No. 2021AP1450-OA

In the Supreme Court of Wisconsin

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

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

v.

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

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

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

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

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ISSUES PRESENTED

This Court's October 14, 2021 Order ordered all parties to address the following questions:

1. Under the relevant state and federal laws, what factors should this Court consider in evaluating or creating remedial maps.

2. Whether this Court should use the "least-change" approach when adopting a remedial map and modify the existing maps only to comply with the equal-population principle. And, if not, what approach should this Court use.

3. Whether the partisan makeup of districts is a valid factor for this Court to consider in evaluating or creating remedial maps.

4. What litigation process this Court should use to determine a constitutionally sufficient map, as it evaluates or creates remedial maps.

INTRODUCTION

This Court has taken jurisdiction over Petitioners' and Intervenor-Petitioners' claims that Wisconsin's existing congressional districts are malapportioned, in violation of the Wisconsin Constitution, and this Court will thus need to adopt a remedial congressional map if the Legislature and Governor fail to do so. Should such a political deadlock occur, this Court would then have the responsibility of adopting a remedial map that alters *existing* district lines as needed to cure the legal violation of the one-person/one-vote mandate, using the "least changes" approach. That follows from the principle that a court's remedy should do no more and no less than addressing the violation that the petitioner or plaintiff has shown in the extant law, while also respecting this Court's role in our constitutional order. This "least-change" approach thus leaves no room for consideration of the partisan makeup of the map (which consideration has, in any event, no legal relevance under either state or federal law). And this approach could well empower this Court to adopt a remedial map based solely on the submissions of the parties/amici, without need for factfinding proceedings.

STATEMENT OF THE CASE

Intervenor-Petitioners Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald (hereinafter "the Congressmen") are the duly elected Representatives to the U.S. House of Representatives

from five of Wisconsin's eight congressional districts, who all intend to run for reelection to the House in 2022. Omnibus Amended Original Action Petition at ¶¶ 43–48 ("Omnibus Pet."). This Court granted the Congressmen's Motion To Intervene as Petitioners in this original action. *See* Order Granting Mots. To Intervene at 2–3, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Oct. 14, 2021). On October 14, 2021, this Court ordered all parties and intervenors to submit simultaneous briefing on four questions. Order at 2, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Oct. 14, 2021).

SUMMARY OF ARGUMENT

I. Any remedial congressional map that this Court adopts must comply with three state and federal-law requirements. Thereafter, this Court may also consider the traditional redistricting criteria, but only where consistent with the "least-change" approach.

A. Any remedial map must comply with the Wisconsin Constitution's and the U.S. Constitution's equal-population requirement, apportioning congressional districts as close to perfect equality as possible. The U.S. Supreme Court has grounded this requirement in Article I, Section 2, of the U.S. Constitution, and the federal Equal Protection Clause imposes this same requirement. The Wisconsin Constitution embodies this same equal-population requirement under both Article I, Section 1, and Article IV.

B. A remedial map must also comply with the Wisconsin Constitution's and the U.S. Constitution's anti-racial-gerrymandering principle. The federal Equal Protection Clause prohibits States from drawing district lines with race as the predominant intent, unless the State can pass strict scrutiny. Wisconsin's Article I, Section 1, imposes the same anti-racial-gerrymandering requirement.

C. Finally, any remedial map must comply with Section 2 of the Voting Rights Act ("VRA"). Section 2 prohibits States from adopting a redistricting map that dilutes the voting power of a politically cohesive minority group. Where such a group exists, under the elements identified in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the State may not disperse that group across multiple districts or excessively concentrate that group in a single district.

D. This Court may only consider traditional redistricting principles—like compactness, contiguity, respect for political boundaries, and core retention—as it evaluates remedial maps to the extent that those principles are consistent with the "least-change" approach.

II. This Court should use the "least-change" approach in adopting a remedial congressional map.

A. Most fundamentally, the "least-change" approach follows from the bedrock remedial and equitable principle that the proven legal violation in a case shapes the appropriate scope of any court-ordered relief. Here, the only legal violation that Petitioners and Intervenor-Petitioners

allege with respect to the *existing* map is of the equal-population principle. Therefore, this Court has the equitable and remedial authority to adjust the existing congressional maps only as necessary to remedy this equal-population violation.

B. The "least-change" approach also best aligns with this Court's role in our constitutional order. The process of redistricting is an inherently political task. When this Court must complete the task of redistricting, however, it must do so according to neutral, predictable rules—consistent with its role as an impartial arbiter of disputes. The "least-change" approach is the most neutral legal principle for adopting a remedial map as a remedy for a violation of the one-person/one-vote rule since it generally carries forward the political and policy decisions in the existing map and corrects it only to equally reapportion the population.

