

**No. 2021AP1450-OA**

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**IN THE SUPREME COURT OF WISCONSIN**

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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.*

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**BRIEF BY THE WISCONSIN LEGISLATURE**

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**BELL GIFTOS ST. JOHN LLC**

KEVIN M. ST. JOHN

SBN 1054815

5325 Wall Street, Suite 2200

Madison, WI 53718

608.216.7995

kstjohn@bellgiftos.com

**LAWFAIR LLC**

ADAM K. MORTARA

SBN 1038391

125 South Wacker, Suite 300

Chicago, IL 60606

773.750.7154

mortara@lawfairllc.com

**CONSOVOY MCCARTHY PLLC**

JEFFREY M. HARRIS\*

TAYLOR A.R. MEEHAN\*

JAMES P. MCGLONE\*

1600 Wilson Blvd., Suite 700

Arlington, VA 22209

703.243.9423

jeff@consovoymccarthy.com

*\* Admitted pro hac vice.*

*Counsel for Intervenor-Respondent,  
The Wisconsin Legislature*

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## TABLE OF CONTENTS

INTRODUCTION.....	6
STATEMENT OF ISSUES FOR REVIEW .....	7
STATEMENTS ON ORAL ARGUMENT & PUBLICATION .....	7
ARGUMENT .....	8
I.    The Legislature’s plans are constitutionally reapportioned .....	8
A. Reapportionment requirements after the 2020 Census.....	9
B. The Legislature’s plans remedy Petitioners’ malapportionment claims .....	11
II.   The Legislature’s map redresses Petitioners’ malapportionment claims in a least-changes way .....	14
A. Core retention of the existing districts .....	16
B. Temporal vote dilution in State Senate elections .....	25
C. Continuity of representation and incumbent pairings .....	28
III.  The Legislature’s plans comply with all state and federal law, including compliance with the Fourteenth Amendment and the Voting Rights Act .....	30
A. Compliance with state law .....	31
B. Compliance with federal law .....	32
CONCLUSION .....	37
CERTIFICATIONS .....	38

## TABLE OF AUTHORITIES

### CASES

<i>Abbott v. Perez</i> , 138 S. Ct. 2305 (2018) .....	32
<i>Arizonans for Fair Representation v. Symington</i> , 828 F. Supp. 684 (D. Ariz. 1992) .....	28
<i>Baldus v. Members of the Wis. Gov’t Accountability Bd.</i> , 849 F. Supp. 2d 840 (E.D. Wis. 2012) .....	passim
<i>Baldus v. Members of Wis. Gov’t Accountability Bd.</i> , 862 F. Supp. 2d 860 (E.D. Wis. 2012) .....	34, 36
<i>Baumgart v. Wendelberger</i> , No. 01-C-0121, 2002 WL 34127471 (E.D. Wis. May 30, 2002) .....	18, 26
<i>Brnovich v. Democratic Nat’l Comm.</i> , 141 S. Ct. 2321 (2021) .....	33
<i>Burns v. Richardson</i> , 384 U.S. 73 (1966) .....	28
<i>Colleton Cty. Council v. McConnell</i> , 201 F. Supp. 2d 618 (D.S.C. 2002) .....	28
<i>Cooper v. Harris</i> , 137 S. Ct. 1455 (2017) .....	32, 33, 35
<i>Evenwel v. Abbott</i> , 136 S. Ct. 1120 (2016) .....	12
<i>Gaffney v. Cummings</i> , 412 U.S. 735 (1973) .....	13
<i>Holder v. Hall</i> , 512 U.S. 874 (1994) .....	32
<i>Jensen v. Wis. Elections Bd.</i> , 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537 .....	7
<i>Johnson v. Wis. Election Comm’n</i> , 2021 WI 87, ___ Wis. 2d ___, ___ N.W.2d ___ (Nov. 30, 2021) .....	passim
<i>Karcher v. Daggett</i> , 462 U.S. 725 (1983) .....	9, 28
<i>Prosser v. Elections Bd.</i> , 793 F. Supp. 859 (E.D. Wis. 1992) .....	26, 31
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964) .....	9, 13
<i>See Ala. Leg. Black Caucus v. Alabama</i> , 575 U.S. 254 (2015) .....	32
<i>Shaw v. Reno</i> , 509 U.S. 630 (1993) .....	32, 33

<i>State ex rel. Attorney General v. Cunningham</i> , 81 Wis. 440, 51 N.W. 724 (1892) .....	9, 14
<i>State ex rel. Bowman v. Dammann</i> , 209 Wis. 21, 243 N.W. 481 (1932) .....	13
<i>State ex rel. Reynolds v. Zimmerman</i> , 23 Wis. 2d 606, 128 N.W.2d 16 (1964) .....	13
<i>Upham v. Seamon</i> , 456 U.S. 37 (1982) .....	17
<i>Vieth v. Jubelirer</i> , 541 U.S. 267 (2004) .....	29
<i>White v. Regester</i> , 412 U.S. 755 (1973) .....	13
<i>White v. Weiser</i> , 412 U.S. 783 (1973) .....	15, 28, 30

## CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV .....	9
Wis. Const. art. IV, §3 .....	9, 30
Wis. Const. art. IV, §4 .....	12, 31
Wis. Const. art. IV, §5 .....	31

## STATUTES

2011 Wis. Act 43, Wis. Stat. §4.001 <i>et seq</i> .....	passim
52 U.S.C. §10301(b) .....	33

## OTHER AUTHORITIES

2021 Wis. Senate Bill 621 (enrolled) .....	passim
2021 Wis. Senate Bill 622 (enrolled) .....	6, 8
Nathaniel Persily, <i>In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders</i> , 116 Harv. L. Rev. 649 (2002) .....	29
Nathaniel Persily, <i>When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans</i> , 73 Geo. Wash. L. Rev. 1131 (2005) .....	29

## INTRODUCTION

In November, both houses of the Legislature passed new redistricting plans for the State Assembly, the State Senate, and Wisconsin's eight congressional districts. *See* 2021 Wis. Senate Bill 621 (enrolled); 2021 Wis. Senate Bill 622 (enrolled). The Legislature submits those plans here to redress Petitioners' malapportionment claims.<sup>1</sup> They are the appropriate "judicial remedy," "making the minimum changes necessary in order to conform the existing congressional and state legislative redistricting plans to constitutional and statutory requirements." *Johnson v. Wis. Election Comm'n*, 2021 WI 87, ¶8, \_\_ Wis. 2d \_\_, \_\_ N.W.2d \_\_ (Nov. 30, 2021) (hereafter, "Order"). After accounting for substantial population decreases in Milwaukee and substantial population growth in Madison, the Legislature's plans leave more than 80 percent of Wisconsinites in their existing Assembly Districts and more than 90 percent in their existing Senate Districts, and otherwise comply with state and federal law.

Redistricting, moreover, "remains the legislature's duty." *Id.* ¶19. The Legislature's plans submitted here are an expression of that duty. The Legislature's plans are the true people's maps. They are not only based on the existing redistricting plans enacted in 2011; they were also voted on by Wisconsin's 132 elected

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<sup>1</sup> The Legislature devotes this brief and accompanying expert reports by Mr. Thomas Bryan (an expert in demography) and Dr. John Alford (a Voting Rights Act expert) to the Legislature's State Assembly and State Senate plans. For reasons stated in the brief to be filed by the Congressmen Intervenor-Petitioners, the Legislature's congressional plan adequately redresses Petitioners' state and federal malapportionment claims with respect to the congressional districts. And the Legislature's congressional plan makes minimum changes to do so, as required by this Court's Order of November 30, 2021.

representatives and approved by an overwhelming majority in 2021. They are the natural remedy for this reapportionment dispute. *See Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam) (“The Framers in their wisdom entrusted this decennial exercise to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other.”).

