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

RESPONSE 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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INTRODUCTION

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ARGUMENT

I. THE COURT SHOULD APPLY MANDATORY APPORTIONMENT REQUIREMENTS AND TRADITIONAL DISTRICTING CRITERIA.

The Court confronts this case with defined lines for what it must, should, and should not consider. The briefs reveal broad consensus on the BLOC Petitioners' articulation of these criteria,[1] centered on state and federal constitutional and statutory criteria governing Wisconsin's state-legislative-district apportionment, such as contiguity, compactness, and respect for political subdivisions. As noted, the Court may also

[1] *See, e.g.*, Evers Br. at 5-8; Hunter Br. at 18-32; Citizen Mathematicians and Scientists Br. at 4-19.

consider established, traditional districting criteria including communities of interest. (*See* BLOC Br. 3-22) In a balanced analysis, the criteria seek to serve the overall goal of "equality of representation" for Wisconsinites. *Reynolds v. Zimmerman*, 22 Wis. 2d 544, 556, 126 N.W.2d 551 (1964).

The parties part ways in that the Legislature, Congressmen, and Johnson Petitioners—in various articulations, one more extreme than the next—all contend that this Court's primary obligation is to arrogate the Governor's role, abrogate his veto, and impose as law the Legislature's preferred (but rejected) partisan gerrymander. These contentions, whether given benign labels like "core retention" or "least change," or more alarmingly, the Legislature's contention that its vetoed map necessarily ***is*** law, amount to a "supreme legislature" theory that the U.S. Supreme Court has rejected and that is inimical to the Wisconsin Constitution's separation of powers.

A. The Legislature Does Not Have Supreme Authority To Establish Wisconsin's Maps.

The Wisconsin Constitution has three coequal branches of government, not one supreme legislature that can dictate how the government will be formed for a decade to come.

As this Court has explained, "[l]ike its federal counterpart, [o]ur state constitution ... created three branches of government, each with distinct functions and powers." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶11, 376 Wis. 2d 147, 897 N.W.2d 394 (quoted source omitted). This structure is "the central bulwark of our liberty." *Serv. Emps. Int'l Union, Local 1 v. Vos,* 2020 WI 67, ¶30, 393 Wis. 2d 38, 946 N.W.2d 35. The three branches each check one another's power. "Checks and balances are designed to promote government accountability and deter abuse. The breakdown of checks and balances tends to make government power unaccountable." *Panzer v. Doyle*, 2004 WI 52, ¶52, 271 Wis.

2d 295, 680 N.W.2d 666. While checks and balances make "the legislative process … an arduous one[,] that's no bug in the constitutional design: it is the very point of the design." *Koschkee v. Evers*, 2019 WI 76, 387 Wis. 2d 552, 929 N.W.2d 600 (Grassl Bradley J., concurring) (quoting *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring)).

The Legislature boldly claims that in the event of a gubernatorial veto, the Court should uncritically accept its proposed (but rejected) maps because they somehow amount to "an expression of the policies and preferences of the State." (Leg. Br. at 19) If anything, the opposite is true: the Court should give no deference to the Legislature's maps that, in the event of a veto, have been considered and plainly ***failed*** to become law through Wisconsin's legislative process. Bills that are vetoed ***are not law***: they reflect ***rejected*** policy ideas and have no legal effect. Wis. Const. art. V, § 10. A contrary rule

would grant the Legislature—without the necessary two-thirds vote, *see id.*—and the Court, with an untethered, atextual power to override the Governor's veto. This contravenes our constitutional separation of powers. *See, e.g.*, *Gabler*, 2017 WI 67, ¶11. The Legislature's desire to arrogate supreme and unilateral power when it comes to apportionment is incompatible with the Wisconsin and U.S. Constitutions, precedent, and longstanding practice; the Court should reject this dangerous argument.

The Legislature's citation to the grant of authority to the "Legislature" in the U.S. Constitution's Elections Clause is misplaced. The U.S. Supreme Court has rejected that very reading, holding that "'the Legislature' ***d[oes] not mean the representative body alone***" but instead broadly encompasses the State's "power that makes laws" consistent with a state's constitution. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 805, 813-14 (2015)

(quoting *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, (1916)) (emphasis added). In other words, the Elections Clause's use of "the Legislature" is a reference to the legislative "function," including the function of apportionment, as each state constitution delineates that process. *Smiley v. Holm*, 285 U.S. 355, 365-66 (1932).

Although the Legislature's brief repeatedly plucks isolated language from cases to suggest state legislatures have primacy in districting, those references are merely shorthand for the legislative function of a State as a sovereign.[2] More

[2] The Legislature leans heavily on cases noting that courts afford legislatures the opportunity to propose remedial plans when a state plan is invalidated. (*See* Leg. Br. at 18-20.) But where the state's ***legislative process*** fails—such as where the Governor vetoes the remedial proposal of the legislature—the courts grant no deference to the remedial map adopted by the legislature. For example, after the U.S. Supreme Court invalidated Virginia legislative districts as racial gerrymanders, the three-judge court ruled that it would "allow the Virginia General Assembly until October 30, 2018 to construct a remedial districting plan." *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 181 (E.D. Va. 2018). The legislature set out to construct remedial plans, but as the Legislature later reported to the court, the Governor announced his intent to veto the legislature's plan. P-I App. 146, Virginia Gen. Assembly's Status Report at 4, *Bethune-Hill*, No. 3:14-cv-00852-REP-AWA-BMK (Oct. 5, 2018), Doc. 275; *see id.* at 5 ("Without assistance from the Governor in being

accurately: "the Constitution leaves with the ***States***"—not solely their legislatures—"primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 507 U.S. 25 (1993) (emphasis added). Under the Wisconsin Constitution, the apportionment function follows the normal legislative process of bicameralism in the Legislature and presentment to the Governor to enact or veto the proposed maps, just like any other law. Wis. Const. art. IV, §§ 3, 4; art. V, § 10; *accord Zimmerman*, 22 Wis. 2d at 554-59. Thus, Wisconsin's "legislative authority" over apportionment "includes not just the two houses of the legislature" but also "a make-or-break role for the Governor" through the gubernatorial veto. *Ariz. Indep. Redisticting Comm'n*, 576 U.S. at 806 (citing *Smiley*, 285 U.S. at 365-66). This is the norm among the states, with

willing to compromise, [the General Assembly] do[es] not see how a legislative solution is possible."). The court ordered its own remedial plan.

only five following a legislative mapmaking process that expressly excludes the Governor. But the states that have decided to provide their legislature supremacy over apportionment have an express state constitutional basis for doing so. *See, e.g.*, N.C. Const. art. II, § 22(5) (explicitly exempting districting maps from gubernatorial veto). Wisconsin has not made this decision, and nothing in the Wisconsin Constitution suggests decades of unbroken practice and unambiguous precedent are wrong.[3]

Indeed, as this Court reasoned in this case only weeks ago, although the "Constitution places primary responsibility for the apportionment of Wisconsin legislative districts on the legislature," the State's "[r]edistricting plans must be approved by a majority of both the Senate and Assembly, ***and are subject***

[3] The Wisconsin Constitution is explicit when it grants exclusive power to the legislature. *See, e.g.*, Wis. Const. art. IV, § 7 ("Each house shall be the judge of the elections, returns and qualifications of its own members ...."); *id.*, § 8 ("Each house may determine the rules of its own proceedings ....").

to gubernatorial veto." Order, Sept. 22, 2021 at 2 (citing Wis. Const. art. IV §§ 3, 4, art. V, § 10) (emphasis added); *see also id.* at 11 (Grassl Bradley, J., concurring) (collecting cases and concluding that in a functional process, "the political ***branches***—not the judiciary—would implement a redistricting plan after every decennial census") (emphasis added). The Court recognized that applying bicameralism and presentment requirements to apportionment is firmly rooted in ***both*** the Wisconsin Constitution and established precedent holding that "both the governor and the legislature are indispensable parts." *Id.* at 2 (majority) (summarizing *Zimmerman*, 22 Wis. 2d at 558). The *Zimmerman* Court dispensed with the same argument the Legislature attempts to revive, holding that there was "no reason why the constitutional framers should have intended that the congressional redistricting must be by law but that legislative redistricting might be by action of the legislature alone." 22 Wis. 2d at 554. And the same argument

that the apportionment "power [is] entirely within the discretion of the legislature" was long ago before the Court, which has never accepted any rule other than requiring the apportionment "legislative power [be] executed in the form of a law, approved by the governor, and published in the general laws" which "is not now open to question." *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 505-506, 51 N.W. 724 (1892) (Pinney, J., concurring).

Moreover, the proffered "supreme legislature" rule has no basis in history or practice. At no time in Wisconsin's past has the Legislature been able to claim the apportionment power for itself to the exclusion of the Governor's role in the lawmaking process. This "[l]ong settled and established practice" has "great weight in a proper interpretation of constitutional provisions" governing Wisconsin's distribution of apportionment authority, *see Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (citation and quotations omitted), and

this history "is especially" pertinent here "in the case of constitutional provisions governing the exercise of political rights, and hence subject to constant and careful scrutiny," *Smiley*, 285 U.S. at 369.

Thus, the Legislature's appeal to constitutional avoidance of a contrived "lurking constitutional question" (Leg. Br. at 20) as a means of resurrecting the "supreme legislature" argument rings hollow. There is nothing to avoid. This Court has repeatedly (and again as recently as weeks ago) decided the issue the Legislature claims should be avoided. Precedent already reinforces that the Legislature is a creation of the Constitution, and that its insistence upon unilateral power over apportionment would exceed its legitimate authority, in violation of Wisconsin's constitutional structure and basic separation-of-powers principles.