C. The "least-change" approach would both minimize voter confusion and maximize core retention, since it limits the total number of people moved into a new district.

D. Finally, the "least-change" approach would also best position this Court to adopt a remedial map quickly, as it may well allow this Court to evaluate proposed maps based solely on the parties'/amici's submissions to this Court.

III. This Court should not consider the partisan makeup of the congressional districts as it evaluates or creates a remedial map. Petitioners and Intervenor-Petitioners have only challenged the existing congressional map on equal-

population grounds, thus this Court's remedial and equitable authority here would extend only to adopting a map that remedies that malapportionment. This Court's authority would *not* extend to adjusting the existing district lines to address partisan-makeup concerns. And neither the Wisconsin Constitution nor the U.S. Constitution makes consideration of partisanship legally relevant to redistricting.

IV. If this Court follows the "least-change" approach, then it may well be able to adopt a remedial map based solely on the parties'/amici's submissions to this Court, without referring this case to any factfinding proceedings before a special master. The threshold requirement under the "least-change" approach is that the remedial map equally apportions the congressional districts. This Court may well be able to resolve that question based on the parties'/amici's submission of their proposed maps, which would provide the necessary population data and explain any adjustments to the existing district lines. Further, the "least-change" approach could well avoid factual disputes over the traditional redistricting criteria, since the existing congressional map fully complies with those criteria. Finally, in the context of the congressional map at issue in this case, the "least-change" approach is also unlikely to raise factfinding disputes with respect to the remedial map's compliance with the anti-racial-gerrymandering principle or Section 2 of the VRA.

ARGUMENT

I. When This Court Adopts Remedial Congressional Districts, Those Districts Must Comply With All State And Federal Laws, And This Court May Then Consider Traditional Redistricting Criteria Only Where Consistent With The "Least-Change" Approach

If the Legislature fails to enact an equally populous congressional map that the Governor signs, then this Court must adopt a remedial map. Order at 2, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. *amend.* Sept. 24, 2021).

As a threshold matter, this Court must first find that Wisconsin's *existing* congressional district map is unlawful. *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 564–69, 126 N.W.2d 551 (1964). But given that the current districts are malapportioned after the 2020 U.S. Census, in violation of the Wisconsin Constitution's one-person/one-vote principle, *see* Omnibus Pet. ¶¶ 8, 90–95, this Court need only enter a declaration that the existing congressional map now violates this requirement. Indeed, in light of the unambiguous Census data, it should be undisputed here that Wisconsin's existing congressional districts are no longer equally populous, as the Wisconsin Constitution requires.

Once this Court turns to creating a *remedial* map for Wisconsin's congressional districts, it must comply with three requirements from both state and federal law. Specifically, those requirements are the one-person/one-vote principle,

infra Part I.A, the prohibition against racial gerrymandering, *infra* Part I.B, and the requirements found within Section 2 of the Voting Rights Act, *infra* Part I.C. And while traditional redistricting criteria may also play a role in evaluating or drawing a remedial map generally, this Court may only consider those criteria to the extent that they are consistent with the "least-change" approach. *Infra* Part I.D.

A. The U.S. Constitution And The Wisconsin Constitution Both Require That Remedial Congressional Districts Be Of Equal Population

The U.S. Constitution and the Wisconsin Constitution require Wisconsin to draw congressional districts with as close to perfect population equality as possible.

Under the U.S. Constitution, "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964). Thus, as a federal constitutional requirement, States must draw their congressional districts "with populations as close to perfect equality as possible." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016). While the U.S. Supreme Court has grounded this equal-population principle for congressional districts in Article I, Section 2, *see* U.S. Const. art. I, § 2; *Wesberry*, 376 U.S. at 7–8, the Equal Protection Clause of the Fourteenth Amendment also embodies this same requirement for congressional districts, *see Karcher v. Daggett*, 462 U.S. 725, 747 (1983) (Stevens, J., concurring); *see also Evenwel*,

136 S. Ct. at 1124. That is, "[e]ven if Article I, § 2 were wholly disregarded, the 'one person one vote' rule would unquestionably apply to action by state officials defining congressional districts just as it does to state action defining state legislative districts" by virtue of the federal Equal Protection Clause. *Karcher*, 462 U.S. at 747 (Stevens, J., concurring); *see also Evenwel*, 136 S. Ct. at 1123–24.

The Wisconsin Constitution also requires population equality between congressional districts in the State, and this requirement flows from two state-constitutional provisions.

