IN THE SUPREME COURT OF WISCONSIN

No. _____

STEPHEN JOSEPH WRIGHT, GARY KRENZ, SARAH J. HAMILTON, JEAN-LUC THIFFEAULT, SOMESH JHA, JOANNE KANE, AND LEAH DUDLEY,
Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION; DON MILLIS, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, AND JOSEPH J. CZARNEZKI, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS COMMISSION; AND MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION,
Respondents.

PETITION TO COMMENCE AN ORIGINAL ACTION

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ISSUE PRESENTED

Whether Petitioners—Wisconsin citizens whose ability to vote is diluted and debased in violation of Wisconsin's constitutional guarantees due to the extreme partisan gerrymanders in place under current districting plans for the Senate and Assembly—are entitled to:

a. a declaration that the senate and assembly districting plans violate the Equal Protection Clause in Article I, Section 1;

b. a declaration that the senate and assembly districting plans violate the Free Speech and Right to Assemble and Petition Clauses in Article I, Sections 3 and 4;

c. a declaration that the senate and assembly districting plans violate the Free Government Clause in Article I, Section 22;

d. a declaration that the senate and assembly districting plans violate the redistricting requirements in Article IV, Sections 3, 4, and 5;

e. a declaration that the senate and assembly districting plans violate the Wisconsin Constitution's separation-of-powers requirements, including the veto provisions in Article V, Section 10;

f. an injunction prohibiting Respondents from administering any senate or assembly election until new senate and assembly redistricting plans that comply with the Wisconsin Constitution are established;

g. the establishment of new senate and assembly redistricting plans that comply with the Wisconsin Constitution and fully cure all constitutional violations in the current senate and assembly redistricting plans;

h. following the establishment of new senate and assembly redistricting plans that fully comply with the Wisconsin Constitution, an order providing for special senate elections in 2024, for two-year terms, in all odd-numbered senate districts; and

i. any such other relief that this Court deems just and proper.

INTRODUCTION

During the post-2010 redistricting cycle, Wisconsin's Republican-controlled Legislature passed—and its Republican Governor signed—one of the most extreme partisan gerrymanders in American history. A decade later, this Court ordered into place senate and assembly maps drawn by the Legislature (the "Legislative Plans") that, by design, sought to "least change" the extreme legislative partisan gerrymanders of the post-2010 cycle. Where those Legislative Plans *did* change the previous decade's gerrymanders, those changes created even greater partisan skew. The result is legislative districting plans that violate multiple rights guaranteed by the Wisconsin Constitution. This Court should act swiftly to establish new maps that fully cure the rampant constitutional violations in the current plans.

Enshrined at the very beginning of the Wisconsin Constitution's Declaration of Rights is the basic tenet that governments "deriv[e] their just powers from the consent of the governed." Wis. Const. art. I, § 1. The Legislative Plans are extreme partisan gerrymanders that dilute and devalue Wisconsin citizens' right to vote. As a result, they break the promise the framers made to the people of Wisconsin and violate the Constitution's Equal Protection Clause, Free Speech and Right to Assemble and Petition

Clauses, and Free Government Clause. The Plans also violate the redistricting requirements set out in Article IV of the Wisconsin Constitution. Finally, the Plans violate the Wisconsin Constitution's separation-of-powers principles because this Court effectively overrode the Governor's veto to effectively enact the Legislature's plans into law, ignoring the Constitution's rule that only the Legislature, by a two-thirds vote of both houses, can override a gubernatorial veto.

This Court has a long history—extending back more than 130 years—of taking original jurisdiction to evaluate legislative apportionment plans under the Wisconsin Constitution for fundamental fairness. It should do so again here to vindicate the principle that a just government must derive its power from the consent of the governed and thus to deliver on the promise made to Wisconsin citizens that legislative districting should achieve "equality of representation" for all. *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35, 57 (1892).

PARTIES

A. Petitioners

1. Petitioners are qualified, registered voters in the State of Wisconsin who reside in various legislative districts and who support the election of Democratic candidates and the implementation of Democratic

policies. Petitioners' votes have been intentionally, severely, durably, and unjustifiably diluted by the Legislative Plans because they live in districts that needlessly "crack" or "pack" Democratic voters. "A 'cracked' district is one in which a party's supporters are divided among multiple districts, so that they fall short of a majority in each; a 'packed' district is one in which a party's supporters are highly concentrated, so they win that district by a large margin, 'wasting' many votes that would improve their chances in others." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2492 (2019) (citation omitted). For each of these Petitioners, the particular composition of the voter's own district thus causes his or her vote—having been cracked or packed—to carry less weight than it would carry in a district that was not drawn for partisan advantage.

2. Each Petitioner also suffers harms that go beyond vote dilution based on cracking or packing and thus are not district-specific. The Legislative Plans' extreme gerrymandering and partisan asymmetry burden the ability of Petitioners and "like-minded people across the State to affiliate in a political party," to "carry out [the party's] activities and objects," and to "pursue their political interests and goals." *Gill v. Whitford*, 138 S. Ct. 1916, 1939–40 (2018) (Kagan, J., concurring) (citing *Vieth v. Jubelirer*, 541 U.S. 267, 315 (2004) (Kennedy, J. concurring)).

3. Petitioners include several individuals who participated in the 2021–2022 redistricting proceedings in this Court as the "Citizen Mathematicians and Scientists," which the Court referred to as "CMS." Petitioners include some of Wisconsin's leading professors and research scientists in mathematics, statistics, and computer science. These Citizen Mathematicians and Scientists include the Chair of the Department of Computer Sciences at the University of Wisconsin-Madison, the Chair of the Department of Mathematics at the University of Wisconsin-Madison, the past chair of Marquette University's former Mathematics, Statistics and Computer Science Department and a recipient of Marquette University's highest teaching award, a professor of Computer Sciences at the University of Wisconsin-Madison, and a Project NexT Fellow with the Mathematical Association of America.

4. In the 2021–2022 redistricting litigation, the CMS Petitioners offered this Court a legislative remedial plan (the "Prior CMS Plans") "using cutting-edge technology" in computational redistricting. *Johnson v. Wisconsin Elections Commission* (*Johnson III*), 2022 WI 19, ¶ 46, 401 Wis. 2d 198, 972 N.W. 2d 559 (2022). The Prior CMS Plans "had less than half the population deviation" of the remedial plans submitted by other parties and "had hundreds fewer local government splits." *Id.* ¶ 45 & n.7. The

Legislative Plan for the Senate had a larger population deviation than the Prior CMS Senate Plan, had compactness scores that were inferior to those of the Prior CMS Senate Plan (on four distinct metrics), and broke more counties (42 rather than only 28) into more pieces (115 rather than only 86) than did the Prior CMS Senate Plan. Likewise, the Legislative Plan for the Assembly had a larger population deviation than the Prior CMS Assembly Plan, had compactness scores that were inferior to those of the Prior CMS Assembly Plan (on four distinct metrics), and broke more counties (53 rather than only 40) into more pieces (212 rather than 175) than did the Prior CMS Assembly Plan. And both the Prior CMS Senate Plan and the Prior CMS Assembly Plan preserved wholly intact all 7,136 of Wisconsin's wards. *See* Expert Report of Dr. Daryl DeFord on Behalf of Intervenors-Petitioners Citizen Mathematicians and Scientists at 13–19, *Johnson v. Wis. Elections Comm'n*, No. 2021AP001450 OA (Wis. Dec. 30, 2021) (App. 250–83) (DeFord Report). Nonetheless, the Court ultimately put into place the Legislature's maps rather than the CMS Petitioners'.

5. Stephen Joseph Wright is a registered voter who resides in Dane County and in Senate District 26 and Assembly District 77. Dr. Wright is the Chair of the Department of Computer Sciences at the University of Wisconsin-Madison and the George B. Dantzig Professor of Computer

Sciences, teaching courses on nonlinear optimization and on linear programming, among other subjects. He is a past Chair of the Mathematical Optimization Society, a current fellow and former trustee of the Society for Industrial and Applied Mathematics, and the current Director of the Institute for Foundations of Data Science at the University. In 2020, Dr. Wright was awarded the Khachiyan Prize, which honors life-time achievements in the area of optimization. Dr. Wright received his Ph.D. in Mathematics from the University of Queensland.

6. Dr. Wright votes for Democratic candidates and supports Democratic Party policies. Both Senate District 26 and Assembly District 77, where Dr. Wright resides, are packed with Democratic voters, which unlawfully dilutes Dr. Wright's vote in violation of the Wisconsin Constitution.

7. Gary Krenz is a registered voter who resides in Milwaukee County and in Senate District 8 and Assembly District 23. Dr. Krenz is a Professor Emeritus of Mathematical and Statistical Sciences and an Adjunct Professor of Computer Science at Marquette University. He is a past chair of Marquette's former Mathematics, Statistics and Computer Science Department. Dr. Krenz received Marquette University's Ignatian Pedagogy Award and the Rev. John P. Raynor, S.J., Faculty Award for

Teaching Excellence. His research interests include mathematical and statistical modeling and computer-science education, for which he has been funded by both the National Institutes of Health and the National Science Foundation. Dr. Krenz received his Ph.D. in Applied Mathematics from Iowa State.

8. Dr. Krenz votes for Democratic candidates and supports Democratic Party policies. Senate District 8, where Dr. Krenz resides, is cracked, which unlawfully dilutes Dr. Krenz's vote in violation of the Wisconsin Constitution.

9. Sarah J. Hamilton is a registered voter who resides in Milwaukee County and in Senate District 7 and Assembly District 20. Dr. Hamilton is an Associate Professor of Mathematics at Marquette University and an Assistant Adjunct Professor at the Medical College of Wisconsin. She has taught courses at Marquette in mathematical modeling and analysis, differential equations, and the theory of optimization. Her research interests include inverse problems, machine learning and data science, and computational imaging, for which she has been funded by the National Institutes of Health. She has been named a Project NexT Fellow by the Mathematical Association of America. Dr. Hamilton received her Ph.D. in Mathematics from Colorado State University.

10. Dr. Hamilton votes for Democratic candidates and supports Democratic Party policies. Both Senate District 7 and Assembly District 20, where Dr. Hamilton resides, are packed with Democratic voters, which unlawfully dilutes Dr. Hamilton's vote in violation of the Wisconsin Constitution.