### **STATEMENT OF ISSUES FOR REVIEW**

1. Whether the Legislature’s redistricting plans comply with state and federal reapportionment requirements.
2. Whether the Legislature’s redistricting plans make minimum changes to accomplish reapportionment, in accordance with the Court’s Order entered on November 30, 2021.
3. Whether the Legislature’s plans otherwise comply with state and federal law.

### **STATEMENTS ON ORAL ARGUMENT & PUBLICATION**

Consistent with this Court’s Order entered on November 17, 2021, the Legislature agrees that a hearing or oral argument between January 18, 2022, and January 21, 2022, will be necessary. The Legislature also requests publication of this Court’s final decision.

## ARGUMENT

The Legislature submits the attached Assembly, Senate, and Congressional redistricting plans, which passed both houses of the Legislature in November, as its proposed remedy for this reapportionment dispute.<sup>2</sup> The Legislature's plans remedy Petitioners' malapportionment claims with minimal changes to the existing districts. To the extent there is any debate over which of the parties' proposed maps the Court ought to adopt, it is the Legislature's. The Legislature's maps achieve remarkable population equality across districts, after addressing sizeable population shifts in Milwaukee and Dane County (including Madison), as well as other population shifts across the State. Also remarkable, the Legislature's plans make those adjustments while keeping the vast majority of Wisconsinites in their existing districts. The Legislature's plans score high on every metric for measuring minimum changes and otherwise comply with all state and federal law. They are the appropriate remedy for this reapportionment dispute.

### **I. The Legislature's plans are constitutionally reapportioned.**

Any remedy must first redress why all the parties are here—to resolve the malapportionment of the existing electoral districts,

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<sup>2</sup> Maps for all three plans are included in the Legislature's Appendix. *See* Legislature App. 3-4 (Assembly plan, 2021 Wis. Senate Bill 621 (enrolled)); App. 5-6 (Senate plan, 2021 Wis. Senate Bill 621 (enrolled)); App. 7 (Congressional plan, Wis. Senate Bill 622 (enrolled)). The bill text of Senate Bills 621 and 622 describe which counties, municipalities, and/or census blocks are included in each district, and the bill appendices include additional maps and population statistics. *See* Bryan Rep. App. 6. Noted above, the Legislature's arguments herein relate specifically to the Legislature's Assembly and Senate plans.

based on now obsolete 2010 Census data. The Legislature's plans redress all Petitioners' malapportionment claims.

**A. Reapportionment requirements after the 2020 Census.**

The state and federal constitutions require roughly equal numbers of individuals across legislative districts. Order ¶¶26, 28; Wis. Const. art. IV, §3; U.S. Const. amend. XIV. Under state law, "there should be as close an approximation to *exactness* as possible[.]" *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1892) (emphasis added). Under federal law, Wisconsin must "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). Under both state and federal law, the State retains some "limited flexibility to pursue other legitimate policy objectives," including keeping political subdivisions together or compactness. Order ¶26; *see also Reynolds*, 377 U.S. at 578. But major inequality across district populations requires an explanation. *See Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

To comply with state and federal constitutional reapportionment requirements in Wisconsin, new districts must account for the State's population growth between 2010 and 2020. Wisconsin's population grew by roughly 3.5%, increasing from 5,686,986 to 5,893,718. Order ¶15. The ideal population of an Assembly District is now 59,533, and the ideal population of a Senate District is 178,598. *Id.*

But Wisconsin's population growth was not uniform across the State. Some portions of the State grew substantially, while others lost significant population. *See* Expert Report of Thomas M. Bryan ("Bryan Rep.") ¶¶39-42; Legislature App. 8-9 (Bryan Maps 1 & 2, illustrating population changes). New districts thus must account

for these population shifts *within* the State, in addition to the State's overall population growth. *See* Bryan Rep. ¶¶39-44. Between 2010 and 2020, populations shifted within Wisconsin in two major ways:

- Large numbers of individuals moved out of Milwaukee. *Id.*; Bryan Rep. ¶¶40, 42. The population in Milwaukee's Assembly Districts 8, 10, 11, 12, 16, 17, and 18 dropped significantly (dropping below ideal population for a 2020 Assembly District by at least 5% and in some cases by more than 10%). Joint Stipulated Facts Ex. A (Nov. 4, 2021); *see* Bryan Rep. App. 4 at 79 (Map 1B) (illustrating Milwaukee population changes).<sup>3</sup> Milwaukee districts must expand to account for the fewer number of individuals in those districts.
- Large numbers of individuals moved into Madison and surrounding areas. Bryan Rep. ¶¶40-41; *see* Bryan Rep. App. 4 at 78 (Map 1A) (illustrating Dane County population changes).<sup>4</sup> Dane County added more than 73,000 individuals—well more than the population of an entire Assembly District. Bryan Rep. ¶41. Existing, now-overpopulated

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<sup>3</sup> There appear to be some disparities in the *exact* population deviation percentages in the existing districts, as between the LTSB-reported deviations reproduced in the parties' joint stipulated facts and deviations calculated based on raw LTSB data. *See* Bryan Rep. ¶38 n.10. The disparities are slight and ultimately immaterial, and the upward or downward population trends are the same. *Id.*

<sup>4</sup> According to LTSB-reported deviations, Joint Stipulated Facts Exs. A & B (Nov. 4, 2021), there were substantial population increases (in excess of 8% above ideal population) in Madison-area Assembly Districts 46, 76, 78, 79, and 80, and Senate Districts 26 and 27. And there were moderate to substantial increases (in excess of 5% above ideal population) in other Madison-area Assembly Districts 47, 48, and 77, and Senate District 16.

districts in the area must shrink to account for the increased numbers of individuals in the existing districts.

These large population changes in Milwaukee and Madison resulted in the greatest degree of deviation from ideal population for 2020 districts, and correcting that malapportionment necessarily has a cascading effect on surrounding districts. *See* Part II, *infra*.

While population changes in the rest of the State were less stark, very few districts remained within 0.5% of ideal population after accounting for the last decade's population changes. *See* Legislature App. 8 (Bryan Map 1).<sup>5</sup>

**B. The Legislature's plans remedy Petitioners' malapportionment claims.**

The Legislature's plans surpass all state and federal requirements to reapportion districts with a roughly equal number of individuals in each Assembly and Senate District. The smallest Assembly District in the Legislature's plan is only 0.37% below ideal population; the largest Assembly District is only 0.39% above ideal

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<sup>5</sup> The second largest growth area in the State included portions of the Fox Valley and up to Brown County. According to LTSB-reported deviations, Joint Stipulated Facts Ex. A (Nov. 4, 2021), Assembly District 5 (containing Kaukauna) and Assembly District 56 (parts of Appleton) exceeded ideal population by at least 8%. Nearby Assembly Districts 2 and 88 also grew, exceeding ideal population by 5% or more. By contrast, the more urban districts south of Milwaukee—Assembly District 20 (containing portions of Milwaukee and all of St. Francis and Cudahy), Assembly District 21 (containing Oak Creek and South Milwaukee), Assembly District 64 (portions of Kenosha), and Assembly District 66 (portions of Racine)—were each *under* ideal population. *See* Joint Stipulated Facts Ex. A (Nov. 4, 2021).

population, making the aggregate population deviation<sup>6</sup> a remarkable +/- 0.76% for Assembly Districts:

<b>Assembly</b>	<b>Deviation from Ideal Population</b>	<b>Persons</b>	<b>Percent</b>
	Mean Deviation	112	0.19
	Largest Positive Deviation	231	0.39
	Largest Negative Deviation	-221	-0.37
	Overall Range in Deviation	±452	± 0.76

*Bryan Rep. ¶47.*

The smallest Senate District in the Legislature’s plan is only 0.28% below ideal population; the largest Senate District is only 0.29% above ideal population, making the aggregate population deviation a remarkable +/- 0.57% for Senate Districts:

<b>Senate</b>	<b>Deviation from Ideal Population</b>	<b>Persons</b>	<b>Percent</b>
	Mean Deviation	175	0.10
	Largest Positive Deviation	520	0.29
	Largest Negative Deviation	-506	-0.28
	Overall Range in Deviation	±1,026	± 0.57

*Bryan Rep. ¶47.*

As this Court and the U.S. Supreme Court have explained, there can be some population deviations in a legislative plan.<sup>7</sup> The very slight deviations in the Legislature’s Assembly and Senate plans are consistent with the Legislature’s “limited flexibility to

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<sup>6</sup> “Maximum population deviation is the sum of the percentage deviations from perfect population equality of the most- and least-populated districts. For example, if the largest district is 4.5% overpopulated, and the smallest district is 2.3% underpopulated, the map’s maximum population deviation is 6.8%.” *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 n.2 (2016) (citation omitted).