First, Article I, Section 1 of the Wisconsin Constitution imposes an equal-population principle for Wisconsin's congressional districts. Article I, Section 1 is Wisconsin's state-analog to the federal Equal Protection Clause, providing that "[a]ll people are born equally free and independent, and have certain inherent rights . . . [and] to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const. art. I, § 1. As this Court has held, Article I, Section 1 offers "essentially the same" protection as does the federal Equal Protection Clause. *Cty. of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 393–94, 588 N.W.2d 236 (1999). Therefore, like its federal counterpart, Article I, Section 1 also requires the State to draw all districts, including congressional districts "with populations as close to perfect equality as possible." *Evenwel*, 136 S. Ct. at 1124; *Karcher*, 462 U.S. at 747 (Stevens, J., concurring); *see also Zimmerman*, 22 Wis. 2d at 564.

Any contrary conclusion—that the Equal Protection Clause and Article I, Section 1 require only equally populous state-legislative districts, but not congressional districts—would make no sense. "[T]he fundamental principle of representative government in this country," which principle the Equal Protection Clause and Article I, Section 1 secure, "is one of equal representation for equal numbers of people." *Reynolds v. Sims*, 377 U.S. 533, 560–561 (1964); *accord C & S Mgmt.*, 223 Wis. 2d at 393–94. That fundamental principle logically applies to state-legislative and congressional districts for the same exact reasons. *See Reynolds*, 377 U.S. at 560–62; *accord C & S Mgmt.*, 223 Wis. 2d at 393–94. There could be no possible justification for restricting this principle to state-legislative districts only, thereby permitting the State to "effectively dilute[ ]" the votes of some of its citizens for their representative in Congress. *Reynolds*, 377 U.S. at 562; *accord C & S Mgmt.*, 223 Wis. 2d at 393–94.

Second, Article IV of the Wisconsin Constitution imposes this same equal-population principle for Wisconsin's congressional districts. Under Article IV, Section 3, "the legislature shall apportion and district anew the members of the senate and assembly, *according to the number of inhabitants*." Wis. Const. art. IV, § 3 (emphasis added); *Zimmerman*, 22 Wis. 2d at 564. Although Section 3 only expressly refers to the state-legislative districts, its identical application to Wisconsin's congressional districts is "the most reasonable manner [to read this provision] in relation to [its]

fundamental purpose"—"to create and define the institutions whereby a representative democratic form of government may effectively function." *Zimmerman*, 22 Wis. 2d at 555.

B. The U.S. Constitution And The Wisconsin Constitution Both Require That Remedial Maps Not Be Racially Gerrymandered

Both the U.S. Constitution and the Wisconsin Constitution also prohibit racial gerrymandering when drawing remedial congressional districts.

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws," U.S. Const., amend. XIV, § 1, and it "prevent[s] the States from purposefully discriminating between individuals on the basis of race," *Shaw v. Reno*, 509 U.S. 630, 642 (1993). "[T]hese equal protection principles govern a State's drawing of congressional districts," *Miller v. Johnson*, 515 U.S. 900, 905 (1995), prohibiting a State from "separat[ing] its citizens into different voting districts on the basis of race," unless it can satisfy strict scrutiny, *id.* at 911, 920; *see Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017).

In particular, the Equal Protection Clause prohibits a State from subordinating any traditional redistricting considerations to considerations of race. *Cooper*, 137 S. Ct. at 1463–64. That is, the State may not make race a "predominant factor motivating [its] decision to place a significant number of voters within or without a particular district," unless the State can satisfy strict scrutiny. *Id.*

(quoting *Miller*, 515 U.S. at 916). The U.S. Supreme Court has thus far held only that mandatory compliance with the "operative provisions of the Voting Rights Act" is compelling enough to justify a State's "race-based sorting" in redistricting. *Id.* at 1464.

The Wisconsin Constitution likewise prohibits racial gerrymandering in redistricting, by virtue of Article I, Section 1. As noted above, that provision states that "[a]ll people are born equally free and independent, and have certain inherent rights," Wis. Const. art. I, § 1, which this Court interprets to impose "essentially the same" or "substantially equivalent" requirements as its federal counterpart, *C & S Mgmt.*, 223 Wis. 2d at 393–94. So, like the U.S. Constitution, the Wisconsin Constitution subjects "[c]lassifications based on a suspect class, such as . . . race, . . . to strict scrutiny." *State v. Post*, 197 Wis. 2d 279, 319, 541 N.W.2d 115, 129 (1995); *see also State v. Villamil*, 2017 WI 74, ¶ 5, 377 Wis. 2d 1, 898 N.W.2d 482 ("unjustifiable standard such as race"). Thus, the Wisconsin Constitution prohibits the drawing of district lines based on race—subordinating traditional redistricting considerations to race during the redistricting process—unless the State can pass strict scrutiny by demonstrating that such lines were required by the VRA. *Cooper*, 137 S. Ct. at 1463–64; *see C & S Mgmt.*, 588 N.W.2d at 246.

