IN THE SUPREME COURT OF WISCONSIN

No. 2021AP1450-OA

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

Petitioners,

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

Intervenors-Petitioners,

v.

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

Respondents,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, IN HIS OFFICIAL CAPACITY, AND JANET BEWLEY SENATE DEMOCRATIC MINORITY LEADER, ON BEHALF OF THE SENATE DEMOCRATIC CAUCUS,

Intervenors-Respondents.

HUNTER INTERVENOR-PETITIONERS' BRIEF ADDRESSING COURT'S OCTOBER 14 ORDER

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ISSUES PRESENTED[1]

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

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

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

4. As we evaluate or create new maps, what litigation process should we use to determine a constitutionally sufficient map?

ARGUMENT

I. The Court should consider representational fairness, including partisan performance, when evaluating or creating new maps.

Thirty-six different institutions, organizations, and individuals are party to this suit in various capacities, and collectively they represent a broad range of views about the relevant factual and legal considerations. There is one piece, however, on which nobody can reasonably disagree: Wisconsin's congressional and legislative districts

[1] This brief addresses the Court's four questions in the following order to minimize repetition between sections.

are among the most politically gerrymandered in the entire country. This very case arose because the gerrymandered Legislature is controlled by Republicans who seek to extend their advantage for another decade, while voters statewide elected a Democratic Governor who seeks to draw fair district lines. With the political process stuck in impasse, the Republican Legislature and other Republican-affiliated petitioners are wagering that this Court will deliver the partisan knockout that they have failed to achieve through the political process. *That wager must not collect.*

The judiciary's institutional credibility as a nonpartisan and independent actor depends on a litigation process that ensures the redistricting deck is not stacked in favor of one party or another. It is bad enough when elected officials ensconce themselves in power; it would be many times worse if a nonpartisan judiciary were to perpetuate a rigged system under its own authority. For government to be representative of the people, districts must be fair. And for districts to be fair, neutral map-drawers must consider the obvious consequences of how their lines will apportion power. Accordingly, this Court should focus its efforts on adopting maps that minimize partisan bias.

A. Wisconsin's political districts are severely gerrymandered to favor Republicans.

The story behind Wisconsin's current legislative districts has been well chronicled. When Republicans took up redistricting after the 2010 census, "[o]ne of their first orders of business" was to assess the partisan make-up of potential new districts. *Whitford v. Gill*, 218 F. Supp. 3d 837, 890 (W.D. Wis. 2016) (three-judge panel), *vacated for lack of standing*, 138 S. Ct. 1916 (2018). The drafters scrutinized the partisan effects of each proposal they considered, and they adjusted the boundaries through several rounds of revisions to ensure the advantages they were manufacturing for Republicans would prove durable. *Id.* at 893-95. As the federal court found, "[t]he map that emerged from this process reduced markedly the possibility that the Democrats could regain control of the Assembly even with a majority of the statewide vote." *Id.* at 895. That is, even if Republicans' statewide vote fell below 48%, the plan was designed to ensure that "Republicans would maintain a comfortable majority." *Id.* "[O]ne of the purposes of [the enacted legislative redistricting plan]," the court concluded, "was to secure Republican control of the Assembly under any likely future electoral scenario for the remainder of the decade, in other words to entrench the Republican Party in power." *Id.* at 896.

The gerrymander was successful: "It is clear that the drafters got what they intended to get," *id.* at 898, as ensuing election results confirmed the enacted plan's gross partisan distortions. In 2012, Democrats won 51.4% of the statewide vote in Wisconsin's elections, but under the highly gerrymandered map, this translated into control of only 39 out of 99 Assembly seats. In 2014, in contrast, when Republicans won the statewide vote share by a similar margin—52%—they won a commanding 63 seats. *Id.* at 901. This 24-seat disparity for similar vote shares illustrates the Republican Party's stunning achievement: under *any* likely electoral outcome—including outcomes where Democratic candidates attract a majority of the statewide vote-share—Republican control of the Assembly is secure. *Id.* As political scientists have confirmed, "Democrats probably have to win about 55 to 56 percent of the statewide vote to win control of the state assembly. Or to put it differently, Republicans need only win 44 to 45 percent."[2]

The current districting plans' partisan bias is startling by any measure, but the truly extraordinary nature of the gerrymander is perhaps most apparent in national and historical context. One study

[2] Jonathan Krasno et al., *Wisconsin's State Legislative Districts Are a Big Republican Gerrymander*, Washington Post (May 24, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/24/wisconsins-state-legislative-districts-are-a-big-republican-gerrymander.

found that Wisconsin's legislative map is the second-most gerrymandered plan in the country—only Wyoming's is worse.[3] Another study surveyed 786 state legislative elections between 1972 and 2015 and calculated that the partisan skew of Wisconsin's maps scored "in the *top 3 percent* in terms of magnitude." *Whitford*, 218 F. Supp. 3d at 861 (emphasis added). Wisconsin's congressional map is hardly better. The legislative map drawers pursued the same partisan purpose, and four common measures of partisan bias all confirm the map's pro-Republican skew.[4]

The fight over redistricting in Wisconsin, is, at its core, a fight over representational fairness. Because the current maps are about as far from fair as the Legislature could possibly achieve, it is imperative that any judicially enacted plans not replicate that partisan prejudice.

