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.

PETITIONERS' BRIEF IN RESPONSE TO THE COURT'S OCTOBER 14, 2021 QUESTIONS

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INTRODUCTION

This litigation represents a challenge to Wisconsin's decade-old legislative and congressional district maps. In light of the results of most recent census, these districts no longer meet constitutional muster. They are no longer of equal population. Petitioners brought this action to ensure that , in the event the political branches cannot adopt a plan or fail to adopt one that is adequate, the Court is in a position to provide constitutionally required relief.

As this litigation moves forward, this Court has sought input from all parties regarding questions of law and procedural matters. Petitioners file this brief in response to the Court's second October 14, 2021 Order requesting responses to four specific questions. Those questions, and Petitioners' responses, are all set forth herein.

PROCEDURAL HISTORY

The procedural history of this case is relatively straightforward. Petitioners filed a Petition for an Original Action with this Court on August 23, 2021. Approximately a month later, on September 22, 2021, this Court granted that Petition and took jurisdiction of this matter.

Following that, a number of parties sought to intervene in this matter. As counsel for the Petitioners made clear in a related rule proceeding last January, redistricting litigation involves a multiplicity

of interests and intervention should be liberally granted. Petitioners did not object to these intervenors. This Court granted several motions to intervene, and, on October 14, 2021, it ordered the Petitioners and Intervenor-Petitioners to submit an Omnibus Amended Petition collecting all of the claims made by all petitioners in this matter. Also on October 14, 2021, the Court ordered all parties to answer a series of questions. The Omnibus Amended Petition was filed on October 21, 2021. This brief addresses the Court's four questions.

RESPONSE TO QUESTIONS

The Court has asked the parties to respond to four questions relating to: (1) the relevant factors for redistricting, (2) whether this Court should adopt a "least changes" approach as advocated by the Petitioners, (3) whether this Court should consider a claim of so-called "partisan gerrymandering", and (4) what litigation process should be in place for this matter. The Petitioners repeat each of the Court's questions as a section heading below, and then answer the question thereafter.

I. First question: Under the relevant state and federal laws, what factors should the Court consider in evaluating or creating new maps?

To begin, there is no question that the Congressional and state legislative districts that currently exist are no longer constitutional because they are no longer sufficiently in equal in population. *See* pp. 8-

10, *infra*. With respect to the specific factors to be considered, this Court previously noted in *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶ 6, n.3, 249 Wis. 2d 706, 639 N.W.2d 537,that the Wisconsin Constitution sets forth standards for redistricting in art. I, § 1 and art. IV, §§ 2–5. This Court, however, has not yet had many opportunities to apply those standards except in *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964).

With respect to those standards based on the equal protection guarantee imposed by Article I, section 1, this Court normally applies the standards set by the United States' Supreme Court's interpretations of federal equal protection guarantees although there are circumstances in which it would be free to adopt a differing standard. In assessing the constitutionality of existing maps, even if there were potential differences between federal and state constitutional requirements, they would not matter. Everyone agrees that the existing maps are unconstitutional under either the federal or state constitutions. They must be redrawn. This case is about remedy.

Because the constitutional requisites for new maps do not likely differ under either the state or federal constitution, the Petitioners will discuss the relevant factors as set forth directly in the Wisconsin

Constitution, in *Reynolds v. Zimmerman*,[1] and in federal cases applying federal redistricting principles all of which the Petitioners contend are instructive as to claims they make under the Wisconsin Constitution.

Petitioners contend that the following factors are required to be considered under Wisconsin law: (1) population equality (2) compactness; (3) contiguity; and (4) honoring municipal boundaries. In addition to those, there are several other factors that courts traditionally consider as part of reviewing district maps that should also be considered here: (1) preserving the cores of prior districts; (2) maintaining traditional communities of interest; and (3) compliance with the Voting Rights Act.

Consistent with the above factors, the Petitioners urge the Court to make the fewest changes necessary to the existing maps to achieve equality of population while meeting the other traditional redistricting criteria set forth above.

