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' RESPONSE BRIEF ADDRESSING PARTIES' OCTOBER 25, 2021 BRIEFS

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INTRODUCTION

This Court has a choice to make: Affirmatively perpetuate one of the country's most extreme gerrymanders, or adopt a neutral map befitting an impartial judiciary. Rhetoric from the Legislature aside, this Court is not required to maintain the existing gerrymander; if it does so, it is only by choice.

This Court owes no special deference to a now outdated and unconstitutional map from the 2010 redistricting cycle. Unlike other redistricting cases in which courts are called upon to remedy one or two districts in a contemporaneously enacted map, impasse litigation, by definition, means *there is no enacted plan* that this Court could defer to that reflects the elected branches' policy choices in light of the 2020 Census.

Nor should the Court give into the Legislature's brazen request that it directly implement the Legislature's preferred map even if that map does not survive a gubernatorial veto. This entire litigation is premised on the expectation that the Republican-controlled Legislature will be unwilling and unable to pass redistricting plans that will be acceptable to Wisconsin's Democratic Governor. Doing as the Legislature requests would be deeply antidemocratic. It also has no basis in law or

precedent: this Court owes *no deference* to the Legislature's preferred redistricting plan after impasse.

In refashioning Wisconsin's reapportionment plans for the next decade, this Court should strive to draw districts that return Wisconsin to a place where Wisconsin's voters have a fair shot at influencing the composition of their legislature. This is what Wisconsin voters themselves have clearly indicated they want. And *Rucho v. Common Cause* does not require otherwise. While several parties lean on *Rucho* to argue this Court should not consider the partisan implications of any remedial map, *Rucho* does not require courts to be willfully blind to the existence of partisan gerrymanders, and it most certainly does not encourage courts to actively perpetuate them. To the contrary, *Rucho* recognizes partisan gerrymanders as "'incompatible with democratic principles." 139 S. Ct. 2484, 2506 (2019). *Rucho* simply found that a partisan gerrymandering challenge under the federal Constitution to an enacted map exceeded the jurisdictional reach of federal courts. Notably, state courts are not so bound. But, in any event, this case does not ask this Court to decide whether a duly enacted map is an unconstitutional partisan gerrymander; instead, where the political branches have been unable to agree on a map, the Court is required to choose one. As many

courts have recognized, in this role, the judiciary should strive for fair and neutral maps.

For all of these reasons, as well as those set forth below, this Court should not adopt a "least-change" approach to Wisconsin's new districts. While the Legislature and others contend that such an approach would "mirror[]" what Wisconsin courts historically have done after impasse, no court in Wisconsin's history has used a least-change approach to lock in an extreme gerrymander. This Court should reject the invitation to lend its imprimatur to highly partisan maps, whether they are the Legislature's past or proposed gerrymander of Wisconsin's electoral districts.[1]

ARGUMENT

I. There is no legal basis for the Court to pursue a least-change approach.

A. The Court's remedial powers are not limited to a least-change approach.

Every ten years, Wisconsin's legislative and congressional districts must be redrawn. Under the Wisconsin Constitution, this task is

[1] In their Opening Brief, the Hunter Intervenor-Petitioners recommended this Court make use of a special master. After evaluating the other parties' briefs, the Hunter-Intervenor Petitioners wish to make clear that they do not recommend that this Court use a special master to draw new maps. Instead, should this Court choose to use a special master at all, that individual might be used to evaluate the proposed maps and identify the submission that best complies with the prescribed criteria. In any event, final decision-making should of course rest with this Court, who are elected by the people of Wisconsin.

assigned to the political branches in the first instance. This redistricting cycle, however, it is clear the political branches will not enact a redistricting plan. As a result, that task now falls to this Court—a task unlike any of this Court's ordinary disputes, and one that requires a wholesale remedy. While other parties to this action have suggested this Court need only relieve a simple malapportionment violation, this argument misunderstands the nature of the task before this Court, ignores the unique scope of impasse cases, and belies the critical distinction between this Court's original jurisdiction and other courts sitting in equity.