11. Jean-Luc Thiffeault is a registered voter who resides in Dane County and in Senate District 26 and Assembly District 77. Dr. Thiffeault is Chair of the Department of Mathematics and also a Professor of Applied Mathematics at the University of Wisconsin-Madison, where his research interests include fluid dynamics, stochastic modeling, and topological dynamics. Dr. Thiffeault is a Fellow of the American Physical Society. He has spoken at over 140 invited research seminars and colloquia and has won the Society for Industrial and Applied Mathematics' outstanding-paper prize. Dr. Thiffeault received his Ph.D. in Physics from the University of Texas at Austin.

12. Dr. Thiffeault votes for Democratic candidates and supports Democratic Party policies. Both Senate District 26 and Assembly District 77, where Dr. Thiffeault resides, are packed with Democratic voters, which unlawfully dilutes Dr. Thiffeault's vote in violation of the Wisconsin Constitution.

13. Somesh Jha is a registered voter who resides in Dane County and in Senate District 27 and Assembly District 79. Dr. Jha is the Sheldon B. Lubar Professor of Computer Sciences at the University of Wisconsin-Madison, where he researches or teaches cartography, adversarial machine learning, computational finance, robust optimization, and data science, among other topics. He has received the National Science Foundation CAREER Award, the Computer-Aided Verification Award, and multiple best-paper awards. He is a Fellow of both the Association for Computing Machinery (awarded to the top 1% of ACM members) and the 5 IEEE (recognizing "extraordinary accomplishments" in the IEEE fields of interest). Dr. Jha received his Ph.D. in Computer Science from Carnegie Mellon University.

14. Dr. Jha votes for Democratic candidates and supports Democratic Party policies. Both Senate District 27 and Assembly District 79, where Dr. Jha resides, are packed with Democratic voters, which unlawfully dilutes Dr. Jha's vote in violation of the Wisconsin Constitution.

15. Joanne Kane is a registered voter who resides in Dane County and in Senate District 26 and Assembly District 77. Dr. Kane is the Associate Director of Assessment and Research at the National Conference of Bar Examiners. Her research interests include scoring methodology,

statistics, and multi-parameter models for fairness and decision-making. Dr. Kane received her Ph.D. in Social Psychology from the University of Colorado at Boulder.

16. Dr. Kane votes for Democratic candidates and supports Democratic Party policies. Both Senate District 26 and Assembly District 77, where Dr. Kane resides, are packed with Democratic voters, which unlawfully dilutes Dr. Kane's vote in violation of the Wisconsin Constitution.

17. Leah Dudley is a registered voter who resides in Dane County and in Senate District 26 and Assembly District 77. Ms. Dudley is a Health Actuary for a consulting company. Much of her work involves analyzing Census data to advise cities, towns, and other local governments about actuarial-science issues. Ms. Dudley received her M.S. in Business Statistics from the University of Wisconsin-Madison.

18. Ms. Dudley votes for Democratic candidates and supports Democratic Party policies. Both Senate District 26 and Assembly District 77, where Ms. Dudley resides, are packed with Democratic voters, which unlawfully dilutes Ms. Dudley's vote in violation of the Wisconsin Constitution.

B. Respondents

19. Respondent Wisconsin Elections Commission ("WEC") is a creation of the Wisconsin Legislature. *See* 2015 Wis. Act 118 § 4, Wis. Stat. § 5.05. It is a six-person commission that has responsibility for administering the election laws in Chapters 5 to 10 and 12 of the Wisconsin Statutes. This includes the laws governing the election of members of the Senate and the Assembly. The WEC supports local clerks in each of Wisconsin's 72 counties in administering and preparing for the election of members of the Wisconsin Legislature.

20. Respondents Don Millis, Robert F. Spindell, Jr., Mark L. Thomsen, Ann S. Jacobs, Marge Bostelmann, and Joseph J. Czarnezki are commissioners of the WEC. The WEC Commissioners are sued solely in their official capacities.

21. Respondent Meagan Wolfe is the administrator of the WEC. She is sued solely in her official capacity.

22. The WEC, its members, and Administrator Wolfe have their offices and principal place of business at 201 West Washington Avenue, 2nd Floor, Madison, Wisconsin 53703.

STATEMENT OF FACTS NECESSARY TO AN UNDERSTANDING OF THE ISSUE

I. The Law Governing Redistricting in Wisconsin

23. Consistent with Article IV, Sections 1 and 2 of the Wisconsin Constitution, the Legislature consists of a 33-member Senate and a 99-member Assembly. Wis. Const. art. IV, §§ 1–2. Article IV, Section 3 of the Wisconsin Constitution provides: "At its first session after each enumeration made by the authority of the United States, 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.

24. In addition to population equality under Section 3, the Wisconsin Constitution identifies several other express limits on the Legislature's redistricting authority, providing that assembly districts "be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable," Wis. Const. art. IV, § 4, that "no assembly district shall be divided in the formation of a senate district," and that each senate district be "of convenient contiguous territory," *id.* § 5.

25. Several other provisions of the Wisconsin Constitution also govern legislative redistricting, including:

a. Article I, Section 1, which provides that "[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from ***the consent of the governed.***" Wis. Const. art. I, § 1 (emphasis added) (the "Equal Protection Clause").

b. Article I, Section 3, which provides that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press." Wis. Const. art. I, § 3 (the "Free Speech Clause").

c. Article I, Section 4, which provides that "[t]he right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged." Wis. Const. art. I, § 4 (the "Right to Assemble and Petition Clause").

d. Article I, Section 22, which provides that "[t]he blessings of a free government can only be maintained by a firm

> adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." Wis. Const. art. I, § 22 (the "Free Government Clause").

26. There are also procedural constraints on legislative redistricting. In particular, Article V, Section 10 of the Wisconsin Constitution grants the Governor the power to veto legislation, including redistricting legislation. It provides that "[i]f the governor rejects the bill, the governor shall return the bill, together with the objections in writing, to the house in which the bill originated. … if, after … reconsideration, two-thirds of the members present agree to pass the bill notwithstanding the objections of the governor, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present it shall become law." Wis. Const. art. V, § 10(2)(a). Accordingly, the only way for vetoed redistricting legislation to become law is through a two-thirds vote of both legislative houses overriding the Governor's veto.

27. In addition, Article I, Section 9 of the Wisconsin Constitution provides that "[e]very person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or

character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." Wis. Const. art. I, § 9.

28. Finally, legislative redistricting in Wisconsin also must comply with federal law, including the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which enshrines the "one person, one vote" principle and prohibits the excessive and unjustified use of race or racial data in redistricting, as well as the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, as amended.

II. Partisan Gerrymandering in Wisconsin

A. The 2011 Redistricting Process

29. In 2010, Wisconsin voters elected a Republican Governor and Republican majorities in the Senate and Assembly—the State's first Republican "trifecta" since the 1990s. Shortly after the 2010 election, Republican majorities in the Senate and Assembly radically reshaped Wisconsin's legislative maps. The resulting plans (the "2011 Plans") shifted 2.3 million Wisconsin residents—more than 40% of the State's population—into new assembly districts, to entrench a Republican majority in the Legislature for at least the next decade. *See* Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. REV. 985, 998 (2022).

30. They succeeded. In the first election following adoption of the 2011 Plans, a majority of voters cast their ballots for Democratic legislative candidates, yet those candidates won just 40.9% of the legislative seats.

31. The legislative plans enacted in 2011 are widely regarded as one of the most effective partisan gerrymanders in modern American history. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 923 (W.D. Wis. 2016) (three-judge court) (noting the "highly successful" efforts "to achieve a substantial, if not maximal, partisan advantage"), *vacated on other grounds and remanded*, 138 S. Ct. 1916 (2018). The 2011 Plans were carefully crafted using a "sharply partisan methodology" and in a manner that "upend[ed] more than a century of practice in Wisconsin." *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 844–46 (E.D. Wis. 2012) (three-judge court). Indeed, "[t]he partisan character of the 2011 maps is evident both in the process by which they were drawn—'under a cloak of secrecy,' totally excluding the minority political party—and in their departure from neutral traditional redistricting criteria." *Johnson v. Wisconsin Elections Comm'n* (*Johnson I*), 2021 WI 87 ¶ 92 & n.2, 399 Wis. 2d 623, 967 N.W.2d 469 (Dallet, J., dissenting) (quoting *Baldus*, 849 F. Supp. 2d at 845).

32. The 2012 and 2014 assembly elections illustrate the consequences of the 2011 Plans' gerrymandering, as the two elections were remarkably dissimilar in their voting, yet similar in their outcomes. In 2012, "Democrats received 51.4% of the statewide vote" in assembly elections, *Whitford*, 218 F. Supp. 3d at 901; and in 2014, the tables turned, as Republicans received a similar majority of the statewide vote. But in both elections, despite the difference in how the people of Wisconsin voted, Republicans carried supermajorities of the assembly seats—specifically, a 60-to-39 Republican advantage in 2012 and a 63-36 Republican advantage in 2014. So the 2011 Plans were not only severely Republican-favoring, but durably so. As the federal District Court explained, gerrymandering entrenched Republican power to such a degree that "even when Republicans are an electoral minority, their legislative power remains secure." *Id.* With no practical opportunity to displace the Republican gerrymanderers by defeating them at the polls, Wisconsin Democrats found themselves "caught up in a legislative straight jacket." *Baker v. Carr*, 369 U.S. 186, 259 (1962) (Clark, J., concurring).

B. The 2021 Redistricting Process

33. In 2021, shortly after the United States Census Bureau delivered updated redistricting data to the State, the Republican leaders of the Senate and Assembly introduced redistricting plans. Republican majorities in the Legislature soon passed these proposals on party-line votes, but Governor Evers vetoed the legislation. The Legislature failed to override his veto. *See Johnson I*, 2021 WI 87, ¶ 17.

34. With the executive and legislative branches deadlocked, a group of voters petitioned this Court to commence an original action to establish redistricting plans for the 2022 election, asserting that the prior plans could not be used because the Census data revealed them to be malapportioned in violation of the "one person, one vote" principle. This Court granted the petition and commenced an original action, permitting several parties—including five of the seven Petitioners here (the Citizen Mathematicians and Scientists, or CMS group)—to intervene.

35. After taking original jurisdiction, the Court asked the parties to address how the Court should go about its task of judicial redistricting given the legislative impasse. Many parties, including the CMS group, advocated bringing the maps into compliance with the Wisconsin

Constitution, including by ensuring that any map adopted by the Court be free of partisan bias.