B. "Core Retention" of Prior Districts Is a Secondary Consideration.

Retaining the core of existing districts ***can be*** a legitimate secondary consideration in the apportionment process, though it is not mandatory, overriding, or context-free. The Court should reject attempts to use the core-retention consideration as a Trojan horse to impose through another name the least-change approach, which has no basis in Wisconsin law or historical practice. *See* Section II, *infra*.

Unlike the apportionment considerations listed above, nothing in the Wisconsin Constitution instructs mapmakers to consider core retention of prior districts, *see, e.g.*, Wis. Const. art. IV, §§ 4, 5, and it is frequently ***not*** included in the U.S. Supreme Court's lists of recognized traditional districting criteria, *see, e.g.*, *Evenwel v. Abbott*, 576 U.S. 54, 136 S. Ct. 1120, 1124 (2016); *Shaw v. Reno*, 509 U.S. 630, 647 (1993). In fact, Wisconsin law suggests that this factor is entitled to

less weight than in other jurisdictions because the State must "apportion and district anew" every decade. Wis. Const. art. IV, § 3.

The Court should reject the argument in several briefs that strains authority in an attempt to argue that core retention is a ***mandatory*** factor that somehow overrides those considerations expressly stated in the Wisconsin Constitution and established in binding precedent.[4] Core retention is merely one among many listed considerations that "might justify" districting decisions, but its weight depends on "case-by-case attention to the[] factors" that must ensure using the criterion actually produces a neutral, "nondiscriminatory" result. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). Given the circumstances here, the Court should give core retention little weight for three reasons.

[4] *See, e.g.*, Pet'rs Br. at 15-19; Leg. Br. at 37-40; Congressmen Br. at 14-15.

First, overemphasizing core retention is improper because, "consistent with judicial neutrality," this Court must not apply criteria that would effectively reinstall "a plan that seeks partisan advantage." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶12, 249 Wis. 2d 706, 639 N.W.2d 537 (quoting *Prosser v. Elections Bd.*, 793 F. Supp. 859, 867 (W.D. Wis. 1992)). The Court must instead "appl[y] th[e] factor in a manner free from any taint of arbitrariness or discrimination," *Brown v. Thomson*, 462 U.S. 835, 843 (1983) (citation omitted), by following the path of numerous courts that have refused to legitimate using "core retention" as a cloak for boosting partisan favoritism, *e.g.*, *Larios v. Cox*, 300 F. Supp. 2d 1320, 1333-34 (N.D. Ga.) (three-judge court), *aff'd,* 542 U.S. 947 (2004); *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 678 (M.D. Pa. 2002). Passively retaining cores of Wisconsin's existing districts, which effect an extreme partisan gerrymander, would place this Court's imprimatur on that

aggressive partisan scheme. Just as "judicial interest should be at its lowest ebb when a [mapmaker] purports fairly to allocate political power to the parties in accordance with their voting strength," the inverse is true when the mapmaker has sought to entrench minority party rule. *See Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

Second, unlike states with a "strong historical preference" for "maintaining core districts," *Abrams v. Johnson*, 521 U.S. 74, 99-100 (1997), Wisconsin has no such history. Of 50 states, only eight directed legislative mapmakers to consider core retention during the last round of decennial apportionment, and just six required preserving the cores of past districts.[5] Wisconsin's express constitutional apportionment criteria, by contrast, make no reference to core

[5] Yunsieg P. Kim & Jowei Chen, *Gerrymandered by Definition: The Distortion of "Traditional" Districting Criteria and A Proposal for Their Empirical Redefinition*, 2021 Wis. L. Rev. 101, 174 (2021) (surveying states' criteria), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3543820.

retention. And in practice, Wisconsin has no "longstanding rule against" moving voters between districts, *cf. Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 761 (2012), nor does it have a stated "long history of … recogniz[ing] the advantages" purportedly derived from core retention, *cf. Abate v. Mundt*, 403 U.S. 182, 186 (1971). Instead, apportionment cases in Wisconsin that have considered core retention did so only in the context of using a neutral court-drawn map as the benchmark. *See Baumgart v. Wendelberger*, Nos. 01-C-0121 & 02-C-0366, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002). The Court need look no further than the "striking numbers" of voters shifted during last districting cycle to know that core retention is not a sacrosanct requirement in this State. *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. 840, 849 (E.D. Wis. 2012).[6]

[6] For the Assembly map in 2010, "[o]nly 323,026 people needed to be moved" but "Act 43 moves more than seven times that number—2,357,592 people," and for the Senate map, "only 231,341 people needed

Third, the entire purpose of apportioning state-legislative districts every decade is for the new census data "to be the basis of such apportionment" in a way that reflects ***changes*** in the composition of the State over the past ten years. *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 149, 53 N.W. 35 (1892). Giving core retention more weight than it is due would ignore the present reality in Wisconsin in favor of locking in place "vestige[s] of the dead past" for another decade. *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 722 n.8 (1964)

(map not redrawn after decennial census held unconstitutional).

The Court should not give core retention undue weight. The Court should instead follow the path taken by other courts that have secondarily considered core retention and found it

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to move … but Act 43 moves 1,205,216–more than five times as many." *Id.*

sufficiently furthered even when other considerations necessitate moving district lines in a way that substantially deviates from the prior core.[7] In sum, the core-retention consideration is flexibly applied and subservient to other mandatory and traditional criteria; it is not an unyielding prerequisite. This Court should consider core retention as a relevant, though less weighty, factor in the apportionment process, always conscious that core retention is not a neutral

[7] *See, e.g.*, *Favors v. Cuomo*, No. 11-cv-5632, 2012 WL 928216, at *15 (E.D.N.Y. Mar. 12, 2012) (finding a "Plan achieves substantial core preservation" even where "three districts are comprised of between 60% and 70% of a prior district, [and] four districts are comprised of between 50% and 60% of a prior district"); *Johnson v. Miller*, 922 F. Supp. 1556, 1562 (S.D. Ga. 1996) (three-judge court) (concluding factor was satisfied even though plan moved sixty-four counties into new districts); *aff'd sub nom. Abrams*, 521 U.S. 74; *Turner v. Arkansas*, 784 F. Supp. 585, 588 (E.D. Ark. 1991) (same for moving six counties and 96,164 people into new districts), *aff'd mem*., 504 U.S. 952 (1992); *Stone v. Hechler*, 782 F. Supp. 1116, 1121-1122 (N.D. W.Va. 1992) (three-judge court) (moved two counties and 47,252 people into new district); *S. Carolina State Conf. of NAACP v. Riley*, 533 F. Supp. 1178, 1180 (D.S.C. 1982) (three-judge court) (map moved six counties into new districts), *aff'd mem*., 459 U.S. 1025 (1982).

consideration but a vehicle for recycling the last decade of severe partisan distortion in Wisconsin's maps.

II. THE LEAST-CHANGE APPROACH HAS NO BASIS IN WISCONSIN LAW AND IS AT ODDS WITH THE ROLE OF THE JUDICIARY.

The "least-change" approach has no basis in Wisconsin law and is inconsistent with the role of this Court. It should be rejected for several reasons.

First, a least-change approach is foreign to Wisconsin law and, if adopted, would subjugate the legal criteria prescribed by the Wisconsin Constitution, the U.S. Constitution, and the federal Voting Rights Act ("VRA"). The Johnson Petitioners' and the Legislature's invocation of other states' cases where a "least-change" approach was followed is misplaced. ***Second***, the policy arguments the Legislature and Johnson Petitioners identify are unavailing. ***Third***, applying a least-change approach will improperly politicize this Court's work and distort its constitutional role.

A. Wisconsin law does not support a least-change approach, and that approach's use in other states is both limited in scope and inapposite here.

As discussed in Section I.B above and in BLOC's opening brief, (BLOC Br. at 22-42), Wisconsin law does not support a least-change approach. This explains why the Johnson Petitioners and the Legislature turn to cases from other states and federal courts, but those cases are procedurally distinct or apply law that differs significantly from Wisconsin law.

1. Judicial review of duly enacted maps is distinct from this Court's role to apportion new districts in the absence of an adopted plan.

The Legislature relies on cases such as *Upham v. Seamon*, 456 U.S. 37 (1982), to support its contention that this Court should make only minimal changes to the previous legislative-district map. The Legislature and the Johnson Petitioners tell this Court that it must defer to the 2011

Legislature—a political body that no longer exists—because of this Court's limited judicial role. (*See* Leg. Br. at 10 ("Redistricting decisions made by the state legislature cannot merely be cast aside.")) But in those cases, courts were assessing legal violations in plans enacted following the Census, and they were limited to remedying those specific violations. Here, there is not merely a malapportionment violation in the 2011 maps, but also a more fundamental violation of the Constitution's command that districting occur "anew" following the Census. Wis. Const. art. IV, § 3. Because the violation alleged here is the failure to adopt an entirely "[]new" plan as required by the Wisconsin Constitution—even if the existing plan were ***not*** malapportioned—this Court's remedial power is not as narrow as the Johnson Petitioners and the Legislature contend.

In *Upham*, the U.S. Supreme Court criticized a federal district court for exceeding its remedial role, making changes

to a Texas congressional plan beyond those necessary to remedy a VRA violation. But in *Upham* (like in *Abrams*, 521 U.S. 74, and *Cooper v. Harris*, 137 S. Ct. 1455 (2017), also cited by the Legislature for similar purposes), and in *Baldus*, 849 F. Supp. at 859-60, the federal district court's task was to evaluate whether a duly enacted apportionment plan complied with federal law. The case did not involve impasse; the political branches had succeeded in enacting a district plan reflecting their political priorities. *See Seamon v. Upham*, 536 F. Supp. 931, 936 (E.D. Tex.), *vacated on other grounds*, 456 U.S. 37. Although the federal district court found the enacted plan did not fully comply with governing law, the court further noted that in such situations, federal district courts are properly limited to correcting the violation. 456 U.S. at 42-44.