<sup>7</sup> In Wisconsin specifically, perfect population equality would be impossible for Assembly and Senate plans that follow 2020 ward lines, assuming wards are not equally apportioned across the State. *Cf.* Wis. Const. art. IV, §4 (“districts to be bounded by county, precinct, town or ward lines”).

pursue other legitimate policy objectives” in redistricting. Order ¶26; see *Reynolds*, 377 U.S. at 577. The U.S. Supreme Court has approved state legislative redistricting plans with population deviations approaching 10%, far greater than the *de minimis* population deviation in the Legislature’s plans. See *Gaffney v. Cummings*, 412 U.S. 735, 750-51 (1973) (7.83% for house districts and 1.81% for senate districts); *White v. Regester*, 412 U.S. 755, 763-64 (1973) (9.9% population deviation); see also Bryan Rep. ¶14 (noting “+/- 5.0% conventional maximums”).

The population equality achieved by the Legislature’s maps is better or equal to population equality in Wisconsin’s historical redistricting plans. See, e.g., *Baldus v. Members of the Wis. Gov’t Accountability Bd. (Baldus I)*, 849 F. Supp. 2d 840, 851 (E.D. Wis. 2012) (noting maximum population deviation for 2011 Assembly Districts was 0.76% and 0.62% for 2011 Senate Districts); *State ex rel. Reynolds v. Zimmerman*, 23 Wis. 2d 606, 607, 128 N.W.2d 16 (1964); *State ex rel. Bowman v. Dammann*, 209 Wis. 21, 243 N.W. 481, 485 (1932). The Legislature’s maps are also better apportioned than other proposals made during this redistricting cycle. For example, the maps created by the Governor’s People’s Maps Commission would have aggregate population deviations of +/- 0.96% for Assembly Districts and +/- 0.74 for Senate Districts.<sup>8</sup> Similarly, an amendment rejected by the Legislature during the redistricting process would have had aggregate population deviations that more than doubled the Legislature’s aggregate

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<sup>8</sup> People’s Maps Commission, *Final Report and Maps* at 24, [https://evers.wi.gov/Documents/PMC/PMC\\_Report\\_Final\\_Full-compressed%20\(2\).pdf](https://evers.wi.gov/Documents/PMC/PMC_Report_Final_Full-compressed%20(2).pdf).

population deviations.<sup>9</sup> Finally, the Legislature’s maps also substantially outperform national averages by other States. Bryan Rep. ¶49 (noting NCSL survey illustrated numerous senate and house plans with deviations in excess of 5% and concluding that the Legislature’s “small deviations cannot be considered anything less than exceptionally good”).

The Legislature’s plans thus redress all Petitioners’ malapportionment claims. Achieving near-perfect reapportionment, the Legislature’s plans ensures that Wisconsinites will have “equal representation in the legislature.” *Cunningham*, 51 N.W. at 729.

## **II. The Legislature’s map redresses Petitioners’ malapportionment claims in a least-changes way.**

This Court has ordered that any proposed remedy make the “minimum changes necessary in order to conform the existing congressional and state legislative redistricting plans to constitutional and statutory requirements.” Order ¶8. Satisfaction of that “minimum changes” requirement ought to be measured by the combination of multiple metrics, including: (1) core retention of the existing districts; (2) temporal disenfranchisement of voters in upcoming State Senate elections; and (3) maintaining constituent-legislator relationships by avoiding pairing of incumbents. *See* Bryan Rep. ¶¶62, 84, 105. Additionally, a “minimum changes” plan is likely to resemble an existing plan when it comes to the number of “splits” (where districts split counties and municipalities) and the compactness of districts. *See, e.g.*, Bryan Rep. ¶¶15, 104.

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<sup>9</sup> Wis. Legislative Reference Bureau Memorandum to Sen. Janet Bewley, at 2 (Nov. 5, 2021), [https://legis.wisconsin.gov/democrats/media/2209/lrb-s0263-2-ab624-sb621-and-2011-act-43-analysis\\_bewley.pdf](https://legis.wisconsin.gov/democrats/media/2209/lrb-s0263-2-ab624-sb621-and-2011-act-43-analysis_bewley.pdf) (reporting aggregate deviation for Assembly Districts of +/- 1.98% and aggregate deviation for Senate Districts of +/- 1.43%).

Described more fully below, each of these metrics probe whether a remedy “honor[s] state policies” by leaving existing district plans largely in place, so as not to “preempt the legislative task, nor intrude upon state policy any more than necessary” in adjusting malapportioned districts. *White v. Weiser*, 412 U.S. 783, 795 (1973) (quotation marks omitted). In combination, these metrics provide a multi-faceted way of ensuring that the Court’s remedy goes no “further than necessary to remedy [the existing districts’] current legal deficiencies,” so as not to “intrude upon the constitutional prerogatives of the political branches and unsettle the constitutional allocation of power.” Order ¶¶64.

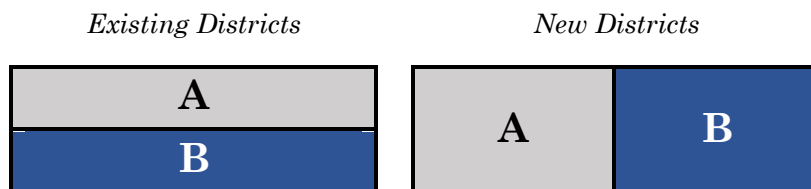
The Legislature’s map satisfies the Court’s “minimum changes” requirement on every metric, while redressing Petitioners’ claims in a near-perfect way. From the beginning of the redistricting process, the Legislature’s redistricting priority has been to “[r]etain as much as possible the core of existing districts, thus maintaining existing communities of interest, and promoting equal opportunity to vote by minimizing disenfranchisement due to staggered Senate terms.” Bryan Rep. App. 6 at 115 (2021 Wis. Senate Joint Resolution 63); Bryan Rep. App. 6 at 116 (public hearing statement by Assembly Speaker Robin Vos) (“Our goal from start to finish was to produce a ‘least-changes’ map that prioritized core retention while adjusting for population change.”).

The Legislature’s resulting plans follow Wisconsin’s existing districts—those “adopted by the legislature, signed by the governor, and survived judicial review by the federal courts.” Order ¶¶64. To be sure, the existing districts necessarily must change some. Any 2020 redistricting plan must account for the declining population in Milwaukee and increasing population in Dane County, among other population changes, any of which could also affect district lines of the surrounding districts. Bryan Rep. ¶¶43, 78. (For

example, the Milwaukee districts must push outward into surrounding districts to bring the Milwaukee districts back up to population equality. Even if those surrounding districts had close to ideal population after the 2020 Census, they must also change to account for the changes in Milwaukee. *Id.*) But the Legislature’s plans illustrate that these adjustments can be made in a “minimum changes” way. Order ¶8; *see* Bryan Rep. ¶15. The Legislature’s plans ultimately do so—keeping keep roughly 84 percent of Wisconsinites in their existing Assembly Districts, and 92 percent of Wisconsinites in their existing Senate Districts. Bryan Rep. ¶¶15, 68, 79; *see also* Legislature App. 18, 21 (core retention tables); Bryan Rep. App. 6 at 113 at 2 (Wis. Legislative Reference Bureau (LRB) Memorandum regarding SB 621).

