No. 2021AP1450-OA

In the Supreme Court of Wisconsin

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS *and* RONALD ZAHN,
PETITIONERS,

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

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, JULIE GLANCEY IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, ANN JACOBS IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, DEAN KNUDSON IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, ROBERT SPINDELL, JR. IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION *and* MARK THOMSEN IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION,
RESPONDENTS,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, IN HIS OFFICIAL CAPACITY, *and* JANET BEWLEY SENATE DEMOCRATIC MINORITY LEADER, ON BEHALF OF THE SENATE DEMOCRATIC CAUCUS,
INTERVENORS-RESPONDENTS.

On Petition To The Supreme Court To
Take Jurisdiction Of An Original Action

RESPONSE BRIEF OF THE CONGRESSMEN, PER THIS COURT'S OCTOBER 14, 2021 ORDER, ADDRESSING FOUR QUESTIONS

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INTRODUCTION[1]

The Congressmen's Initial Brief explained that this Court should adopt a "least-change" approach to drawing a remedial map, consistent with bedrock remedial and equitable principles. Certain other parties now oppose this approach, offering a grab-bag of objections, while proposing their own approaches. These parties are wrong as a matter of law, especially because they do not purport to explain what source of equitable authority permits a wholesale judicial rewriting of a congressional map that was enacted by the Legislature and signed by the Governor in 2011, when the only violation alleged is due to population changes in the last decennial. In any event, all of these alternative approaches are nonstarters because they would require this Court to adopt a map according to these parties' policy preference.

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[1] Given that this Court ordered the parties to file their Initial Briefs simultaneously, *see* Order, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Oct. 14, 2021), the Congressmen present this Response Brief in a typical reply-brief format, for the benefit of this Court, so that they may more closely respond to the parties' various positions on the four Issues Presented.

ARGUMENT

I. The Parties Generally Agree On The State- And Federal-Law Requirements Governing This Court's Adoption Of A Remedial Map, Although Some Parties Misunderstand The Scope Of The Voting Rights Act

As all parties appear to agree, *see generally* Johnson Br.8–21; BLOC Br.3–22; Hunter Br.1–13; Citizen Math. Br.4–19; Leg. Br.16–31; Gov. Br.5–8; Bewley Br.9–14, any remedial congressional map must comply with the following legal mandates: (A) the one-person/one-vote rule found in Article I, Section 1 and Article IV of the Wisconsin Constitution, as well as in Article I, Section 2 of the U.S. Constitution and the Fourteenth Amendment's Equal Protection Clause, *see* Congressmen Br.8–11; (B) the anti-racial-gerrymandering principle in the U.S. Constitution and the Wisconsin Constitution, *see* Congressmen Br.11–12; and (C) Section 2 of the Voting Rights Act ("VRA"), *see* Congressman Br.13–14.

Some parties erroneously suggest that the VRA either requires or permits drawing district lines according to race even where this would not produce a majority-minority district under *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986). *See* Hunter Br.21–22; BLOC Br.8–9; Citizen Math. Br.10–11. This is legally wrong. The VRA prohibits minority "vote dilution" through the "dispersal of a group's members into districts in which they constitute an ineffective minority of voters." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (quoting *Gingles*, 478 U.S. at 46 n.11) (alteration omitted).

Accordingly, a necessary "threshold condition[ ]" for a Section 2 vote-dilution claim is the presence of a politically cohesive minority group that could form a *majority* "in some reasonably configured legislative district." *Id.* at 1470. Thus, Section 2 does not extend to situations where a politically cohesive minority group cannot form a voting majority. *See League of United Latin American Citizens v. Perry (LULAC)*, 548 U.S. 399, 445–46 (2006) (controlling op. of Kennedy, J.); *Bartlett v. Strickland*, 556 U.S. 1, 12–17, 23 (2009) (controlling op. of Kennedy, J.). Any other conclusion "would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *LULAC*, 548 U.S. at 445–46 (controlling op. of Kennedy, J.); *accord Bartlett*, 556 U.S. at 22 (controlling op. of Kennedy, J.).

II. The "Least-Change" Approach Follows From This Court's Remedial And Equitable Authority, And The Parties Opposing This Approach Fail To Refute That

As the Congressmen explained, bedrock remedial and equitable principles compel the "least-change" approach to drawing any remedial congressional maps. Congressmen Br.15–19. The "least-change" approach also comports with this Court's role in our constitutional order, as it is a neutral rule guiding the completion of the redistricting process. Congressmen Br.19–22. This would also minimize voter confusion and maximize core retention. Congressmen Br.22–