First, this Court is not called upon to remedy a minor technicality, but rather a wholesale failure of the political branches. There is no doubt that the political branches have a legal duty to reapportion Wisconsin's legislative and congressional districts, regardless of population change. Even if Wisconsin's population was unchanged between 2010 and 2020, the Wisconsin Constitution still requires that state legislative districts be apportioned "anew" after each Census. Wis. Const. art. IV, § 3. Similarly, the U.S. Constitution requires that representatives be apportioned according to an enumeration made every ten years. U.S. Const. art. I, § 2, cl. 3.

Second, impasse litigation is not like other kinds of redistricting cases that challenge specific portions of a recently enacted map for alleged legal violations. Instead, impasse litigation seeks a court-ordered remedy to the legislature's failure to enact a map in the first instance by asking the Court to take up the pen. In that way, the case before the Court implicates the entire map. The far-reaching scope of the violation calls for a comprehensive remedy.

Third, the argument that this Court has limited remedial powers in this case misunderstands the role of this Court when exercising its original jurisdiction. Whatever the limits on the remedial powers of lower Wisconsin courts or federal courts, there are no such limits on *this* Court. The judicial power of federal courts, for example, is limited to adjudicating "cases or controversies," and their remedial power is limited to what is necessary to resolve those controversies. *See United States v. Raines*, 362 U.S. 17, 21 (1960) ("This Court, as is the case with all federal courts, has no jurisdiction to pronounce any statute, either of a state or of the United States, void … except as it is called upon to adjudge the legal rights of litigants in actual controversies.") (quotations omitted). Similarly, the equitable power of Wisconsin circuit courts is limited to responding to "the invasion of legally protected rights." *In Interest of E.C.*, 130 Wis. 2d 376, 389, 387 N.W.2d 72, 77 (1986) (explaining the

circuit court "may provide complete justice only where there is a wrong"). But neither the Wisconsin Constitution nor any legal precedent places any such limits on this Court's original jurisdiction; it is simply permitted to "hear original actions and proceedings." Wis. Const. art. VII, § 3. Indeed, as this Court has recognized, the question over whether to accept an original action is one of "judicial policy rather than one relating to the power of this court." *State v. Grimm*, 208 Wis. 366, 243 N.W. 763, 765 (1932).

As a question of judicial policy, there can be no doubt that it is appropriate for this Court to take up the task of redistricting in full. This Court has previously recognized that redistricting cases warrant original jurisdiction because any redistricting case "is, by definition, *publici juris*, implicating the sovereign rights of the people of this state." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 17, 249 Wis. 2d 706, 717, 639 N.W.2d 537, 542. Indeed, this Court recognized that decennial redistricting is not akin to correcting a legal violation but resembles a form of "judicially legislating." *Id.* ¶ 10.

The cases identified by other parties—where federal courts are limited in the relief they can grant—only serve to further illustrate the propriety of this Court developing an independent redistricting plan. As the U.S. Supreme Court recognized in *Growe v. Emison*, the reason for

deferring to state courts is because redistricting is a "highly political task" that is "primarily the duty and responsibility of the State" through either its legislature *or* its courts. 507 U.S. 25, 33-34 (1993). If the question presented in this suit, or in *Growe*, were simply a question of correcting a legal violation, it would be just as appropriate for federal courts to address that issue in the first instance.

In sum, there is no limit on this Court's remedial power to provide Wisconsin voters a materially different reapportionment plan from the now-defunct plan they had in the prior decade. Though there may be sound reasons for *other* courts to narrow the scope of their review, this Court is well positioned to fully take up the task of redistricting in lieu of the political branches.

B. There is no rule of deference to a decade-old map.

Wisconsin is not the same as it was ten years ago. The 2020 Census reflects a decade of change and growth, posing the question: how should Wisconsin, *as it exists today*, be represented in Congress and the Legislature? The answer involves policy decisions that, under the Wisconsin Constitution, are left to the political branches in the first instance. Indeed, if the political branches were to agree on an answer to the policy questions posed by Wisconsin's growth over the last decade, their enacted map would warrant deference. But this case is before the

Court precisely because the political branches have not—and likely will not—supply the answer.