By contrast to cases like *Upham* that involve judicial review of enacted maps, here the Court (presumably) faces the ***absence*** of any duly enacted maps. Its task is not to review an

adopted plan, but to create the apportionment required by law because the political branches charged with the task have failed to do so. *Jensen*, 2002 WI 13, ¶10 ("Courts called upon to perform redistricting are, of course, ***judicially legislating***, that is, ***writing*** the law rather than ***interpreting*** it") (emphases in original). And because the political branches have failed, unlike in *Upham* and its progeny, those branches have not made policy choices to which the Court must or should defer. Indeed, the Court must ***avoid*** giving weight to the Legislature's ***rejected*** policy choices, lest it improperly assume the Governor's exclusive power to accept or reject those choices. This Court previously has recognized that its task differs in those two different situations. In *Jensen*, the Court noted this Court's proper role where legislative impasse over apportionment has been reached: "'[W]e are not reviewing an enacted plan. An enacted plan would have the virtue of

political legitimacy.'" *Id.*, ¶12, (quoting *Prosser*, 793 F. Supp. at 867).

2. The limited examples of least-change or core-retention-focused approaches in other state and federal court decisions are unpersuasive here.

The Legislature points to decisions of state and federal courts in nine states (including Wisconsin) that it argues have either followed a least-change approach or looked to core retention as a significant factor.[8] (Leg. Br. at 35-36) These cases are inapposite.

As a threshold matter, it is notable that of the 50 states, only eight consider core retention during decennial apportionment, and only six require preservation of past districts. *See* Kim & Chen, *supra*, at 149-50. In the last

[8] Those states include Georgia, Maryland, Minnesota, Missouri, New Hampshire, Oklahoma, Rhode Island, South Carolina, and Wisconsin. As shown below, however, the case for which the Legislature cites Wisconsin law, *Baumgart*, neither followed a least-change approach nor applied core retention as a significant, much less primary, criterion.

decennial cycle, only three courts in the remaining states took an approach based on the previous maps. (*See* Br. of *Whitford Amici* at 14, identifying Connecticut, Mississippi, and Minnesota.) But those three decisions are neither binding nor persuasive here. Two of those courts, like the *Baumgart* court, used a previous ***court-drawn*** map, as opposed to a prior plan enacted with one-party control of the political branches that the voters had since changed via the ballot box. *See Hippert v. Ritchie*, 813 N.W.2d 374 (Minn. 2012); *Smith v. Housemann*, 852 F. Supp. 2d 757 (S.D. Miss. 2011). In *Baumgart*, the court concluded that deference to the previous court-drawn plan was appropriate because the map was motivated by "neutral principles," 2002 WL 34127471, at *7, whereas the "partisan origins" of the Republican Assembly leader's proposed plan were "evident" and the Democratic Senate Leader's proposed plan was "riddled with [its] own partisan markers," *id.* at *4.

The Legislature also points to a series of cases from Georgia that it argues support the Court taking a least-change approach here. ***First***, it is notable that four of the five cases cited deal with local districting,[9] not state-legislative or congressional districts. But more importantly, Georgia's apportionment caselaw and its minimal-changes approach were developed as a means to comply with Section 5 of the VRA, because a court-drawn plan that minimized changes lowered the risk the state would be found to have retrogressed minority-voting rights.[10] Even in the single statewide Georgia districting case the Legislature cites, the court recognized a

[9] *Martin v. Augusta-Richmond Cnty., Ga., Comm'n*, No. CV 112-058, 2012 WL 2339499 (S.D. Ga. June 19, 2012) (challenge to County Commission and Board of Education districts); *Markham v. Fulton Cnty. Bd. of Registrations & Elections*, No. 1:02-cv-1111, 2002 WL 32587313 (N.D. Ga. May 29, 2002) (challenge to apportionment of Board of Education districts); *Crumly v. Cobb Cnty. Bd. of Elections & Voter Registration*, 892 F. Supp. 2d 1333 (N.D. Ga. 2012) (challenge to County Commission districts); *Bodker v. Taylor*, No. 1:02-cv-999, 2002 WL 32587312, at *5 (N.D. Ga. June 5, 2002) (same).

[10] "[S]ome court-ordered plans have been subject to Section 5 and its requirements." *Johnson*, 922 F. Supp. at 1569.

minimal-changes approach but looked beyond the past decade's maps, finding its judicial task was "not limited to Georgia's current unconstitutional plan," but "akin to those cases in which states had no plans." *Johnson*, 922 F. Supp. at 1561, *aff d sub nom*. *Abrams*, 521 U.S. 74.

Georgia and other covered jurisdictions, *see Perry v. Perez*, 565 U.S. 388 (2012), understandably relied on the guidance of past plans, which had received federal approval, to comply with Section 5. That context is absent in Wisconsin—never a covered jurisdiction under Section 5—and is not even being followed this decade in states like Texas and Georgia, no longer constrained by Section 5.

3. Federal courts engaging in apportionment defer to state political actors based on federalism concerns, which do not apply here.

As federal courts have repeatedly recognized—indeed, as the Johnson Petitioners and the Legislature argued with

gusto in their briefs as part of the companion cases pending in the Western District of Wisconsin—federalism concerns motivate federal courts to defer to state actors, including both state courts and state political branches. Those same concerns do not bind this Court, however. *See, e.g.*, *Growe*, 507 U.S. at 34 (noting federalism basis for federal courts to defer to state courts). Indeed, plaintiffs in the federal action were limited by the Eleventh Amendment to advancing malapportionment claims under the U.S. Constitution. But in this Court, Petitioners and Intervenor-Petitioners also raise state-law claims, including a claim that the Legislature has violated its obligation to district "anew." Wis. Const. art. IV, § 3. Not only are the federalism concerns that constrain federal courts absent here, but this Court is faced with an entirely different legal claim that requires adopting an entirely new plan. *See id.* Deference to a now-defunct plan that was the product of open, aggressive partisan aims is incompatible with the claims

advanced here. This is underscored by the difference in kind between this Court's role and the deference applied of federal courts. That alone renders many cases the Johnson Petitioners and the Legislature rely upon inapposite.

Similarly, the Legislature mistakenly relies on decisions where federal courts have been called on to establish interim district plans in the absence of preclearance under Section 5 of the VRA. (*See* Leg. Br. at 32 (citing *Perry*, 565 U.S. at 393).) In those cases, the state has duly enacted a plan—with approval of ***both*** the legislature and governor—but the plan cannot take effect until it receives federal approval. *See, e.g.*, *Perry,* 565 U.S. at 393. The U.S. Supreme Court held that such an interim plan must modify only those aspects that have a "not insubstantial" chance of failing to gain preclearance. *Id.* at 395. Because the balance of the plan reflected the states' policy choices—approved by the legislature and governor—those aspects could not be altered by the court's interim plan. *Id.* Not

only is this Section 5 precedent inapplicable to Wisconsin, but it highlights the stark difference here: the Governor will (likely) have ***rejected*** the policy choices of the legislature.

B. Other considerations cited by the Legislature and the Johnson Petitioners do not compel or justify a least-change approach.

In support of their manufactured least-change approach, the Legislature and the Johnson Petitioners point to additional policy considerations: the asserted value of "continuity of representation" and the avoidance of short-term disenfranchisement caused by moving voters between even- and odd-numbered Senate districts. Both of these policy arguments are unavailing.

1. "Continuity of Representation" is a policy choice not prioritized by Wisconsin law—certainly not above constitutional criteria.

While "continuity of representation" may have logical benefits in certain cases and contexts, the Wisconsin Constitution does not include any continuity criteria. Indeed,

"continuity of representation" seems yet another code phrase for "maintain partisan gerrymander." Instead, the Wisconsin Constitution requires state legislative districts to be apportioned "anew" after each decennial census. Wis. Const. art. IV, § 3. This stands in contrast to Minnesota's state constitution—examined by the *Hippert* court, 813 N.W.2d 374—which lacks any reference to apportioning "anew."

In addition to being the law, Wisconsin's approach has significant policy benefits. While stability in representation may have some benefits, fresh voices bring important value to our representative system—with new opportunities for accountability and diversity of expertise and experience. *See* Robert Yablon, *Gerrylaundering*, Univ. of Wis. L. Studies Research Paper No. 1708, p. 27 (Aug. 23, 2021), 97 N.Y.U. L. Rev. (forthcoming 2022) ("Stability is a value to be optimized,

not maximized.").[11] It is natural for those in elected office to value stability, but as Justice Scalia noted, "Those in power, even giving them the benefit of the greatest good will, are inclined to believe that what is good for them is good for the country." *McConnell v. FEC*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part). The beliefs of current officeholders cannot write "continuity of representation," "core retention," or other criteria that benefit incumbents into the text of our Constitution.

Just last decade, the enacted state-legislative-district plan that a federal court reviewed moved 2,357,592 Wisconsinites into new Assembly districts, seven times more than necessary to equalize district populations. *Baldus*, 849 F. Supp. 2d at 849. This apparently satisfied the Legislature's view for respecting "continuity of representation"; this Court

[11] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3910061.

should reject the contention that this concept means something different today.[12]

2. Concern over disenfranchisement of state Senate voters moved to new districts does not justify a least-change approach.