23. Finally, the "least-change" approach will allow this Court to adopt a remedial map efficiently. Congressmen Br.23.

The *Hunter* Petitioners, the *BLOC* Petitioners, the Governor, Minority Leader Bewley, and the Citizen Mathematicians all oppose the "least-change" approach. Hunter Br.20; BLOC Br.22; Bewley Br.14; Citizen Math. Br.20. However, none of these parties refute the fundamental argument: that core remedial and equitable principles compel this Court to follow the "least-change" approach, given the nature of the alleged legal violation. In any event, the arguments that these parties make against the "least-change" approach are all unpersuasive, *infra* Part II.A.1–4, and they offer only their preferred policy preferences as an alternative to guide this Court, *infra* Part II.B.[2]

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[2] While the Legislature supports the "least-change" approach, its primary position is that this Court should defer to the maps that it adopts, if vetoed by the Governor. Leg. Br.12, 16, 18–20. The Legislature's position has substantial merit given that redistricting is "an inherently . . . legislative" task, "entrusted . . . to the legislative branch," *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam), and that this Court should defer to the Legislature's choices when considering alternative "least-change" remedies for congressional district lines. Having said that, so long as this Court retains its decision in *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964), the Congressmen could imagine a situation where a future Legislature could adopt a congressional map entirely different from the existing map, which map the Governor may veto. *See id.* at 557, 570 (holding that the Governor may exercise his veto power over the Legislature's approved maps). In that hypothetical circumstance, the Congressmen doubt that this Court's remedial and equitable authority would allow it to adopt such a wildly different map, as a remedy for a one-person/one-vote violation in the existing map. This Court need not deal with this hypothetical in this case, however, given

A. The Parties Challenging The "Least-Change" Approach Offer Only Unpersuasive Arguments

1. The "Least-Change" Approach Is Legally Sound

Various parties challenging the "least-change" approach raise meritless constitutional arguments against it and/or baseless claims that it will trigger other statutory violations. None of these arguments has merit.

The *BLOC* Petitioners argue that the Wisconsin Constitution precludes the least-change approach under the *expressio unius* canon, since Article IV, Section 4 explicitly lists compactness, contiguity, and respect for political boundaries as mandatory redistricting criteria that the Legislature must follow with respect to the state legislative districts. *See* BLOC Br.27–28 & n.6 (citing Wis. Const. art. IV, § 4 and *State v. Lickes*, 2021 WI 60, ¶ 24, 960 N.W.2d 855, among other authorities); *accord* Whitford Am.Br.4–5. This argument is fundamentally confused because the question here is how *this Court* should remedy a one-person/one-vote violation. Congressmen Br.7, 15–16. That is, this Court's role is to adopt a remedy that is "appropriately tailored to" the equal-population "violation." Congressmen Br.16–19 (quoting *Serv. Emps. Int'l Union, Loc. 1 ("SEIU") v. Vos*, 2020

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that the Legislature has already committed to adopting a "least-change" congressional map, meaning that both the "least-change" approach and the Legislature's primary approach will likely converge in their entirety here. *See* Leg. Br.12 (discussing 2021 Wis. Senate Joint Res. 63).

WI 67, ¶ 47, 393 Wis. 2d 38, 946 N.W.2d 35)). The "least-change" approach is the most "fitting remedy" for that constitutional violation, as it adjusts the existing district lines only to account for population changes. Congressmen Br.16–19 (quoting *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam)).

Regardless, even if these parties were correct that this Court should essentially sit as the Legislature in drawing the remedial congressional map, Article IV, Section 4 does not limit what the Legislature may consider when completing the redistricting process. Article IV, Section 4 simply lists the *minimum requirements* for the State's legislative districts, *see* Wis. Const. art. IV, § 4, leaving the Legislature to make other "political and policy decisions" once those requirements are met, *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam). Indeed, each of the parties criticizing the "least-change" approach—including the *BLOC* Petitioners—recognize this, since each of them urge this Court to follow one redistricting principle or another not specifically enumerated in Article IV, Section 4. *See, e.g.*, BLOC Br.15–19 (advocating for consideration of "preservation of communities of interest," "[i]ncumbents' [r]esidences," and "partisan makeup of districts"); Hunter Br.11–13 ("measures of partisan bias"); Gov. Br.7 ("maintaining traditional communities of interest"; "avoiding unnecessary pairing of incumbents"); Bewley Br.13–14 ("preserving identifiable communities of interest";

"account[ing] for . . . partisan influence"); Citizen Math. Br.4 ("partisan fairness"; "competitiveness or responsiveness").