B. The Court must not be complicit in partisan gerrymandering.

As the United States Supreme Court has recognized, "[p]artisan gerrymanders . . . are incompatible with democratic principles." *Ariz. State Legislature v. Ariz. Ind. Redistricting Comm'n*, 576 U.S. 787, 791 (2015) (citations omitted). While that Court has declined to recognize

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[3] Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering & the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 882 (2014).

[4] PlanScore, https://planscore.campaignlegal.org/wisconsin/#!2020-plan-ushouse-d2.

federal law claims against *legislatively enacted* partisan gerrymanders, there is substantial consensus that the judiciary should strive for partisan fairness when it is tasked with adopting district maps.

In *Gaffney v. Cummings*, 412 U.S. 735 (1973), the United States Supreme Court unanimously affirmed the importance of partisan fairness in judicial redistricting. The Court dismissed a challenge to Connecticut's legislative redistricting plan, which was drawn by a panel of three state court judges after legislative impasse, and declined the challengers' invitation to invalidate the plan on grounds that it "attempted to reflect the relative strength of the parties in locating and defining election districts." *Id.* at 752. Instead, the Court emphasized, "[t]he very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats." *Id.* at 753.

If legislators can harness political data to produce maps that are reliably biased, there is no question that courts can observe the same political data to produce maps that are reliably fair. Even in 1973, partisan data was easily available down to the precinct and ward level, and "it require[d] no special genius to recognize the political consequences of drawing a district line along one street rather than

another." *Id.* Those decisions, of course, "[can] well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely." *Id.* This fact is not merely "obvious," the Court said: it is "absolutely unavoidable." *Id.* Since then, technological advances mean that demographers can predict the partisan consequence of districting decisions with exacting accuracy. The map drawer's assignment is to decide whether to use this data to achieve partisan advantage or partisan neutrality.

There is nothing sullying about considering a proposed map's partisan performance when that information is used to create neutral, fair maps. In fact, for voters, candidates, and elected officials, partisan performance is often the most important feature of a districting plan. Just as commonly considered factors such as compactness, contiguity, and undivided county boundaries recognize that people who reside near each other often share common political interests warranting shared representation, it is no more controversial to recognize that partisan affiliation is among the strongest indicators of common political interest, and thus comprises one of the most salient considerations in the drawing of political maps. Purporting to ignore those interests undermines one of the primary purposes of drawing political districts in the first place.

The United States Supreme Court has made clear that any attempt to ignore partisan data is not merely unreasonable; it can be irresponsible. In *Gaffney*, the Court explicitly rejected the argument that map drawers should focus exclusively on achieving population equality and other seemingly apolitical goals. Such a "politically mindless approach," the Court explained, "may produce, whether intended or not, the most grossly gerrymandered results." *Id.* And what's more, the Court continued, "it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, *if not changed, intended*." *Id.* (emphasis added). If a court does not intend to enact a partisan gerrymander, then it must consciously take steps to prevent that result from occurring.

A federal court in Wisconsin arrived at the same conclusion in the process of redrawing the state's legislative districts in 1992. The three-judge panel rejected the contention that political fairness should be "irrelevant" to the court's selection of a redistricting panel, as if non-partisan criteria like population equality were all that mattered. *Prosser v. Elections Bd.*, 793 F. Supp. 859, 866 (W.D. Wis. 1992). The court acknowledged that the political effects of *legislatively* enacted maps may not always require close judicial scrutiny, but nonetheless recognized

that courts must be more attuned to political considerations when they are responsible for adopting new maps in impasse cases. Indeed, the panel defined its task with explicit reference to partisan fairness:

> We are comparing submitted plans with a view to picking the one (or devising our own) most consistent with judicial neutrality. ***Judges should not select a plan that seeks partisan advantage***—that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda—even if they would not be entitled to invalidate an enacted plan that did so.