The Johnson Petitioners and the Legislature argue that the Court should adopt a least-change approach because, when voters are moved to new state Senate districts, some voters who are moved will miss one election (because only half of the Senate seats are on the ballot in any given election year). (Leg. Br. at 36-37) But the Johnson Petitioners and the Legislature overstate the issue. As discussed in the next paragraph, established authority holds that short-term delay in some voters' opportunity to vote for Senate is of legal concern only when its impact is targeted. Further, such dilution can be

[12] The Legislature contends that "***[c]ourts*** and social scientists have recognized that there is a societal advantage to being represented by the same individual over a period of time." (Leg. Br. at 38 (emphasis added)) It supports that statement with citations to two law review articles but not to any court decision.

minimized or eliminated in other ways, by this Court or by the Legislature itself. While the Court could consider levels of this kind of vote dilution when comparing competing apportionment plans (after applying all of the mandatory criteria to each plan), doing so does not compel adherence to a least-change approach.

The *Prosser* court, while noting this consideration, acknowledged that it is "inevitable" to some degree in decennial districting and "a temporary dilution" of this nature that "does not burden a particular group does not violate the equal protection clause." 793 F. Supp. at 866 (citing *Republican Party v. Keisling*, 959 F.2d 144, 145-46 (9th Cir. 1992) (per curiam)). The *Baumgart* court also acknowledged that this staggered-term delay is undesirable, but did not displace mandatory criteria to eliminate this delay—it used this data as one of many tools in comparing plans proposed by parties for the purpose of potentially justifying deviations in

population across districts. 2002 WL 34127471, at *3. More recently, the court in *Baldus* determined that moving 299,704 voters and delaying their state senator vote for two years did not create a legal injury requiring redress. 849 F. Supp. 2d at 852-53.

Moreover, this Court could choose to minimize this temporary vote dilution in (approximately 16) Senate races by numbering new Senate districts with this consideration in mind.

C. Employing a Least-Change Approach would Improperly and Unnecessarily Politicize this Court.

The Johnson Petitioners argue their approach is "the most fair and neutral way" for this Court to select or impose new districts. (Pet'rs Br. at 21) Not so. As demonstrated above, nothing in Wisconsin law supports this Court carrying out its task of apportionment by making only minimal changes to existing state-legislative districts. Disregarding the plain text

of article IV, section 3 would be a political act—one that would be widely perceived to benefit one political party at the expense of the other.[13] "[T]o use an existing plan as a constraint, especially if that constraint were allowed to override constitutional requirements, is to dictate a continuation of the deficiencies in the old plan." *In re Legislative Districting of State*, 370 Md. 312, 374, 805 A.2d 292 (2002). *See also* Yablon, *Gerrylaundering*, *supra*, at 6 ("Preserving cores and protecting incumbents are better viewed as ***inherently political redistricting strategies*** rather than as bona fide districting principles suitable for use by a court charged with exercising scrupulous neutrality." (emphasis added)).

[13] Since the current Republican gerrymander was installed, public reaction has been clear: 55 of Wisconsin's 72 counties have passed county resolutions in support of "fair maps," *see* https://www.fairmapswi.com/. This Court has seen this public engagement in the districting process skyrocket in backlash to the current maps: when the Court considered a rulemaking petition related to redistricting, it received nearly 2,000 public comments.

The Legislature argues a least-change approach is the apex of judicial restraint, but the opposite is true. Instead of neutrally applying the law, removed from the political fray, the Legislature asks this Court to act as its agent: to make the political and legislative choices it does not have enough votes to affect through the political process. The Legislature is quick to remind the Court its powers are limited, "[i]n doing so, the Court's role is still that of a Court, not a Legislature" (Leg. Br. at 15), but it is fine asking this Court to arrogate the role of the Governor and force the Legislature's preferred maps into law. Rather than compromise from its existing extreme gerrymander—in response to the voters' rejection of one-party control in 2018—the Legislature has proposed aggravating the existing gerrymander, and it asks this Court to decree the more extreme maps as law. The Court cannot adopt any of the made-to-order, neutral-sounding labels the Legislature has offered in support of its desired end-run around the Governor's

constitutional role. To do so would contravene the judiciary's politically neutral role in our constitutional system.

III. THE COURT MUST CONSIDER PARTISAN METRICS TO MEET ITS OBLIGATION TO AVOID IMPOSING—INTENTIONALLY OR OTHERWISE—A PARTISAN GERRYMANDER.

The Court cannot fulfill its role without considering the partisan implications of proposed maps. The Wisconsin Constitution provides that "[t]he blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." Wis. Const. art. I, § 22. This 'implied inhibition' against governmental action" acts "with quite as much efficiency as would express limitation." *Jacobs v. Major*, 129 Wis. 2d 492, 508-09, 407 N.W.2d 832 (1987). This Court is duty bound to enforce and adhere to this limit. *State ex rel. Milwaukee Med. Coll. v. Chittenden*, 127 Wis. 468, 518, 107 N.W. 500 (1906) (noting

that, under Article 1, § 22, "the judiciary is the judge as to what is beyond the boundaries of reasonable regulation and in the domain of destruction"). As the U.S. Supreme Court has emphasized, "[e]xcessive partisanship in districting leads to results that reasonably seem unjust," *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019), and "partisan gerrymanders ... are incompatible with democratic principles," *Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 791.

This limitation accords with federal case law, in which courts have repeatedly held that they must consciously avoid imposing districting plans with partisan bias. *See, e.g.*, *Gaffney*, 412 U.S. at 753 ("It may be suggested that those who redistrict and apportion 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."); *Prosser*, 793 F. Supp. at 867

("Judges should not select a plan that seeks partisan advantage."); BLOC Br. at 51-52 (collecting cases). Indeed, the U.S. Supreme Court has unanimously agreed that partisan gerrymandering is "unlawful," *Vieth*, 541 U.S. at 293 (Scalia, J., plurality), and therefore likewise violates the equal-protection and free-speech guarantees of the Wisconsin Constitution, Wis. Const. art. I, §§ 1, 3-4.

The Legislature, the Congressmen, and the Johnson Petitioners contend that this Court may not consider the partisan effects of maps. In support of this supposed prohibition, they contend that (1) the U.S. Supreme Court's *Rucho* decision held that partisan gerrymandering is permissible; (2) Wisconsin's political geography is naturally biased in favor of Republicans; (3) this Court is incapable of detecting a partisan gerrymander; and (4) this Court's remedial power is limited to equalizing population. All of these arguments are meritless.

A. *Rucho*'s Holding that Federal Courts Lack Jurisdiction over Partisan Gerrymandering Claims Did Not Render Partisan Gerrymandering Constitutional.

The U.S. Supreme Court's holding in *Rucho* that federal courts lack jurisdiction to adjudicate partisan gerrymandering claims did not render partisan gerrymandering constitutional. In *Rucho*, the Court held that "partisan gerrymandering claims present political questions beyond the reach of the ***federal courts***." *Rucho*, 139 S. Ct. at 2506 (emphasis added). They are beyond the reach of ***federal courts***, the Court explained, because "Article III of the Constitution limits federal courts to deciding 'Cases' and 'Controversies,'" *id.* at 2493, and thus federal courts lack jurisdiction to adjudicate partisan gerrymandering claims.

Citing *Rucho*, the Congressmen contend that "[t]he U.S. Supreme Court has now expressly held that States may constitutionally draw their redistricting maps with partisan

considerations in mind." (Congressmen Br. at 25) Likewise, the Johnson Petitioners contend that *Rucho* held that the federal Equal Protection Clause permits partisan gerrymandering, and therefore so must the Wisconsin Constitution's parallel provision. (Pet'rs Br. 29-30)

First, *Rucho* merely held that federal courts lack Article III jurisdiction to decide whether a map is an unconstitutional partisan gerrymander. As the Justices unanimously agreed in *Vieth*, "excessive injection of politics" in apportionment "is unlawful," regardless of whether federal courts can adjudicate such a claim. 541 U.S. at 293 (Scalia, J., plurality) (emphasis omitted). The Constitution's commands do not disappear merely because a federal court cannot adjudicate cases regarding them; states are not free, for example, to jettison the republican form of government merely because they cannot be sued in federal court under the Guaranty Clause.

Second, this Court has held it "plain" that "interpretations of the United States Constitution do not bind the individual state's power to mold higher standards under their respective state constitutions." *State v. Knapp*, 2005 WI 127, ¶57, 285 Wis. 2d 86, 700 N.W.2d 899. "Correspondingly, this court has stated that when interpreting our constitution, decisions from the United States Supreme Court interpreting analogous provisions in the federal constitution 'are eminent and highly persuasive, but not controlling, authority.'" *Id.* (quoting *McCauley v. Tropic of Cancer,* 20 Wis. 2d 134, 139, 121 N.W.2d 545 (1963)). It therefore does not follow that *Rucho*'s federal justiciability holding renders this Court impotent.

Accordingly, this Court may not impose—intentionally or not—districting plans with unfair partisan bias. *See* Wis. Const. art. I, §§ 1, 22. Nothing in *Rucho* prohibits this Court from adhering to the Wisconsin Constitution's command that

it ensure that the maps it adopts adhere to justice, moderation, temperance, and fundamental principles of democracy.[14] And, given the U.S. Supreme Court's unanimous interpretation that the federal Equal Protection Clause prohibits excessive partisan gerrymandering, *Vieth*, 541 U.S. at 293, this Court should likewise ensure that the remedial map it imposes adheres to the Wisconsin Constitution's corollary provision, *see Funk v. Wollin Silo & Equip., Inc.*, 148 Wis. 2d 59, 61, n.2

[14] In fact, nothing in *Rucho* prohibits this Court from adjudicating *federal* partisan gerrymandering claims under the First Amendment and Equal Protection Clause. "[T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or ... a federal statute." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989); *see also Smith v. Wis. Dep't of Agric., Trade & Consumer Protection*, 23 F.3d 1134, 1142 (7th Cir. 1994) ("While some consider it odd that a state court might have the authority to hear a federal constitutional claim in a setting where a federal court would not ... Article III's 'case or controversy' limitations apply only to federal courts. ... Wisconsin's doctrines of standing and ripeness are the business of the Wisconsin courts, and it is not for us to venture how the case would there be resolved."); *see also Goldwater v. Carter*, 444 U.S. 996, 1005 n.2 (1979) (Rehnquist, J., concurring) (noting that the U.S. Supreme Court "may not prohibit state courts from deciding political questions").