The *BLOC* Petitioners' additional constitutional argument—that Article IV, Section 3 prohibits the "least-change" approach because it states that "the legislature shall apportion and district *anew*"—makes no sense. Wis. Const. art. IV, § 3 (emphasis added); *see* BLOC Br.30–36; *see also* Whitford Am. Br.5–6. According to the *BLOC* Petitioners, Article IV, Section 3's use of "anew" means that the State cannot use the "least-change" approach because that approach "enshrine[s] the old" redistricting map for the State, rather than redistricting the State "anew." BLOC Br.32. To begin, this argument suffers from the same fundamental flaw as the argument just discussed above, as the question here is how this Court should adopt a *remedial* map, following applicable remedial and equitable principles. *See supra* pp. 3–4. In any event, this argument ignores the full constitutional text of Article IV, Section 3, which requires the Legislature to "*apportion* and *district* anew," Wis. Const. art. IV, § 3 (emphases added). "Anew" modifies the verbs "apportion" and "district," meaning that the Legislature need only readjust existing district lines as needed to rebalance the districts' populations. *See Apportion*, Oxford English Dictionary (Sept. 2021) ("[t]o assign in proper portions or

shares");[3] *District*, Oxford English Dictionary (Sept. 2021) ("[t]o divide or organize into districts").[4]

The Governor, for his part, claims that the "least-change" approach would impermissibly elevate the retention of the existing district lines over other binding constitutional and statutory requirements. Gov.Br.8–10. Here again, this confuses the issue before this Court: how *this Court* should remedy a one-person/one-vote violation. Congressmen Br.7, 15–16; *supra* pp. 3–4. Foundational remedial and equitable principles directly support following the least-change approach here, as it narrowly remedies the only legal violation at issue, the malapportionment of the existing districts. Congressmen Br.16–19; *supra* pp. 3–4.

Finally, the *Hunter* Petitioners claim that the "least-change" approach would "expand the scope of this litigation" by requiring this Court to adjudicate "other [legal] deficiencies in the existing maps," including "violations of article I of the Wisconsin Constitution and Section 2 of the Voting Rights Act." Hunter Br.14. But again, this Court's task is only to remedy a one-person/one-vote violation. Congressmen Br.7, 15–18. This Court would *not* further concern itself with any other alleged legal "deficiencies in the existing maps," contrary to the *Hunter* Petitioners'

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[3] Accessed at www.oed.com/view/Entry/9748 (all websites last accessed Oct. 31, 2021).

[4] Accessed at www.oed.com/view/Entry/55797.

suggestion. Hunter Br.14. While this Court must ensure that this remedial map complies with all state and federal requirements, *see* Congressmen Br.7, that same inquiry is required for *any* remedial map that this Court adopts under *any* of the parties' proposed approaches, including under the "least-change" approach. The *only* difference is that the "least-change" map is *less* likely to contravene state or federal requirements as compared to a map generated under any other approach, since it largely carries forward the existing congressional boundaries, which boundaries have withstood a decade of litigation. Congressmen Br.15–16, 27–29.

2. The "Least-Change" Approach Is Easily Administrable

Multiple parties argue that this Court should not follow the "least-change" approach because it is too "abstract," BLOC Br.23, or "nebulous," Bewley Br.14–15, leaving this Court "only to guess" how to apply it here, Hunter Br.13–14. These parties' criticisms are incorrect.

As the Congressmen explained, the "least-change" approach requires this Court to adopt a remedial map by making "minor or obvious adjustments" to the existing map to account for "shifts in [Wisconsin's] population," as expressed in the 2020 Census. Congressmen Br.15–16 (quoting *Perry v. Perez*, 565 U.S. 388, 392 (2012)). This is a simple, concrete approach providing specific guidance for this Court to follow, *contra* BLOC Br.23; Bewley Br.14–15; Hunter

Br.13–14, which is why courts across the country, including the U.S. Supreme Court, have endorsed it, *see* Congressmen Br.15–23 (citing four cases endorsing the "least-change" approach, including *Upham v. Seamon*, 456 U.S. 37, 43 (1982), and *White v. Weiser*, 412 U.S. 783, 795 (1973)); *see also* Leg. Br.35–36 (collecting over ten additional cases using the "least-change" approach).[5] And while Professor Whitford's amicus argues that the U.S. Supreme Court "rebuked a court" for following the "least-change" approach in *LULAC*, 548 U.S. 399, that is incorrect. Whitford Am. Br.15. *LULAC* reviewed a mid-decade redistricting map drawn by a legislature, and it merely described in its background section (without rebuke) that a district court had previously adopted a "least-change" map for the State. *LULAC*, 548 U.S. at 412–13; *compare Upham*, 456 U.S. at 43 (endorsing the "least-change" approach); *White*, 412 U.S. at 795 (same).

Of course, this Court must exercise some limited discretion under a "least-change" approach when determining precisely how to adjust existing district lines to achieve population equality, since there is no one way to accomplish

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[5] The *BLOC* Petitioners argue that this Court should not follow the "least-change" approach because no previous court has "applied such an approach" when adopting a remedial map for Wisconsin. BLOC Br.36–37. That is wrong, since *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam), followed precisely this approach—"taking the [existing] reapportionment plan as a template and adjusting it for population deviations" to create a remedial map. *Id.* at *7 (describing this approach as "the most neutral way [the court] could conceive"); *contra* BLOC Br.36–37.

this goal. As the Congressmen have explained, traditional redistricting principles would guide the exercise of that limited discretion. *See* Congressmen Br.14–15, 27. Thus, if a given district were underpopulated—such that the "least-change" remedial map needed to add more people to that district—traditional redistricting principles would counsel in favor of adjusting the district's lines in a manner that eliminates county or municipal splits and/or makes the district more compact. *See* Congressmen Br.14–15 (identifying these as traditional redistricting principles). And within this narrow band of discretion under the "least-change" approach, this Court should defer to the Legislature's reasonable judgments on how to adjust the existing lines, consistent with this Court's recognition that redistricting is an "inherently . . . legislative task." *Jensen*, 2002 WI 13, ¶ 10; *see supra* p. 4 n.2.