Id. at 867 (emphasis added). Notably, the court did not permit reasonable differences about how partisan data should be interpreted to deter it from selecting "the least partisan" plan that it could. *Id.* at 871. And other courts across the country have similarly recognized the importance of prioritizing partisan neutrality. *See, e.g.*, *Jackson v. Nassau County Board of Supervisors*, 157 F.R.D. 612, 615 (E.D.N.Y. 1994) (applauding districting plan submitted by a Special Master who concentrated his energies on devising a plan that "(i) contained the least amount of district-wide population deviation possible, and (ii) was the most fair politically"); *Good v. Austin*, 800 F. Supp. 557, 566-67 (E.D. Mich. 1992) (analyzing "political fairness" of newly construed districts in court-drawn plan because it was "apparent that a districting map devised entirely according to nonpolitical criteria could inadvertently result in a plan that

unfairly favored one political party over the other"); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 659 (N.D. Ill. 1991) (three-judge panel) (judicially adopting a map that "best meets the constitutional requirements of population equality and fairness to racial and language minorities, while achieving a politically fair projected distribution of congressional seats across party lines"); *Legislature v. Reinecke*, 516 P.2d 6, 38 (Cal. 1973) (affirming redistricting plan proposed by special masters and deeming it "appropriate to consider whether the recommended plans are politically fair").

These decisions appreciate that the need to avoid partisan bias is most pressing when the judiciary holds the mapping pen. Judges can no more avoid responsibility for that bias by closing their eyes to partisan data than physicians can avoid malpractice liability by announcing they will ignore all easily predictable side effects of a chosen treatment regimen. The proper course in any field is to consider all reasonably foreseeable consequences of a given action, and, in the redistricting context, to avoid crafting any map that resembles the aggressive approach of scheming partisans.

Once an effective gerrymander is in place, as in Wisconsin, voters have no realistic hope of meaningfully changing the composition of the legislature to rationalize the lines, even if a majority of voters across the

state support the out-party. In Wisconsin, the most that voters could do to convey their displeasure with the prevailing districting plans was to elect a candidate for Governor—a statewide race that is immune from gerrymandering—at the turn of the decade who would reject ten more years of hostile gerrymandering. In 2018, Wisconsinites did exactly that.

Governor Evers, a Democrat, is the only redistricting actor with a statewide mandate, and his anticipated veto of any new Republican gerrymander should mark the end to the current distortions. Politically divided government in a redistricting year should reset the partisan advantage back to zero. This can occur by the Legislature proposing a neutral map that attracts the Governor's signature, or, in the event of impasse, by the judiciary's conscientious adoption of new neutral plans. Anything else would be a rebuke to Wisconsin voters and a blow to foundational democratic principles.

C. Consideration of simple and common measures of partisan bias can ensure representational neutrality.

There are many commonly accepted measures of partisan bias. Because the Court has requested briefing only on *whether* partisan makeup of districts is a valid factor to consider, the *Hunter* Intervenors deem it premature at this stage to recommend *how* the Court should measure and analyze partisan bias. But it is important to note that the

prospect of choosing among an array of available metrics to identify partisan bias (and its flip side, fairness) should not dissuade this Court from accepting that obligation. Just as measuring brainwaves, pulse, and breathing activity are each distinct methods to determine whether or not a person is alive, for example, common statistical tools such as the efficiency gap, mean-median difference, and partisan bias all quantify related elements that help determine whether a plan is fair—or not. These familiar measures are intuitive and easily available.[5] Unlike evaluating the partisan distortions in a legislatively enacted map, which requires a court to determine "[h]ow much is too much," *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019), this Court will enjoy the much easier task of evaluating an array of proposed maps to determine which map performs best on metrics of partisan neutrality.

And unlike the Johnson Petitioners' proposed "least changes" approach to judicial redistricting, partisan neutrality reflects principles embedded in state law.[6] Regardless of whether Wisconsin's Constitution

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[5] For example, websites including PlanScore, the Princeton Gerrymandering Project, and FiveThirtyEight each provide contemporaneous evaluations of proposed maps and their likely partisan effects. *See* PlanScore, https://planscore.campaignlegal.org/wisconsin/#!2020-plan-ushouse-eg; Princeton Gerrymandering Project, https://gerrymander.princeton.edu/; FiveThirtyEight, https://projects.fivethirtyeight.com/redistricting-2022-maps/wisconsin/.

[6] This Court has interpreted Article I, sections 3 and 4 of the Wisconsin Constitution to "guarantee the same freedom[s] as do the First and Fourteenth amendments of the

creates a justiciable cause of action to challenge legislative gerrymanders, it clearly embodies a respect for political equality. Because neutral maps are most consistent with that principle, and because recognizing and adopting neutral maps is comfortably within the judicial competence, this Court should consider the partisan composition of proposed districts in evaluating or creating new maps.