C. Section 2 Of The VRA Prohibits The Remedial Map From Diluting The Votes Of Members Of Protected Classes

Finally, any remedial map must comply with Section 2 of the VRA. *See Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 16, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam).

Under Section 2, no State may impose or apply any voting practice or procedures that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a); *see generally Gingles*, 478 U.S. at 71 (explaining that Section 2, as amended, does not require "discriminatory intent"). As it relates to redistricting, Section 2 prohibits a State from "diluting" the "voting power" of "[a] politically cohesive minority group" through "the manipulation of district lines." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993).

In order for a redistricting plan to implicate Section 2, certain threshold requirements defined by the U.S. Supreme Court in *Gingles*, 478 U.S. 30, must first be met: (1) a minority group must be sufficiently large and geographically compact to create a majority-minority district; (2) the minority group must be politically cohesive in terms of voting patterns; and (3) voting must be racially polarized, such that the majority group can block a minority's candidate from winning election. *Id.* at 44–45; *see also, e.g.*, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 854 (E.D. Wis. 2012).

If the *Gingles* threshold requirements are met, then a redistricting plan will violate Section 2 when, under "the totality of the circumstances," it denies a politically cohesive minority group an equal opportunity to participate in the political process and elect candidates of its choice. 52 U.S.C. § 10301(b). "In the context of single-member districts," such a denial may occur when the redistricting plan: (a) disperses a minority group "into districts in which they constitute an ineffective minority of voters," or (b) concentrates a minority group "into districts where they constitute an excessive majority." *Voinovich*, 507 U.S. at 154 (citation omitted).

D. After Complying With State And Federal Requirements, This Court May Consider Traditional Redistricting Criteria Only Where Consistent With The "Least-Change" Approach

When redistricting, map drawers often consider whether a congressional map complies with traditional redistricting criteria. Those criteria include, for example, whether proposed remedial districts are sufficiently compact, contiguous, respect preexisting political boundaries, and retain the core of the existing districts. *See Harris v. Arizona Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306 (2016); *League of Women Voters of Chicago v. City of Chicago*, 757 F.3d 722, 726 (7th Cir. 2014); *Baldus*, 862 F. Supp. 2d at 862; *Prosser v. Elections Bd.*, 793 F. Supp. 859, 863 (W.D. Wis.

1992) (per curiam); Wis. Const. art. IV, §§ 3–4; *see generally Zimmerman*, 22 Wis. 2d at 556, 570.

When adopting a remedial congressional map, this Court may consider these same traditional redistricting criteria *to the extent that they are consistent with the "least-change" approach*. That is because, as explained below, when crafting a remedial congressional map, remedial and equitable principles limit this Court only to curing the legal violation in the *existing* map—specifically, here, a violation of the equal-population principle. *Infra* Part II; *see* Omnibus Pet. ¶¶ 125–27, 139–40. That said, if parties or amici present this Court with multiple proposed remedial maps that satisfy the "least-change" approach (as well as all federal and state constitutional and statutory requirements), then this Court will need to consider those proposed maps' comparative compliance with the traditional redistricting criteria in deciding from among these proposed, "least-change" maps.

II. This Court Should Use The "Least-Change" Approach In Adopting A Remedial Congressional Map

This Court should carry out its obligation to draw a remedial congressional map, in the event of a deadlock between the Legislature and the Governor, by following the "least-change" approach. Under that approach, this Court would complete the redistricting process by starting with "the State's existing districts"—here, the congressional map adopted by the Legislature in 2011—and "mak[ing] only

minor or obvious adjustments" to account for "shifts in [Wisconsin's] population," thereby updating the 2011 map to comply with the equal-population principle after the 2020 Census. *Perry v. Perez*, 565 U.S. 388, 392 (2012).

Four principles support this Court following the "least-change" approach here.

A. Most fundamentally, the "least-change" approach follows from the bedrock equitable and remedial principles governing the grant of any form of relief.