Other parties to this case, hoping this Court will adopt Wisconsin's reapportionment plans from the last decade, distort numerous cases from the U.S. Supreme Court for the alleged proposition that this Court must defer to a decade-old map. But the cases they cite exclusively concern judicial deference to maps *actually enacted* through ordinary political processes after the most recent census. In *Upham v. Seamon*, for example, the Supreme Court's statement that any modifications to the challenged districting plan should be "limited to those necessary to cure any constitutional or statutory defect" referred to a redistricting plan that had been enacted by Texas's legislature in the wake of the 1980 Census, in which only two districts were in contention. 456 U.S. 37, 38, 43 (1982). Similarly, in *White v. Weiser*, when the Supreme Court instructed courts to "follow the policies and preferences […] in the reapportionment plans proposed by the state legislature," it was referring to a duly enacted law that had been signed by Texas's governor in the wake of the 1970 Census. 412 U.S. 783, 795 (1973). The same is true of *North Carolina v. Covington,* which evaluated a racial

gerrymandering challenge to a handful of districts in another duly enacted map. 138 S. Ct. 2548 (2018).[2]

Moreover, *Perry v. Perez*, which the other parties repeatedly cite, further illustrates that courts adjudicating impasse cases are not bound to the policy choices of a decade-old legislature. *Perry* clarified that *Upham* deference only applies to "recently enacted plan[s]" because they reflect "the State's policy judgments on where to place new districts and how to shift existing ones in response to massive population growth." 565 U.S. 388, 393 (2012).[3] If that were not clear enough, the Supreme Court also distinguished the *Upham* line of cases from *Balderas v. Texas*, 2001 WL 36403750 (E.D. Tex. Nov 14, 2001), *summarily aff'd*, 536 U.S. 919 (2002), an impasse case where no redistricting plan had been enacted

[2] Indeed, even where plaintiffs are challenging aspects of a recently-enacted map, courts are not bound by a least-change approach. In *Abrams v. Johnson*, for instance, the Supreme Court *rejected* the invocation of *Upham* deference because its remedial plan was required to address "a large geographic area of the State." 521 U.S. 74, 86 (1997). Under those circumstances, the court "was justified in making substantial changes to the existing plan." *Id.*

[3] This distinction in *Perry*—that courts should not defer to a decade-old map—has been the consistent approach of federal courts. *See, e.g.*, *Smith v. Clark*, 189 F. Supp. 2d 529, 539 (S.D. Miss. 2002) (holding that where the state "failed to enact a congressional redistricting plan … there is no expression, certainly no clear expression, of state policy on congressional redistricting to which we must defer"); *O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982) ("In the circumstances before us, with the 1971 Kansas redistricting plan being constitutionally unacceptable and the legislature having failed to enact a new redistricting plan, our powers are broad."); *Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982) (affording no deference because vetoed redistricting plan was only the "proffered current policy rather than clear expressions of state policy") (citations omitted).

since the most recent Census. *Perry*, 565 U.S. at 396. As the Court explained, because "there was no recently enacted state plan," the *Balderas* court was "compelled to design an interim map based on its own notion of the public good." *Id.*

Balderas is particularly instructive here. There, the political branches had failed to enact a state redistricting plan to account for the 2000 Census. *See* 2001 WL 36403750 at *2. As a result, the court set out to "draw a redistricting plan according to neutral redistricting factors, including compactness, contiguity, and respecting county and municipal boundaries." *Id.* (cleaned up). Instead of looking at vetoed maps or decade-old maps, the starting point was traditional redistricting criteria—including drawing majority-minority districts required by the Voting Rights Act. *Id.* After using neutral criteria to develop a map, the Court "checked [their] plan against the test of general partisan outcome" using prior election results, describing it as a "traditional last check upon the rationality of any congressional redistricting plan." *Id.* at *3. Once it was shown that "the plan is likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state," the court was satisfied with the plan. *Id.*

Balderas's approach—rejecting a proposed least-change approach and explicitly considering partisan outcomes—is particularly important

when the existing map is grossly gerrymandered. Like Wisconsin's now outdated map, the prior map before the *Balderas* court "sabotaged traditional redistricting principles." *Vera v. Richards*, 861 F. Supp. 1304, 1334 (S.D. Tex. 1994), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996). "For the sake of maintaining or winning seats … [incumbents had] shed hostile groups and potential opponents by fencing them out of their districts." *Id.* The map was excoriated as "not one in which the people select their representatives, but in which the representatives have selected the people." *Id.*