435 N.W.2d 244 (1989). *Rucho* does not bless partisan gerrymandering, and it certainly does not require this Court to turn a blind eye to it.

B. Wisconsin's Political Geography Does Not Compel an Extreme Partisan Gerrymander Favoring Republicans.

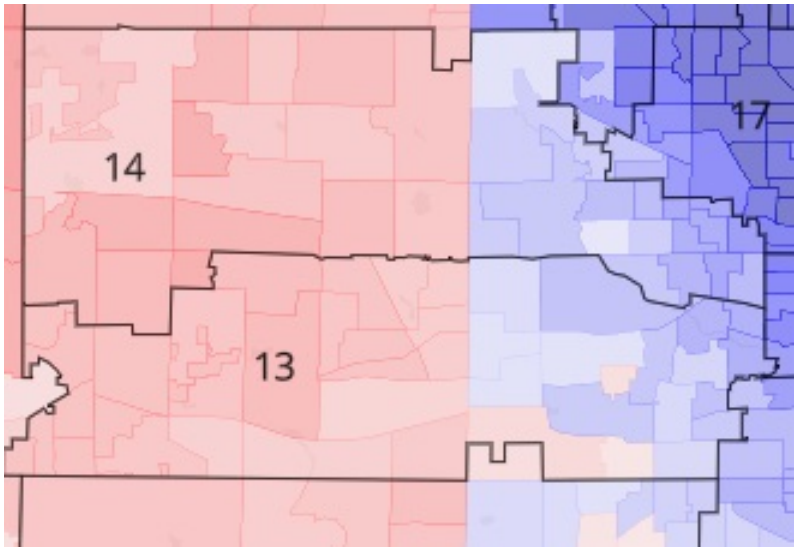
Wisconsin's political geography does not compel an extreme partisan gerrymander favoring Republicans. The Johnson Petitioners contend that this Court cannot look to congruence between a party's seat share in the legislature and its statewide vote share because, in Wisconsin "Democratic voters are more heavily geographically concentrated than Republican voters." (Pet'rs Br. at 28-29) The Legislature likewise contends that this Court should not consider the partisan effects of the maps it considers because single-member districts have "a large measure of unfairness [] baked into" them. (Leg. Br. at 42 (citation omitted)) These arguments are misplaced.

First, the fact that political geography and the nature of single-member districts makes exact proportionality unattainable does not excuse this Court from its obligation to analyze the maps it imposes for compliance with the requirements of Article 1, § 22 and the equal-protection guarantee of Article I, § 1. Rather, those factors inform ***whether*** a particular map exceeds the bounds of justice, moderation, temperance, and the fundamental principles of democracy, Wis. Const. art. I, § 22, or the guarantees of equal protection, *id.* art. 1, § 1, or free speech, *id.* art. I, §§ 3 & 4.

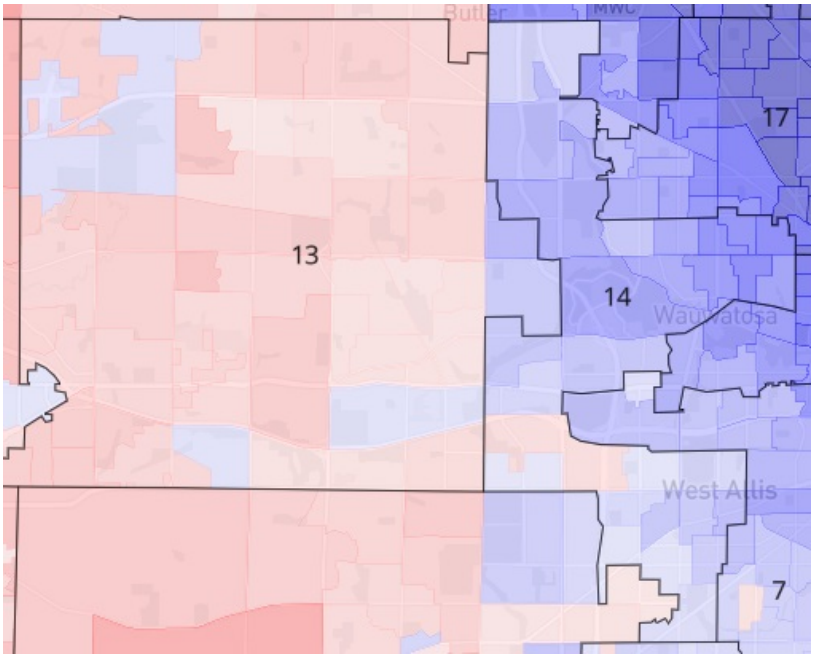
Second, the Legislature and the Johnson Petitioners greatly overstate the "natural" Republican bias in Wisconsin's political geography. Indeed, the current Assembly plan—and the Legislature's newly proposed plan—reach the level of "extreme" partisan gerrymandering largely because of how they sort voters ***outside*** of Milwaukee and Madison.

For example, the 2011 legislature drew current Assembly Districts 13 and 14 in the Milwaukee suburbs as long, stacked rectangles from Waukesha County into Milwaukee County in an effort to "crack" Democratic voters in Milwaukee County and overpower them with Republican votes. But by 2018, the suburbs shifted in the Democratic direction, and District 14 flipped parties. District 13 followed suit in 2020. The map[15] below shows the current boundaries of Districts 13 and 14, with red and blue shading illustrating the results of the 2020 presidential election.

[15] The maps in this brief were taken from Dave's Redistricting App, a publicly available online districting tool. *See* http://davesredistricting.org.



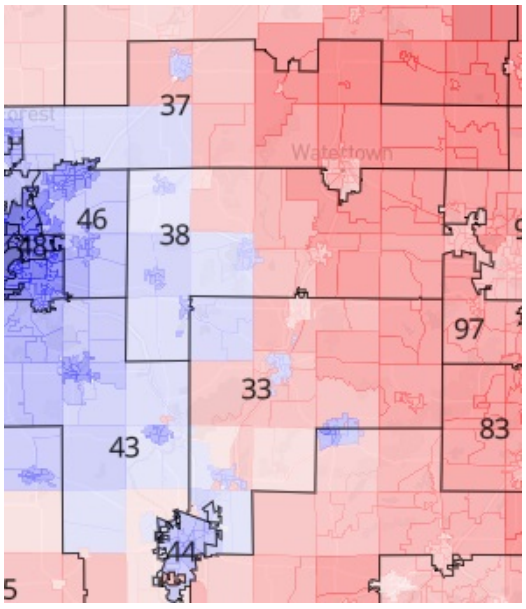
Now that the Legislature's original effort to gerrymander Districts 13 and 14 in the Republicans' favor has failed, it has proposed to radically reshape these districts. Below is how the Legislature now proposes to configure these districts, with a serpentine District 14 packed with Democratic voters in order to create a new, safely Republican District 13.



This is neither least-change, the unavoidable result of Wisconsin's political geography, nor the nature of single-member districts, as the Legislature and the Johnson Petitioners contend. It is an easily identifiable gerrymander. And it is a statewide feature of the Legislature's proposed apportionment plan, SB621.

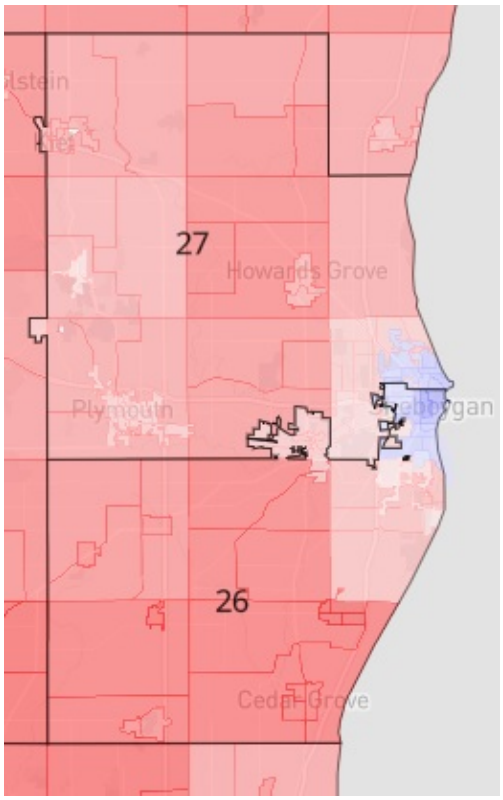
The Legislature's proposed Districts 33, 37, and 38 in SB621 combine just enough of the suburbs of Madison and

Janesville to create three safe Republican districts, while blocking the creation of a Democratic district. One way they do so is to cleave the City of Whitewater in half, diluting its Democratic-leaning votes into two adjoining Republican districts. By contrast, alternative orientations can easily be identified that would permit the suburban voters—with their shared interests—to elect their preferred representative.