The *BLOC* Petitioners', the *Hunter* Petitioners', and Minority Leader Bewley's criticisms of the "least-change" approach as giving insufficient clarity to this Court are deeply ironic, as each of these parties offer only opaque alternatives in its place, as explained below. *Infra* Part II.B. Further, the *Hunter* Petitioners in particular must understand that the "least-change" approach does provide sufficiently clear guidance. They ask this Court to follow this *exact same approach* when adjusting the existing boundaries of certain Assembly Districts that fall within the scope of Section 2 of the VRA. Hunter Br.21 (asking this Court to make only

"minor adjustments . . . to account for population change" with respect to Assembly Districts 8 and 9). The *Hunter* Petitioners do not attempt to explain why this Court could follow this approach with respect to those particular Assembly Districts, but not with respect to each of the congressional districts, as it adopts a remedial map for the entire State. *See generally* Hunter Br.13–14, 21.

3. Whether The Legislature Used The "Least-Change" Approach In Prior Redistricting Cycles Does Not Alter This Court's Remedial Authority

Multiple parties argue that this Court should not follow the "least-change" approach because, they claim, the Legislature did not adhere to it when adopting Wisconsin's existing congressional map in 2011. Hunter Br.15–16; Gov. Br.9–10; Bewley Br.16–17; Whitford Am. Br.8. This criticism reflects a fundamental misunderstanding of this Court's role vis-à-vis that of the Legislature. When the Legislature exercises its constitutional redistricting power, it has the authority to redraw districts based on "political and policy decisions," given that redistricting is an "inherently political and legislative task." *Jensen*, 2002 WI 13, ¶ 10; *Zimmerman*, 22 Wis. 2d at 570; *State ex rel. Bowman v. Dammann*, 209 Wis. 21, 243 N.W. 481, 485 (1932); *see* Congressmen Br.24. The only "limits" on the Legislature's discretionary "choices" in this sphere are those found in federal and state constitutional and statutory requirements. *Zimmerman*, 22

Wis. 2d at 570; *see* Congressmen Br.7–15, 20. Thus the Legislature has the authority to choose to adopt wholly new maps, as it pursues the public policy that it thinks best for the State. This Court's role in redistricting is decidedly different, as it is only remedying an equal-population violation. Congressmen Br.15–19, 21.

4. The "Least-Change" Approach Does Not Undermine Political Incentives

Multiple parties argue that this Court following the "least-change" approach would incentivize the Legislature and the Governor not to adopt a compromise redistricting map in the future. BLOC Br.43–45; Hunter Br.17; Citizen Math. Br.27. This misses the mark. As noted immediately above, the Legislature may desire to make substantial changes to the map to achieve political or policy objectives apart from mere re-equalizing the districts. *Supra* Part II.A.3; *Jensen*, 2002 WI 13, ¶ 10. If the Legislature and Governor do not reach a compromise and end up deadlocking, their ability to achieve those political or policy goals through a redistricting action would be frustrated. This is because, under the "least-change" approach, this Court would only make those minor adjustments to the existing map necessary to correct a malapportionment. Thus, if the Legislature and Governor wish to achieve any portion of their political- or policy-based redistricting goals by substantially altering the

existing map, the only way would be to complete the redistricting task themselves, through a political compromise.

B. The Parties Challenging The "Least-Change" Approach Only Offer Their Preferred Policy Preferences As Alternatives

All of the parties who reject the "least-change" approach fail to offer a satisfactory alternative to guide this Court's remedial-map-drawing efforts. Instead, each would simply have this Court redistrict the State according to these parties' own preferred policies. *See generally* Hunter Br.13–18, 26; BLOC Br.23–24, 46, 49; Gov. Br.8–13; Citizen Math. Br.19–29; Bewley Br.14–19. Thus, even if these parties' critiques of the "least-change" approach had some merit, which they plainly do not, *see* Part II.A, their failure to offer a viable alternative counsels in favor of following the "least-change" approach here, *see Rucho v. Common Cause*, 139 S. Ct. 2484, 2502–06 (2019) (considering and rejecting plaintiffs' multiple proposed standards for adjudicating their partisan-gerrymandering claims); Honorable Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 Case W. Reserve L. Rev. 905, 918–19 (2016).

The Congressmen briefly address each of the proposed approaches of the *Hunter* Petitioners, the *BLOC* Petitioners, the Governor, Minority Leader Bewley, and the Citizen Mathematicians immediately below, explaining how each approach invites this Court to adopt a map according to

unguided policy preferences, which are incompatible with this Court's role in our constitutional order.

