigation.

A trial would likely include only expert witnesses. While fact witnesses may be necessary depending on what criteria the Court establishes, and the possibility that they might need to testify at trial cannot be ruled out before a record has even been developed, fact witnesses will likely not play a prominent role in this litigation. Even if fact witnesses are necessary, their testimony could potentially be admitted via deposition transcript or recorded video. Therefore, it is likely any trial would be limited to expert testimony.

The BLOC Petitioners also posit that opening statements would be unnecessary for this trial. Since under the BLOC Petitioners' proposal the parties would submit pretrial briefs, opening statements would be superfluous. However, the Court should allow time for all parties to make closing arguments, which could occur on the final day of the trial, or the following day.

A three-to-five-day trial would be in line with previous redistricting litigation. In *Whitford*, the federal court conducted a four-day trial to determine whether Wisconsin's current maps were unconstitutional due to partisan gerrymandering. In *Baldus*, the court conducted a two-day trial to evaluate whether Milwaukee-area Assembly districts were unconstitutional. Thus, a three-to-five-day trial would be consistent with prior cases involving redistricting disputes and allow adequate time for all parties and the Court to cross-examine expert witnesses.

C. The Court Should Issue Its Final Apportionment Plan by January 21, 2022.

The federal panel has reserved the week of January 31, 2021 for a legislative reapportionment trial. Therefore, this Court must have its maps in place by January 21, 2022 to allow time for adequate, orderly federal review.

While federal courts must defer to state redistricting proceedings, final maps adopted by this Court are still subject to review. As the U. S. Supreme Court stated in *Growe v. Emison*, the "federal court was empowered to entertain … claims relating to legislative redistricting only to the extent those claims challenged the *state court's* plan." 507 U.S. 25, 36 (1993) (emphasis in original). This directive is clear. Any maps created by this Court remain subject to review and collateral attack. Accordingly, this Court must allow sufficient time for federal courts to review maps adopted by this Court. As the BLOC Petitioners have previously argued, Wisconsin's

elections statutes clearly require that final maps be in place no later than March 14, 2022. If the Court finalizes its legislative maps by January 21, 2022, that will leave enough time for the federal panel to review those maps, and time for any possible appeal to the U.S. Supreme Court, before the March 14, 2022 deadline.

CONCLUSION

For the reasons argued above, the BLOC Petitioners urge the Court to accept their answers to the four questions posed by the Court. Those answers:

(1) delineate the relevant considerations as this Court assesses possible apportionment maps;

(2) reject Petitioners' proffered least-changes approach as irreconcilable with the Wisconsin Constitution, applicable legal standards, and precedent;

(3) recognize the necessity of considering the partisan impact of any apportionment maps considered; and

(4) adopt a schedule and procedures that allow for efficient discovery, a three-to-five-day trial that allows for cross-examination and closing arguments, and concludes this Court's function by January 21, 2022, leaving time for adequate, orderly federal review before maps must be in place under Wisconsin's election statutes.

Dated: October 25, 2021.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief, exclusive of the caption, Table of Contents, and Table of Authorities, is 10,279 words.

Dated: October 25, 2021.

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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.

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CERTIFICATION BY ATTORNEY

I hereby certify that filed with this brief is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 25th day of October, 2021. Signed:

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