[1] To distinguish this Court's decision in *State ex rel. Reynolds v. Zimmerman*, from the U.S. Supreme Court's decision in *Reynold v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (discussed later), the Petitioners will refer to the former as *Reynolds v. Zimmerman* and the latter as *Reynold v. Sims*.

a. Factors mandated by Wisconsin law

i. Population equality

The first factor to consider in evaluating or creating new maps, of course, is population equality. The U.S. Supreme Court established this requirement in dual cases from 1964: *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L.Ed.2d 481 (1964) (requiring population equality for Congressional districts) and *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (requiring population equality for state legislative districts).

This Court has similarly held that the Wisconsin Constitution requires equality of population between districts and that while "mathematical equality of population" is impossible to achieve, a valid reapportionment 'should be as close an approximation to *exactness* as possible." *Reynolds v. Zimmerman*, 22 Wis. 2d at 565.

With respect to congressional districts the federal courts require near perfect equality. But, even as a matter of federal law, there is more flexibility with respect to state legislative districts. *See*, *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002), amended, No. 01-C-0121, 2002 WL 34127473 (E.D. Wis. July 11, 2002) (Congressional redistricting plans held to higher standards

than state legislative ones but slight deviations are allowed if supported by historically significant state policy or unique features in the state).

With respect to state legislative seats, the U.S. Supreme Court has held that an apportionment plan with a maximum population deviation under 10%[2] has generally been considered a minor deviation and is generally determined to be constitutionally permissible. *Brown v. Thomson*, 462 U.S. 835, 842, 103 S. Ct. 2690, 77 L.Ed.2d 214 (1983). The U.S. Supreme Court most recently in *Harris v. Arizona Indep. Redistricting Comm'n*, 578 U.S. 253, 136 S. Ct. 1301, 1307, 194 L.Ed.2d 497 (2016), confirmed that as long as a state legislative map's deviation does not exceed 10% it will most likely pass the constitutional standards for population equality of legislative maps. The Petitioners suggest that these same standards would satisfy the Wisconsin Constitution with respect to state legislative districts.

ii. Compactness of districts

[2] The "deviation" is measured by starting with the population of the most populous district in the state and subtracting from it the population of the least populous district in the state and then dividing that number by the mean population in all districts. So, if the mean population in each Wisconsin Assembly District is 60,000 and the most populous assembly district had 62,000 people and the least populous assembly district had 59,000 then the maximum level of deviation is 5% (62,000-59,000 = 3,000; 3,000 divided by 60,000 = 5%).

The Wisconsin Constitution, Article IV, Section 4, requires voting districts "be in as compact form as practicable." "Compactness," to be sure, is somewhat subjective and courts have emphasized that the compactness requirement is a practical requirement and is not an absolute. *See e.g., Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 634 (E.D. Wis., 1982) ("Practical factors such as natural or political subdivision boundaries may legitimately vary the shapes of districts. In other words, districts should be reasonably, though not perfectly, compact and contiguous." (*citing People ex rel Scott v. Grivetti*, 50 Ill.2d 156, 277 N.E.2d 881 (1971))); *see also*, *Prosser v. Elections Board*, 793 F. Supp. 859, 863-865 (E.D. Wis., 1992).

Because it is to be applied "as practicable", compactness has been referred to as a secondary principle for review, as "the requirement of compactness is clearly subservient to the overall objective of population equality." *Wisconsin State AFL-CIO,* 543 F. Supp. at 634.

iii. Contiguity of districts

This factor is also explicitly mentioned by the Wisconsin Constitution in Article IV, Section 4, requiring districts ". . . to consist of contiguous territory. . ." The contiguity factor has been often discussed alongside the compactness factor, *see, e.g., Prosser*, 793 F. Supp. at 863. (discussing the importance of both compactness and contiguity and

nothing that there is some "correlation between geographical propinquity and community of interest, and therefore compactness and contiguity are desirable features in a redistricting plan.")

This Court has defined "contiguous" to mean that a district "cannot be made up of two or more pieces of detached territory," *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 148, 53 N.W. 35 (1892). One might also expect courts to look with disfavor on islands of larger territory connected by thin strands of territory. *Cf., Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (large areas of population connected by areas no wider than I-85 corridor).

This is a relatively simple factor to apply.

iv. Honoring municipal boundaries

Wisconsin Constitution Article IV, Section 4 provides that Wisconsin's legislative districts are "to be bounded by county, precinct, town or ward lines."