Beginning with the *Hunter* Petitioners, they propose that this Court adopt a remedial map by "examin[ing]" proposed maps submitted by the parties/amici, "analyz[ing] how they serve relevant redistricting criteria," and then choosing "a redistricting plan that best serves the *myriad of competing considerations that go into redistricting*." Hunter Br.18 (emphasis added). The *Hunter* Petitioners offer no principled rule for how this Court may balance these "myriad of competing considerations," *id.*, only that such balancing must also "consider[ ] . . . partisan performance" and "create neutral, fair maps"—an additional balancing act for which they offer no further legal guidance. Hunter Br.7, 18.

The *BLOC* Petitioners' approach is equally unbounded. They propose that this Court adopt a remedial map by following the criteria that it "*must* consider," then "sometimes also weighing factors [it] *may* consider," while "avoiding the criteria [it] *must not* consider." BLOC Br.23–24. And somewhere in this unbounded framework, this Court "must [also] consider the partisan effects of the maps it imposes"—"analyz[ing] that question in light of justice, moderation, temperance, and respect for democratic principles." BLOC Br.46, 49. This too reduces only to policy preference, as the *BLOC* Petitioners offer no coherent rule for how this Court should "sometimes" weigh the "may-consider" factors or

sufficiently pursue their lofty (and lengthy) list of values that a remedial map must also somehow embody.

As for the Governor, he proposes that this Court adopt a remedial map that, in addition to "comply[ing] with federal and state constitutional and statutory requirements," also "include[s] other considerations, if appropriate under the circumstances and not in conflict with the binding requirements." Gov. Br.8. And "[p]artisan makeup . . . can be, and should be," one of those other considerations, so as "to help ensure maps are fair and balanced." Gov. Br.8, 14. Here again, the Governor offers no principled rule for applying the largely unnamed "considerations" and "circumstances" that he champions, let alone a discernible standard for when a map would be "fair and balanced." Gov. Br.8, 14.

Minority Leader Bewley recommends that this Court adopt a remedial plan "designed to do 'best possible' service to principles of fair representation embodied in the governing federal and state law, and as supported by traditional redistricting principles." Bewley Br.19. This approach lacks coherent legal principles for its application, and it is *admittedly* driven by judicial policy preferences, as Minority Leader Bewley wants this Court to "*apply its own values and put its own thumb on the scale*." Bewley Br.18 (emphasis added).

Finally, the Citizen Mathematicians argue that this Court "should adopt a 'best map' approach," which requires balancing "at least eleven traditional, neutral redistricting

principles," such as "partisan fairness," "competitiveness or responsiveness," and "stability." Citizen Math. Br.4, 18, 20. The Citizen Mathematicians admit that these factors may be "hard to measure," will "inevitably" raise questions of "how much is enough," and—"[p]erhaps hardest of all"—require "tradeoffs" between one factor as opposed to another. Citizen Math. Br.18. This approach is composed of policy choices from beginning to end—starting with deciding which factors are the relevant considerations; moving to how those factors are measured, weighed, and prioritized; and ending with the selection of the "best map." And while the Citizen Mathematicians do elaborate on their own ranking of the factors, they simply assume that their ranking is normatively correct, *see* Citizen Math. Br.24–26, rather than grounding the ranking in any coherent, predictable legal principles.

III. This Court Should Not Consider Partisan Makeup When Adopting A Remedial Map

A. The Congressmen explained that this Court should not consider a remedial map's partisan makeup here for two fundamental reasons. First, this Court considering such political concerns would exceed its remedial and equitable authority to adopt a remedial map. Congressmen Br.23–24. Second, nothing in either the Wisconsin Constitution or the U.S. Constitution makes partisan considerations relevant to a redistricting map's legality, including because redistricting is an "inherently political . . . task" that requires the

Legislature to make "political and policy decisions." *Jensen*, 2002 WI 13, ¶ 10 (emphasis added); Congressmen Br.23–24.

B. While the *Hunter* Petitioners, the *BLOC* Petitioners, the Governor, Minority Leader Bewley, and the Citizen Mathematicians all argue that this Court should consider partisan makeup in its remedial map, none of these parties even attempt to explain how such considerations could fall within this Court's equitable authority to remedy the malapportionment violation at issue here, which should be the end of the issue. *See generally* BLOC Br.46–57; Hunter Br.1–13; Citizen Math. Br.29–36; Gov. Br.14–15; Bewley Br.19–21. In any event, as explained below, the arguments that these parties muster fail to show how either the state or the federal constitutions allow this Court to consider partisanship in its remedial-map-drawing process. *Infra* Part III.B.1. Nor do these parties' arguments provide any judicially administrable standard for deciding when a map's partisan makeup is "too much." *Infra* Part III.B.2.