When a court grants any relief, the legal violation that empowers the court to act necessarily shapes the appropriate scope of relief. That is, a court must "fashion relief for the parties injured" according to "the act and practices involved in th[e] action," *In Interest of E.C.*, 130 Wis. 2d 376, 388, 387 N.W.2d 72 (1986) (citation omitted), ensuring that it "craft[s] a remedy appropriately tailored to any [legal] violation," *Serv. Emps. Int'l Union, Loc. 1 ("SEIU") v. Vos*, 2020 WI 67, ¶ 47, 393 Wis. 2d 38, 946 N.W.2d 35; *see also State v. Webb*, 160 Wis. 2d 622, 630, 467 N.W.2d 108 (1991). Put another way, "[t]he relief that a court grants [ ] must be in response to the invasion of legally protected rights," *In Interest of E.C.*, 130 Wis. 2d at 389, and it "may not properly exceed the effect of the [legal] violation," *State ex rel. Memmel v. Mundy*, 75 Wis. 2d 276, 288–89, 249 N.W.2d 573 (1977) (citations omitted; brackets omitted); *accord Bowen v. Kendrick*, 487 U.S. 589, 620 (1988).

This bedrock remedial and equitable principle applies in full to redistricting cases. "Relief in redistricting cases is fashioned in light of the well-known principles of equity," as the U.S. Supreme Court, this Court, and others have recognized. *See North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam); *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 729 (1892); *see also, e.g.*, *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *1, *8 (E.D. Wis. May 30, 2002) (per curiam) (issuing equitable remedies of declarations and injunctions). Therefore, as in all cases, a redistricting court must "select a fitting remedy for the legal violations it has identified," *Covington*, 137 S. Ct. at 1625, "limit[ing]" the "modifications of a state plan" only to "those necessary to cure any constitutional or statutory defect," *Upham v. Seamon*, 456 U.S. 37, 43 (1982). Thus, "[i]n fashioning a remedy in redistricting cases, courts are generally limited to correcting only those unconstitutional aspects of a state's plan." *Johnson v. Miller*, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997); *accord SEIU*, 2020 WI 67, ¶ 47; *Memmel*, 75 Wis. 2d at 288–89; *In Interest of E.C.*, 130 Wis. 2d at 388.

Here, if this Court were to adopt a remedial map after Petitioners and Intervenor-Petitioners prevail on their malapportionment claims, this same foundational, equitable and remedial principle requires a "least-change" approach. That is the most "fitting remedy," *Covington*, 137 S. Ct. at

1625, "in response to" the equal-population violation at issue here, *In Interest of E.C.*, 130 Wis. 2d at 389, as it is tailored to equally reapportioning the existing congressional map without disrupting entirely lawful aspects of that plan, *SEIU*, 2020 WI 67, ¶ 47; *Memmel*, 75 Wis. 2d at 288–89.

After all, the *only* legal violation with respect to the existing congressional map that Petitioners and Intervenor-Petitioners assert here is a violation of the one-person/one-vote requirement. Omnibus Pet. ¶¶ 125–27, 139–40; *see supra* Part I.A (discussing this requirement). That is, Petitioners and Intervenor-Petitioners claim that Wisconsin's *existing* congressional districts are unlawful because they are malapportioned in light of the 2020 Census, not because they violate any other state or federal requirement. Omnibus Pet. ¶¶ 125–27, 139–40; *compare supra* Part I.B–C.

The "least-change" approach is the most "fitting" and precisely tailored "remedy" to resolve the one-person/one-vote "legal violation[ ]" that Petitioners and Intervenor-Petitioners have alleged (and almost certainly will prove) here. *Covington*, 137 S. Ct. at 1625; *accord SEIU*, 2020 WI 67, ¶ 47; *Memmel*, 75 Wis. 2d at 288–89; *In Interest of E.C.*, 130 Wis. 2d at 389. As described above, the "least-change" approach would have this Court adopt a remedial map by beginning with the "existing [congressional] districts" and then "mak[ing] only minor or obvious adjustments" to the lines to reestablish equal apportionment among the districts, in light of the "shifts in [Wisconsin's] population" as reflected in the

2020 Census. *Perry*, 565 U.S. at 392. Once equal apportionment is achieved (and this Court assures itself that the remedial map would not violate any federal or state constitutional or statutory requirement), this Court would not make further adjustments to pursue any traditional redistricting criteria or other values. *See id.*; *Memmel*, 75 Wis. 2d at 288–89. So, by adjusting the lines only to reestablish equal populations, this Court's "modification[s]" to the congressional districts would be "limited to those necessary to cure" the "constitutional or statutory defect" established here—the violation of the of equal-population principle. *Upham*, 456 U.S. at 43; *see also Johnson*, 922 F. Supp. at 1559; *accord SEIU*, 2020 WI 67, ¶ 47; *Memmel*, 75 Wis. 2d at 288–89; *In Interest of E.C.*, 130 Wis. 2d at 389.

B. The "least-change" approach also best comports with this Court's role in our constitutional order, as it supplies a neutral rule for this Court to apply in this delicate area.