This requirement, however, like the compactness factor is only of "secondary importance" to population equality. *Wisconsin State AFL-CIO*, 543 F. Supp. at 635. The Attorney General citing to *Reynolds v. Sims*, has similarly suggested that population equality should be the primary concern, and that maintaining boundary lines as required under the Wisconsin Constitution should be done only "insofar as it does not

compel disregard for the requirements of the federal equal protection clause." 58 Op. Atty. Gen. 88, 91 (1969).

Consistent with these principles, when Courts have considered redistricting for Wisconsin in the past several decades, they have remained concerned about splitting all types of municipalities wherever possible. When drawing a map in the 1980s, for example, the court stated, "[w]e believe that municipal splits should be used sparingly," but recognized that some splitting up of municipalities was necessary to maintain the one person, one vote principle. *Wisconsin State AFL-CIO*, 543 F.Supp at 636. Similarly, in the 2000s, the court noted the map it had drawn was superior to other plans proposed by the parties because its plan split only 50 municipalities, while the others all split more than that number. *Baumgart*, 2002 WL 34127471, at *7.

To the extent practicable then, this Court should consider this as one of the factors in this litigation.

b. Other traditional redistricting factors that should be considered

i. Preserving the cores of prior districts

An important consideration is the preservation of the cores of prior districts. The U.S. Supreme Court, in *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983), noted "[a]ny number of

consistently applied legislative policies might justify some variance [in population amongst districts], including, for instance, making districts compact, respecting municipal boundaries, *preserving the cores of prior districts,* and avoiding contests between incumbent Representatives." (emphasis added). The value of core retention is obvious. It tends to minimize the number of voters who will be represented by a new and potentially unfamiliar legislator and, with respect to state senate districts, reduces the number of voters who are move between even and odd numbered districts and may have to sit out an additional senate re-election cycle. *Baldus v. Members of Wisconsin Government Accountability Board*, 849 F.Supp.2d 840, 852 (E.D. Wis., 2012) (explaining that redistricting can move "voters among senate districts in a manner that causes certain voters who previously resided in an even-number district (which votes in presidential years) to be moved to an odd-numbered district (which votes in mid-term years); this shift means that instead of voting for a state senator in [the presidential year], as they would have done, they must wait until [the following mid-term year] to have a voice in the composition of the State Senate.")

Preserving the cores of prior districts is at the foundation of "least change" review which the Petitioners have advocated for, and discussed further in Section II, *infra*. In *Tennant v. Jefferson Cty. Comm'n*, 567

U.S. 758, 764, 133 S.Ct. 3, 183 L.Ed.2d 660 (2012), the U.S. Supreme Court stated "[t]he desire to minimize population shifts between districts is clearly a valid, neutral state policy." Indeed, as the Petitioners explain in greater detail *infra*, this "least change" approach to reviewing maps is the most neutral way a Court can update and redraw a map.

For example, in 2002 when a federal court redrew Wisconsin's map after the 2000 census, it stated that it "undertook its redistricting endeavor in the most neutral way it could conceive—by taking the 1992 reapportionment plan as a template and adjusting it for population deviations." *Baumgart,* 2002 WL 34127471, at *7. This is similar to the court's action in the 1990s as they said their plan "creates the least perturbation in the political balance of the state." *Prosser,* 793 F. Supp. at 871.

In the most recent redistricting in 2012, the court again emphasized that it would have been preferable to move the fewest number of people as possible. *Baldus*, 849 F. Supp.2d at 849.

We anticipate that certain of the Petitioner-Intervenors will argue that "core retention" or "least changes" should be abandoned because they claim the maps drawn by the legislature and signed into law by the Governor in 2011 are a partisan gerrymander and "unfair." This would be wholly inappropriate. These maps survived not one – but two rounds

of litigation. *Baldus, supra,* and *Gill v. Whitford*, 138 S. Ct. 1916, 201 L. Ed. 2d 313 (2018). Challenges to these (and other) maps as partisan gerrymanders were ultimately rejected because the discernment of such a gerrymander is nonjusticiable.

After considering varying conceptions of what "fairness" between political parties might require, the United States Supreme Court concluded:

> Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts.