1. None of the parties advocating for consideration of partisan makeup shows that the Wisconsin Constitution or the U.S. Constitution would support such considerations. That failure is not surprising, given this Court's decision in *Jensen*, 2002 WI 13, and the U.S. Supreme Court's decision in *Rucho*, 139 S. Ct. 2484. *See* Congressmen Br.24–25.

a. Beginning with the Wisconsin Constitution, the *BLOC* Petitioners argue that this Court recognized partisan-gerrymandering claims in the *Cunningham* cases. *See* BLOC

Br.50–51 (discussing *State ex rel Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892), and *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35 (1892)). But the *Cunningham* cases rested on the equal-population principle, not on a rule against partisan gerrymandering, as this Court was adjudicating only claims that the "disparity in the number of inhabitants in the legislative districts" drawn by the Legislature was "so great" as to be "a direct and palpable violation of the constitution." *Cunningham*, 53 N.W. at 55. Or, as this Court explained in *Zimmerman*, 22 Wis. 2d 544, "the malapportionment present in [*Cunningham*] was not found to be a 'gerrymander' as that term is generally understood"; instead, *Cunningham* considered a map with a "substantial deviation from per capita equality of representation." *Id.* at 566–67.

Next, the Citizen Mathematicians claim that *Jensen* requires this Court to consider partisan makeup, since *Jensen* quoted favorably from *Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992). *See* Citizen Math. Br.31–32; *accord* Hunter Br.8–9 (favorably citing *Prosser*); Gov. Br.14–15 (same). The Citizen Mathematicians overread *Jensen*'s reliance on *Prosser*. While this Court in *Jensen* quoted some passages from *Prosser*, it did so *only* to explain that it was "in a position similar to that in which [*Prosser*] found itself"—specifically, it was called upon to adopt a remedial redistricting map without the benefit of "an enacted plan," just like the *Prosser* court. *Jensen*, 2002 WI 13, ¶ 12 (quoting

Prosser, 793 F. Supp. at 867). *Jensen* did *not* rely on *Prosser* for the proposition that this Court's role when adopting a remedial map is to balance the partisan makeup, contrary to the Citizen Mathematician's claim. *Compare id.*, *with* Citizen Math. Br.31–32. Indeed, such a leap would put *Jensen* in tension with itself, given that this Court recognized in that case that redistricting is "inherently political" and raises "critical legal and political issues." 2002 WI 13, ¶¶ 10, 18.

In any event, both *Jensen* and *Prosser* are factually distinguishable here. In both those cases, this Court and the federal court dealt with a redistricting challenge to then-existing, *court-drawn* maps. *See Jensen*, 2002 WI 13, ¶ 12 (considering challenge to 1992 court-drawn map); *Prosser*, 793 F. Supp. at 861–62 (considering challenge to 1982 court-drawn map); *see generally Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 844 (E.D. Wis. 2012) ("In 1982, 1992, and 2002, Wisconsin's legislative districts were drawn by a three-judge court."). Here, the Petitioners and Intervenor-Petitioners challenge the legislatively enacted map from 2011, Omnibus Amended Original Action Pet. ¶ 72—a map that has, in *Prosser*'s words, "the virtue of political legitimacy," 793 F. Supp. at 867.

The *BLOC* Petitioners briefly argue that Article I, Section 22 of the Wisconsin Constitution independently requires this Court to consider partisan makeup. BLOC Br.46–50. This argument goes nowhere. Article I, Section 22 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 Court interprets this provision to offer the same protections as the Fourteenth Amendment. *See Chicago & N.W. Ry. Co. v. La Follette*, 43 Wis. 2d 631, 642–43, 169 N.W.2d 441 (1969). The Fourteenth Amendment, however, does not permit federal courts to engage in partisan balancing during the redistricting process, *see Rucho*, 139 S. Ct. at 2491, 2499; thus, Article I, Section 22 would not permit this Court to engage in such balancing either, *contra* BLOC Br.46–50.

The *Hunter* Petitioners assert that the Wisconsin Constitution "embodies a respect for political equality," from which they conclude, apparently, that this Court must balance the partisan makeup of a remedial congressional map. Hunter Br.13; *see* Bewley Br.19 (arguing that "principles of fair representation [are] embodied in the governing federal and state law," without identifying a specific source of such law); Citizen Math. Br.33 (asserting that "logic suggests" that a map should embody proportional representation). This is mere *ipse dixit*, as the *Hunter* Petitioners cite no constitutional text establishing this redistricting principle, let alone translating that principle into a requirement that binds this Court's remedial-map-drawing efforts. *See* Hunter Br.13; *accord* Bewley Br.19; Citizen Math. Br.33. This lack of support in our State's

Constitution is understandable, given that redistricting is an "inherently political . . . task," *Jensen*, 2002 WI 13, ¶ 10.

b. Moving to the U.S. Constitution, multiple parties simply refuse to accept that *Rucho* expressly held that the U.S. Constitution permits state legislatures to employ political considerations in redistricting and prohibits federal courts from "reallocat[ing] political power" by adjusting district lines based on partisan concerns. Congressmen Br.25 (quoting *Rucho*, 139 S. Ct. at 2498, 2506–07).