**A. Core retention of the existing districts.**

Core retention is the first metric by which to assess whether a redistricting plan is a “minimum changes” plan. *See* Bryan Rep. ¶61. Core retention is a quantitative measure of how much of the geographical “core” of an existing district remains in a newly drawn district. Bryan Rep. ¶¶61-62. In the following simplified example of a two-district area, assuming uniform population distributions and no population growth, the overall core retention score is 50%. Half of District A’s population was moved to District B, and half of District B’s population was moved to District A:



A redistricting plan with high core retention scores is indicative of a “minimum changes” redistricting plan. Bryan Rep. ¶62. A plan with low core retention scores, on the other hand, is indicative

of a redistricting plan that did not give due regard for existing districts. *Id.* Adopting the latter plan as a court-ordered remedy would be a political re-writing of existing law, “interfering with the lawful policy choices of the legislature,” not a judicial redressing of constitutional claims. Order ¶81; *see also id.* ¶78 (rejecting invitation for “a judicial replacement of the law enacted by the people’s elected representatives with the policy preferences of unelected interest groups”); *Upham v. Seamon*, 456 U.S. 37, 43 (1982) (noting the court had no “authority to disregard aspects of the legislative plan not objected to by the Attorney General” on constitutional or statutory grounds).

Core retention can be measured overall and on a district-by-district basis. Bryan Rep. ¶¶63, 67. On any measure, the core retention of the Legislature’s plans is very high. Bryan Rep. ¶¶68, 73, 77-78; Bryan Rep. App. 2 (Core Retention Analysis tables). These high core retention scores are the first of many reasons why the Legislature’s proposed remedy is the “minimum changes” remedy that this Court seeks. Order ¶8; *see also* Bryan Rep. ¶77.

**1. Overall core retention.** The overall core retention of the Legislature’s plans keeps more than 84% of Wisconsinites in their existing Assembly Districts, and more than 92% of Wisconsinites in their existing Senate Districts. Bryan Rep. ¶¶15, 68, 79; *see also* Legislature App. 16, 18 (core retention tables); Bryan Rep. App. 6 at 113 at 2 (Wis. LRB Memorandum).<sup>10</sup> These are soaringly high core retention numbers, especially in light of the substantial population decreases in Milwaukee, substantial population increases in Dane County, and Wisconsin’s overall population increase that

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<sup>10</sup> The Legislature’s plans overall core retention scores are tabulated by aggregating district-by-district core retention scores. *See* Bryan Rep. ¶65 (explaining methodology); Bryan Rep. App. 2A (core retention tables); Legislature App. 10-21 (core retention tables and totals).

was not uniform throughout the state. Bryan Rep. ¶¶43-45, 68, 73, 77; *cf. Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at \*7 (E.D. Wis. May 30, 2002) (plan with 76.7% Assembly core retention); *Baldus I*, 849 F. Supp. 2d at 858.

For a sense of how high the Legislature’s core retention scores are, consider the significantly lower core retention scores of the legislative maps proposed by the Governor’s People’s Maps Commission earlier this year.<sup>11</sup> The Governor’s maps kept fewer than 60% of Wisconsinites in existing Assembly and Senate Districts. Bryan Rep. ¶¶69-72, 75-76. These low core retention scores, as well as any district-by-district comparison, indicate that the plans were not based on existing districts, let alone made with “minimum changes” to those existing districts. Bryan Rep. ¶72.

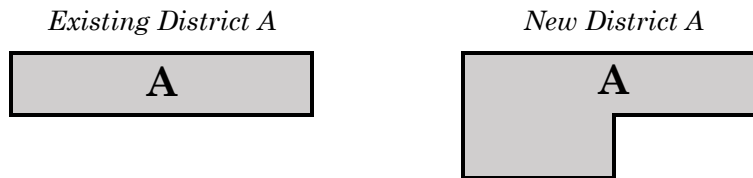
By this overall core retention number, the Legislature’s plans are minimum changes plans. Bryan Rep. ¶¶68, 73.

**2. District-by-District Core Retention.** Core retention can also be examined on a district-by-district basis. To evaluate “minimum changes” on this district-by-district basis, Order ¶8, the best core retention measure is how much of an *existing* district remains in the *new* district in a new redistricting plan. Bryan Rep. ¶62. Existing districts will inevitably have to change on the margins in a new redistricting plan because of population growth or decline. But districts in a “minimum changes” plan will begin with the core of the existing district and grow outward, or begin with the core of the existing district and contract as necessary to achieve population equality. Measuring core retention in this way, a district with decreasing population can still have a core retention score of 100%. *All* of the existing district remains in the new district (plus new territory required to bring the district back to population equality).

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<sup>11</sup> See People’s Maps Commission, *Final Report and Maps*, *supra*.

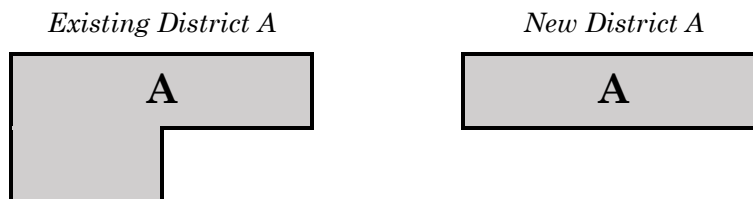
Bryan Rep. ¶62. For example, the core retention of District A below is still 100%, even though population changes required District A to add territory:



Applied to the Legislature's plans, every new Senate District retains nearly all of every existing district. *See* Bryan Rep. App. 2A at 47. The Legislature's Senate Districts 3, 4, 6, 7, 9, 12, 17, 18, 21, 22, 24, 25, 29, and 32 retain at least 95% of the existing district. *See* Legislature App. 19-21 (Senate core retention from Bryan Rep. App. 2B). And all but two of the Senate Districts retain at least 80% of the existing district. *Id.* Similarly, 25 Assembly Districts retain at least 95% of the existing district. The average Assembly District retains 84.4% of the existing district (and the median, 87.9%). *See* Legislature App. 10-18 (Assembly core retention from Bryan Rep. App. 2C).

District-by-district, the Legislature's plans are minimum changes plans. Bryan Rep. ¶77. The lion's share of Assembly and Senate Districts remain substantially intact, adding or shedding territory where necessary to bring the districts back up to population equality. And while some districts on a district-by-district basis have lower core retention scores, that is explained by the reality that sometimes the Legislature had no choice but to modify the existing districts substantially given stark population changes in some areas. Bryan Rep. ¶78; *see, e.g.*, Legislature App. 9 (Bryan Map 2) (showing population changes across I-94 corridor between Milwaukee and Madison).

**3. Core retention and areas affected by population change.** Districts affected by Dane County and other areas affected by population growth or decline will necessarily have core retention scores lower than 100%, if one examines core retention by assessing whether all persons in an existing district remain in that district. Bryan Rep. ¶62. Due to population changes, portions of a growing district must be cleaved off so that the district does not exceed ideal population. *See, e.g.*, Bryan Rep. ¶65 (showing example of overpopulated Senate District 2). In the following simplified example, imagine that District A's population has grown such that the southern portion of District A must be reapportioned to the neighboring district, lest District A exceed ideal population:



That change is a change required by shifting populations. And even in minimum changes redistricting plans, such changes will be necessary to constitutionally reapportion new districts. In these growing districts, it will be impossible to achieve a 100% core retention score under any redistricting plan (unless a redistricting plan ignores population equality requirements), even if all individuals in the new district lived in the old district.

Applied to the Legislature's plans, nearly all existing districts in Dane County and some in the surrounding area had to contract in size, because they exceeded ideal population. Bryan Rep. ¶¶39-40; Bryan Rep. App. 4 at 78, 80 (Maps 1A, 2) (illustrating Dane County and surrounding growth). Simultaneously, the Legislature had to accommodate Dane County's population growth of roughly 73,000 individuals, growth in excess of the size of an entire

Assembly District. Bryan Rep. ¶41. Explained more fully below, what results from these population-driven changes—combined with population declines in Milwaukee—is that many districts in and between Dane County and Milwaukee have lower-than-average core retention scores. Bryan Rep. ¶78; *see* Legislature App. 9.