36. In a split decision, four Justices rejected the notion that the Court should ensure that any judicially imposed redistricting plan be free of partisan bias. *Johnson I*, 2021 WI 87 ¶ 39. The Court instead held that it would select a map by prioritizing a "'least-change' approach," stating that it would select the map that made the minimum changes necessary to remedy the malapportionment in the then-existing redistricting plans. *Id.* ¶ 81. *But see id.* ¶¶ 82–84 & n.4 (Hagedorn, J., concurring) (stating, in contrast to the lead opinion, that equitable considerations could inform the judicial remedy imposed). The Court further held that it would not consider the partisan composition of districts when selecting a map and precluded the parties from presenting the Court with any information about the partisan composition of districts, partisan bias, or partisan unfairness when proposing or advocating for maps. *Id.* ¶ 39; *see also id.* ¶ 87 (Hagedorn, J., concurring) ("Parties should not present arguments regarding the partisan makeup of proposed districts. While other, traditional redistricting criteria may prove helpful and may be discussed, our primary concern is modifying only what we must to ensure the 2022 elections are conducted under districts that comply with all relevant state and federal laws.").

37. The dissent pointed out that this "least-change approach is not the 'neutral standard' the majority/lead opinion portrays it as." *Johnson I*, 2021 WI 87, ¶ 93 (Dallet, J., dissenting). As the dissent noted, "applying that [least-change] approach to 2011's maps affirmatively perpetuates the partisan agenda of politicians no longer in power." *Id.* The dissent further noted that "the text of the Wisconsin Constitution provides no support for the majority's hierarchical distinctions" whereby the Court would prioritize "least change" over the "requirements of compactness, contiguity, and respect for political subdivision boundaries found in Article IV." *Id.* ¶ 100 (Dallet, J., dissenting).

38. The Court then invited maps from the parties and began the selection process. Initially, a four-Justice majority of the Court adopted Governor Evers's submission as the maps that best complied with the "least-change" criterion that the Court had declared paramount. *Johnson v. Wis. Elections Comm'n* (*Johnson II*), 2022 WI 14, ¶ 52, 400 Wis. 2d 626, 971 N.W.2d 402, *summarily rev'd*, 142 S. Ct. 1245 (2022). Though concurring in that selection, Justices Ann Walsh Bradley, Dallet, and Karofsky noted the problems with elevating the atextual "least change" criterion above all else. As the concurrence stated: "The people of Wisconsin deserve both a fair process and fair maps. … Here, the 'least change' approach necessarily

enshrines the partisan advantage adopted by the political branches ten years ago. Its application undermines, rather than fulfills, the promise of a truly representative government." *Id.* ¶ 61 (Ann Walsh Bradley, J., concurring).

39. The Legislature then appealed to the U.S. Supreme Court, which summarily reversed this Court's decision on the grounds that the Governor's assembly plan was excessively race-conscious without sufficient justification for race-consciousness under the Voting Rights Act. *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1247–51 (2022) (per curiam).

40. On remand, this Court ultimately adopted the senate and assembly maps crafted and passed by the Wisconsin Legislature. *Johnson III*, 2022 WI 19, ¶ 22. By accepting the Legislature's plans, this Court overrode Governor Evers's veto of those maps, and thereby put into place what one commentator labeled as "by far the most politically skewed state legislative maps adopted by a court anywhere in the country over at least the past three decennial redistricting cycles." Yablon, *Gerrylaundering*, 97 N.Y.U. L. REV. at 998, 1052–53 n.317.

41. The dissent argued that the Court's least-change approach "served only to entrench the prior—and blatantly partisan—district maps."

Johnson III, 2022 WI 19, ¶¶ 159, 210 (Karofsky, J., dissenting). As the dissent stated: "We must acknowledge our responsibility to implement the best, judicially appropriate maps possible and to fully justify our decisions rather than pawning that responsibility off to party participants. We can and should do so much better." *Id.*

III. Partisan-Gerrymandering Claims Remain Justiciable Under the Wisconsin Constitution

42. In the face of extreme partisan gerrymandering, this Court is not powerless. To the contrary, Petitioners and similarly situated citizens across the State of Wisconsin are "entitled to a certain remedy in the laws for [their] injuries, or wrongs"—and this Court thus is tasked under the Wisconsin Constitution with providing them justice "completely and without denial, promptly and without delay." Wis. Const. art. I, § 9.

43. Partisan-gerrymandering claims remain justiciable under the Wisconsin Constitution. In *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), the United States Supreme Court held that partisan-gerrymandering claims are not justiciable in federal courts. *Id.* at 2498–502. But it was careful to leave the door open for partisan-gerrymandering challenges brought under state constitutions in state courts. *Id.* at 2507–08. Indeed, since *Rucho*, several state courts have found partisan-gerrymandering claims cognizable and justifiable under their respective state constitutions. *See*,

e.g., *Republican Party of N.M. v. Oliver*, S-1-SC-39481 (N.M. July 5, 2023) (App. 4–9); *In re the 2021 Redistricting Cases*, Nos. 18332/18419, 110 (Alaska Apr. 21, 2023) (App. 10–154); *Szeliga v. Lamone*, C-02-CV-21-00117733, 93–94 (Md. Cir. Ct., Anne Arundel Cnty. Mar. 25, 2022) (App. 155 –249); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 192 N.E.3d 379, 414–15 (Ohio 2022); *League of Women Voters of Pa. v. Pennsylvania*, 178 A.3d 737, 814, 818, 821 (Pa. 2018). "There is no reason why [this Court] would not develop similar standards to judge such claims in Wisconsin." *Johnson I*, 2021 WI 87, ¶ 104 (Dallet, J., dissenting).

44. To be sure, in *Johnson I*, the majority stated that partisan gerrymanders present political questions under the Wisconsin Constitution because "(1) there are no 'judicially discoverable and manageable standards' by which to judge partisan fairness; and (2) the Wisconsin Constitution explicitly assigns the task of redistricting to the legislature." *Johnson I*, 2021 WI 87, ¶ 40 (citation omitted). The majority further stated that "measuring a state's partisan divide is difficult," and that "[e]ven if a state's partisan divide could be accurately ascertained, what constitutes a 'fair' map poses an entirely subjective question with no governing standards grounded in law." *Id.* ¶ 44.

45. As an initial matter, the majority's justiciability discussion was "an unnecessary and sweeping overreach … answering a constitutional question that [the Court] never asked, that the parties did not brief, and that [was] immaterial to [the] case." *Id.* ¶ 102 (Dallet, J., dissenting). Indeed, no party in *Johnson I* challenged an existing map on partisan-gerrymandering grounds, so the "majority's gratuitous discussion of whether claims of extreme partisan gerrymandering are cognizable" was an "advisory opinion" that does not bind this Court. *Id.* In addition, as discussed in Part IV below, a State's partisan divide and the contours of a "fair" map can be ascertained using objective methods. And finally, *Johnson I* stands out as the exception to a long history of this Court adjudicating apportionment disputes to ensure that elections in Wisconsin conform with the basic principles of democratic self-government.

46. Indeed, for more than a century, this Court has intervened to correct cases of legislative overreach in the apportionment context. As early as 1892, this Court held that malapportioned districts thwarted majority rule, that normal political processes could not solve the problem, and that this Court's intervention was therefore essential. In *State ex rel. Attorney General v. Cunningham*, this Court imposed redistricting standards when the Legislature had apportioned citizens unequally into legislative districts.

81 Wis. 440, 51 N.W. 724 (1892). The Court explained that its willingness to exercise its original jurisdiction hinged on the Court's determination that the apportionment statute at issue "violates and destroys one of the highest and most sacred rights and privileges of the people of this state, … and that is equal representation in the legislature," which is "a matter of the highest public interest and concern to give this court jurisdiction in this case." *Id.* at 483. "The breaking up of the lines and boundaries of counties by the new assembly districts," the Court concluded, was "made intentionally and willfully for some improper purpose, or for some private end foreign to constitutional duty and obligation." *Id.* at 484. The Court aptly concluded that "[i]f the remedy for these great public wrongs cannot be found in this court, it exists nowhere." *Id.* at 483.

47. In a sequel case, this Court again made clear that it would enforce constitutional limits on the Legislature's apportionment power. *See Lamb*, 83 Wis. 90. "Had the framers of the [Wisconsin] constitution intended to give to the legislature absolute and unlimited power in the making of such apportionments, they would simply have required them from time to time to 'apportion and district anew the members of the senate and assembly,' and stopped right there, or have said nothing on the subject," the Court reasoned. *Id.* at 146. But "[i]t was because the framers of the constitution

were unwilling to vest such discretionary and unlimited powers in the legislature that they prescribed specific methods, restrictions, and limitations upon the exercise of such powers." *Id.* at 147. In the end, this Court rejected the "conten[tion] that this [dispute] is a mere 'political action … to effect a political object,' and therefore cannot be maintained." *Id.* at 134 (ellipsis in original). "We readily perceive that the determination of an action may have a political effect, and in that sense may effect a political object," the Court stated, "but that would not necessarily make the question determined a political, instead of a judicial, question." *Id.* at 134–35.

48. Summing up its approach to justiciability, this Court later held that "the power of this court to review the constitutionality of a legislative reapportionment must be taken as settled." *State ex rel. Bowman v. Dammann*, 209 Wis. 21, 23, 243 N.W. 481, 482 (1932). The Court noted that in the *Cunningham* and *Lamb* cases, it had intervened specifically to assess "the fairness of the apportionment" and ultimately determined it was "dealing with clear and obvious gerrymanders, … the characteristics of … which subjected them to condemnation [and] ran through and characterized them as a whole." *Id.* at 31, 243 N.W. at 485. In contrast, in *Bowman*, the Court declined to find a clear and obvious gerrymander. However, Justice

Fowler, joined by two colleagues, dissented, stating: "Just where the courts should draw the line of constitutional departure from that provision cannot, of course, be precisely stated, but, in my opinion, the present act requires us to hold that it goes beyond that line." *Id.* at 34, 243 N.W. at 486.