Faced with the prospect of placing the court's imprimatur on a gerrymandered map, the *Balderas* court rejected any suggestion of pursuing a least-change approach. Instead, the court took direct aim at the issue, and found that "political gerrymandering, a purely partisan exercise, is inappropriate for a federal court drawing a congressional redistricting map." *Balderas*, 2001 WL 36403750 at *4. The court described gerrymandering as "an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good." *Id.* The Supreme Court summarily affirmed that approach in *Balderas,* 536 U.S. 919 (2002), and it should serve as a guide in this litigation.

Devoid of support for their position from U.S. Supreme Court precedent, the Johnson Petitioners attempt to find support elsewhere, but cannot. The Johnson Petitioners confidently assert that least-change "is the legal rule in Minnesota," based on a single case. Johnson Br. at 23 (citing *Hippert v. Ritchie*, 813 N.W.2d 374 (Minn. 2012)). But that case does not support what the Johnson Petitioners ask this Court to do: adopt a least-change approach *and* ignore considerations of partisan outcome. *Hippert* adopted a least-change approach, but—crucially—it did so with a cognizance of political outcomes. Specifically, the court "consider[ed] the impact of redistricting on incumbent officeholders to determine whether a plan results in either undue incumbent protection or excessive incumbent conflicts." *Hippert*, 813 N.W.2d at 386. The court only finalized its plan after comparing incumbent conflicts between "legislators of the same political party, and legislators of different parties." *Id.*

Moreover, the *Hippert* court was not faced with the same challenge before this Court and the *Balderas* court—developing a redistricting plan after a decade of extreme partisan gerrymandering. In *Hippert*, the least-change approach only placed the court's imprimatur on another map enacted by *another Minnesota court* ten years prior. *Id.* at 378 (citing *Zachman v. Kiffmeyer*, No. C0–01–160 (Minn. Special

Redistricting Panel Mar. 19, 2002) (Final Order Adopting a Legislative Redistricting Plan)). Thus, read in its proper context, *Hippert*, too, supports the conclusion that multiple other courts (including the U.S. Supreme Court) have announced: no court should adopt a least-change approach when it would function to implement a partisan gerrymander.

C. There is no basis for deference to a vetoed bill.

The Legislature's extraordinary contention that the Court should defer to the Legislature's forthcoming redistricting plan even if it is not duly enacted into law—beyond being deeply antidemocratic—has no basis in law or precedent. Courts owe *no deference* to the Legislature's preferred redistricting plan after impasse.

This argument—that a vetoed bill with no force of law deserves deference in a redistricting case—has been rejected many times, including in a prior impasse case in Wisconsin. *See Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 632 (E.D. Wis. 1982) ("The vetoed plan has been submitted to us for our consideration and, after reviewing it, we conclude that it is one of the worst efforts before us and for that reason we decline to adopt it. The plan has, in our opinion, no redeeming value."); *O'Sullivan*, 540 F. Supp. at 1202 ("[W]e are not required to defer to any plan that has not survived the full legislative process to become law."); *Cartens*, 543 F. Supp. at 79 (explaining that a vetoed legislative

plan "cannot represent current state policy any more than the Governor's proposal"); *Hippert*, 813.N.W.2d at 379 n.6 ("[B]ecause the Minnesota Legislature's redistricting plan was never enacted into law, it is not entitled to [*Upham*] deference.") (citing *Perry*, 565 U.S. at 392-96). As the U.S. Supreme Court has explained, a legislative reapportionment plan that has been vetoed by the Governor represents little more than the legislature's "proffered" plan, and certainly does not reflect "the State's policy" where the Governor has a contrary recommendation. *Sixty-Seventh Minn. State Senate v. Beens,* 406 U.S. 187, 197 (1972).