II. The Court should not adopt a least-changes approach.

The Court should not adopt a least-change approach for several reasons, the least of which is that the meaning of the approach is entirely unclear. Petitioners describe this approach as "making the least number of changes to the existing maps as are necessary to meet the requirement of equal population and the remaining traditional redistricting criteria." Pet. at 12. But the Petitioners do not identify those traditional redistricting criteria, nor do they explore what would be "necessary to meet" them. Indeed, rarely are any redistricting criteria strictly necessary; most often they operate as guideposts that inevitably must be

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United States Constitution." *Lawson v. Hous. Auth. of City of Milwaukee*, 270 Wis. 269, 274, 70 N.W.2d 605 (1955). Four justices on the United States Supreme Court, in turn, have recognized the ways in which partisan gerrymandering injures associational rights protected by the First Amendment. *See Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring). While a majority of that Court has not identified manageable standards to invalidate legislative gerrymanders—as discussed, a task significantly more challenging and altogether different than what is presented here—the Court recognized that those principles and standards may be supplied by state constitutions. *See Rucho*, 139 S. Ct. at 2507.

compromised to some extent depending on the circumstances. As a result, the parties and the Court are left only to guess what Petitioners are envisioning and how a least-change approach might direct this litigation, which further illustrates the lack of legal precedent for such an approach.

Even if Petitioners could provide some clarity on this amorphous principle, there are several reasons not to base this litigation on a defunct redistricting plan. First, any commitment by this Court to using a least-change approach would necessarily expand the scope of this litigation. In addition to litigating the proper contours of a 2020 map, the parties will need to advance any and all legal challenges regarding deficiencies in the existing map. Currently, the parties have only challenged the existing maps on malapportionment grounds. However, there are numerous other deficiencies in the existing maps, including violations of article I of the Wisconsin Constitution and Section 2 of the Voting Rights Act, that would have to be litigated and resolved if the Court were required to simply preserve them in its adopted map.

Second, the least-change approach would treat all deviations from the current map as equally suspect, rather than permitting an informed consideration of which deviations are a break from historically continuous district lines. Indeed, the least-change approach ignores the

fact that Wisconsin's current congressional and legislative maps are themselves significant deviations from historic district lines in the state.

A few examples from the congressional map are illustrative:

- For 80 years, Dane and Columbia Counties were represented by the same member of Congress. However, in 2011 they were split between the Second and Sixth Districts.
- Since 1913, Wood and Portage Counties had been in the same district. Now, Portage County is in the Third District and Wood County is split between the Third and Seventh Districts.
- In 2011, the Wisconsin Dells region of Columbia, Sauk, Adams, and Juneau Counties was split between an unprecedented *four* congressional districts: the Second, Third, Sixth, and Seventh.

The existing state legislative maps are also notable for their irregular treatment of municipalities. For example, the city of Sheboygan is divided into multiple Assembly districts and the cities of Neenah and Menasha are now in different Assembly districts. Furthermore, in 2011, a new statute was enacted permitting the legislature to override municipalities' own ward lines. *See* Wis. Stat. §

5.15(1)(c). Reversing over 100 years of practice, the new statute required municipalities to adjust their ward lines according to legislative districts—forcing strange new ward boundaries in order to meet the constitutional requirement that legislative districts be bounded by municipal ward lines. *See* Wis. Const. art. IV, § 4. As a result of the 2020 Census, many municipalities are now required to adjust their ward lines—which would make it nearly impossible to use a "least-change" approach to design a state legislative map that meets the constitutional requirement that legislative districts be bounded by ward lines.

In essence, Petitioners ask this Court to use a "least-change" approach to lock in one of the most significant changes to district lines in Wisconsin's history. It is frankly disingenuous for Petitioners to invoke the concept of "least-change" to cement such a striking aberration to Wisconsin's political landscape. To the extent the Court's redistricting plan is informed by the historical district lines that fostered regional political communities in Wisconsin, it must be a full accounting of that history—not a rubber-stamping of the most recent map.

Third, a least-change approach would only further entrench and exacerbate the partisan gerrymandering that took place ten years ago. As this Court has noted, "[r]edistricting determines the political landscape for the ensuing decade and thus public policy for years

beyond." *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶ 10, 249 Wis. 2d 706, 713, 639 N.W.2d 537, 540. With ten years of power to grab, politicians are apt to take advantage. Through a least-change approach, gerrymandered maps now have the prospect of persisting for twenty years. Ordinarily, gerrymandering in Wisconsin is only possible when, as was the case last cycle, a single party controls the Senate, Assembly, and the Governor's office. However, if this Court determines that biased maps will be maintained through a "least-change" approach, the gerrymandering party need only retain control of one of the legislative chambers to ensure partisan advantage for another decade—if not in perpetuity. Petitioners' two proposals—to ignore partisan fairness and to prioritize least changes—together are constructed to lead the Court directly toward putting its imprimatur on a highly partisan gerrymandered map, contrary to the will of Wisconsin's electorate, as represented by not only its partisan makeup but its recent electoral choices.