49. This Court thus has a long history of assessing the fairness of districting plans and determining where there is a "clear and obvious gerrymander" even in the absence of determining precisely "where the courts should draw the line of constitutional departure." *Id.* This Court can do so again here. Although assessing a redistricting plan to determine whether it is an extreme partisan gerrymander may have political effects, it is not a political question beyond the competence of this Court.[1]

IV. Objective Scientific Methods Establish that the Legislative Plans Are Extreme Partisan Gerrymanders

50. In *Johnson I*, a majority of this Court suggested that considering the partisan makeup of individual districts and the partisan fairness of a map as a whole would necessarily entangle the Judiciary in "entirely subjective" "policy preferences." *Johnson I*, 2021 WI 87, ¶¶ 44, 62; *see also id.* ¶ 80. But Petitioners, grounded as they are in mathematics,

[1] Indeed, this Court regularly evaluates whether gerrymandering has occurred in annexation cases by applying a "test of reason." In *Town of Wilson v. City of Sheboygan*, 2020 WI 16, ¶ 24, 390 Wis. 2d 266, 938 N.W.2d 493, this Court noted that "Wisconsin courts have applied the rule of reason in annexation cases for over 50 years to serve as a check on whether a municipality has abused its powers of annexation," including by assessing whether a municipality has engaged in "gerrymander annexation." (footnote omitted).

statistics, and computer science, know that detecting extreme partisan gerrymandering is hardly subjective. Rather, it is based on the systematic analysis of the relationship between votes cast and seats won, to determine whether a districting plan unfairly advantages one political party's voters by diluting the opposition's voting strength. These are, at bottom, the same fundamental principles that undergird both the "one person, one vote" doctrine—not allowing voters from declining or slow-growing (often rural) regions to dilute the strength of voters from fast-growing (often metropolitan) regions—and the Voting Rights Act's prohibition against minority vote dilution—not allowing voters from the numerically dominant racial group to dilute the voting strength of minority citizens. As with these other well-established fields of redistricting law, the key to resolution of partisan-gerrymandering claims is not recourse to subjective policy preferences, but rather a devotion to numerical data, objective scientific methods, and some straightforward math. As discussed below, a mountain of data supports the conclusion that the Legislative Plans at issue here reflect partisan gerrymandering.

A. Distinguishing Fair Maps from Gerrymanders

51. Fair districting maps would allow Wisconsin's voters, Democratic and Republican alike, to translate their voting strength into

representation. Under a fair legislative map, a political party whose candidates earn the most votes statewide in a given election cycle would, more often than not, win a majority of seats in the legislature. And a closely divided statewide electorate would ordinarily give rise to a closely divided legislature. Over the course of an entire decade, which is the typical lifespan of a redistricting map, as the two major parties each experience relatively strong and relatively weak election cycles, control of the legislature could freely shift with the tides of public opinion and popular voting behavior.

52. By contrast, when a districting map in a highly competitive State locks in one political party's majority status in both chambers for five consecutive election cycles, consigning the other major party to minority status for an entire decade, and when that skew is perpetuated by a judicially imposed "least change" requirement, democratic accountability is subverted, electoral competition is suppressed, and the fundamental promise that a government must derive its power from the consent of the governed is shattered. That, unfortunately, is Wisconsin's story.

53. Wisconsin is extraordinarily competitive politically—exactly the kind of State where one would expect partisan control of the Legislature to shift frequently, depending on whether the previous election tilted slightly toward one political party or the other. That, however, is not the

case. The reason is extreme partisan gerrymandering. The essence of an extreme partisan gerrymander is the corruption of the relationship between the ***votes*** that a State's citizens cast for candidates from each political party and the ***seats*** that each political party wins in the State's legislature.

B. The Partisan Composition of the Wisconsin Legislature

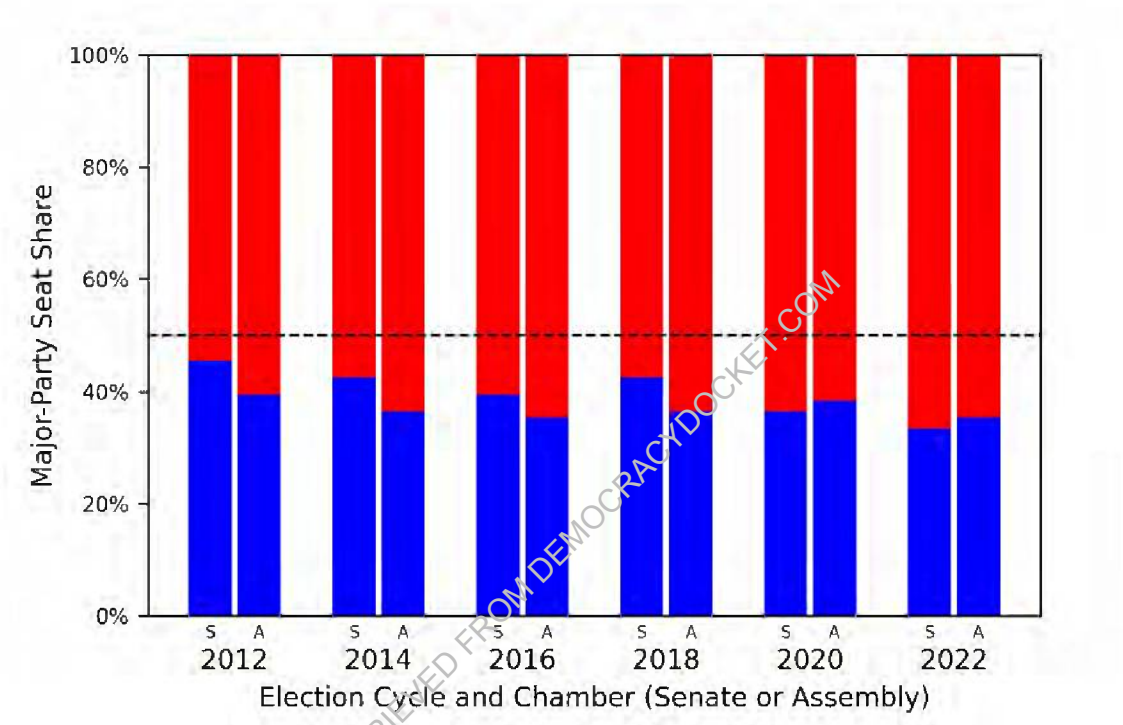
54. The partisan composition of the Wisconsin Legislature has skewed heavily Republican for more than a decade. Because the Legislative Plans that Petitioners challenge here are deeply rooted in the 2011 Plans, Figure 1 starts with a simple chart showing the Legislature's partisan composition after each of the last six general elections—in 2012, 2014, 2016, 2018, 2020, and 2022.[2]

55. Figure 1 follows two conventions that also apply to other Figures in this Petition. First, blue represents Democrats, and red represents Republicans. Second, Democratic and Republican percentages sum to 100% because in the relevant period every senate and assembly seat was won by a Democratic or Republican candidate. Likewise, when analyzing votes, percentages reflect the "major-party" vote—that is, the total votes cast for Democratic and Republican candidates in general

[2] Because state senators have staggered four-year terms, the 2012 senate data reflect senators elected from even-numbered districts in 2012 and senators elected from odd-numbered districts in 2010, under the prior senate map. So the "2014" data are the first that fully reflect senators elected under the 2011 Senate Plan.

elections—because independent, third-party, and write-in candidates often get less than one percent, and almost always get less than five percent, of the total votes cast in Wisconsin.

Figure 1: Partisan Composition of the Wisconsin Legislature



56. Three features of Figure 1 stand out:

- Each party's share of the seats has been relatively stable over this six-year period, especially in the Assembly but also in the Senate. This is because the legislative maps contain relatively few competitive districts and thus are not responsive to shifts in public opinion or voters' partisan preference.

- In both chambers and in all six election cycles, the Republican candidates won a majority or supermajority of the seats, while the Democratic candidates won only a minority. As explained in detail below in Part IV.C, this Republican lopsidedness in no way reflects the partisan composition of Wisconsin's voters.
- The 2022 election results—from the only election conducted under the Legislative Plans that Petitioners challenge here—are the most lopsided, with Republicans carrying fully two-thirds of the senate seats (22 of 33, or 67%) and nearly two-thirds of the assembly seats (64 of 99, or 65%). This increase in partisan skew is not due to a pro-Republican shift in the electorate in 2022, but rather to specific redistricting decisions made by the Legislature, some examples of which are highlighted below in Part IV.D.

C. The Partisan Composition of the Wisconsin Electorate

57. To determine whether the relationship between seats and votes has been corrupted by an extreme partisan gerrymander, we turn next to a detailed examination of the Wisconsin electorate.

58. Wisconsin is one of the most politically competitive States in the Nation. It is one of only five States that voted for President Trump in 2016 but then voted against him in 2020. And it is the only State where the

winning margin in both elections was less than one percentage point. Indeed, in both elections, Wisconsin was the pivotal State in the Electoral College—the one "must win" State for both political parties.

59. Wisconsin's political competitiveness is not confined to Presidential elections. Wisconsin is one of only a handful of States represented by both a Democrat and a Republican in the United States Senate—and it has held that distinction longer than any State other than Ohio.