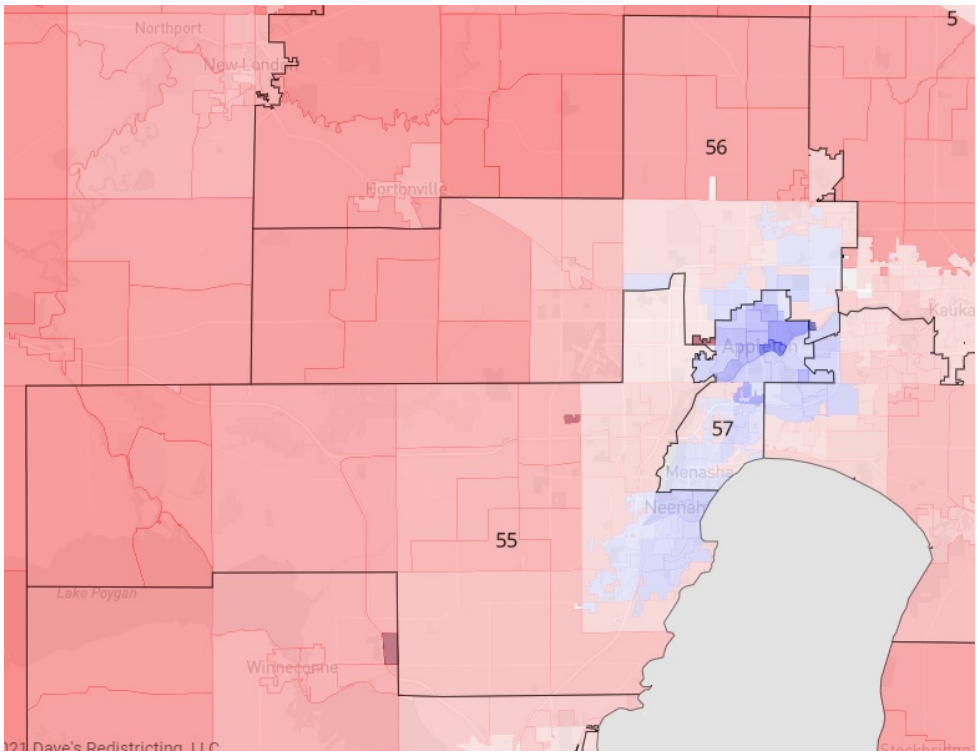
As with Whitewater, the Legislature also proposes to splice the City of Sheboygan—with a population around

10,000 fewer than the ideal district size—in half, in order to create two safe Republican seats rather than one that would lean Democratic.



In the Fox Valley, the Legislature proposes to pack Democrats into a single district, cracking apart other Democratic voters in the area among several heavily

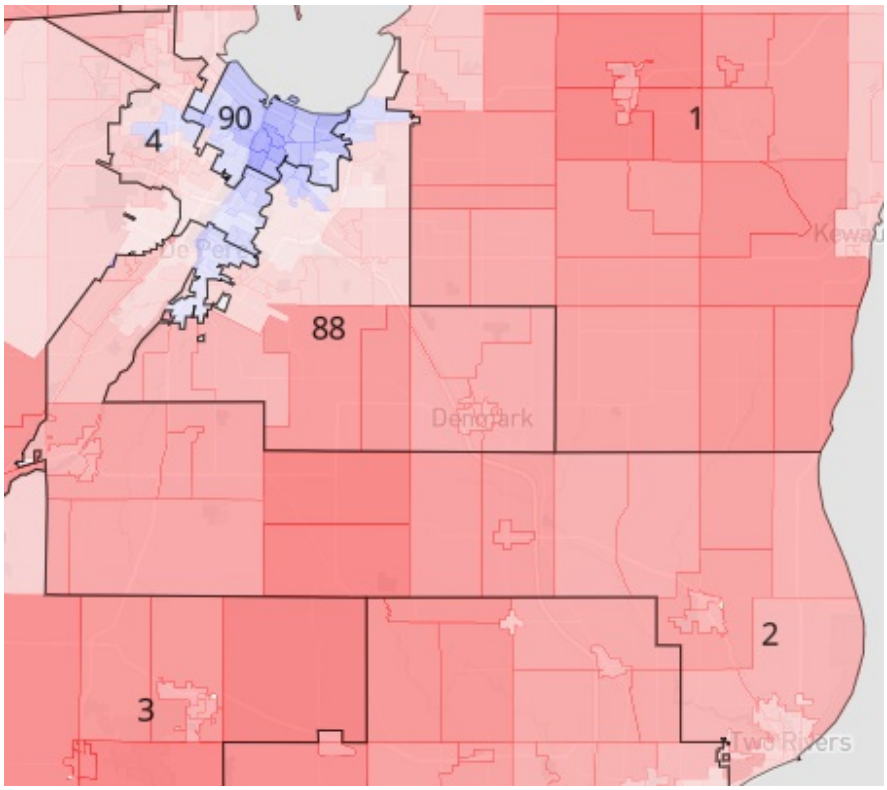
Republican districts, breaking apart the twin cities of Neenah and Menasha in the process.[16]



In Green Bay, the Legislature proposes packing Democratic voters in Green Bay and cracking apart Democratic voters in neighboring suburbs Allouez and De Pere

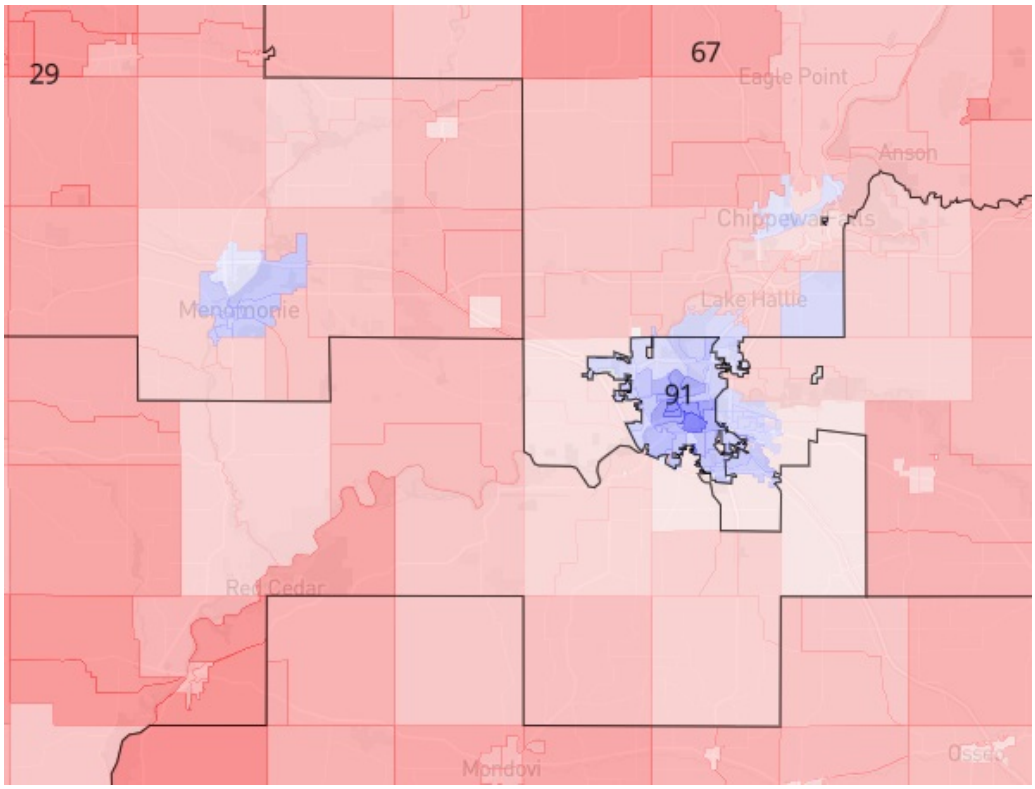
[16] This is not a function of municipal boundaries. Appleton exceeds the ideal population of an assembly district and must therefore be split.

into two separate districts, with one stretching to Two Rivers. The result of these lines is one, rather than two, Democratic leaning districts.



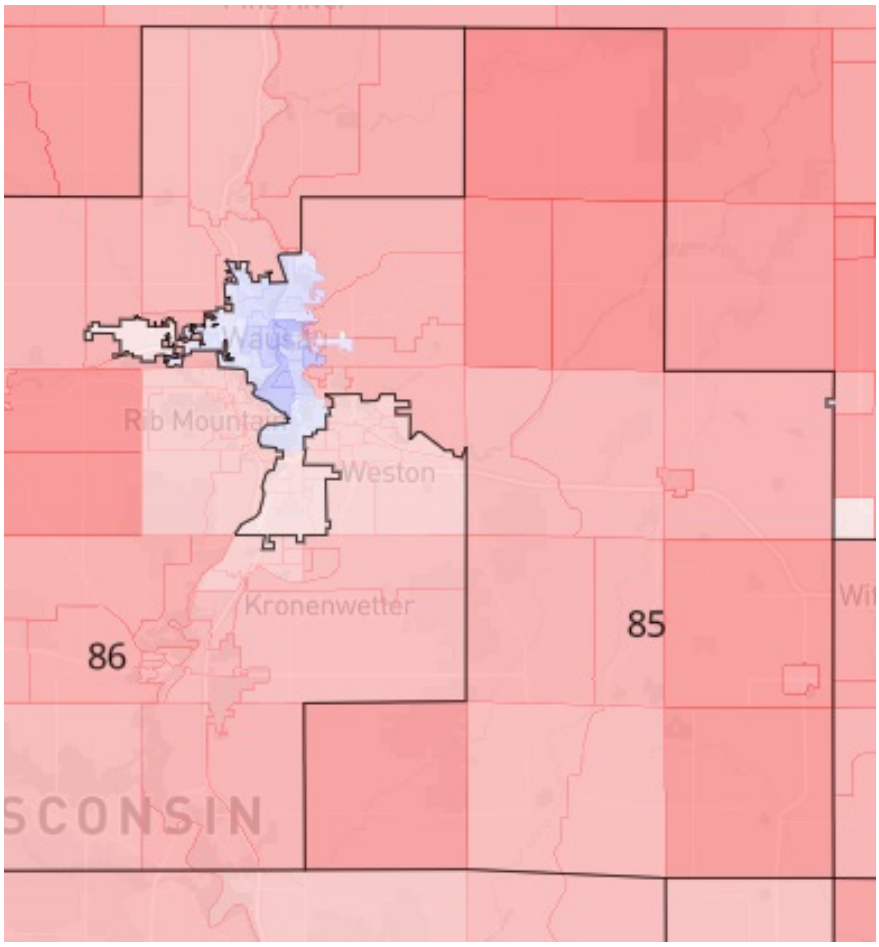
In Eau Claire, a city whose population exceeds the ideal district size and must therefore be split, the Legislature proposes to pack the area's Democratic voters in a single district, cracking apart nearby Democratic leaning

communities of Altoona, Chippewa Falls, and Menomonie across three districts dominated by rural Republican voters.