Adopting a least-change approach also only makes it more likely that Wisconsin's political branches will fail to draw a map in future cycles. As this Court noted in *Jensen*, the people of Wisconsin "deserve no less" than a map that is enacted by the political branches pursuant to the Wisconsin Constitution. 2002 WI 13, ¶ 23. But adopting a least-

change approach rewards parties who force a political impasse to preserve a gerrymandered map. Where, as here, the Governor and Legislature appear unable to reach a deal, this Court should not reward gerrymandering in the same way that it "should not select a plan that seeks partisan advantage." *Prosser*, 793 F. Supp. at 867.

Ultimately, this Court is simply called upon to apply relevant redistricting criteria to the current distribution of persons in Wisconsin. The parties will approach this task thoughtfully and propose maps that provide equal representation to all Wisconsinites. The Court will examine these maps, analyze how they serve relevant redistricting criteria, and enact a redistricting plan that best serves the myriad of competing considerations that go into redistricting. There is no reason to contort the task before the Court with misguided attachment to a set of maps that all parties agree are no longer acceptable.

III. The Court should consider the following substantive redistricting criteria.

A. Legislative Districts

Equal population. Both the United States and Wisconsin Constitutions require Wisconsin's legislative districts to be substantially equal in population. Under the United States Constitution, the Equal Protection Clause "requires that the seats in both houses of a bicameral

state legislature [] be apportioned on a population basis." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). The Wisconsin Constitution similarly directs that apportionment for the assembly and senate shall occur "after each enumeration by the authority of the United States"—that is, after the decennial census—and shall be apportioned "according to the number of inhabitants," Wis. Const. art. IV, § 3, which the Wisconsin Supreme Court has also interpreted to require substantial population equality. *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 565, 126 N.W.2d 551, 563 (1964) (noting "a valid apportionment should be as close as approximation to *exactness* as possible") (quotation and citation omitted).

While a legislature has *some* discretion with population deviations when it draws legislative districts, when courts redistrict, they are held to a stricter standard in the first instance. *See Connor v. Finch*, 431 U.S. 407, 414 (1977); *Chapman v. Meier*, 420 U.S. 1, 26 (1975) (explaining that "[a] court-ordered plan [] must be held to higher standards than a State's own plan"). For that reason, when courts implement their own redistricting plans, they are typically required to achieve *de minimis* population deviations in legislative plans. *See Connor*, 431 U.S. at 414; *Chapman*, 420 U.S. at 26-27.

When prior courts have resolved Wisconsin's redistricting impasses and implemented new legislative district plans, these courts have similarly strived to achieve *de minimis* population deviations. In the past three decades of resolving Wisconsin's impasses, all courts achieved population deviations in legislative districts of under two percent, and often well under one percent. *See Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *7 (E.D. Wis. May 30, 2002) (court-ordered plan to resolve impasse had population deviation of 1.48%); *Prosser*, 793 F. Supp. at 870 (court-ordered plan to resolve impasse had population deviation of .52%); *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 637 (E.D. Wis. 1982) (court-ordered plan to resolve impasse had population deviation of .87%).

Consistent with both United States Supreme Court precedent and Wisconsin's impasse history, this Court can and should achieve a population deviation of one percent or less for legislative districts.

Compliance with the Fifteenth and Fourteenth Amendments to the United States Constitution and the Voting Rights Act. Legislative districts should not be drawn with purpose or effect of denying or abridging the voting rights of any United States citizen on account of race, ethnicity, or membership in a language minority group. Consistent with Section 2 of the Voting Rights Act of 1965, 52 U.S.C. §

10101 et seq., legislative districts must provide minority groups with an equal opportunity to participate in the political process and elect a candidate of their choice, whether alone or in a coalition with others.[7]

Wisconsin had previously been required to draw districts that comply with Section 2 and will be required to do so again. In the 2010 redistricting cycle, for example, a federal court found that Wisconsin's assembly districts in Milwaukee violated Section 2. As a remedy, the court ordered that Assembly Districts 8 and 9 be drawn to give Hispanic citizens the opportunity to elect the candidates of their choice. *See Baldus v. Members of Wis. Gov't Accountability Bd.,* 862 F. Supp. 2d 860, 862 (E.D. Wis. 2012). But for minor adjustments that may need to be made to account for population change in the intervening years, this Court should not disturb the cores of Assembly Districts 8 and 9 so as to comply with the Voting Rights Act.

Moreover, where possible, members of minority groups that constitute less than a voting-age majority of a district's population should have an opportunity to influence the outcome of an election.

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[7] Coalitions of minority groups can qualify for Section 2's protections. *See, e.g.*, *Holloway v. City of Virginia Beach*, No. 2:18- cv-69, 2021 WL 1226554, at *19–23 (E.D. Va. Mar. 31, 2021) (collecting cases recognizing coalition districts in the Fifth, Eleventh, Second, and Ninth Circuits), *appeal docketed*, No. 21-1533 (4th Cir. May 5, 2021).