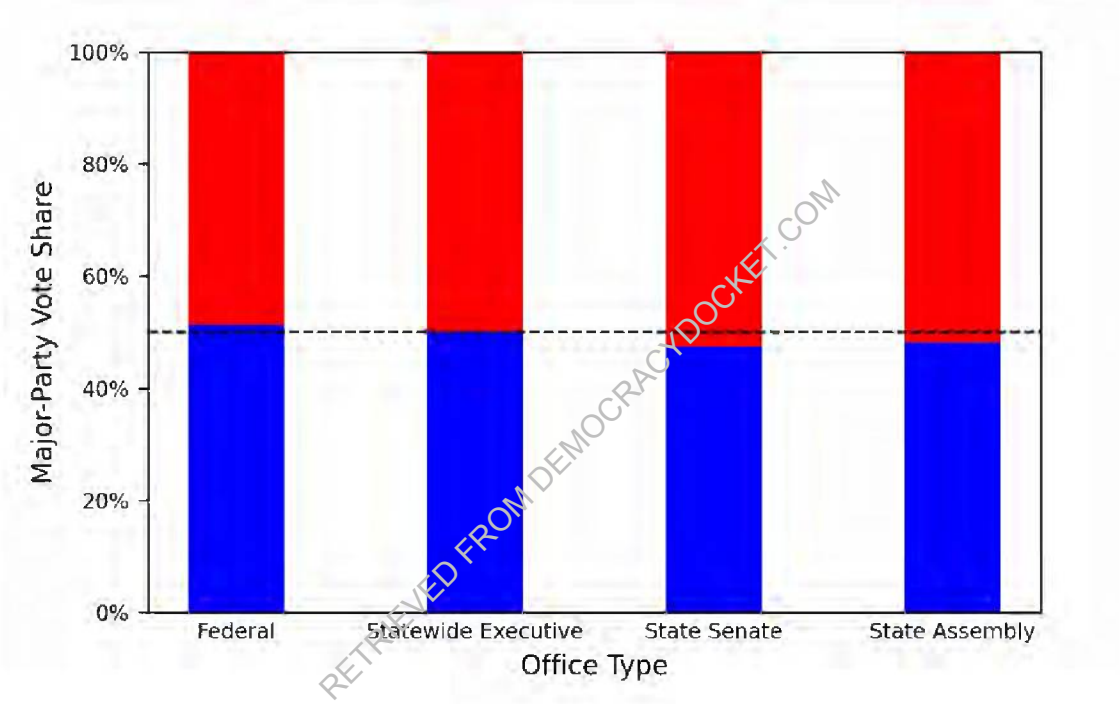
60. Furthermore, Wisconsin's political competitiveness is also not confined to federal offices. In the last dozen years, votes cast in Wisconsin's quadrennial statewide elections for constitutional executive offices—Governor/Lieutenant Governor (on the same ticket), Attorney General, Secretary of State, and State Treasurer—have split almost evenly, with Democratic candidates winning almost 15 million total votes and Republican candidates likewise winning almost 15 million votes. Most recently, in November 2022, both Democrats and Republicans narrowly prevailed for different statewide offices. Thus, where gerrymandering is irrelevant—that is, in elections for single-member offices like President, U.S. Senator, Governor, Attorney General, and so forth—the State is almost evenly divided.

61. Totaling votes cast throughout the State for the Senate or the Assembly raises more complicated issues. Not only do the district maps change after each Census, but also in any given election year there typically are some districts where one of the two major parties does not even field a candidate, as well as districts where one party's nominee is relatively unknown and severely underfunded. There are some districts featuring an incumbent from one party—who benefits from the many advantages that come with the office—and other districts featuring incumbent-less "open seat" contests. And because there have been many more Republican than Democratic legislators in recent years, the incumbency advantage is not evenly distributed between the parties.

62. Even with those caveats, however, the state-legislative election data, totaled statewide, show Wisconsin to be relatively evenly balanced. From 2012 through 2022, a total of about 3.7 million votes were cast for Democratic senate candidates and about 4.0 million votes were cast for Republican senate candidates in regularly scheduled general elections. And in the same elections, a total of about 7.3 million votes were cast for Democratic assembly candidates and about 7.9 million votes were cast for Republican assembly candidates. Thus, not unlike the voting for statewide offices, Wisconsin is closely divided in state-legislative voting, too.

63. Figure 2 summarizes the percentages of the major-party vote that Democratic and Republican candidates received since 2012 for federal offices (President and U.S. Senator), statewide executive offices, the Senate, and the Assembly.

Figure 2: Partisan Composition of the Wisconsin Electorate



64. Figure 2 powerfully refutes the *Johnson I* Court's assertion that "measuring a state's partisan divide is difficult." *Johnson I*, 2021 WI 87, ¶ 43. Clearly, there is a mismatch between the (readily discernible) partisan composition of the Wisconsin electorate, shown in Figure 2, and the (even more readily discernible) partisan composition of the Wisconsin Legislature, shown in Figure 1. The electorate is evenly divided, but the legislative seats are not. This mismatch was evident under the 2011 Plans and only became

worse under the Legislative Plans that the Republican-controlled Legislature passed in 2021 and this Court adopted in 2022, giving rise to a two-thirds Republican majority in the Senate and a nearly two-thirds Republican majority in the Assembly.

D. The Legislature's 2021 Partisan Gerrymandering Exacerbated the 2011 Plans' Partisan Skew

65. The explanation for how such a closely divided electorate came to be represented in the Legislature by such lopsided Republican majorities is straightforward: partisan gerrymandering.

66. The bulk of the partisan skew in the Legislative Plans is a carryover from the 2011 Plans that the Republican Legislature enacted on party lines a decade earlier. However, the 2021 redrawing, also passed on a party-line vote (though not enacted into law), exacerbated the 2011 Plans' partisan skew.

67. Classic techniques of partisan gerrymandering are on display in the 2021 drawing of the Legislative Plans. The essence of each technique is to subordinate to partisanship the traditional nonpartisan districting criteria such as contiguity, geographic compactness, and respect for political subdivision lines (counties, cities, villages, towns). The telltale sign of gerrymandering is when subordinating one or more of these criteria either makes an already vulnerable member of the disfavored political party (here,

the Democrats) even more vulnerable or shores up a vulnerable member of the favored political party (here, the Republicans).

68. Three assembly districts that the Republican Legislature redrew in 2021 present clear cases of this pernicious practice—though they are by no means the only examples. Two of these districts—Assembly Districts 74 and 82—already had population totals, according to the new 2020 Census, that were almost precisely one-ninety-ninth of the State's population and thus did not violate the "one person, one vote" rule and therefore did not need to be redrawn at all. And Assembly District 24 was only slightly overpopulated and could have been brought into the lawful population range with only minor adjustments. Yet the Republican legislators reconfigured all three districts, not for equal-population purposes, but to attain their partisan goals. Assembly Districts 24 and 82 were modified to prevent those districts from falling out of Republican control, and Assembly District 74 was revamped to flip it from the Democratic to the Republican column.

1. Example One: Assembly District 24

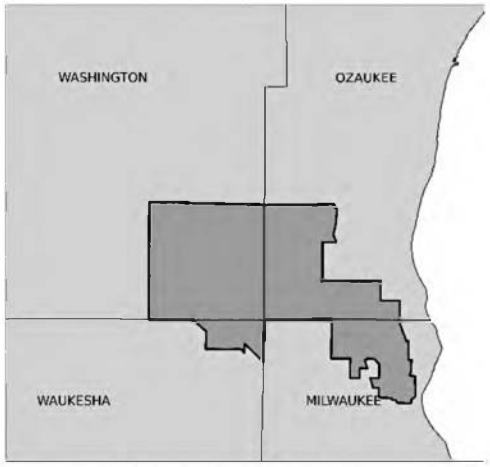
69. Before being redrawn in 2021, District 24 was politically competitive, as it consisted of the largely Republican Germantown in Washington County, parts of Mequon and Menomonee Falls in Ozaukee and

Waukesha Counties, and a solidly Democratic piece of Milwaukee County that included River Hills, Brown Deer, and a fragment of the city of Glendale.

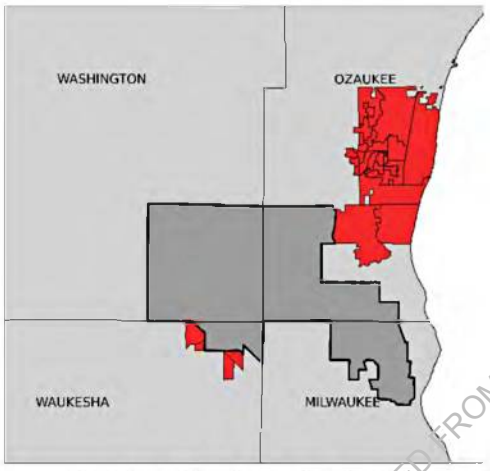
70. After running unopposed in both the 2014 and 2016 general elections, Republican incumbent Dan Knodl was challenged in both the 2018 and 2020 general elections by Democrat Emily Siegrist. In 2018, Siegrist, a nurse from River Hills, was part of a wave of first-time Democratic women facing off against Republican male incumbents in the Assembly. Nevertheless, Representative Knodl, a longtime Germantown resident, won with a 7-point margin in 2018. However, his lead shrunk to less than 3 points in 2020.

71. With the district becoming increasingly competitive, Representative Knodl's Republican colleagues took action. As depicted below, in the 2021 redraw they removed ***all*** the district's Milwaukee wards—drawing Democratic challenger Siegrist out of the district. And they extended the district further north into Ozaukee County, grabbing both the Republican-leaning town and village of Grafton. The voters who were ***removed*** from District 24 had voted 66% to 34% for President Biden in the previous presidential election, while the voters who were ***added*** to the district had voted 57% to 43% for President Trump.

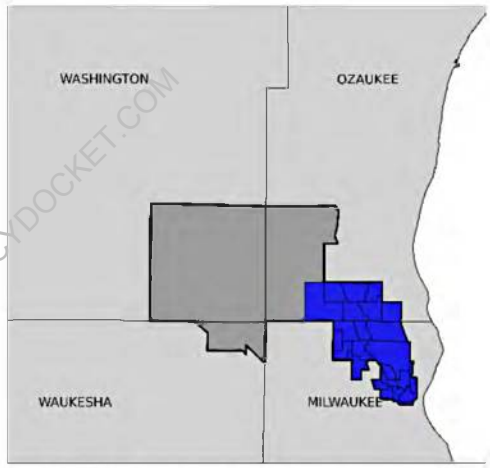
72. The Republican mapmakers' plan worked. In November 2022, Representative Knodl faced off against Democrat Bob Tatterson and won reelection with a 22-point margin. Just six months later, when the senate seat for District 8 came open, Representative Knodl ran and won—and he in turn was succeeded in Assembly District 24 by Republican newcomer Paul Melotik, who prevailed by only 7 points in the July 2023 special election. Had it not been for the 21-point "net swing" in the district's partisanship due to the 2021 redraw (i.e., a 21-point change in the margin between the parties' presidential candidates), Assembly District 24 would likely have fallen into Democratic hands—which was exactly where it had seemed to be headed.