This Court is a "neutral, impartial, and nonpartisan" institution, *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶ 16, 307 Wis. 2d 1, 745 N.W.2d 1, whose role is to "say[ ] what the law is and not what [it] may wish it to be," *State v. Lickes*, 2021 WI 60, ¶ 3 n.4, 960 N.W.2d 855; *accord Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 37, 376 Wis. 2d 147, 897 N.W.2d 384. Accordingly, this Court must issue its judgments under coherent and predictable legal tests and principles, *Horst v. Deere & Co.*, 2009 WI 75, ¶ 71, 319 Wis. 2d 147, 769 N.W.2d 536 (citing Antonin Scalia, *The Rule Of Law As A Law*

Of Rules, 56 U. Chi. L. Rev. 1175, 1179 (1989)), rather than based upon "policy choices" or "preference[s]," *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 529, 576 N.W.2d 245 (1998).

The redistricting process is, "[b]eyond question, . . . an exercise of legislative power," *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35, 56 (1892), which requires innumerable "political and policy decisions" to complete, *Jensen*, 2002 WI 13, ¶ 10; *accord Perry*, 565 U.S. at 392–93, 396. That is, even after accounting for the various state and federal requirements for district maps, *see* Part I, there "is no single plan which the constitution, as a matter of law, requires to be adopted to the exclusion of all others," *Zimmerman*, 22 Wis. 2d at 570. Rather, "there are choices which can validly be made within constitutional limits" regarding the contours of the map that are not reducible to neutral, predictable legal rules for courts to apply. *See id.*; *Horst*, 2009 WI 75, ¶ 71. So, given the vast discretion inherent in redistricting, "[t]he framers in their wisdom entrusted this decennial exercise to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other." *Jensen*, 2002 WI 13, ¶ 10.

Although redistricting is "an inherently political and legislative—not judicial—task," *id.*, this Court must "embark on th[is] task" itself if "the Legislature and the Governor [fail] to accomplish their constitutional responsibilities," Order at

2, *Johnson*, No.2021AP1450-OA (Wis. *amend.* Sept. 24, 2021). But when this Court is required to complete redistricting, it does not take the place of the political branches. Instead, it adheres to its "neutral, impartial, and nonpartisan" role, *Helgeland*, 2008 WI 9, ¶ 16, applying "neutral legal principles" in adopting a remedial map, *Perry*, 565 U.S. at 393; *Upham*, 456 U.S. at 42; *accord Horst*, 2009 WI 75, ¶ 71.

The "least-change" approach is the most "neutral legal principle[ ] in this area," *Perry*, 565 U.S. at 393, allowing this Court to issue a remedial map in an objective, predictable manner that reduces "political and policy decisions," *Jensen*, 2002 WI 13, ¶ 10. This approach carries forward the discretionary decisions made by the political branches in the prior decade, *infra* pp. 27–28, freeing this Court of the need to make such "inherently political and legislative" choices, *Jensen*, 2002 WI 13, ¶ 10; *see, e.g.*, *Perry*, 565 U.S. at 396 (directing courts not to "substitute" their "own concept of 'the collective public good' for the [ ] Legislature's" when adjudicating redistricting disputes); *White v. Weiser*, 412 U.S. 783, 795 (1973) (holding that "a district court should similarly honor state policies in the context of congressional reapportionment" when "fashioning a reapportionment plan or in choosing among plans"); *Upham*, 456 U.S. at 42 ("The only limits on judicial deference to state apportionment policy . . . [are] the substantive constitutional and statutory standards to which such state plans are subject."); *Hippert v. Ritchie*, 813 N.W.2d 391, 397 (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 plan established by the panel is a least-change plan to the extent feasible."); *Johnson*, 922 F. Supp. at 1559 ("A minimum change plan acts as a surrogate for the intent of the state's legislative body."); Katharine Inglis Butler, *Redistricting In A Post-Shaw Era: A Small Treatise Accompanied By Districting Guidelines For Legislators, Litigants, And Courts*, 36 U. Rich. L. Rev. 137, 222 (2002).

C. The "least-change" approach would simultaneously "minimize[ ] voter confusion," *Hippert v. Ritchie*, 813 N.W.2d 374, 381 (Minn. 2012), and maximize "core retention," *Baumgart*, 2002 WL 34127471, at *3, *7, by limiting the number of people placed in different congressional districts. That reduces voter confusion by decreasing the number of people forced to vote in elections for unfamiliar congressional candidates, after a switch to a new district. And it furthers core retention by preserving the "relations" between representatives and their "constituents" in the existing districts, promoting "continuity" and "stability." Jon M. Anderson, *Politics and Purpose: Hide and Seek in the Gerrymandering Thicket After* Davis v. Bandemer, 136 U. Pa. L. Rev. 183, 234 (1987); *accord Cunningham*, 51 N.W. at 730. Pursuing these benefits in this redistricting cycle, in particular, is especially warranted, as the shortened

redistricting timeline caused by the 2020 Census delay would magnify any disruption caused from any shift in district lines.