While influence districts are not strictly required by the Voting Rights Act, *see Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (plurality op.), they are nevertheless a powerful tool for vindicating the promise of political equality enshrined in the Fourteenth and Fifteenth Amendments to the United States Constitution. As the U.S. Supreme Court has observed, influence and crossover districts—where minority voters might not be in the majority but can "work together" with majority voters "toward a common goal"—"can lead to less racial isolation" and increased minority voting strength. *Id*. at 23. Influence districts can also promote another neutral and traditional redistricting criteria—uniting communities of interest—which Petitioners describe separately below.

Notably, each of the three federal courts that resolved Wisconsin's impasse for legislative districts in the 2000, 1990, and 1980 redistricting cycles recognized the value of influence districts and each court-ordered map provided opportunities for different minority groups to exercise influence in their district. *See Baumgart*, 2002 WL 34127471, at *7 (creating a Black influence district); *Prosser*, 793 F. Supp. at 870-71 (creating both a Hispanic influence district and a Black influence district); *Wisconsin State AFL-CIO*., 543 F. Supp. 630 at 632, 636 (creating a Black influence district and recognizing potential harm in fragmenting the Hispanic community in Milwaukee). This Court

should similarly recognize the value in influence districts throughout this process.

Nesting. The Wisconsin Constitution prohibits senate districts from splitting assembly districts, meaning that each senate district must encompass three whole assembly districts. Wis. Const. art. IV, § 5; Wis. Stat. § 4.001. In practice, this means this Court should finalize a constitutional assembly plan and ensure that plan complies with general redistricting principles before finalizing any senate plan.

Contiguity. The Wisconsin Constitution requires legislative districts to be compromised of contiguous territory. Wis. Const. art. IV, §§ 4-5. A contiguous district generally can be defined as one in which "all parts of the district are connected," and is usually measured "by whether it is possible to travel to all parts of a district without ever leaving it." Nat'l Conf. of State Legislatures, *Redistricting Law 2020* 77 (2019). While perfect contiguity has not been required in certain instances in Wisconsin to accommodate islands of cities to which they belong, *see Prosser*, 793 F. Supp. at 866, this Court should otherwise demand contiguous legislative districts.

Convenience. The Wisconsin Constitution specifically requires senate districts to be organized of "convenient" territory. Wis. Const. art. IV, § 5. While the Wisconsin Supreme Court has never defined what it

means for a senate district to be "convenient," neighboring states with this requirement have interpreted it to mean "[w]ithin easy reach; easily accessible." *LaComb v. Growe*, 541 F. Supp. 145, 150 (D. Minn.) (three-judge panel) (quoting *Convenient*, *The Compact Edition of the Oxford English Dictionary* (1971)), *aff'd sub nom. Orwoll v. LaComb*, 456 U.S. 966 (1982)). Generally speaking, this requirement means that Wisconsin's senate districts should be compact and not unnecessarily meander.

Compactness. The Wisconsin Constitution requires assembly districts to be "in as compact form as practicable." Wis. Const. art. IV, § 4. Compactness refers to the shape of a district; bizarrely shaped and irregularly shaped districts are generally to be avoided. *See* Nat'l Conf. of State Legislatures, *Redistricting Law 2020* 76 (2019). While courts may use the "eyeball test" to consider whether a district is compact, there are also a variety of statistical tests that can be used to measure compactness. *See id.*

While there is not a specific requirement under the Wisconsin Constitution for senate districts to be compact, they are required to be "convenient," *see supra* at 25, which in itself suggests a measure of compactness. In any event, no court that has resolved Wisconsin's impasse disputes in modern history has suggested that Wisconsin's

senate districts would be excused from a general compactness requirement. *See Baumgart*, 2002 WL 34127471 at *4 (considering compactness in proposed senate districts); *Prosser*, 793 F. Supp. at 870 (same); *Wisconsin State AFL-CIO*, 543 F. Supp. At 634 (considering compactness generally for legislative districts). A compactness requirement for senate districts makes sense here: compactness is a traditional redistricting principle, *see Shaw v. Reno*, 509 U.S. 630 (1993), and courts are held to a high standard when redistricting in their own right, *see supra* at 21.

Consistent with the Wisconsin Constitution, traditional redistricting principles, and past practice, this Court should require Wisconsin's legislative districts to be as compact as practicable.