Rucho v. Common Cause, 139 S. Ct. 2484, 2500, 204 L. Ed. 2d 931 (2019), *citing Zivotofsky* v. *Clinton*, 566 U.S. 189, 196, 132 S.Ct. 1421, 182 L.Ed.2d 423 (2012).

In *Rucho,* the Supreme Court made clear that, after fifty years of trying, there is no "clear, manageable and politically neutral" to tell how much political consideration in the drawing of maps is "too much." *Rucho*, 139 S.Ct. at 2500, 2501. If this could not be done in assessing challenges to new maps, neither can it be done to treat existing maps as

somehow "illegitimate" such that a traditional redistricting principle like "core retention" can be abandoned.

ii. Maintaining traditional communities of interest

A related factor for this Court's consideration is maintaining communities of interest. Again, the factor is somewhat subjective and a "secondary" principle – a thumb on the scale. One might, for example, try to avoid combining areas with very different interests such as industrial and agricultural areas. One might be reluctant to split a Native American reservation.

This factor overlaps several others. In *Wisconsin State AFL-CIO,* 543 F. Supp. at 636, the court noted that this criteria of maintaining traditional communities of interest is closely related to the goal of maintaining municipal lines. This factor also has some overlap with analysis under the Voting Rights Act (discussed *infra*), as the court in *Baldus* further noted, "the concept of community of interest will have an important role to play when we come to [review a claim under the Voting Rights Act]." *Baldus*, 849 F.Supp.2d at 852.

iii. Respecting the requirements of the Voting Rights Act

Historically, Wisconsin has had majority-minority districts, consistent with the Voting Rights Act ("VRA") as part of its maps. This

Court has acknowledged that "redistricting litigation typically presents . . . questions under the Voting Rights Act." *Jensen,* 2002 WI 13, ¶ 4, n. 1. This Court may be asked to consider the requirements of the VRA in approving maps for Wisconsin, as other State Courts have done in reviewing a redistricting plan. *See, e.g., In re Colorado General Assembly,* 332 P.3d 108 (Colo. 2011) (A case from the state courts of Colorado considering the VRA when reviewing state legislative districts).

Section 2 of the Voting Rights Act provides:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color . . .

52 U.S.C. § 10301(a). The U.S. Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), articulated a three-part test to determine whether a population may be entitled to a majority-minority district under Section 2 of the Voting Rights Act. That test looks at: (1) whether the population in question is sufficiently large and geographically compact to require such a majority-minority district, *id*. 478 U.S. at 50; (2) whether the population is politically cohesive in their voting patterns, *id. at 51.*; and (3) whether the population can show voting is racialized to such an extent that the majority population as a bloc can deny the minority population a representative of its choice, *id.*.

These factors must be applied in light of the U. S Supreme Court's recent decision in *Brnovich v. Democratic National Committee,* 141 S.Ct. 2321, 210 L.Ed.2d 753 (2021), which arguably calls for a stronger emphasis on the opportunity to participate and the magnitude of the impact on the population in question. But it would be premature to consider that question here – in the abstract before any such question has been raised.

II. Second question: 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?

The "least change" approach is the most fair and neutral way for this Court to modify any existing maps and to meet the requirements of all the factors outlined under Section I above. It is the approach that best comports with this Court's duty to assess the constitutionality of laws rather than to draft them from scratch.

The Wisconsin Constitution vests in the Legislature the power to determine district lines. Wis. Const. art. IV, § 3. That is, redistricting is inherently a legislative task. This Court has acknowledged as much, stating that redistricting "remains an inherently political and legislative—not judicial—task." *Jensen* 2002 WI 13, ¶ 10.

The U.S. Supreme Court has repeatedly affirmed the idea that the primary governmental body to oversee a redistricting should be the legislature. *See Abrams v. Johnson*, 521 U.S. 74, 87, 117 S.Ct. 1925, 138

L.Ed.2d 285 (1997), ("The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies."); *White v. Weiser*, 412 U.S. 783, 795, 93 S.Ct. 2348, 37 L.Ed. 335 (1973), ("We have adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment").