Recognizing, as it must, that *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964), explicitly requires any legislative redistricting plan to be signed by the governor (or have his veto overridden) to receive the force of law, the Legislature pushes its antidemocratic agenda one step further by asking this Court to discard its own on-point precedent. The Legislature suggests that "*Zimmerman* is on shaky ground in light of the language of Article IV, § 3 and historical context." Leg. Br. at 20. But there can be no serious doubt the Court was well aware of this language and historical context when it concluded in *Zimmerman* that "it would be unreasonable to hold that the framers of the constitution intended to exclude from the reapportionment process

the one institution guaranteed to represent the majority of the voting inhabitants of the state, the Governor." 22 Wis. 2d at 556-57.

In perhaps its wildest leap, the Legislature argues that the principle of constitutional avoidance would be served by deferring to their prospective bill—thereby overruling *Zimmerman* implicitly, rather than explicitly. *See* Leg. Br. at 22. Suffice it to say, requiring the Governor's signature on laws reapportioning the state has been the rule in Wisconsin for over 100 years, and nothing could be on shakier ground than the Legislature's own contentions. *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1892) (holding "the apportionment act is like any other act of the legislature, and is passed by the legislature in the exercise of its legislative power"); Wis. Const. art. V, § 10 ("Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor.").

II. A least-change approach entrenches extreme partisan advantage.

A. *Rucho* does not require this Court to be willfully blind to the partisan impact of a map.

As the Hunter Intervenor-Petitioners explained in their Opening Brief, the judiciary's institutional credibility as a nonpartisan and independent actor depends on a reapportionment process that ensures Wisconsin's new redistricting plans are not stacked in favor of one party

from the outset. *See* Hunter Br. at 2. While the Legislature argues that a "least-changes" plan would "minimize" this Court's involvement in the "political thicket," Leg. Br. at 40, adopting the basic outlines of maps that Wisconsin voters know to be the most gerrymandered in the country does not shield this Court from the political thicket; it thrusts the Court into it. While both the Legislature and Republican Congressmen lean on *Rucho v. Common Cause* to argue this Court should not consider the partisan implications of any remedial map, *Rucho* does not require courts to be willfully blind to the existence of partisan gerrymanders. To the contrary, *Rucho* recognized that that "[partisan] gerrymandering is "'incompatible with democratic principles." 139 S. Ct. at 2506 (citing *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015)). The issue in *Rucho* was what federal courts should do when faced with an argument that a duly enacted state map was *too* gerrymandered under the federal Constitution. *See id.* at 2484, 2497 ("The 'central problem' is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is 'determining when political gerrymandering has gone too far.'") (citing *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004)).

Petitioners are *not* asking this Court to rule on whether Wisconsin's outgoing reapportionment plans would be struck down as

unconstitutional partisan gerrymanders, or even more to the point, to determine *at what point* the extreme political gerrymandering in the map crossed over the constitutional line. Petitioners simply ask that in drawing maps for Wisconsin voters to select their representatives in coming elections, the Court decline to operate as a Republican-controlled arm of government, and instead do as other courts that have been similarly tasked have done: apply neutral redistricting principles, and consider whether the likely partisan outcome of the plan "is likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state." *Balderas*, 2001 WL 36403750 at *3.

In other words, this Court cannot and should not ignore that Wisconsin's Legislature created some of the most extreme and effective gerrymanders in the country in the last redistricting cycle. *See, e.g.*, *Whitford v. Gill*, 218 F. Supp. 3d 837, 890-96, 898-99 (W.D. Wis. 2016) (three-judge panel), *vacated for lack of standing*, 138 S. Ct. 1916 (2018). Regardless of whether that abuse could have been actionable under Wisconsin's Constitution—a question not present in this case because the previous decade's maps have already been rendered unconstitutional by population changes—adopting a least-change approach would calcify that gerrymander into existence indefinitely. It would also put this Court's stamp of approval on those extreme political gerrymanders—a

choice that would be wholly inappropriate for a judicially drawn map—and risk eroding the people's confidence in the judiciary as a neutral and fair arbiter. *See*, *e.g.*, *Balderas*, 2001 WL 36403750 at *4.