Nonetheless, this required movement of district lines presented opportunities to unify municipalities that were previously split. For example, changes in Dane County permitted the Legislature to re-unify the City of Verona, the Village of Oregon, and the Towns of Cottage Grove, Verona, and Dunkirk, which were previously split by Act 43. *See* Bryan Rep. ¶¶55-60 (comparing splits in Act 43 versus Legislature’s plans).<sup>12</sup>

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<sup>12</sup> *Compare* 2011 Wis. Act 43, Wis. Stat. §§4.79(6), 4.80(1)(h), *with* 2021 Wis. Senate Bill 621 (enrolled) §4.80(1)(d) (City of Verona); *compare* 2011 Wis. Act 43, Wis. Stat. §§4.43(1)(c), 4.80(1)(d), *with* 2021 Wis. Senate Bill 621 (enrolled) §4.43(1)(b) (Village of Oregon); *compare* 2011 Wis. Act 43, Wis. Stat. §§4.46(2), 4.47(2), *with* Wis. Senate Bill 621 (enrolled) §4.46(1) (Town of Cottage Grove); *compare* 2011 Wis. Act 43, Wis. Stat. §§4.79(2), 4.80(1)(b), *with* 2021 Wis. Senate Bill 621 (enrolled) §4.80(1)(a) (Town of Verona); *compare* 2011 Wis. Act 43, Wis. Stat. §§4.43(1)(b), 4.46(3), *with* Wis. Senate Bill 621 (enrolled) §4.43(1)(a) (Town of Dunkirk).

Similarly, population growth in the Fox Valley area required changes, and the Legislature used those changes as an opportunity to eliminate existing splits in the City of De Pere, the Village of Little Chute, the Towns of Ledgeview (Brown County), Calumet (Fond du Lac County), and Greenville (Outagamie County), all of which were split by Act 43. *Compare* 2011 Wis. Act 43, Wis. Stat. §§4.02(1)(e), 4.88(4), *with* 2021 Wis. Senate Bill 621 (enrolled) §4.02(1)(c) (City of De Pere); *compare* 2011 Wis. Act 43, Wis. Stat. §§4.03(2)(c), 4.05(2)(c), *with* 2021 Wis. Senate Bill 621 (enrolled) §4.05(1)(c) (Village of Little Chute); *compare* 2011 Wis. Act 43, Wis. Stat. §§4.02(1)(b), 4.88(2), *with* 2021 Wis. Senate Bill 621 (enrolled) §4.88(1) (Town of Ledgeview); *compare* 2011 Wis. Act 43, Wis. Stat. §§4.52(2), 5.59(2)(b), *with* 2021 Wis. Senate Bill 621

**4. Core retention in surrounding areas affected by population changes.** Changes to Madison- and Milwaukee-area districts will necessarily have a cascading effect on nearby districts. For example, consider the hypothetical six-district area below. The western districts are overpopulated by 10% (similar to Madison), the middle districts are at ideal population, and the eastern districts are underpopulated by 10% (similar to Milwaukee):

<b>A</b> (+10%)	<b>C</b> (+0%)	<b>E</b> (-10%)
<b>B</b> (+10%)	<b>D</b> (+0%)	<b>F</b> (-10%)

Because districts must be contiguous, the overpopulated Districts A and B cannot simply transfer population to the underpopulated Districts E and F, just like the overpopulation in Madison cannot be “trade[d]” with the underpopulation in non-contiguous Milwaukee. Bryan Rep. ¶78. Instead, changes will be required for all districts, including ideally populated Districts C and D. *See id.* That cascade of changes will affect core retention not only in under- or overpopulated districts, but also in ideally populated districts nearby. Bryan Report. ¶¶43-44; 78.

Milwaukee provides a real-world example of this cascading effect. The Milwaukee districts decreased in population between 2010 and the 2020 Census. *See* Bryan Rep. App. 4 at 79 (Map 1B). Any redistricting plan must expand these districts to achieve roughly equal population. But the options for expansion in

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(enrolled) §4.59(3)(a); *compare* 2011 Wis. Act 43, Wis. Stat. §§4.55(1)(b), 4.56(1)(c), *with* 2021 Wis. Senate Bill 621 (enrolled) §4.56(1) (Town of Greenville).

Milwaukee are limited, given the constraint of Milwaukee's eastern border of Lake Michigan and the nearby Illinois state line.<sup>13</sup> Considering population increases immediately to the north of Milwaukee and the pull created by population increases in Dane County to the west, the most natural way in which the Milwaukee districts could expand is illustrated by the Legislature's plan: a mostly westward expansion into Waukesha, with some changes to the north as well. Bryan Rep. App. 4 at 82 (Map 3A). Milwaukee's expansion will thus necessarily affect core retention scores of the districts between Milwaukee and Madison. Bryan Rep. ¶78.<sup>14</sup>

Finally, the Legislature again used the expansion of the Milwaukee districts into the surrounding areas as an opportunity to improve upon the existing districts. The changes allowed the Legislature to eliminate five pre-existing municipal splits in

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<sup>13</sup> Further constraining options, districts between the City of Milwaukee and the state line (in Racine and Kenosha Counties) were below ideal population as well. *See* Legislature App. 8 (Bryan Map 1).

<sup>14</sup> Unsurprisingly, districts with lower core retention scores in the Legislature's plan sit between Madison and Milwaukee, or north of Milwaukee. Bryan Rep. ¶78; Bryan Rep. App. 2A. These include Senate Districts 5, 11, 15, 27, and 28—all districts that have population in the counties of Milwaukee, Waukesha, Jefferson, or Dane. Bryan Rep. App. 2A at 47. Likewise, the Assembly Districts with the five lowest core retention scores (Assembly Districts 13, 14, 24, 43, and 83) included territory in the counties of Milwaukee, Waukesha, Jefferson, or Dane. Bryan Rep. App. 2A at 50. Assembly District 24, for example, previously included Milwaukee territory. But Milwaukee districts to the south, including Assembly Districts 10 and 11, absorbed that Milwaukee territory to bring those Milwaukee districts back to population equality. Legislature App. 11 (reporting movement of individuals from Assembly District 24 to Assembly Districts 10, 12, and 23).

Milwaukee and nearby Waukesha County.<sup>15</sup> For example, the Legislature had to address sizeable population decreases in Assembly Districts 10 and 11 on the northside of Milwaukee. *See* Bryan Rep. App. 4 at 79 (Map 1B); Joint Stipulated Facts Ex. A (Nov. 4, 2021) (reporting each Assembly District was more than 5,000 persons below ideal population). The Legislature's Assembly District plan retains more than 85% of existing District 10 and 11. But both districts were among several in the area that also had to grow to bring each back to ideal population. To do so for Assembly District 10, the Legislature unified the City of Glendale (previously split between districts in Act 43) and placed all of it into District 10.<sup>16</sup>

**5. Relatively unchanged areas.** Elsewhere in Wisconsin, districts still must shift slightly to meet the new ideal population for 2020. *See* Legislature App. 8 (Bryan Map 1); Bryan ¶¶39, 43. Even in those districts with close to ideal population, changes can be unavoidable due to changes near the surrounding districts. Bryan Rep. ¶¶43, 78. For example, the population in existing

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<sup>15</sup> In Milwaukee County, the Legislature's redistricting plans eliminate a municipal split in Glendale. *Compare* 2011 Wis. Act 43, §§4.11(a), 4.24(1)(b), *with* 2021 Wis. Senate Bill 621 (enrolled) §4.10(2). In neighboring Waukesha County, the Legislature's redistricting plans eliminate municipal splits in the City of Brookfield, the City of New Berlin, the Town of Brookfield, and the Town of Genesee. *Compare* 2011 Wis. Act 43, Wis. Stat. §§4.13(2)(c), 4.14(2)(b), *with* 2021 Wis. Senate Bill 621 (enrolled) §4.13(2)(c) (City of Brookfield); *compare* 2011 Wis. Act 43, Wis. Stat. §§4.15(2), 4.84(2), *with* 2021 Wis. Senate Bill 621 (enrolled) §4.15(2)(b) (City of New Berlin); *compare* 2011 Wis. Act 43, Wis. Stat. §§4.13(2)(a), 4.14(2)(a), *with* 2021 Wis. Senate Bill 621(enrolled) §4.13(2)(a) (Town of Brookfield); *compare* 2011 Wis. Act 43, Wis. Stat. §§4.97(1), 4.99(2), *with* 2021 Wis. Senate Bill 621 (enrolled) §4.97(1) (Town of Genesee).