This idea is further supported by the U.S. Supreme Court's holding that courts should not ignore legislative policy choices on reapportionment even when the courts have been tasked with determining district lines and that any changes a court makes to a legislatively supported reapportionment plan should be as minimal as possible to remedy any constitutional violations. *Upham v. Seamon*, 456 U.S. 37, 42, 102 S.Ct. 1518, 71 L.Ed.2d 725 (1982).

Nonetheless, as has long been recognized, judicial involvement in redistricting is often necessary – and so the question becomes what is the best way for this Court to fulfil *its* duties while still respecting the Legislature's role. The "least change" approach is the most efficient way for this Court to engage in what is inherently a political and legislative task in the most neutral way possible.

The existing maps in Wisconsin were adopted by the Legislature, signed by the Governor and approved by the courts. They are unquestionably constitutional (but for changes in population reflected by the new census) and the simplest way to honor the Legislature's prerogatives with respect to redistricting is to start with the most recent maps approved through the legislative process, including both being adopted by the Legislature and approved by the Governor, and then making the minimum changes necessary to ensure their constitutionality—to deal with the population shifts over the last 10 years. Drastic changes, or an approach that involves drawing an entirely new map—with all the political decisions that such a process would necessarily involve—are tasks that should be reserved to the political branches. This principle also incentivizes those branches to reach agreement on their own, rather than expecting this Court to do their jobs for them. In other words this *will* serve as a constitutional safety-valve should the legislative process fail, but the Court's actions in this politically-charged sphere will be as minimal as possible. If the Legislature and Executive wish for more than that, they must compromise.

The least-change strategy is the legal rule in Minnesota. *Hippert v. Ritchie*, 813 N.W.2d 374, 380 (Minn. 2012) ("Because courts engaged

in redistricting lack the authority to make the political decisions that the Legislature and the Governor can make through their enactment of redistricting legislation, the panel utilizes a least-change strategy where feasible.") *See also*, *Stenger v. Kellett*, No. 4:11CV2230 TIA, 2012 WL 601017, at *3 (E.D. Mo. Feb. 23, 2012) ('This is called the "least change" or "minimal change" method, which assumes that if the current district map complied with the redistricting criteria during the previous census, then a new map will likely comply with only limited changes. The "least change" method is advantageous because it maintains the continuity in representation for each district and is by far the simplest way to reapportion the county council districts.")

The "least change" approach to modifying a map is also consistent with the goal of "preserving the cores of prior districts." Similarly, it is the simplest way to comply with the *other* redistricting review factors as well. That is, since the currently-in-place maps in Wisconsin were found to be constitutional previously, starting with those maps, and making minimal changes to them is the easiest and most neutral way to ensure the other factors (like population equality, maintaining communities of interest, etc.) all also continue to be met.

As discussed briefly in Section I above, the least change approach is also consistent with prior redistricting court decisions in Wisconsin.

For example, in the 2000s, a divided state government, then with a Republican governor and split control in the legislature, failed to adopt a legislative reapportionment plan and legislators from both parties requested the federal district court to devise a new map based on the new census numbers. In *Baumgart,* 2002 WL 34127471, the court reviewed and accepted submission of sixteen maps from a variety of interested parties including representatives of both political parties in the state legislature. *Id.* at *4. The court rejected all of these plans and instead decided to draw their own map. *Id.* at *6. The court then worked off the existing 1992 reapportionment plan and made the necessary adjustments to account for population changes throughout the state. *Id*. In establishing its proposed legislative map, the court said its map was preferable to all of the other submitted maps because the judges adhered to the judicially favored redistricting criteria in devising the map. *Id.* at *7.

In the previous decade to *Baumgart*–the 1990's–the Democrat majority in both legislative chambers passed a reapportionment map that was later vetoed by Republican Governor Tommy Thompson, so redistricting again fell to a court. Recognizing the limitations of judges drawing entirely new maps, the court stated their "task would be easier

if we were reviewing an enacted districting plan rather than being asked to promulgate one ourselves." *Prosser,* 793 F. Supp. at 865.