This is precisely why many courts tasked with drawing reapportionment plans have sought to draw politically neutral maps, even if the state itself does not prohibit the political branches from engaging in partisan gerrymandering. *See* Hunter Br. at 9-10. This approach makes sense: "A court-ordered plan [] must be held to higher standards than a State's own plan." *Chapman v. Meier*, 420 U.S. 1, 26 (1975). *Rucho* does not change this. It simply determines that federal courts are ill-equipped to determine whether a duly enacted state plan is an unconstitutional partisan gerrymander. 139 S. Ct. at 2508. It says nothing about whether courts may consider partisan implications of a map when tasked with drawing it in the first instance. Indeed they should, because, as *Rucho* recognized, partisan gerrymandering is inherently undemocratic. *Id.* at 2506. This Court should seize the opportunity to ensure that, for the first time in ten years, Wisconsin voters have a redistricting plan that is consistent with democratic principles.

B. No court in Wisconsin's history has used a least-change approach to lock in an extreme gerrymander.

While the Johnson Petitioners suggest that a least-change approach is "consistent" with what previous federal Wisconsin impasse courts have done, Johnson Br. at 24-26, this argument obscures crucial differences between the circumstances in those redistricting cycles and the circumstances here.

To start, the federal panels tasked with drawing new maps for Wisconsin in both *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471 (E.D. Wis. May 30, 2002), and *Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992), did not begin with baseline maps that were widely recognized as partisan gerrymanders. To the contrary, both *Baumgart* and *Prosser* built new maps for Wisconsin based on maps that had been drawn by neutral courts—not by partisan actors—in the previous redistricting cycle. The *Baumgart* panel drew Wisconsin's legislative maps for the 2000 redistricting cycle based on maps the *Prosser* panel had drawn when Wisconsin was at an impasse in the 1990 redistricting cycle. And the *Prosser* panel, which consisted of Judges Posner, Crabb, and Curran, specifically sought to "*not* select a plan that seeks partisan advantage." 793 F. Supp. at 867 (emphasis added). It ultimately drew Wisconsin's legislative maps for the 1990 redistricting

cycle based on maps the 1980 federal impasse panel had drawn on its own when Wisconsin was at an impasse in the 1980 redistricting cycle. *See Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982).

The upshot is that no court is Wisconsin's modern history has used a least-change approach when doing so would lock in a map adopted by partisan actors, let alone when that map was a partisan gerrymander. Instead, those courts used prior courts' plans as a baseline because, under the circumstances, doing so would help ensure a "neutral" outcome for the state. *See Baumgart,* 2002 WL 34127471, at *7. It is not plausible that any of those panels would have accepted a least-change approach had they been confronted with the baseline map that this Court faces today. The *Baumgart* panel, for instance, specifically chastised plan submissions that had clear "partisan origins" or were "riddled with [] partisan marks." *Id.* at *4. The *Prosser* panel, too, specifically disclaimed plans that sought "partisan advantage" and refused to draw a map that would enable "one party [to] do better than it would do under a plan drawn up by persons having no political agenda." 793 F. Supp. at 867.

While the Johnson Petitioners once again point to Minnesota as a state where courts use a "least-changes" approach, *see* Johnson Br. at 23-24 (citing *Hippert*, 813 N.W.2d at 380), they fail to point out that

Minnesota courts—not Minnesota's political branches—have been drawing reapportionment plans for decades. For that reason, when the *Hippert* panel used a least-change approach in the 2010 redistricting cycle, it too had as its baseline a map that a neutral court had drawn in the previous redistricting cycle. *See Zachman v. Kiffmeyer*, No. C0-01-160 (Minn. Special Redistricting Panel Mar. 19, 2002).

Ultimately, those in favor of a least-change approach for this redistricting cycle cite no precedent in which a court used such an approach to lock in an aggressive partisan gerrymander. If anything, such an approach in this case would be flatly inconsistent with the stated values and goals of Wisconsin's prior impasse courts to achieve a neutral map.