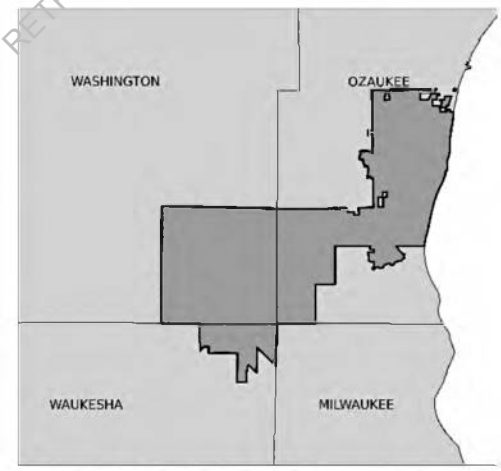
District 24 in the 2012 Assembly Map



Wards Added to District 24



Wards Removed from District 24



District 24 in the 2022 Assembly Map

2. Example Two: Assembly District 82

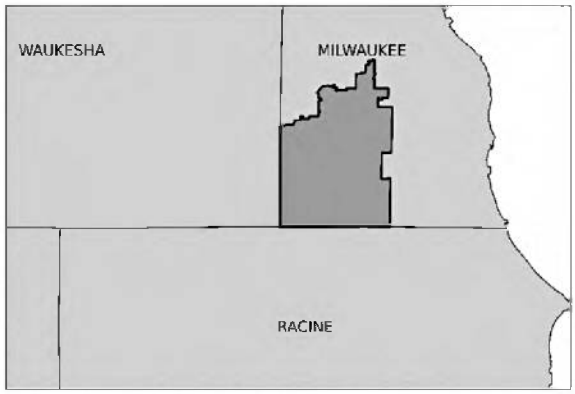
73. Before redistricting, District 82 was wholly contained in the southwest corner of Milwaukee County. It covered almost the entire city of Franklin, all of Greendale, and a piece of the city of Greenfield. Like District 24 (discussed above), District 82 was only slightly Republican leaning, with President Biden carrying almost 49% of the district's major-party vote in 2020. In that year's assembly race, 22-year-old Democrat Jacob Malinowski got nearly the same share of the vote, 48%, against Republican incumbent Ken Skowronski. Representative Skowronski's slim margin of victory against such an inexperienced candidate made District 82 a target.

74. Republicans did not need to redraw District 82 at all to comply with Wisconsin's equal-population requirements. Its 2020 Census population of 59,196 was already within the allowable thresholds for assembly districts. Nevertheless, as depicted below, Republican mapmakers added about 13,000 people to the district and removed about 13,000. The voters removed from the district were closely divided but a bit more Democratic than the rest of the district, having voted 52% to 48% for President Biden over President Trump. In sharp contrast, the voters added to the district were overwhelmingly Republican, having voted for President Trump by a 65% to 35% margin.

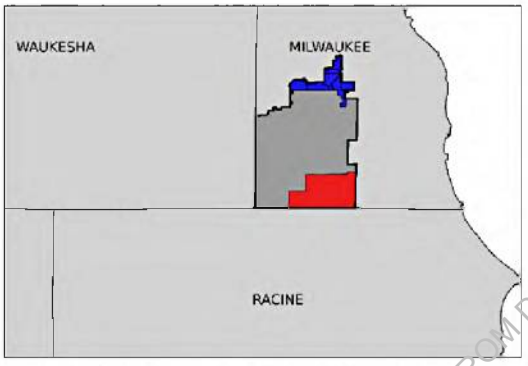
75. Republicans also did not redraw the district to better respect county lines, an objective expressly set forth in Article IV, Section 4 of the Wisconsin Constitution. Whereas the old district sat entirely within Milwaukee County, the new district extends into neighboring Waukesha County, grabbing half of solidly Republican Muskego to offset population lost when the district jettisoned Democratic-leaning parts of Greendale and Greenfield.

76. In the process, Republican mapmakers pulled into new District 82 the Waukesha County neighborhood of District 83's Republican three-term Representative Chuck Wichger, one of 15 Wisconsin legislators who had signed a letter urging Vice President Pence not to certify the 2020 presidential election. Representative Skowronski, at age 84, announced he would not seek reelection in District 82 shortly before this Court approved the Republicans' gerrymandered plan. With District 82's Republican base greatly strengthened via redistricting, Representative Wichger then prevailed in November 2022 by 13 points over Democrat Debra Davis, a former civics teacher and longtime Franklin resident. And Wichger's former District 83, which remained staunchly Republican, then was carried decisively by 33-year-old Republican Nik Rettinger over a third-party challenger (the Democrats did not even field a candidate in this

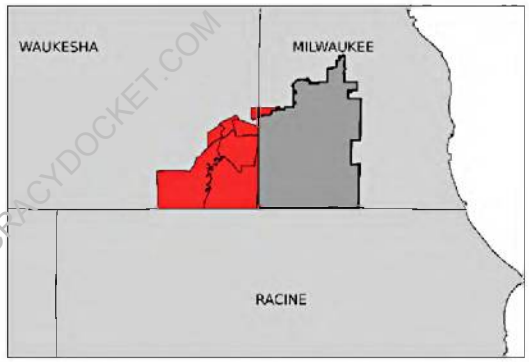
uncompetitive district). So, without any deleterious effect on Republican prospects in District 83, the Legislature successfully redrew District 82 to replace a vulnerable Republican incumbent who was unlikely to hold the office with a familiar Republican colleague who could then be safe for the remainder of the decade.



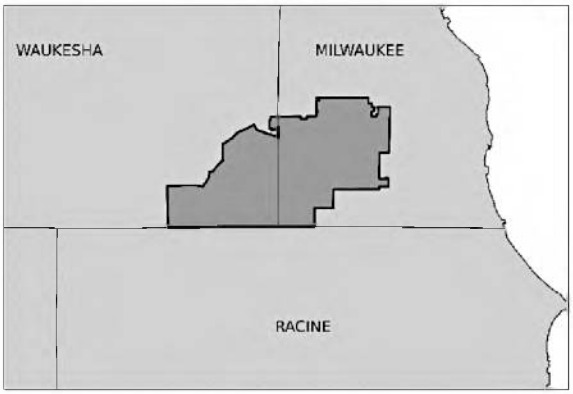
District 82 in the 2012 Assembly Map



Wards Removed from District 82



Wards Added to District 82



District 82 in the 2022 Assembly Map

3. Example Three: Assembly District 74

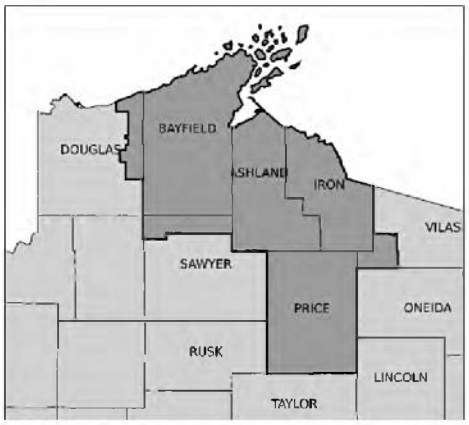
77. Unlike Districts 24 and 82, where Republican legislators plugged their colleagues' vulnerabilities by making their districts more Republican and less competitive, in District 74 they seized on a Democratic incumbent's vulnerability, setting the stage for a Republican to replace her.

78. District 74 sits in the northwest part of the State bordering Lake Superior. Prior to redistricting, it was one of Wisconsin's few competitive districts, with President Biden getting 49.2% of the vote in the 2020 presidential contest and incumbent Democrat Beth Meyers getting 51.5% in the district's assembly race the same year. But the district had been trending Republican, and in 2020 Representative Meyers outspent her Republican opponent Jim Bolen nearly ten-to-one. Even with superior campaign resources, Representative Meyers's 3-point margin in 2020 compared poorly with her 12-point winning margin just two years earlier.

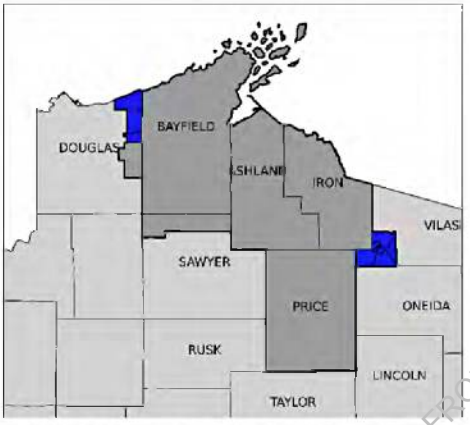
79. Not satisfied to allow this trend to run its course, Republican legislators in 2021 reshaped District 74 to accelerate their party's advantage. As in District 82, redrawing was unnecessary under the "one person, one vote" principle: The district already sat well within constitutional population limits. But, as depicted below, Republicans proceeded to excise the solidly Democratic town of Lac du Flambeau on the

district's eastern border in exchange for more Republican wards in rural Douglas County on its western border. President Biden had carried the removed voters by a 17-point margin, and President Trump had carried the newly added voters by a similar 17-point margin.

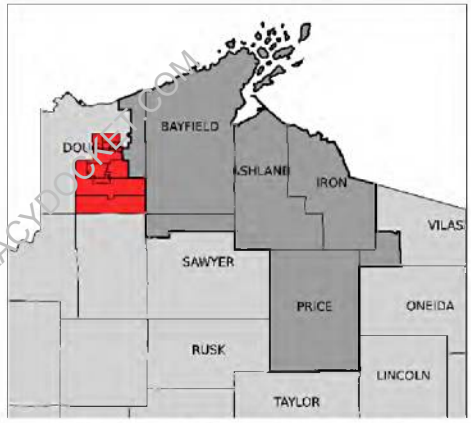
80. Within two months after the Legislature passed the new map, Representative Meyers announced that she would not seek reelection. Democrat John Adams attempted to take her place in the Assembly but was defeated in November 2022 by Republican Chanz Green, who carried the newly gerrymandered district by a nearly 6-point margin.



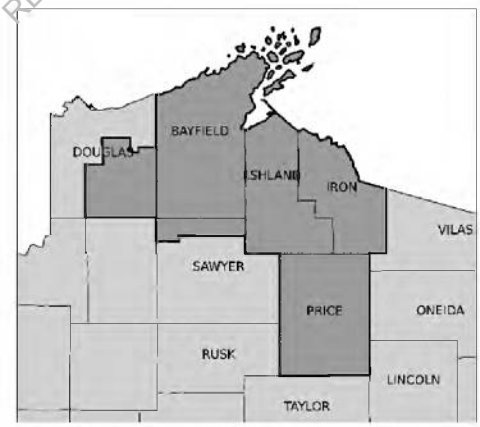
District 74 in the 2012 Assembly Map



Wards Removed from District 74



Wards Added to District 74



District 74 in the 2022 Assembly Map

81. These three districts are not alone. Time and again, the 2021 mapmakers took pains to add Republican voters and remove Democratic voters from the 2011 Plans' most competitive districts, where neither party had prevailed by ten or more percentage points in the last election. These manipulations both suppressed electoral competition and fortified the Republicans' stranglehold on the Legislature. Indeed, the Legislative Plans increased the Republican percentages in eight of the nine assembly districts that had been most closely contested in the 2020 assembly election, and in all four of the senate districts that had been most closely contested in the 2018 and 2020 senate elections. These districts were instrumental to building the two-thirds majority in the Senate and nearly two-thirds majority in the Assembly that the Republican Party currently enjoys.