D. Finally, the "least-change" approach would also best position this Court to adopt a remedial congressional district map quickly, giving clarity to the people of this State. As explained below, the "least-change" approach would very likely accelerate this Court's adoption of a redistricting map, enabling this Court to evaluate proposed remedial maps based solely on the submissions of the parties/amici, without need for a factfinding hearing (or, if any factfinding were to occur, it would be exceedingly limited). *Infra* Part IV.

III. This Court Should Not Consider The Partisan Makeup Of Districts In Evaluating Or Creating Remedial Congressional Maps

For many of the same reasons that this Court should follow the "least-change" approach, it should also refrain from considering partisan makeup as it evaluates or creates a remedial congressional map. As explained above, the remedial and equitable principles that control the grant of any relief require courts to "craft a remedy appropriately tailored to any [legal] violation," *SEIU*, 2020 WI 67, ¶ 47, such that it "respon[ds]" only to "the invasion of legally protected rights," *In Interest of E.C.*, 130 Wis. 2d at 389. Here, Petitioners and Intervenor-Petitioners have only alleged that Wisconsin's *existing* congressional districts violate the equal-population principle. *See supra* pp. 18–19. Thus, the scope of this Court's authority to remedy that violation extends to

correcting this violation by adopting a map that equally reapportions the existing districts. *See* Part II. This Court's authority would not extend to changing existing district lines in a remedial map based upon partisan-makeup concerns.

Notably, nothing in Wisconsin or federal law makes political considerations relevant to the legality of a map, including a remedial map.

This Court has expressly held that the Legislature and Governor legally may—and inevitably will—draw district lines according to political considerations, as redistricting is an "*inherently* political . . . task." *Jensen*, 2002 WI 13, ¶ 10 (emphasis added). This is because redistricting "raises important . . . political issues that go to the heart of our system of representative democracy," *id.*, ¶ 4, as it "determines the political landscape for the ensuing decade and thus public policy for years beyond," *id.* ¶ 10. For this reason, "[t]he framers [of the Wisconsin Constitution] in their wisdom entrusted this decennial exercise to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of *political and policy decisions*, is preferable to any other." *Id.* (emphasis added); *accord* Order at 2, *Johnson*, No.2021AP1450-OA (Wis. *amend.* Sept. 24, 2021) ("We cannot emphasize strongly enough that our Constitution places primary responsibility for the apportionment of Wisconsin legislative districts on the legislature."); *State ex rel. Bowman v. Dammann*, 209 Wis. 21,

243 N.W. 481, 485 (1932). Therefore, the Legislature and Governor making "precisely these sorts of political and policy decisions" when redistricting could not possibly violate Wisconsin law. *Jensen*, 2002 WI 13, ¶ 10.

Federal law is in accord. The U.S. Supreme Court has now expressly held that States may constitutionally draw their redistricting maps with partisan considerations in mind, and that, accordingly, "partisan gerrymandering claims" are "beyond the federal courts," as the courts have "no plausible grant of authority in the Constitution" to "reallocate political power" by adjusting district lines for partisan concerns. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498, 2506–07 (2019) (citations omitted).

IV. Assuming This Court Adopts The "Least-Change" Approach, It May Well Be Able To Adopt A Remedial Congressional Map Based Solely On Submissions To This Court Without The Need For Factfinding

Under the "least-change" approach, this Court would adopt a remedial congressional map by beginning with the existing congressional districts adopted by the Legislature in 2011 and then making those adjustments necessary to equally reapportion the districts. *Supra* Part II. If this Court were to follow that approach here, then it may well be able to complete the remedial congressional redistricting process based solely on the submissions of the parties/amici, thereby avoiding the need to resort to factfinding or a special master.