The Governor argues that the U.S. Constitution empowers this Court to consider partisan makeup in a remedial map by relying on *Gaffney v. Cummings*, 412 U.S. 735 (1973), while ignoring *Rucho*. Gov. Br.14–15. But *Gaffney* only explained that such considerations could be proper for a State's redistricting body tasked with drawing new maps, not for a court tasked with adopting a remedial map in the event of a political gridlock. *See Gaffney*, 412 U.S. at 736, 754 (considering map drawn by "a three-man bipartisan Board"). And, of course, *Rucho* removes all doubt that the U.S. Constitution could support a court taking such partisan-balancing concerns into account when selecting a remedial map. *See Rucho*, 139 S. Ct. at 2498, 2506–07.

Similarly, Minority Leader Bewley argues that this Court must consider the partisan makeup of the districts in a remedial map in order to "vindicat[e]" the "First Amendment rights of the citizens of Wisconsin." Yet, she too only cites pre-*Rucho* precedent for that claim, Bewley Br.21, which

precedent obviously cannot override *Rucho*'s more-recent, express holdings to the contrary.

Finally, the Citizen Mathematicians argue that *Chapman v. Meier*, 420 U.S. 1 (1975), imposes "higher standards" on courts than on state legislatures when completing the redistricting process, which they interpret to mean that courts must ensure that their remedial maps are politically balanced, as a matter of federal constitutional law. *See* Citizen Math. Br.33 (citing *Chapman*, 420 U.S. at 26). Again, that argument cannot possibly survive *Rucho*, which was decided far more recently than *Chapman*. In any event, *Chapman*'s "higher standards" holding relates *only* to the one-person/one-vote rule, requiring court-drawn maps to limit "deviation[s] from approximate population equality" to a greater extent than legislature-drawn plans. *Chapman*, 420 U.S. at 26; *accord* Hunter Br.19 (explaining that *Chapman*'s "higher standards" apply to apportionment). And, if anything, *Chapman* supports this Court not considering partisan makeup in a redial map, since *Chapman* imposed its more stringent equal-population standard on court-drawn maps precisely because courts "lack[ ] the political authoritativeness" to "compromise sometimes conflicting state apportionment policies in the people's name." *Connor v. Finch*, 431 U.S. 407, 415 (1977); *Chapman*, 420 U.S. at 26–27.

2. These parties have also failed to identify a judicially manageable standard with which to reliably judge partisanship in a redistricting map, which is why *Rucho*

rejected any partisan gerrymandering claim at the federal level. 139 S. Ct. at 2499–502, 2508.

While the *Hunter* Petitioners, the *BLOC* Petitioners, the Governor, Minority Leader Bewley, and the Citizen Mathematicians all want this Court to consider whether a map is "too partisan," none of these parties put forward an objective, judicially administrable standard for when a map exceeds permissible partisanship thresholds. *See* Hunter Br.1–13; BLOC Br.46–57; Gov. Br.14–15; Bewley Br.19–21; Citizen Math. Br.29–36. Instead, these parties just assert that this Court's remedial map must not have "excessively partisan effects," Citizen Math. Br.29 (capitalization altered), or must not be a "severe partisan gerrymander," BLOC Br.56, "aggressive[ly]" partisan, Hunter Br.10, or "improperly promote unfair partisan advantage," Gov. Br.14. That is, none of these parties identify any "coherent legal test" to judge with any "measure of predictability," *Horst v. Deere & Co.*, 2009 WI 75, ¶ 71, 319 Wis. 2d 147, 769 N.W.2d 536, when a map has "too much" partisanship, *see* Gov. Br.14–15 (failing to discuss an administrable test); BLOC Br.46–57 (same); Bewley Br.19–21 (same); Citizen Math. Br.29–36 (same); *accord* Hunter Br.11–12 (claiming that it is "premature at this stage to recommend *how* the Court should measure and analyze partisan bias"). And while some of the parties cite a grab bag of social-science metrics that would purportedly quantify partisanship, *see* Hunter Br.12; *accord* BLOC Br.43–44, those metrics do not identify the tolerable limits of

partisanship, *accord Rucho*, 130 S. Ct. at 2501; *Gill v. Whitford*, 138 S. Ct. 1916, 1932–33 (2018).

The parties' failure to put forward a coherent standard for measuring excessive partisanship is the same fatal flaw that doomed partisan gerrymandering claims in *Rucho*. As *Rucho* explained, for a court to declare that a map is impermissibly partisan, it must first have "a standard for deciding how much partisan dominance is too much." 139 S. Ct. at 2498 (citation omitted). Otherwise, the court would issue its judgment "with uncertain limits," thus "risk[ing] assuming political, not legal, responsibility" over the redistricting process. *Id.* (citations omitted). So, unless the parties here present this Court with a coherent standard to measure excess partisanship, this Court cannot "even begin to answer the determinative question: 'How much [partisanship] is too much?'" *Id.* at 2501.