The court then received a number of different proposals from the parties but again rejected all of them and drew its own working from aspects of one of the plans submitted by the Republican Assembly Leader and one passed by the Democrat controlled state legislature, the court highlighted their new apportionment map "preserves the strengths" of the two plans including those maps' contiguity, compactness, and population equality while discarding its weaknesses. *Id.* at 870. The court noted its plan "creates the least perturbation in the political balance of the state." *Id.* at 871.

Legislatures have the requisite capability to best draw and implement district lines because of the inherent political nature of establishing district boundaries. *Gaffney v. Cummings*, 412 U.S. 735, 754, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973). While easy-to-define criteria do exist to help dictate constitutionally appropriate districts, the subjective factors that innately arise when choosing how to redraw districts are best suited to be considered solely by the legislature.. *Id.* This is especially true in an age of highly computerized programs which help parties design maps, hundreds if not thousands of maps exist that would vary in political advantage for any party that would still be

constitutional. This Court acknowledged as much in *Reynolds v. Zimmerman*, 22 Wis.2d at 565-566: "[T]he problem of drafting a [new reapportionment] plan convinces us that there is no single plan which the constitution, as a matter of law, requires to be adopted to the exclusion of all others, and that there are choices which can validly be made within constitutional limits."

The least changes approach simplifies the Court's job by starting with maps *fully approved by the political process* (and approved by the courts) and then making the minimum number of changes to those maps to ensure equality of population and consistency with the traditional redistricting factors.

To be sure, there are some who will argue that deference to legislatures is not warranted because of the interest that legislators have in the redistricting process. But this observation is at war with the fact that both our United States and Wisconsin constitutions expressly grant redistricting to state legislatures. *U.S. Const., art. I, sec. 4, cl. 1; Wis. Const., art. IV, § 3.*

For these reasons, the Petitioners continue to ask this Court to embrace the "least change" approach to modifying any existing maps, should such a modification become necessary during this litigation.

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

No. The partisan makeup of districts should **not** be a factor this Court considers in evaluating or creating new maps. It cannot be.

This position is consistent with the U.S. Supreme Court's recent opinion in *Rucho*. In *Rucho* the Supreme Court considered and rejected a partisan gerrymander claim brought under the Equal Protection clause of the fourteenth amendment, concluding that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Rucho,* 139 S.Ct. at 2506-2507. The Supreme Court further clarified that "federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." *Id*. at 2507. Significantly, the Court made clear that the absence of congruence between the proportion of seats won in the legislature by Democrats and Republicans and the aggregated total of votes of all votes for Democratic and Republicans in geographic districts does not present a constitutional problem. In a system that elects legislators from single-member geographic districts, there is no right to proportional representation. And in a state where Democratic voters are more heavily

geographically concentrated than Republican voters,[3] there is no reason to believe the outcome will be proportional.

Although the Supreme Court was there concerned with the federal constitution, the same reasoning applies here—there is no plausible grant of authority in the Wisconsin Constitution for the consideration of partisan gerrymandering claims, nor are there legal standards to limit and direct this Court's decisions.

With respect to the former, this Court has "given the equal-protection provision of the Wisconsin Constitution and the parallel clause of the United States Constitution identical interpretation." *Funk v. Wollin Silo & Equip., Inc.*, 148 Wis. 2d 59, 61, n. 2, 435 N.W.2d 244 (1989). And there is no reason to deviate here. There is nothing in the text of the Wisconsin Constitution that suggests that the framers intended to allow a claim of so-called partisan gerrymandering under Wisconsin law. Neither the text of Wis. Const. art. I, §1 or art. IV, §§ 2–5 suggest such a result.

[3] This feature of Wisconsin's political geography has been noted by Courts before. For example, in *Gill v. Whitford*, the Supreme Court quoted the findings of the three-judge panel in that case, noting the lower court recognized that "Wisconsin's political geography, particularly the high concentration of Democratic voters in urban centers like Milwaukee and Madison, affords the Republican Party a natural, but modest, advantage in the districting process." *Gill v. Whitford*, 138 S. Ct. 1916, 1925–26, 201 L. Ed. 2d 313 (2018), (quoting *Whitford v. Gill*, 218 F. Supp. 3d 837, 921 (W.D. Wis. 2016)).