<sup>16</sup> *Compare* 2011 Wis. Act 43, §§4.11(a), 4.24(1)(b), *with* 2021 Wis. Senate Bill 621 (enrolled) §4.10(2).

Assembly District 43, which included a small portion of Dane County, was close to ideal population after the 2020 Census. However, the overall growth in Dane County required significant changes in the area to accommodate the more than 73,000 new Dane County residents since the 2010 redistricting. Bryan Rep. ¶41. As a consequence, Assembly District 43 in the Legislature's Assembly District plan is pulled in toward Madison and adds several Dane County municipalities, including the City of Stoughton. *Compare* 2011 Wis. Act 43, Wis. Stat. §4.43, *with* Wis. Senate Bill 621 (enrolled), §4.43.

These changes again present opportunities to respect “secondary” constitutional considerations by reducing existing splits, among other neutral redistricting criteria. Order ¶34. Overall, in addition to remarkably high core retention scores, the Legislature's plans reduce the number of municipal and other splits in Act 43, and retain nearly the same amount of compactness as the Act 43 districts. Bryan Rep. ¶¶55-60, 104.

\* \* \*

On multiple measures, the core retention of the Legislature's plans is high. The Legislature's plans make modifications as required for shifting populations. In doing so, the Legislature improves upon the existing districts. The Legislature otherwise respected the existing districts, leaving the vast number of Wisconsinites in their existing districts.

#### **B. Temporal vote dilution in State Senate elections.**

The second important measure of a “minimum changes” map in Wisconsin is the effect of a new redistricting plan on the ability of Wisconsinites to vote in their next State Senate election. *See* Bryan Rep. ¶84. Wisconsin Senate elections are staggered,

meaning those in odd-numbered Senate Districts will vote for State Senate in the 2022 elections (having last voted in 2018) and those in even-numbered Senate Districts will vote for State Senate in the 2024 elections (having last voted in 2020):

	Existing District	New District	Last Voted	Next Voted
1	Odd	Odd	2018	2022
<b>2</b>	<b>Odd</b>	<b>Even</b>	<b>2018</b>	<b>2024</b>
3	Even	Even	2020	2024
4	Even	Odd	2020	2022

Bryan Rep. ¶86 (Figure IV.17); *see also, e.g., Baldus I*, 849 F. Supp. 2d at 852; *Baumgart*, 2002 WL 34127471, at \*3.

Temporal vote dilution occurs when a redistricting plan moves individuals from odd-numbered Senate Districts to even-numbered Senate Districts. *See* Bryan Rep. ¶86. When a voter who last voted for State Senate in 2018 (in her old odd-numbered district) will not be able to vote again until 2024 (in her new even-numbered district), her vote has been diluted as compared to other Wisconsin voters who remain in their Senate districts. This is a shift from the existing State Senate map, where this voter and others in odd-numbered districts would be expected to vote in 2022.

A minimum changes remedy should mitigate this movement of individuals from odd- to even-numbered districts. Bryan Rep. ¶84. The temporal vote dilution that results from such movement is a “special consideration[]” that must be kept in mind in Wisconsin redistricting and “is not something to be encouraged.” *Id.* at \*7; *Prosser v. Elections Bd.*, 793 F. Supp. 859, 866 (E.D. Wis. 1992). Dilution with an outsized effect on some groups of voters, moreover, would create constitutional concerns under the Equal Protection Clause. *See Prosser*, 793 F. Supp. at 866; *see also Baldus I*, 849 F. Supp. 2d at 852 (“It is important to us here that the evidence presented at trial did not indicate that any particular group will

suffer more disenfranchisement than the remainder of the population.”). A map with minimal changes will mitigate the harm of such temporal vote dilution, because such a map should leave most individuals in their existing Senate Districts. Bryan Rep. ¶¶84, 86.

Some amount of temporal vote dilution in Senate Districts is unavoidable due to shifting populations. Bryan Rep. ¶88. Between 2010 and 2020, odd-numbered Senate Districts 1, 5, 13, 19, 23, 27, and 31 all increased in population in excess of the ideal population for a new Wisconsin Senate District (178,598) and thus must shed some of their existing population. Order ¶15; Joint Stipulated Facts Ex. B (Nov. 4, 2021); Bryan Rep. ¶88.<sup>17</sup> Voters moved will necessarily have to wait until 2024 (versus 2022) to vote in their next State Senate election, unless they can be moved to odd-numbered and under-populated Senate Districts (an impossibility if there is no contiguous, odd-numbered district). Bryan Rep. ¶86. Additionally, the Legislature had to adjust the remaining existing Senate Districts, all with wide variation in population. *See* Joint Stipulated Facts Ex. B (Nov. 4, 2021). Those additional changes necessarily have a cascading effect on certain areas of the redistricting plan, which further contributes to movement of Senate voters from one district to another. Bryan Rep. ¶¶77-78.

The Legislature’s Senate District plan mitigates temporal vote dilution in Senate Districts, while again making changes necessary to rebalance population across districts. Ultimately, the Legislature’s plan moves only 138,732 people from odd-numbered senate districts to even-numbered senate districts. Bryan Rep. ¶91 By comparison, the proposed plan by the Governor’s People’s Maps Commission would move roughly *four times* as many people—

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<sup>17</sup> Senate Districts 26 and 27 saw the most substantial population growth, increasing by roughly 12% and 9% over ideal population respectively. Joint Stipulated Facts Ex. B (Nov. 4, 2021).

causing temporal vote dilution for more than 540,000 Wisconsinites. Bryan Rep. ¶94. A rejected amendment to the Legislature’s map would have similarly moved 533,201 individuals.<sup>18</sup>

### **C. Continuity of representation and incumbent pairings**

Continuity of representation—as measured by incumbent pairings—is the third metric for assessing “minimum changes” in a proposed remedy. *See Karcher*, 462 U.S. at 740 (identifying “avoiding contests between incumbent Representatives” among “legitimate objectives” for redistricting); Bryan Rep. ¶105. One of the most direct ways a voter experiences a least-changes redistricting plan is when the voter remains represented by the same representative before and after redistricting, with the opportunity to vote for (or against) her representative in the upcoming elections. *See, e.g., Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618, 647 (D.S.C. 2002) (affirming importance of “protecting the core constituency’s interest in reelecting, if they choose, an incumbent representative in whom they have placed their trust”). Districts that pair incumbents or draw incumbents out of their districts prohibit voters from maintaining (or making the choice not to maintain) that constituent-incumbent relationship. *See Karcher*, 462 U.S. at 740; *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688 (D. Ariz. 1992) (“maintenance of incumbents provides the electorate with some continuity”), *aff’d sub nom. Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 507 U.S. 981 (1993); *White*, 412 U.S. at 792 (approving “policy frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents”); *see also* Nathaniel Persily, *When*

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<sup>18</sup> Wis. LRB Memorandum to Sen. Janet Bewley, *supra*, at 3.

*Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131, 1136 (2005) (“[C]ourts that take account of incumbency do so in order to preserve the constituency-representative relationship that existed under the enjoined plan.”).