With no coherent legal test to judge whether Wisconsin's existing maps are impermissibly partisan, *Horst*, 2009 WI 75, ¶ 71, the various parties simply assert that this is so, heavily relying on the district-court decisions in *Baldus v. Members of Wisconsin Government Accountability Board*, 849 F. Supp. 2d 840 (E.D. Wis. 2012), and *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018). *See* Hunter Br.3–5; Gov. Br.10–11; Bewley Br.17; *accord* BLOC Br.21, 39, 53–54. Yet *Whitford* involved no challenge to congressional districts, and the partisan-gerrymandering claims against the congressional

districts in *Baldus* went nowhere, as the court observed that these districts resulted from a bipartisan process. *Whitford*, 218 F. Supp. 3d at 843–44; *Baldus*, 849 F. Supp. 2d at 854 (ultimately dismissing claim for plaintiffs' failure to present judicially manageable standard). And while these parties focus on the state legislative districts, the U.S. Supreme Court vacated the *Whitford* district-court decision in whole, *Gill*, 138 S. Ct. at 1934, and then the parties dismissed the case after *Rucho*, *see Whitford v. Gill*, 402 F. Supp. 3d 529, 531 (W.D. Wis. 2019).

IV. The "Least-Change" Approach May Well Allow This Court To Adopt A Remedial Map Based Solely On Submissions To This Court, Without Need For Factfinding Or Discovery Proceedings Proposed By Some Of The Parties

Finally, as the Congressmen previously explained, the "least-change" approach may well allow this Court to adopt a remedial congressional map based solely on submissions from the parties/amici. Congressmen Br.25–29. Specifically, if this Court were to follow the "least-change" approach, the parties/amici would submit their proposed maps to this Court, along with all necessary population data and explanations for the adjustments to the existing district lines. Congressmen Br.26–27. Based on these submissions, this Court may well be able to choose a "least-change" remedial congressional map without need for further factfinding—including as to the map's compliance with the other state and federal-law

requirements—using the traditional redistricting criteria to guide the selection of the most fitting changes, while deferring to the Legislature's reasonable judgments as appropriate. Congressmen Br.26–29; *supra* p. 4 n.2. This is notably unlike many of the other approaches put forward by some of the parties, which depend upon factfinding or discovery procedures. *See* BLOC Br.57–66; Gov. Br.15–16; Bewley Br.21–22; *see also* Hunter Br.32–33.

The "least-change" approach would also empower this Court to adopt a remedial map expeditiously, as the Congressmen previous explained in their letter briefs to this Court. Congressmen Letter Br., *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Oct. 6, 2021) ("Congressmen Oct. 6 Letter"); Congressmen Resp. Letter Br., *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Oct. 13, 2021) ("Congressmen Oct. 13 Letter"). Specifically, the Congressmen's approach would allow this Court to adopt a remedial plan by **February 28, 2022**, one day in advance of **March 1, 2022** deadline that the federal court in *Hunter v. Bostelmann*, Dkt. 75, Nos. 3:21-cv-512, *et al.* (W.D. Wis.), has apparently set, *see* Congressmen Oct. 6 Letter at 1–2; Congressmen Oct. 13 Letter at 1–2. Below is an example schedule that this Court could follow to adopt a remedial map by the Congressmen's proposed **February 28** date:

- If the Legislature approves new redistricting maps by the close of its next available floor period, **November 11, 2021**, the Governor will have until

November 18, 2021 to approve or veto the maps. Wis. Const. art. V, § 10(1)(b), (3);

- Then, if the Governor were to veto the proposed maps on **November 18**, this Court could immediately declare that Wisconsin's existing congressional and state-legislative maps are malapportioned, in violation of the Wisconsin Constitution;

- Next, this Court could order all parties/amici to simultaneously submit their proposed "least-change" maps and accompanying briefs/materials by **December 24, 2021**, with simultaneous response briefs due by **January 7, 2022**;

- Finally, after the Court reviews those submissions, it could either enter its decision adopting redistricting maps for the State based on the parties' submissions or order limited fact-finding procedures, if necessary, and then order all parties/amici to submit simultaneous supplemental memoranda by **January 28, 2022**, with the Court entering its final relief by **February 28, 2022**.

Congressmen Oct. 13 Letter at 2–3; *see* Congressmen Oct. 6 Letter at 2.

CONCLUSION

The Congressmen respectfully submit that this Court should approach this matter as described above and, in the Congressmen's Initial Brief.

Dated: November 1, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font, as well as to this Court's October 14, 2021 Order. The length of this Brief is 6,419 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12), AND OF SERVICE

I hereby certify that:

I have submitted an electronic copy of this Brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the Brief filed as of this date.

A copy of this certificate has been served with the paper copies of this Brief filed with the Court and served on all opposing parties.

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