Maintenance of political divisions including counties, precinct, town or ward lines. The Wisconsin Constitution requires assembly districts "to be bounded by county, precinct, town or ward lines." Wis. Const. art. IV, § 4. Despite this requirement, courts resolving Wisconsin's impasses have held that *some* political boundaries (particularly county boundaries) may inevitability need to be split to achieve basic population equality in districts. *See Baumgart*, 2002 WL 34127471, at *3. Where possible however, wards should be kept whole. *See id.* (recognizing the requirement in the Wisconsin Constitution that

wards "be kept whole where possible" and that Wisconsin's 1992 and 1982 court-drawn plans "did not divide any wards in their respective reapportionment plans").

Notably, Wisconsin's local governments are in the process of redrawing new ward boundaries to account for the 2020 census data as required by Wisconsin statutes. *See* Wis. Stat. § 5.15(1)(a)(2). Because wards will be the basic building block of Wisconsin's assembly and senate plans, this Court should wait to redistrict until ward boundaries are finalized, which is expected to be completed by the end of November 2021.[8]

Unite identifiable communities of interest. While it is not a requirement under the Wisconsin Constitution, preserving communities of interest in drawing political boundaries is a traditional redistricting criterion that this Court should account for in drawing new maps. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433 (2006) (explaining that "maintaining communities of interest" is a traditional redistricting principle) (citations omitted); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (including respect for "communities defined by actual shared interests" in list of "traditional race-neutral districting

[8] *See* Wisconsin League of Municipalities, *2021 County and Municipal Redistricting Timeline*, available at: https://lwm-info.org/1648/Redistricting.

principles"). Notably, the People's Maps Commission has also identified uniting communities of interest as an important redistricting priority.[9]

Communities of interest may include, but are not limited to, groups of Wisconsinites with clearly recognizable similarities of social, geographic, regional, cultural, historic, ethnic, socioeconomic, occupational, trade, transportation, or other interests. To determine identifiable communities of interest, this Court should consider citizen testimony submitted to the People's Maps Commission, which has compiled citizen testimony in a documented record.[10] This Court could also separately accept affidavits in this proceeding from Wisconsinites describing the important communities of interest that should be considered in a new redistricting plan.

Historically, when courts have drawn Wisconsin's new redistricting plans after an impasse, they have always considered communities of interest in doing so. *See Baumgart*, 2002 WL 34127471, at *7 (explaining court was guided by principle of "uniting communities of interest" and relied on affidavits submitted by parties to determine those communities); *Wisconsin State AFL-CIO.*, 543 F. Supp. 630 at 636

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[9] *See* The People's Maps Commission, *Criteria for Drawing Districts*, available at: https://evers.wi.gov/Documents/PMCCriteriaMemoFINAL.pdf

[10] *See* The People's Maps Commission, *Written Testimony,* available at: https://govstatus.egov.com/peoplesmaps/work-records.

(recognizing the importance "of preserving identifiable communities of interest in redistricting"); *see also id.* at 637-38 (identifying important communities of interest represented in court-drawn plan). As the *Prosser* Court explained during Wisconsin's 1990 cycle impasse, "[t]o be an effective representative, a legislator must represent a district that has a reasonable homogeneity of needs and interests." 793 F. Supp. at 863.

Fellow state courts in impasse cases have also found preserving communities of interest to be an important value when implementing a new redistricting plan. In Minnesota, for example, a state that regularly has court-drawn maps due to impasses, the courts frequently consider preserving communities of interest when drawing new plans. *See, e.g.*, Order Stating Redistricting Principles and Requirements for Plan Submissions at 6-7, 9, *Hippert v. Ritchie*, No. A11-152 (Minn. Special Redistricting Panel Nov. 4, 2011).

For all of these reasons, this Court should similarly consider communities of interest when implementing Wisconsin's new legislative plans.

Representational fairness This Court should also specifically consider the partisan impact of any plan it intends to adopt. For this Court's sake, Petitioners will not repeat briefing and instead direct this

court to the arguments presented in Section II on why this factor should be considered in implementing new legislative maps.

B. Congressional Districts

Many of the factors that this Court should consider in drawing legislative districts should similarly apply to congressional districts in the event this Court determines it has jurisdiction to implement a new congressional plan.[11]

Where the same factors or similar arguments apply to congressional districts, the *Hunter* Petitioners simply refer the Court to the argument made in Section III(A). The *Hunter* Petitioners also specifically note where the standards for congressional districts do and should diverge from the standards the Court should consider for legislative districts.

Equal population. The United States Constitution requires that congressional districts be nearly equal in total population as practicable. *See* U.S. Const. art. I, § 2. As compared to legislative districts, congressional districts are held to a stricter standard of population equality. *See Karcher v. Daggett,* 462 U.S. 725 (1983); *Kirkpatrick v.*

[11] As the *Hunter* Petitioners have previously argued, the Court should not recognize a claim for congressional malapportionment under article IV of the Wisconsin Constitution. *See* Omnibus Petition at 57 n. 7.