A minimum changes remedy will maximize continuity of representation. Bryan Rep. ¶105. That includes minimizing the pairing of two or more incumbents into new districts bearing little resemblance to their old districts. Such incumbent-pairings upset continuity of representation for voters, who necessarily “develop relationships with their representatives,” and whose representatives “learn about and understand the unique problems of their districts and to pursue legislation that remedies those problems” while in office. Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649, 671 (2002); *see also Vieth v. Jubelirer*, 541 U.S. 267, 357-58 (2004) (Breyer, J., dissenting) (collecting sources for the idea that continuity of representation “makes it easier for voters to identify which party is responsible for government decisionmaking”).

Applying this third metric to the Legislature’s plans, continuity of representation was one of the guiding principles for the Legislature in the redistricting process. Bryan Rep. App. 6 at 115 (2021 Wis. Joint Senate Resolution 63) (“Promote continuity of representation by avoiding incumbent pairing unless necessary...”). The Legislature’s resulting plans include only three incumbent pairings in the Assembly and no incumbent pairings in the Senate. Bryan Rep. ¶107; Bryan Rep. App. 6 at 114 (Wis. LRB Memorandum). (By comparison, the Governor’s People’s Maps Commission proposed maps with twenty incumbent pairings among Assembly Members and six of incumbent pairings among Senate Members,

including districts where *three* incumbents would be paired in a new district. Bryan Rep. ¶¶107, 110. Similarly, a rejected amendment to the Legislature’s maps would have paired thirty incumbents in the Assembly in fifteen new districts and eight incumbents in the Senate in four new districts.<sup>19)</sup>

\* \* \*

On every metric, the Legislature’s redistricting plans are an appropriate least-changes remedy for Petitioners’ malapportionment claims. The Legislature’s plans are based entirely on the existing redistricting plans—“the law enacted by the people’s elected representatives.” Order ¶78. They are adjusted as necessary “to achiev[e] compliance with the law,” rather than “draw maps from scratch.” *Id.* ¶¶8, 75. And to the extent those adjustments entailed making a policy choice—inherent when a policymaker is faced with possible redistricting options—the Legislature’s plans are the appropriate remedial plan because those choices were made by the elected representatives for the State of Wisconsin. *See* Wis. Const. art. IV, §3; *cf.* *White*, 412 U.S. at 795-96.

### **III. The Legislature’s plans comply with all state and federal law, including compliance with the Fourteenth Amendment and the Voting Rights Act.**

All parties agree that this Court must ensure that any remedy must comply with all remaining state and federal law, including the requirements of the Voting Rights Act. Order ¶27. The Legislature’s plans do so in the following ways.

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<sup>19</sup> Wis. LRB Memorandum to Sen. Janet Bewley, *supra*, at 5-7.

### A. Compliance with state law.

The Legislature's plans contain 99 single-member Assembly Districts and 33 single-member Senate Districts, where 3 contiguous Assembly Districts are nested in each Senate District. Bryan Rep. ¶¶13, 52; Wis. Const. art. IV, §§4, 5 (providing for single-member districts and that "no assembly district shall be divided in the formation of a senate district"). All districts are contiguous. Bryan Rep. ¶¶13, 52; Wis. Const. art. IV, §4 (requiring Assembly districts to "consist of contiguous territory"); *id.* §5 (requiring Senate districts to be of a "convenient contiguous territory").<sup>20</sup> Districts are "in as compact form as practicable." Wis. Const. art. IV, §4; *see* Bryan Rep. App. 3. Finally, every district follows 2020 ward boundaries, meaning no 2020 wards are split. Bryan Rep. ¶52. Indeed, the Legislature's plans reduce the number of county and municipal splits in the existing Act 43 districts. *See* Bryan Rep. ¶¶55-60 (comparing splits between 2011 Act 43 and Legislature's plans). The Legislature's plans thus comply with all remaining state law requirements, as well as secondary considerations. Order ¶¶34-36.

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<sup>20</sup> Contiguity means political contiguity. Order ¶36. If annexation by municipalities creates a municipal "island" (common in the Madison area, for example), the district containing detached portions of the municipality is legally contiguous even if the geography around the municipal island is part of a different district. *See, e.g., Prosser*, 793 F. Supp. at 866 (rejecting argument that Wisconsin's constitution requires "literal" contiguity, and noting "that it has been the practice of the Wisconsin legislature to treat [municipal] islands as contiguous with the cities or villages to which they belong"); *see also* Wis. Stat. §5.15(1)(b), (2)(f)(3); Wis. Stat. §4.001(2) (1972) ("Island territory (territory belonging to a city, town or village but not contiguous to the main part thereof) is considered a contiguous part of its municipality.").

## **B. Compliance with federal law.**

Any remedy must address Petitioners' malapportionment claim without creating another constitutional or legal harm. Order ¶34 ("in remedying the alleged harm, we must be mindful of these secondary principles so as not to inadvertently choose a remedy that solves one constitutional harm while creating another"). Applied here, the Legislature's redistricting plans comply with federal reapportionment requirements, Part I, *supra*, while also complying with the Fourteenth Amendment and the federal Voting Rights Act, in addition to the aforementioned state-law requirements.

Determining whether a map complies with both the Fourteenth Amendment and the Voting Rights Act can be a difficult task when a State considers race throughout the redistricting process. *See Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018); *Cooper v. Harris*, 137 S. Ct. 1455, 1463-65 (2017); *see also Holder v. Hall*, 512 U.S. 874, 896 (1994) (Thomas, J., concurring in judgment). Ordinarily, such racial considerations are unconstitutional. The Constitution's Equal Protection Clause does not tolerate race-based sorting unless proved to be for a compelling government interest and "narrowly tailored" to that end. *Shaw v. Reno*, 509 U.S. 630, 643 (1993). In redistricting, the Supreme Court has long assumed that compliance with the Voting Rights Act permits some consideration of race in redistricting. *Cooper*, 137 S. Ct. at 1464. But the Voting Rights Act does not give *carte blanche* authority to redistrict based on race. There must be a compelling reason for doing so. *See Ala. Leg. Black Caucus v. Alabama*, 575 U.S. 254, 279 (2015); *Shaw*, 509 U.S. at 643. And the use of race must be "narrowly tailored." *Cooper*, 137 S. Ct. at 1464.

**1. The Legislature's race-neutral approach and compliance with the Fourteenth Amendment.** Applied to the

Legislature's plans, there can be *no* claim that the Legislature's map is an unconstitutional racial gerrymander in violation of the Fourteenth Amendment. The Legislature's plans employ only race-neutral redistricting criteria and do not redistrict on the basis of race. *See* Bryan Rep. App. 6 at 116 (Assembly Speaker Robin Vos's statement explaining that drafters did not consider race when redistricting and instead considered only race-neutral criteria). Any racial gerrymandering claim or any suggestion of racial intent in the Legislature's redistricting plans would thus fail at step one. There can be no suggestion that there has been any "effort to separate voters into different districts on the basis of race," *Shaw*, 509 U.S. at 649, because the Legislature did not redistrict on the basis of race.

**2. The Legislature's least-changes approach and compliance with the Voting Rights Act.** The Legislature's plans also exemplify that a redistricting plan can comply with the Supreme Court's existing Voting Rights Act precedents *without* race predominating in redistricting. The Milwaukee area has always been an area of concern for the Voting Rights Act. The Legislature's plans for the Milwaukee area comply with the Voting Rights Act, both for Milwaukee's Black and Hispanic populations. *See* Report of John R. Alford ("Alford Rep.") ¶¶19, 39. The districts make the political process "equally open to participation" by all citizens. 52 U.S.C. §10301(b); *see Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2337-38 (2021). And there has been no "dispersal of a group's members into districts"—intentional or otherwise—leaving them as "an ineffective minority of voters." *Cooper*, 137 S. Ct. at 1464 (brackets omitted) (*quoting Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986)); *see* Order ¶27.