E. Visualizing the Relationship Between Wisconsin's Legislative Seats and Legislative Votes

82. Because the essence of an extreme partisan gerrymander is the corruption of the relationship between seats and votes, it is helpful to capture that relationship graphically, so that alternative maps, and the ways they translate votes into seats, can be systematically compared. The standard way to depict this relationship is to plot election outcomes on a "seats/votes graph," like the one shown in Figure 6.

83. Figure 6's horizontal x-axis measures percentages of votes, and its vertical y-axis measures percentages of legislative seats. The graph is a perfect square as both axes run from 0% to 100%. A political party's performance in any single election—such as the Democrats' performance in the November 2022 general election for the Wisconsin Assembly—can be plotted by placing a point on the graph reflecting the percentage of the statewide vote that the party's candidates earned at the polls and the percentage of the legislative seats that the party won.

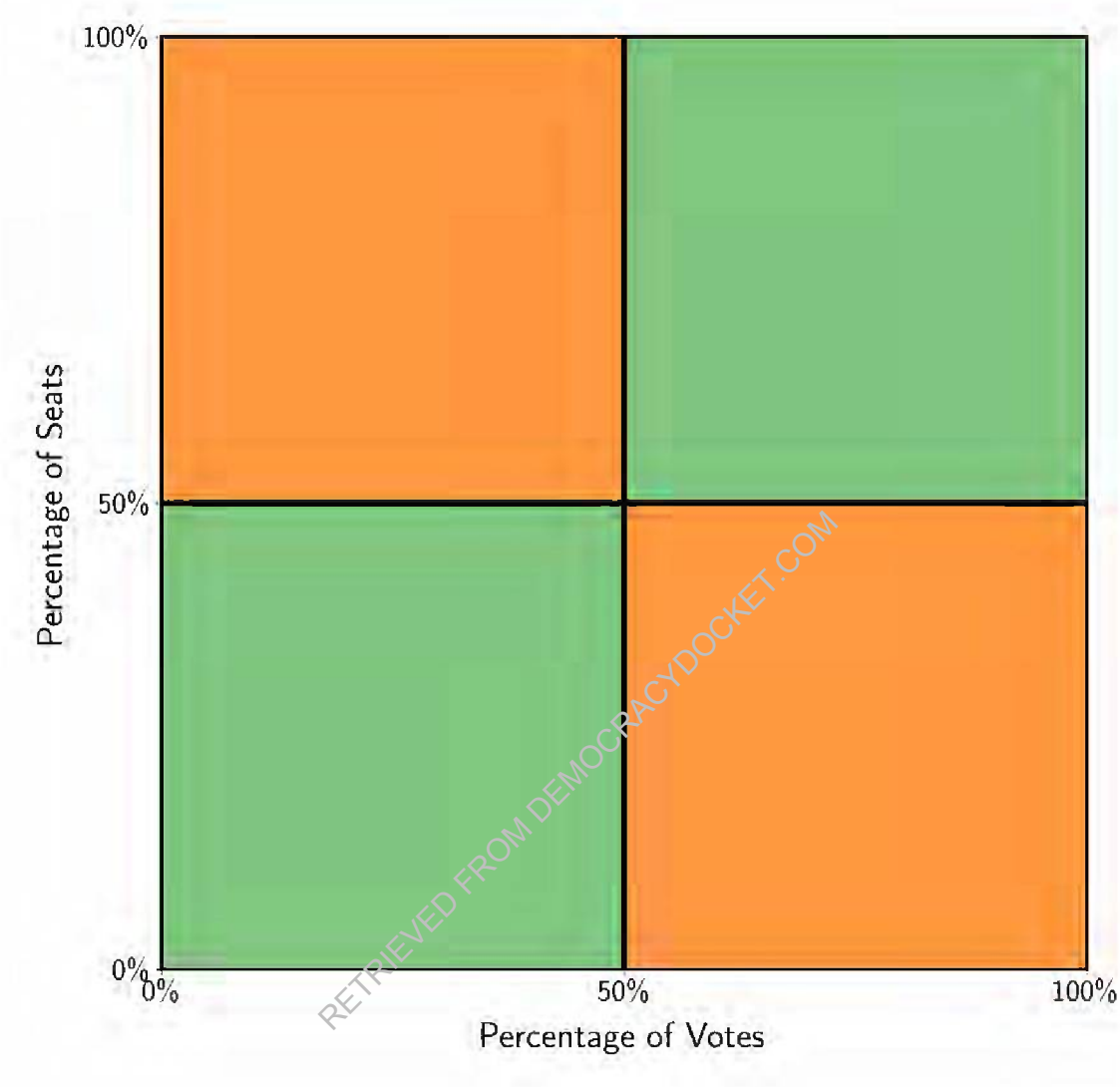
84. Because 50% is such an important threshold in a majoritarian democracy—the tipping point where one political party's voters or legislators outnumber the other party's—lines are also drawn where x equals 50% and where y equals 50%. If an election hypothetically fell at the intersection of these two lines, then the parties' candidates would have earned the exact same number of votes across the entire State and been awarded the exact same number of legislative seats.

85. These two lines divide the square into four quadrants. In Figure 6, the lower-left and upper-right quadrants are depicted in green and reflect an ordinary translation of votes into seats: In the former quadrant, a party whose candidates earned less than half the votes wins less than half the seats; in the latter, a party whose candidates earned more than half the

votes wins more than half the seats. All else equal, these are fair, majoritarian outcomes. To be sure, even a fair map cannot ***guarantee*** that a majority of votes statewide will ***always*** produce a majority of seats for that party; but a fair map at least renders this result plausible, even commonplace.

86. By contrast, the upper-left and lower-right quadrants are depicted in orange (a caution signal of sorts) and reflect a potentially worrisome mistranslation of votes into seats: In the former quadrant, a party that earned less than half the votes somehow wins more than half the seats; in the latter, a party that earned more than half the votes somehow wins less than half the seats. This is a bit like awarding the gold medal to the team that finishes second and the silver medal to the winner. In the Olympics, that would be called ***corruption***. In politics, it's ***gerrymandering***.

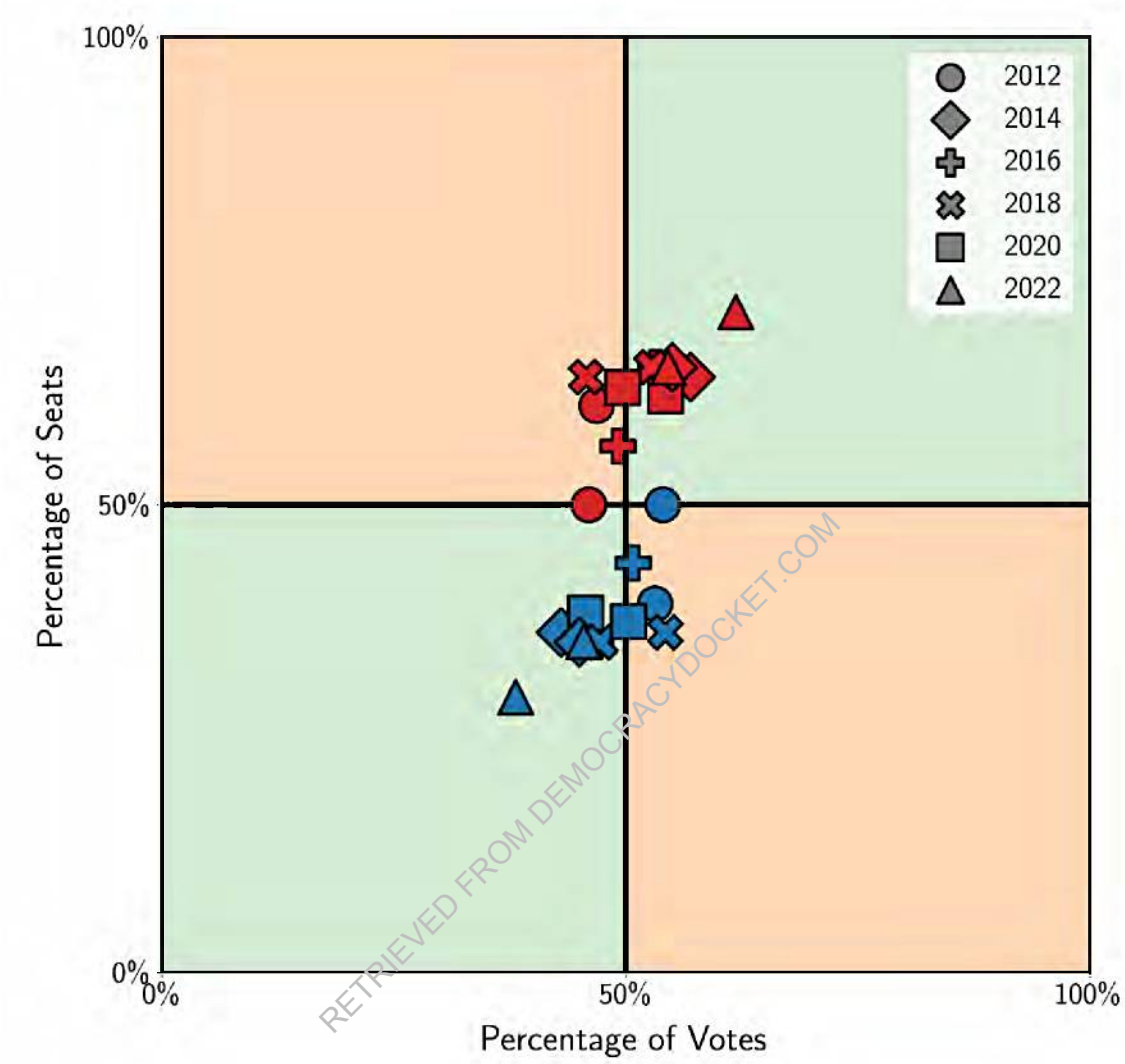
Figure 6: A Seats/Votes Graph



87. Wisconsin's recent legislative elections not only have fallen in some instances into these problematic orange quadrants, but have veered deeply into the orange area, far from the 50/50 point at the square's center. Figure 7 plots the senate and assembly data discussed earlier in Parts IV.B and IV.C: the Democratic and Republican percentages of the major-party votes cast for legislative candidates statewide, and the Democratic and

Republican percentages of the legislative seats statewide. For each party in each chamber (Senate and Assembly) there are six markers, corresponding to the results of each of the six elections held under the Legislative Plan or its 2011 predecessor—specifically, the 2012, 2014, 2016, 2018, 2020, and 2022 elections (each year with a different-shaped marker). So there are a total of 24 markers. The 12 blue markers show Democratic percentages, and the 12 red markers show Republican percentages. If one rotated either graph, it would be clear that the Democratic and Republican markers are perfectly symmetrical. This is not surprising, because every seat awarded to one party is not awarded to the other party, and every vote cast for one party's candidate is not cast for the other party's.