Priesler, 394 U.S. 526, 530-31 (1969) (requiring that the State make a good-faith effort to achieve precise mathematical equality). Of course, because a court-ordered redistricting plan must conform to a higher standard of population equality than a redistricting plan created by a legislature, *Abrams v. Johnson*, 521 U.S. 74, 98 (1997), absolute population equality should be the goal for congressional districts.

Compliance with the Fifteenth and Fourteenth Amendments to the United States Constitution and the Voting Rights Act. Just as with legislative districts, congressional districts cannot be drawn with purpose or effect of denying or abridging the voting rights of any United States citizen on account of race, ethnicity, or membership in a language minority group.

Contiguity, Compactness, and Uniting Communities of Interest. While the Wisconsin Constitution and the federal Constitution do not impose any additional requirements on Wisconsin's congressional districts, each of these factors are traditional redistricting criteria and should be required by this Court. *See, e.g.*, *Shaw,* 509 U.S. at 646-47 (identifying contiguity and compactness as traditional districting principles); *Perry*, 548 U.S. at 433 (identifying "maintaining communities of interest" as traditional redistricting principle); *Miller*, 515 U.S. at 916 (same); *see also* Nat'l Conf. of State Legislatures,

Redistricting Law 2020 75-79 (2019) (identifying all three principles as traditional redistricting principles).

Moreover, these principles are ones that courts regularly deploy when drawing congressional maps in impasse litigation. *See, e.g.*, *Order Re: Redistricting*, *Guy v. Miller,* No. 11-OC-00042-1B (1st Jud. Dist., Carson City Sept. 21, 2011) (Nevada court in impasse case considering contiguity, compactness, and preserving communities of interest in drawing new congressional districts); Order Stating Redistricting Principles and Requirements for Plan Submissions at 6-7, 9, *Hippert v. Ritchie*, No. A11-152 (Minn. Special Redistricting Panel Nov. 4, 2011) (Minnesota court in impasse case considering contiguity, "convenience," and communities of interest in drawing new congressional districts); Order of Referral to Magistrate Judges, ECF No. 133, *Favors v. Cuomo*, No. 1:11-cv-05632 (E.D.N.Y. Feb. 28, 2012) (court in New York impasse case considering contiguity, compactness, and communities of interest in drawing new congressional districts).

There is no reason for this Court to stray from these traditional factors in implementing a new congressional plan for Wisconsin.

Representational fairness. Just as with legislative districts, this Court should also specifically consider the partisan impact of any plan it intends to adopt. For this Court's sake, Petitioners will not repeat

briefing and instead direct this court to the arguments presented in Section II on why this factor should be considered in implementing new congressional maps.

IV. This Court should appoint a special master and consider proposed plans from the parties.

Once the Court identifies the relevant redistricting criteria, the Court should establish a deadline for all parties to submit proposed maps that comply with those criteria and accompanying reports that explain the proposed maps' key features. Each party should also be given an opportunity to respond to maps and reports submitted by other parties.

The Court should appoint a special master, such as a retired judge or experienced academic, to evaluate the proposed maps and identify the submission that best complies with the prescribed criteria. This approach is common when courts are tasked with adopting new redistricting plans. *See, e.g.*, *Larios v. Cox*, No. 1:03-cv-693-CAP, ECF No. 189 at 2-3 (N.D. Ga. Mar. 1, 2004) (appointing as special master the Honorable Joseph Hatchett, a former justice of the Florida Supreme Court and a former judge on the Fifth and Eleventh Circuits); *Navajo Nation v. Ariz. Indep. Redistricting Comm'n*, 230 F. Supp. 2d 998, 1004 (D. Ariz. 2002) (appointing Professor Bruce Cain as special master "to evaluate evidence submitted by the parties in support of their proposed

redistricting plans, and to assist the Court, if necessary, in developing a legal plan"); *Anthony v. Michigan*, 35 F. Supp. 2d 989, 1000 (E.D. Mich. 1999) (appointing Professor Richard Pildes to serve as independent expert to court); *In re Apportionment of State Legislature-1992*, 439 Mich. 715, 724 n.31 (1992) (appointing current and former judges as special masters to assist in drawing Michigan's reapportionment plans). The Court should solicit submissions from the parties on potential suggestions for special masters in this case.

After the special master recommends a map for this Court to adopt, the parties should be given an opportunity to brief in support of or in opposition to the recommended plan. This Court should then adopt the recommended plan, with or without modifications, or instruct the special master on any further factfinding that would benefit the Court's consideration.

Dated this 25th day of October, 2021.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this 25th day of October, 2021, I caused a copy of this brief to be served upon counsel for each of the parties via e-mail.

Dated: October 25, 2021

/s/ *William K. Hancock*
William K. Hancock