The Legislature's Milwaukee districts are least-changes from the districts that were challenged (and then survived in part and

changed in part) in last redistricting cycle's *Baldus* litigation. See *Baldus I*, 849 F. Supp. 2d 840; see Alford Rep. ¶¶12, 20-22. The *Baldus* plaintiffs, including a Petitioner-Intervenor here, alleged that the Act 43 districts violated the Voting Rights Act in two ways. *Id.* at 848. First, they alleged that "Act 43 'pack[ed]' African-American voters in Milwaukee into six districts" (existing Assembly Districts 10, 11, 12, 16, 17, and 18<sup>21</sup>), instead of taking "the opportunity to create a seventh 'influence' district." *Id.* Second, they alleged that Act 43 "crack[ed]' the Latino community into two districts" (existing Assembly Districts 8 and 9), "neither one of which is a majority-minority district of *citizen* voting age Latinos." *Id.* The plaintiffs "abandoned at trial their challenge to the African-American districts," while their challenge to the Hispanic districts ultimately succeeded. *Id.* at 848, 859. The *Baldus* court adjusted Assembly Districts 8 and 9, which are the boundaries still in effect today. *Baldus v. Members of Wis. Gov't Accountability Bd.* (*Baldus II*), 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012). That approval of the existing districts by the *Baldus* court creates yet another reason why the Legislature's minimum changes remedy is appropriate here.<sup>22</sup>

Importantly, the Legislature's proposed plans keep nearly all of the existing minority populations from the districts challenged in *Baldus* in the same districts under the Legislature's plans. Alford Rep. ¶12 (Tables 2 and 3); Legislature App. 22-23. With

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<sup>21</sup> See Grofman Expert Decl., *Baldus v. Members of the Wis. Gov't Accountability Bd.*, No. 2:11-cv-562 (Feb. 10, 2012), ECF 131-5.

<sup>22</sup> In pending federal litigation, the *BLOC* Petitioner-Intervenors have asserted that a seventh Black majority-minority district should be included in a 2020 redistricting plan. As their underpopulated demonstration plan reveals, that claim is wholly without merit. Alford Rep. ¶¶29-36.

respect to the predominately Black Assembly and Senate Districts that were litigated in *Baldus*, the Legislature's least-changes districts retain all or nearly all of the Senate and Assembly Districts.<sup>23</sup> Alford Rep. ¶¶12, 21. The *entirety* of the existing Senate Districts 4 and 6 are included in the Legislature's proposed Senate Districts 4 and 6. *See* Alford Rep. ¶20; Legislature App. 19. Additionally, all existing representatives remain districted in these Senate and Assembly Districts under the Legislature's plans; none has been paired with any other incumbent. Alford Rep. ¶19; Bryan Rep. App. 3 at 114 (LRB Memorandum). The only changes to these Assembly and Senate Districts are those required by the districts' declining populations. *See* Joint Stipulated Facts Ex. A (Nov. 4, 2021). Each had to grow in some way, lest they all fall well below the ideal population. But the districts grew outward, such that the Legislature's resulting districts move few individuals (and in some cases none) currently districted in the Act 43 districts. The Legislature's plans retain the *Baldus* districts and comply with the Voting Rights Act. Alford Rep. ¶19.<sup>24</sup>

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<sup>23</sup> These include Assembly Districts 10, 11, and 12—which together comprise Senate District 4—and Assembly Districts 16, 17, and 18—which together comprise Senate District 6.

<sup>24</sup> Discussed in Dr. Alford's report, the Legislature's Assembly District 10 declined in Black Voting Age Population (BVAP), as compared to the Act 43 districts. Alford Rep. ¶11 (Table 1) (46% BVAP). Black individuals still make up the largest share of the population of the Legislature's Assembly District 10 (totaling 29,311 individuals), which also includes white, Hispanic, Asian, and other minority voters. *Id.* The district remains compliant with the Voting Rights Act. Alford Rep. ¶¶24-27. And as the Supreme Court made abundantly clear in *Cooper*, there is no requirement that a district exceed 50% BVAP to comply with the Voting Rights Act; indeed, unnecessarily inflating a district to exceed 50% BVAP can itself violate the Fourteenth Amendment. *Cooper*, 137 S.

Likewise, with respect to the Hispanic districts adjusted by the *Baldus* court, the Legislature’s plans keep the cores of those districts almost exactly as they were in *Baldus*—meaning almost all individuals districted in Assembly Districts 8 and 9 after *Baldus* remain in Assembly Districts 8 and 9 under the Legislature’s plan. Specifically, the Legislature’s plan keeps intact 100% of existing Assembly District 8, more than 90% of existing Assembly District 9, and adds new Hispanic population to both Assembly Districts 8 and 9. Alford Rep. ¶¶12-13, 38; Legislature App. 23.<sup>25</sup> Importantly, the representatives for both districts remain in the districts under the Legislature’s plan, and they have not been paired. Alford Rep. ¶40; *cf. Baldus I*, 849 F. Supp. 2d at 858 (describing “the radical reconfiguration” of Act 43’s Assembly District 8 and emphasizing that the existing representative was “not an incumbent with respect to fully 45% of the population” of the then-new district). The Legislature’s plan then grows both districts, as required by population decreases.<sup>26</sup> The resulting districts mirror the demographics of those in *Baldus* and comply with the Voting Rights Act. Alford Rep. ¶¶38-39.

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Ct. at 1472 (“neither will we approve a racial gerrymander whose necessity [of 50%+1 BVAP] is supported by no evidence and whose *raison d’être* is a legal mistake”).

<sup>25</sup> When the *Baldus* court adjusted existing Assembly Districts 8 and 9 for Voting Rights Act compliance, the modified Assembly District 8 had a Hispanic Citizen Voting Age Population (HCVAP) of 55.22%, and the modified Assembly District 9 had an HCVAP of 34.78%. *See Baldus II*, 862 F. Supp. 2d at 862-63.

<sup>26</sup> Assembly District 8 was roughly 9% below ideal population after the 2020 Census, and Assembly District 9 was roughly 3% below ideal population. Joint Stipulated Facts Ex. A (Nov. 4, 2021).

## CONCLUSION

The Court should adopt the Legislature's proposed plans as the remedy for Petitioners' claims. The Legislature's Assembly, Senate, and Congressional District plans both redress Petitioners' malapportionment claims and comply with all other state and federal law. They make minimum changes to the existing districts. And they are the true people's map, passed by a majority of the representatives of all Wisconsinites.

Dated this 15th day of December, 2021.

Respectfully submitted,

Electronically Signed By  
Kevin M. St. John

**CONSOVOY MCCARTHY PLLC**

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

\* *Admitted pro hac vice*

\*\* *Admitted pro hac vice;  
licensed to practice in Mass.*

**BELL GIFTOS ST. JOHN LLC**

Kevin M. St. John, SBN 1054815  
5325 Wall Street, Ste. 2200  
Madison, Wisconsin 53718  
608.216.7990  
*kstjohn@bellgiftos.com*

**LAWFAIR LLC**

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

*Attorneys for Intervenor-Respondent,  
The Wisconsin Legislature*

## CERTIFICATIONS

**Form and Length.** I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c) for a brief and appendix produced with proportional serif font. The length of this brief is 8,592 words as calculated by Microsoft Word, not including the caption, table of contents, table of authorities, signatures, and these certifications.

**Appendix.** I hereby 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.

**Filing, Electronic Filing, and Service.** I hereby certify that I caused the foregoing brief, the Legislature's Appendix, and the Expert Reports of Thomas Bryan and John Alford to be filed with the Court as attachments to an email to clerk@wicourts.gov, sent on or before 12:00 noon on 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 tomorrow. This method of filing and electronic filing was required by the Court's Order dated November 17, 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, all of whom have consented to service by email.

Dated this 15th day of December, 2021.

Respectfully submitted,

Electronically Signed by  
Kevin M. St. John

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

Attorney for the  
Wisconsin Legislature