Under the "least-change" approach, the most salient question for whether a proposed, remedial congressional map for this State would be constitutionally sufficient is whether it apportions the districts "with populations as close to perfect equality as possible," *Evenwel*, 136 S. Ct. at 1124, while also making "only minor or obvious adjustments" to account for "shifts in [Wisconsin's] population" since 2011, *Perry*, 565 U.S. at 392. To assist this Court in conducting this inquiry, the parties/amici would submit proposed remedial maps to this Court, demonstrating the number of people that they would place in each district. *See Prosser*, 793 F. Supp. at 862, 865–67 (discussing these metrics for proposed plans, based on the submissions of the parties). The parties/amici will also explain where they made the changes from the prior map and the rationales for such changes, which explanations would assist this Court in adopting a "least-change" map. Notably, the required population-change data is readily and easily gathered from the map-drawing software used to craft a proposed map and the 2020 Census results. *See generally Baldus*, 849 F. Supp. 2d at 846, 849; U.S. Census Bureau, *Decennial Census P.L. 94-171 Redistricting Data* (Aug. 12, 2021) (Census data).[*] And given the accuracy and objectivity of this population-based data, it appears unlikely that any

[*] Available at https://www.census.gov/programs-surveys/decennial-census/about/rdo/summary-files.html (all websites last accessed on Oct. 24, 2021).

party could mount a plausible factual challenge on this front, *accord Rucho*, 139 S. Ct. at 2501, leading to factual disputes and/or resort to a special master, Wis. Stat. § 751.09.

The least-change approach would relieve this Court of the "daunting task" of "design[ing] a reapportionment plan" from scratch; thus, factual disputes with respect to those criteria would not likely arise either. *Prosser*, 793 F. Supp. at 864; *supra* Part I.D. That is, the Legislature in 2011 already determined that the existing congressional map *already* fully complied with the relevant traditional redistricting factors, *Baldus*, 849 F. Supp. 2d at 848, 853–54, and this Court would carry that compliance forward by using those districts as the basis for a remedial map under the "least change" approach. And, again, if multiple proposed remedial maps submitted to this Court qualify as "least-change" maps, this Court could determine which of those limited submissions best satisfies the traditional redistricting criteria based on explanations submitted by the proposed remedial map's proponents.

Of course, this Court would need to assure itself that any "least-change" remedial map that it ultimately adopts complies with all federal and state law requirements—beyond the requirements of the one-person/one-vote principle that the "least-changes" approach addresses directly, *see supra* pp. 18–19—but that is likely to be an unchallenging endeavor for any remedial congressional map in this case.

As for the anti-racial-gerrymandering constitutional requirement in the U.S. Constitution and the Wisconsin

Constitution, *supra* Part I.B, the "least-change" approach is exceedingly unlikely to raise factual disputes regarding compliance with this constitutional rule. Under this requirement, the State may not draw district lines with race as a "predominant factor motivating [its] decision to place a significant number of voters within or without a particular district," thereby subordinating traditional redistricting considerations to racial considerations—unless it can satisfy strict scrutiny. *Cooper*, 137 S. Ct. at 1463–64 (citation omitted); *accord C & S Mgmt.*, 588 N.W.2d at 246. There is no suggestion that any of the *existing* congressional district lines impermissibly subordinated traditional redistricting criteria to racial considerations. Indeed, Wisconsin has conducted congressional elections under the existing map for the past decade, with no party arguing that any of those districts were somehow racially gerrymandered. It is hard to see how following the "least-change" approach to adopt a remedial map could give rise to a plausible racial-gerrymandering claim, thereby necessitating factfinding hearings, since the predominant intent in drawing that remedial map would be to achieve population equality.

Finally, with respect to Section 2 of the VRA, *supra* Part I.C, the "least-change" approach to a remedial congressional map is unlikely to raise factual disputes over this federal-law requirement either. Section 2 prohibits diluting a politically cohesive minority group's voting power by, as relevant to single-member districts, dispersing the

group across districts or excessively concentrating it into a single district. *Gingles*, 478 U.S. at 50–51; *Voinovich*, 507 U.S. at 154; *Baldus*, 849 F. Supp. 2d at 854. Here, Wisconsin's existing congressional district map recognized one majority-minority congressional district in the State, *see* App'x to SB-149 at 1, *Statistics And Maps* (2011–2012) (listing, as part of the 2011 redistricting drafting file, that Congressional District 4 has a majority-minority population);† and there appears to be no argument that Section 2 would require recognition of any other such district under *Gingles*. Therefore, this Court largely carrying the boundaries of the existing districts forward in a remedial congressional map, under the "least-change" approach, is exceedingly unlikely to trigger any plausible Section 2 claim, requiring resolution of any factual dispute before a special master.

CONCLUSION

The Congressmen respectfully submit that this Court should approach this matter as described above.

† Available at https://docs.legis.wisconsin.gov/2011/related/rd/sb149.pdf.

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font, as well as to this Court's October 14, 2021 Order. The length of this Brief is 6,550 words.

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

I hereby certify that:

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

I further certify that:

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

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

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