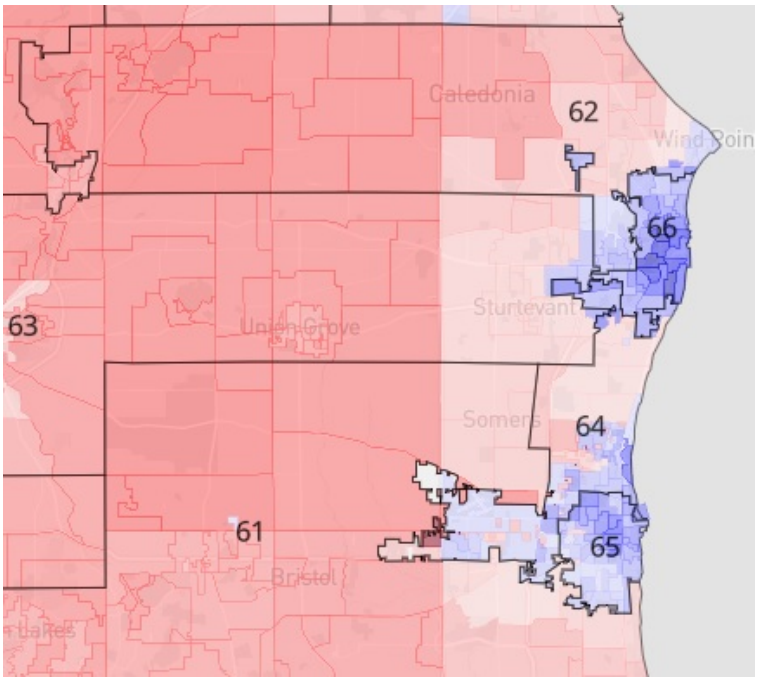
In Wausau, the Legislature proposes to combine the city, which leans Democratic, with heavily Republican rural towns rather than the more urbanized neighboring Rib Mountain or Weston, which share more in common with

Wausau. The result is a district that favors Republicans, rather than a competitive seat that either party could win.



Racine's population exceeds the ideal district size by over 18,000 persons. The Legislature proposes packing Democratic voters in the city and needlessly splitting the city

across three assembly districts, with the effect of preventing the formation of a second Racine-based Democratic district (like the second Kenosha-based Democratic district) and instead submerging the cracked Democratic voters in a rural-dominated District 62. By cracking and packing, and by adopting excessive municipal splits, the Legislature proposes gerrymandering a Republican district into the area.



The fact that Madison and Milwaukee contain many Democratic voters does not render the State consigned to an extreme Republican bias in the legislature. Nor does the Legislature's observation that "voters tend to live around like-minded voters" (Leg. Br. at 42) mean that the map this Court imposes will unavoidably skew in favor of the Republican Party. That results only from an intentional decision to cleave like-minded voters apart in order to silence their voices in the Legislature—or, as the Legislature, the Johnson Petitioners, and the Congressmen would have it, from an intentional decision by ***this Court*** to ignore the obvious.

As the Johnson Petitioners note (Pet'rs Br.at 29 n.3), courts have recognized that "Wisconsin's political geography, particularly the high concentration of Democratic voters in urban centers like Milwaukee and Madison, affords the Republican Party a natural, ***but modest***, advantage in the districting process. *Gill v. Whitford*, 138 S. Ct. 1916, 1925-26,

(2018)" (quotation marks omitted) (emphasis added). This is true. But the key word is ***modest***. Political geography is not why President Biden would have carried just 35 of 99 districts in the Legislature's proposed SB621 despite prevailing in the popular statewide vote 49.5% to 48.8%. The Legislature's manipulation of district lines—largely ***outside*** of Madison and Milwaukee—is the cause, and it results in a windfall of more than 10 seats for Republicans. That windfall comes at the expense of ***citizens***, whose right to political expression and association should not be made—certainly not by this ***Court***—to depend upon the viewpoints they express through their ballot. *See* Wis. Const. art. I, § 1 (governmental power comes from "the consent of the governed"); *id.* art. I, § 3 ("Every person may freely speak ... and no laws shall be passed to ... abridge the liberty of speech").

This Court cannot decline to assess the partisan implications of the maps it considers and adopts because

political geography or the nature of a single-member district system makes exact congruence with Wisconsinites' political views impossible. Rather, this Court is obligated to ensure the maps it imposes adhere to the confines of Article 1, § 22, lest the Court fail to ensure the "maintenance of free government," *id.*, which "deriv[es its] powers from the consent of the governed," *id.* art. I, § 1. The State's political geography is a fact relevant to this Court's consideration, but it is not an excuse to evade the duty to enforce the limits of the Wisconsin Constitution.

C. This Court Is Capable of Distinguishing Between Extreme Partisan Gerrymanders and Just, Moderate, and Temperate Maps.

This Court is capable of distinguishing between extreme partisan gerrymanders and just, moderate, temperate maps that accord with fundamental principles of democracy, as the Wisconsin Constitution requires. The Legislature and the Johnson Petitioners contend, citing *Rucho*, that there are no

judicially manageable standards to adjudicate a partisan gerrymandering claim, and that "[i]mportantly, 'fairness' is not a component of any state or federal equal protection analysis." (Leg. Br. at 41) But *Rucho* made clear that this was because ***federal*** law failed to provide courts the authority or standards by which to separate an unlawful gerrymander from a lawful plan. The Court said so expressly: "Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Rucho*, 139 S. Ct. at 2507.

The Pennsylvania Supreme Court found such standards and guidance in the "free and equal elections" clause of its state constitution. *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018). In North Carolina, a three-judge court found such standards and guidance in the state constitutional guarantee that "[a]ll elections shall be free," N.C. Const. art. I, § 10, the Equal Protection Clause, art. I, § 19, Freedom of Speech Clause, *id.* art. I, § 12, and the Freedom of Assembly

Clause, *id.* art. I, § 14. As the North Carolina Supreme Court reasoned:

> In the context of the constitutional guarantee that elections must be conducted freely and honestly to ascertain, fairly and truthfully, the will of the People, these clauses provide significant constraints against governmental conduct that disfavors certain groups of voters or creates barriers to the free ascertainment and expression of the will of the People.

Common Cause v. Lewis, No. 18 CVS 014001, 2019 WL 4569584, at *2 (N.C. Sup. Ct. Sept. 3, 2019). Article I, sections 1 and 22 of the Wisconsin Constitution likewise provide that standard and guidance.

As the maps above illustrate, it is not particularly difficult to ascertain features of a districting plan that are designed to obtain excessive partisan power. This Court will be presented with an array of proposals from the parties, who will no doubt endeavor to satisfy the traditional districting criteria. The parties can accompany those plans with a range of election data from past statewide elections, "reconstituted" to

show how the candidates fared in the various proposed districts. The parties can also provide analysis using a range of accepted methods of measuring partisan fairness or symmetry.[17] The Johnson Petitioners call these metrics "impressive-sounding statistical terms" named to provide "an air of authority." (Pet'rs Br. at 32) We call them "evidence," which this Court is equipped to weigh and probe. Those metrics may guide the Court. Or the Court can simply compare the maps before it. Those maps will likely be reasonably comparable on the various traditional districting criteria. But some will have an extreme Republican skew, while others will

[17] PlanScore, a tool offered by Campaign Legal Center, permits plans to be uploaded and scored using a range of measures of partisan fairness. The site also provides those metrics for historical plans to provide a comparison to current plans and proposals. *See* www.planscore.campaignlegal.org.

have a modest Republican skew. Surely the Court is capable of deciphering between the two.

The Legislature should give this Court more credit. There is nothing judicially unmanageable about comparing plans and picking one—or drawing one—that does not afford an extreme advantage to one political party. And while the Legislature mocks "fairness" as foreign to our law (Leg. Br. at 41), it is a central concept in the Constitution's guarantee of "free government." Wis. Const. art. I, § 22.

This Court is capable of identifying—and rejecting—an extreme partisan gerrymander in imposing districting plans that will determine the structure of our democracy for the next decade.

D. The Court's Remedial Authority Is Not Limited to Equalizing Population.

The Court's remedial authority is not limited to equalizing population. The Legislature and Congressmen contend that the sole claim before the Court is

malapportionment, and thus this Court may address only the malapportionment. (Congressmen Br. at 23; Leg. Br. at 43) These arguments are mistaken.

First, malapportionment is not the only legal claim before the Court. Rather, the parties also allege a violation of Article IV, Section 3—the obligation to apportion "anew" each decade. The plain text of this obligation is different from the obligation to equalize population, and a violation of this provision is remedied by the Court districting "anew" and consistent with the limits Article 1, § 22 places on this Court's actions.

Second, there are innumerable ways to equalize population among districts. If the Court can consider ***only*** population equality, and nothing else, then the Court's remedial power would be unconstrained. It would also equalize population to draw thin spaghetti-shaped districts out from Madison and Milwaukee and into rural Wisconsin. But doing

so would result in a ***Democratic*** gerrymander, even if the Court blinded itself to the political data while drawing the lines. Especially when this Court issues orders bearing on the structure of our democracy, its remedial power is constrained—regardless of the claims before it—by the obligation to maintain a "free government" through "a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." Wis. Const. art. I, § 22. This Court is powerless to issue a remedy that independently violates the Wisconsin Constitution, regardless of the nature of the claim before it. The Court can adhere to that constraint only by opening its eyes to the facts before it, not blinding itself to them.