C. The Court should not prioritize redistricting factors that will have the effect of locking in a gerrymandered map.

This Court also should not use (or at a minimum, should not prioritize) two factors—core retention and incumbency protection—that will have the obvious effect of perpetuating the current gerrymandered maps despite the Governor's anticipated veto over a plan that retains the core of the gerrymandered plan. Those two factors' inherent ability to lock-in existing gerrymanders is so notorious that it has a name—"gerrylaundering"—a term that describes when otherwise neutral-

sounding redistricting criteria are used to give an existing gerrymandered map a veneer of legitimacy. *See, e.g.*, Robert Yablon, *Gerrylaundering*, Univ. of Wis. L. Studies Research Paper No. 1708, p. 15 (Aug. 23, 2021), 97 N.Y.U. L. Rev. (forthcoming 2022), *available at* https://ssrn.com/abstract=3910061. In practice, "gerrylaunders" are just as antidemocratic as traditional gerrymanders; both deprive a state's citizens of representatives responsive to the will of the electorate.

While the Legislature describes "core retention," "continuity of representation," and "incumbent protection" as "undisputed traditional redistricting criteria," Leg. Br. at 37-38, the Wisconsin Constitution makes no mention of these criteria. Nor is "continuity of representation" or "core retention" required in many other states; to the contrary, many more states *prohibit* reapportionment plans that entrench the status quo than those that require it. *See* Yablon, *Gerrylaundering* at 23-24 (conducting 50-state survey). The same is true of incumbency protection. *See id.* (describing at least 10 states that prohibit considering incumbent addresses or drawing maps that protect incumbents and few, if any, that require it).

Notably, many courts tasked with redistricting after an impasse have specifically chosen to eschew continuity of representation or incumbency protection as a factor to consider in drawing apportionment

plans even when the Legislature would not be prevented from doing so in the first instance. *See, e.g.*, *Wis. State AFL-CIO*, 543 F. Supp. at 638 (Wisconsin panel refusing to consider incumbency protection in drawing Wisconsin's reapportionment plans after impasse); *Hippert*, 813 N.W.2d at 385–86 (Minnesota court refusing to prioritize incumbency protection in drawing reapportionment plans after impasse); *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223, at *7 (E.D.N.Y. Mar. 19, 2012) (New York court refusing to consider incumbency protection in drawing reapportionment plans after impasse). This is not surprising. As the Fifth Circuit explained long ago, "[m]any factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts." *Wyche v. Madison Par. Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985). Because the goal of "protecting incumbents [] enshrines a particular partisan distribution," *Rucho*, 139 S. Ct. at 2500, this Court should decline to consider it in creating new maps for Wisconsin.

Finally, this Court should not be swayed by arguments that core retention or continuity of representation must be prioritized to avoid "temporal vote dilution" in state senate elections. *See* Leg. Br. at 36. The Hunter Intervenor-Petitioners do not deny that moving voters outside of their existing senate districts will have a temporary adverse effect on

some voters' ability to participate in senate elections in the next election. (Indeed, this is true of every new redistricting plan, whether adopted by the Legislature or a court.) But the alternative—locking in a partisan gerrymander—deprives *all* Wisconsin voters of a fair map for at least the next ten years, a far worse outcome. And as the *Baldus* panel recognized last cycle, this effect "in the wake of redistricting is seen as inevitable, and thus as presumptively constitutional, so long as no particular group is uniquely burdened." *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 852 (E.D. Wis. 2012).

Perhaps most importantly, this Court should not reward the Legislature with a least-change map on this basis when the Legislature itself moved an extraordinary number of voters outside of their existing senate districts to accomplish its gerrymander in the 2010 redistricting cycle. As the BLOC Intervenor-Petitioners explain, the Wisconsin Legislature moved over 1,200,000 Wisconsin voters out of their existing senate districts in that redistricting cycle when it could have moved just a fraction of those voters to account for population changes. *See* BLOC Br. at 40. Simply put, the Legislature did not feel hamstrung by the need to minimize temporal vote dilution in 2011, belying its contention that the Court is somehow bound by this principle now.

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Respectfully Submitted,

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 5,365 words.

Dated: November 1, 2021

Aria C. Branch

CERTIFICATE OF SERVICE

I certify that on this 1st day of November, 2021, I caused a copy of this brief to be served upon counsel for each of the parties via e-mail.

Dated: November 1, 2021

Aria C. Branch