In addition, the Wisconsin Constitution vests the power to draw legislative districts in a partisan body (the Legislature). Wis. Const., art IV. § 3. Given that, and given the fact that this Court has recognized redistricting as "inherently political" (*Jensen*, 2002 WI 13, ¶ 10) it would be nonsensical for this Court to review the inherently political decisions of a partisan legislative body in order to avoid partisan outcomes.

Moreover, while the language of art. I, § 1 certainly supports a claim based on "one person, one vote" there is no way to turn that into a claim based on partisan status. In rejecting the claim that the Equal Protection clause of the fourteenth amendment required them to review the partisan makeup of districts, the U.S. Supreme Court specifically noted that: "It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support." *Rucho,* 139 S.Ct. at 2501. This is because in the "one person, one vote" context, a court can easily apply the standard because "each representative must be accountable to (approximately) the same number of constituents." *Id*. An individual's rights are easy to adjudicate under such a standard. However, the Court was clear "[t]hat requirement does not extend to

political parties. It does not mean that each party must be influential in proportion to its number of supporters." *Id.*

This is also consistent with the U.S Supreme Court's holding in *Gill v. Whitford*, 138 S.Ct. 1916, a year before *Rucho,* where the U.S. Supreme Court rejected a claim for partisan redistricting under the 2011 Wisconsin maps. The Supreme Court there stated that courts are "not responsible for vindicating generalized partisan preferences." *Gill v. Whitford*, 138 S. Ct. at 1933.

In *Rucho*, beyond rejecting partisan gerrymandering claims, the Supreme Court also cautioned that a partisan review would be "unprecedented expansion of judicial power," *Rucho* 139 S.Ct. at 2507. This Court, in reviewing and potentially modifying any redistricting map, should be wary of any such expansion of judicial power, especially where such an expansion would put this Court into the position of playing referee between competing partisan interests.

Further, even if this Court thought it might otherwise possess the license to review partisan gerrymandering claims, no rule exists by which to adjudicate it, or to apply such a standard in creating new maps. The Supreme Court of the United States acknowledged in *Rucho* that it had "struggled without success over the past several decades to discern judicially manageable standards for deciding such claims" before

abandoning the effort. *Id*. at 2491. Some parties to this action will, no doubt, suggest various tests, festooning them with various impressive-sounding statistical terms in order to give them an air of authority. But none will "meet[] the need for a limited and precise standard that is judicially discernible and manageable." *Id.* at 2502. None will "provide[] a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties." *Id.*

For these reasons, this Court should not consider partisan makeup as a factor in reviewing or creating any redistricting map.

IV. Fourth question: As we evaluate or create new maps, what litigation process should we use to determine a constitutional sufficient map?

Consistent with the criteria for review outlined herein, the Petitioners suggest the following process be adopted by the Court to ensure a fair and efficient review:

First, all parties would submit their proposed map to the Court, as well as an expert report addressing why that map meets all the requisite factors necessary. Second, following those initial submittals, all parties would have an opportunity for limited discovery related to the expert reports if necessary.

Third, all parties would file responses to the other proposals and other expert reports. Following these two rounds of briefing, the Court

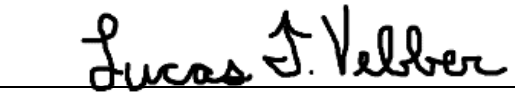
would either select one of the parties' proposals, or draw its own (ideally in a manner that makes the least changes from the adopted maps in current law). If it thought that there were factual issues in need of resolution, it could refer the matter to a referee to take testimony.

The Court could enter a scheduling order consistent with this approach. This process would allow for ample opportunity for all parties to fully brief this court and to support their proposals with expert testimony. The Court would also have ample opportunity to hear from nonparties who may desire to participate in this action.

CONCLUSION

The Petitioners respectfully submit these responses to the Court's questions as to how this litigation should proceed.

Respectfully submitted this 25th day of October, 2021.



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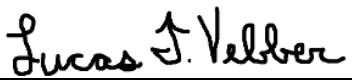
CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief produced with a proportion serif font. The length of this brief is 5,759 words.

Signed,



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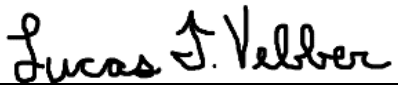

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