IV. ANY LITIGATION PROCESS MUST ALLOW FOR DEVELOPING EVIDENCE, HOLDING A TRIAL, AND ISSUING AN APPORTIONMENT PLAN BY JANUARY 21, 2022.

The BLOC Petitioners' original brief detailed a process consistent with previous apportionment cases and proposed deadlines to ensure timely adoption of new maps.[18] The BLOC Petitioners' proposed schedule is reasonable, practical, allows for full presentation of evidence and argument, and does not deprive any party of the opportunity for future appellate review. The Court should adopt the proposed plan.

A. This Case Requires a Trial and Full Pre-trial Discovery.

The Johnson Petitioners, Legislature, and Congressmen would give short shrift to the adversarial process and eliminate a critical element in apportionment litigation: trials.

Trials have been an element in all recent Wisconsin apportionment proceedings. *See Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (four-day trial on unlawful partisan

[18] Many parties echo the BLOC Petitioners' request for the Court to identify the relevant districting criteria it will be considering, including the Legislature. (*See* Leg. Br. at 44.)

gerrymander of Wisconsin's existing legislative districts); *Baldus*, 849 F. Supp. 2d 840 (two-day trial on constitutionality of Milwaukee area assembly districts); *Baumgart*, 2002 WL 34127471 (two-day districting trial); *Prosser*, 793 F. Supp. 859 (two-day districting evidentiary hearing). This Court previously recognized that any apportionment procedure should include "at a minimum, deadlines for the development and submission of proposed plans, ***some form of factfinding (if not a full-scale trial)***, legal briefing, public hearing, and decision." *Jensen*, 2002 WI 13, ¶20 (emphasis added). There is no reason to stray from the trial formula.

The parties and the Court need to understand the underlying algorithms and metrics used to draw a proposed map. This requires a trial. During trial, experts will be cross-examined and the Court can pose its own questions to those experts. That provides the Court a first-hand opportunity to weigh—and compare—each expert's methodology and

credibility. Yet the Congressmen argue a trial is unnecessary. (Congressmen Br. at 25-29) The Legislature and the Johnson Petitioners seem to believe that, at most, a very limited evidentiary hearing would suffice. (Leg. Br. at 45; Johnson Pet'rs Br. at 33) The procedure proposed by the Johnson Petitioners, Legislature, and Congressmen would contravene the standard practice for apportionment litigation, and improperly deprive the parties and the Court the opportunity to fully test proposed maps through adversarial litigation. *See Wis. Legislature v. Palm*, 2020 WI 42, ¶254, 391 Wis. 2d 497, 942 N.W. 2d 900 (Hagedorn, J., dissenting) ("We risk serious error when we issue broad rulings based on legal rationales that have not been tested through the crucible of adversarial litigation.").

The need for a trial necessitates pre-trial depositions of experts and, if necessary, fact witnesses. Simply submitting maps with expert reports, and not subjecting anyone to cross-

examination, would be unheard of and would impede the Court's work. The Court and parties must know what criteria an expert used in drawing a particular map and if any additional criteria was used. Experts may weight certain factors more heavily than others in drawing a legislative map. For instance, if a map emphasizes core retention over compactness, the Court and parties must know to what extent that factor was prioritized and why. The only way to fully understand how an expert weighed those factors is through discovery and cross-examination.

B. The Legislature's Proposed Procedure is Unworkable.

The Legislature's procedural suggestions (Leg. Br. at 43-46) are ill-conceived and inconsistent with *Growe* and *Jensen.* The Court should disregard the Legislature's proposed procedural timeline altogether.

The Legislature's plan is based on the incorrect premise this Court's maps are not subject to federal district court review. (Leg. Resp/ Letter Br. at 4) This premise overlooks the U.S. Supreme Court's express guidance in *Growe* that a district court must give state court plans legal effect, but that "federal court[s] [are] empowered to entertain … claims relating to legislative redistricting only to the extent those claims challenged the state court's plan." 507 U.S. at 36 (emphasis removed). As this Court previously acknowledged, "redistricting remains an inherently political and legislative—not judicial—task. Courts called upon to perform redistricting are, of course, judicially legislating, that is, writing the law rather than interpreting it, which is not their usual—and usually not their proper—role." *Jensen*, 2002 WI 13, ¶10. Consequently, any decision by this Court is subject to review by a federal court. *See D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 476-77 (1983).

The *Jensen* Court's decision declining original jurisdiction almost twenty years ago is particularly instructive. *Jensen* acknowledged that "[a] redistricting plan adopted by this court—like one adopted by the legislature—would be subject to collateral federal court review for compliance with federal law." 2002 WI 13, ¶16. For that reason, the Court recognized, even "if the federal court were to stay its hand under *Growe* and wait for the outcome of this case, the likelihood of followup federal court review, and, therefore, continued uncertainty and delay remains." *Id.*, ¶20. The Court determined that adopting legislative maps "would necessarily put this case and any redistricting map it would produce on a collision course with the case now pending before the federal three-judge panel." *Id.*, ¶16. Recognizing the right of federal review, and in an effort to avoid undermining "principles of cooperative federalism and federal-state comity" the Court

declined to invoke original jurisdiction. *Id.*, ¶18 (footnote omitted).

Given that a decision by this Court is still subject to federal district court review, it is imperative that the Court set a trial schedule leading to adoption of a final apportionment plan by January 21, 2022. That allows the federal court to conduct a trial the week it has put aside, starting January 31, 2022, if necessary. The Legislature's suggestion that the Court issue a final decision by April 4, 2022 not only violates Wisconsin statutory deadlines that necessitate new maps earlier (BLOC Resp. Letter Br. at 3-5), but also would preclude any federal review and could lead to the federal panel enjoining this proceeding. Worse yet, delaying adoption of new maps could substantially disrupt the administration of upcoming elections, or even lead to a federal court invalidating maps ***after*** the fall 2022 election.

C. The Court Should Not Appoint a Special Master.

The Court should decline the wholly unnecessary suggestion of a special master.[19] A special master would not aid the Court in any capacity, nor would it be a judicious use of the Court's time and resources.

The Hunter Petitioners suggest the Court appoint a special master "to evaluate the proposed maps and identify the submission that best complies with the prescribed criteria." (Hunter Br. at 32) The Hunter Petitioners also suggest soliciting submissions from the parties nominating potential special masters for this case. The Legislature and the Johnson Petitioners also briefly mention a special master or "referee" in their briefs, but provide no specifics of the special master's

[19] In addition to being superfluous and unworkable, the proposal of a special master contravenes Wisconsin's public policy of avoiding a single factfinder in apportionment litigation. Wis. Stat. § 751.035(1).

role. (*See* Leg. Br. at 44 and Pet'rs Br. at 33.) None of these proposals are availing.

A special master is unnecessary. The Court will be dealing mostly with expert submissions and cross-examinations. The BLOC Petitioners do not foresee numerous mediation-amenable discovery disputes that would justify the addition of a special master. And the process of fairly identifying and appointing a special master would be an ill-advised use of the Court's time and resources.

Just identifying a special master would be an arduous and time-consuming process. A 2000 report issued by the Federal Judicial Center and 2019 guidance from the American Bar Association provide guidance on appointing a special master. According to the Federal Judicial Center, the most common method for selecting a special master is for parties to submit nominations, since they are "generally were more familiar with individuals who possessed the requisite

background or skills." Thomas E. Willging, *et al.*, *Special Masters' Incidence and Activity* (Fed. Judicial Ctr. 2000) (report to the Judicial Conference's Advisory Committee on Civil Rules) at 37.[20] The American Bar Association echoes this sentiment, stating the "choice of who is to serve as a special master … requires careful consideration. Courts need to ensure that the selection and use of special masters is fair. Courts should afford parties the opportunity to propose acceptable special master candidates." American Bar Association, *ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation* at 11 (Jan. 2019).[21]

Additionally, the Federal Judicial Center noted parties typically examine the proposed nominees and raise the raise of conflicts of issues. Federal Judicial Center, *supra*, at 37. *See*

[20] Available at https://www.uscourts.gov/sites/default/files/specmast.pdf.

[21] Available at https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2019/100-midyear-2019.pdf.

also ABA, *supra*, at 11 ("Courts should choose special masters … ***in a manner that promotes confidence in the process and the choice*** by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen." (emphasis added)).

While the BLOC Petitioners do not believe the Court should appoint a special master, they nonetheless suggest that, if the Court were to appoint a special master, it should allow each party to submit 1-3 nominees, allow the parties to file letter briefs objecting to any proposed special masters for good cause, including, but not limited to, partisan affiliation or conflicts of interests,[22] and make a selection in time to keep on track with the already truncated litigation schedule. These extra filings and decisions are not a judicious use of the Court's time

[22] The Court would need to provide the parties with clear guidelines for nominations and objections. Since a special master must be truly independent, the BLOC Petitioners would propose that, in addition to other criteria, a special master should have minimal connection to Wisconsin.

and resources. Instead, inserting a special master into the mix would simply add an additional layer of complexity (not to mention more deadlines and additional filings) to the already time-consuming and time-sensitive litigation process necessary for this case.

CONCLUSION

For the reasons above and in the BLOC Petitioners' prior brief, the Court should apply mandatory and traditional redistricting criteria, should reject the atextual least-change approach, must assess the partisan implications of proposed maps, and should adopt the litigation process proposed by the BLOC Petitioners.

Dated: November 1, 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 10,948 words.

Dated: November 1, 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, November 2, 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.

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