Figure 7: Seats/Votes for Wisconsin's Legislative Elections



88. Three features stand out:

- Republicans always win at least half the districts. Democrats always lose at least half the districts. This is not what one would expect in a highly competitive State like Wisconsin, as seen in Figure 2.
- When elections are very close, with markers near the vertical x=50% line, as is often the case in Wisconsin, Republicans typically win many

more seats than do Democrats—an extraordinarily disparate outcome.

- When Republicans earn most of the votes, Republicans win most of the seats, as one might expect. But when Democrats win most of the votes, Republicans ***still*** win most of the seats. The blue markers in the orange lower-right quadrant and the corresponding red markers in the orange upper-left quadrant show that this distortion occurred repeatedly: in the 2012 election (Assembly), the 2016 election (Senate), the 2018 election (Assembly), and the 2020 election (Senate). This anti-majoritarian outcome is the hallmark of a partisan gerrymander.

F. Checking the Robustness of the Seats/Votes Relationship

89. As noted earlier, adding up each party's votes across dozens of legislative districts, as done in Figure 7 above, encompasses very different circumstances—everything from an incumbent legislator running unopposed (and thus getting 100% of the district's major-party vote) to an incumbent running against a relatively unknown, underfunded challenger (and thus getting an arguably inflated percentage) to an open-seat contest where two comparably experienced, comparably well-funded candidates, both lacking any incumbency advantage, square off.

90. By contrast, in a statewide contest—whether for a federal office like President or U.S. Senator or for a state executive office like Governor or Attorney General—the same pair of candidates, both of whom are typically well known, well funded, or both, face each other in every one of Wisconsin's approximately 7,000 wards. This uniformity of candidates and campaigns across all wards promotes "apples-to-apples" comparisons. Therefore, it can be helpful to plot not only state-legislative vote totals (as in Figure 7 above) but also vote totals from these statewide contests, along with the number of legislative districts that each statewide candidate carried.

91. Plotting seats/votes points for statewide candidates has two additional advantages when studying the recently adopted Legislative Plans. First, statewide contests are useful for evaluating the even-numbered senate districts that were adopted in 2022 but have not yet hosted elections, as only the odd-numbered senate districts held elections in 2022.

92. Second, while there is only one set of legislative general-election vote totals under the Legislative Plans—from the November 2022 general election—there are multiple recent statewide contests that can be overlaid on the 2022 districts to analyze the districts' partisan impact. Because each pair of competing statewide candidates brought their own

strengths and weaknesses to the campaign, each statewide contest has a unique pattern of Democratic and Republican support across the approximately 7,000 wards. As shown below, these vote patterns are very highly correlated in Wisconsin; but because each vote pattern is at least slightly different, analyzing multiple statewide contests provides a robustness check that analyzing a single year's legislative elections cannot provide.

93. The *Johnson I* Court was correct in noting that "political affiliation 'is not an immutable characteristic, but may shift from one election to the next'" and that "self-identified partisans can—and do—vote for a different party's candidates" in some elections. *Johnson I*, 2021 WI 87, ¶ 56. If party-switching and ticket-splitting were rampant, it indeed might be impossible to make out a successful partisan-gerrymandering claim. But the magnitude of these behaviors, which must be properly considered not only at the level of individual voters but more importantly at the level of whole legislative districts, is an empirical question, not a legal one. So the mere possibility that partisan patterns at the district level in some hypothetical State at some hypothetical time could be so unstable as to defeat a partisan-gerrymandering claim is something to be tested empirically with real-world data, not something to be assumed away as a

matter of law. *See Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting) (applauding courts that "refused to content themselves with unsupported and out-of-date musings about the unpredictability of the American voter").

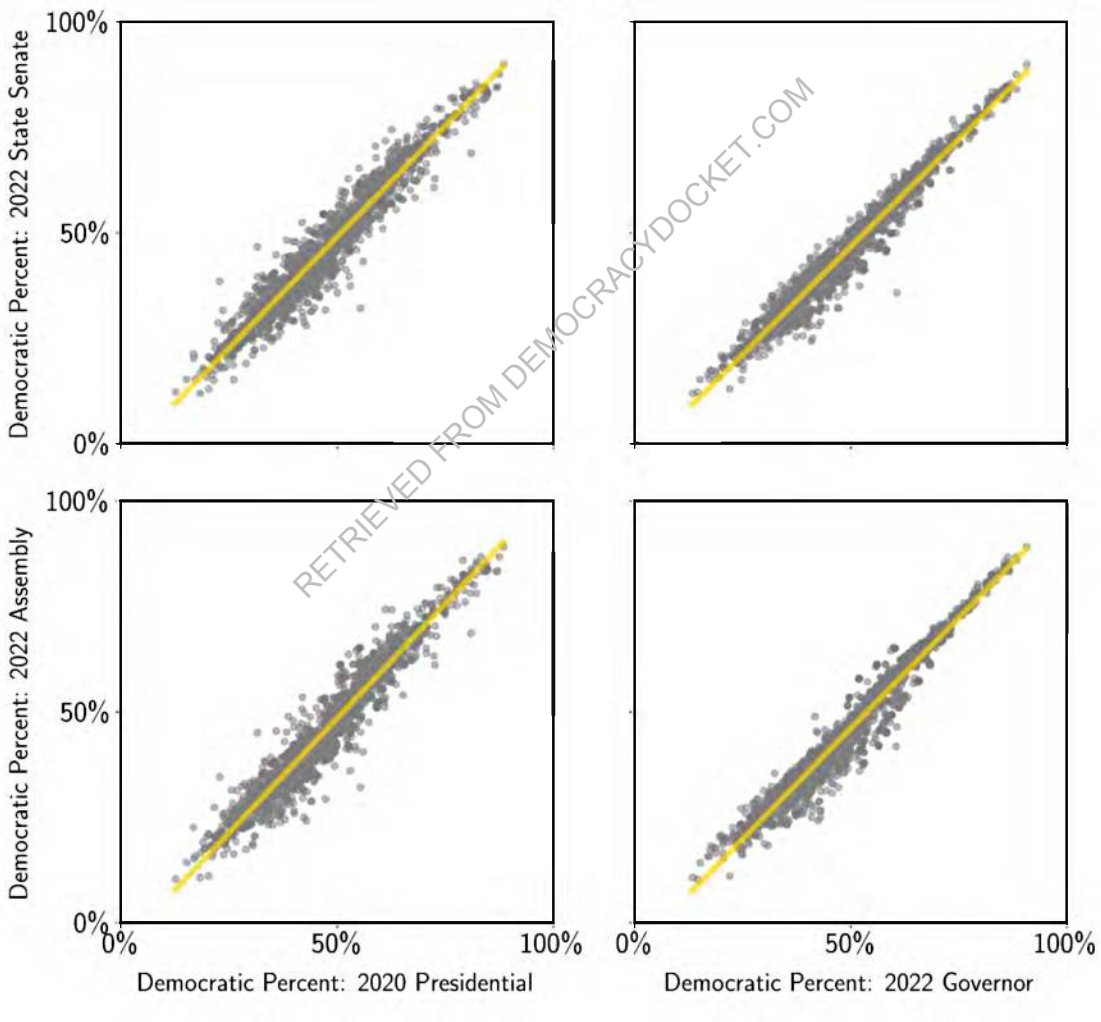
94. Therefore, before proceeding with seats/votes plots for recent statewide contests, one should determine whether citizens exhibit roughly similar voting behavior in both types of contests—districted contests for legislative office, and non-districted contests for statewide (or national) office. In current-day Wisconsin, there are strong correlations between votes in legislative elections and votes in statewide elections. And these correlations persist from one election year to the next.

95. Figure 8 illustrates these points with four similar graphs. The top row shows ward-level results for the 2022 senate general election, and the bottom row shows ward-level results for the 2022 assembly general election. The left column shows how the legislative results relate to the 2020 presidential contest between President Biden and President Trump, and the right column shows how the legislative results relate to the 2022 gubernatorial contest between Governor Evers and his Republican challenger, Tim Michels.

96. Each gray dot represents a ward that cast at least 25 votes for major-party candidates in the statewide contest and in contested senate and

assembly contests. So the exact same set of 2,129 wards is depicted in each of these four graphs. In each graph the yellow "linear regression" line shows the relationship between the Democratic percentage of votes cast in the statewide election (on the x-axis) and the Democratic percentage of votes cast in the legislative election (on the y-axis).

Figure 8: Correlation Between Statewide and Legislative Voting



97. Four features of Figure 8 stand out:

- The points on each graph are tightly bunched around the yellow regression line, rather than being widely scattered, which suggests a strong relationship between voting for statewide candidates and voting for legislative candidates.
- The roughly 45-degree upward slope of the yellow regression line in each graph suggests that a ward that is more Democratic (or Republican) in a statewide election will be similarly more Democratic (or Republican) in a legislative election.
- Comparing the top two graphs with the bottom two graphs shows that these relationships hold true for both senate and assembly elections.
- Comparing the two graphs on the left with the two graphs on the right shows that these relationships hold true from one election year (2020) to the next (2022), as both the 2020 and the 2022 statewide elections correspond tightly with the 2022 legislative election.

98. In sum, key assumptions on which the *Johnson I* Court relied to cast doubt on the justiciability of partisan-gerrymandering claims turn out to be sharply at odds with actual evidence from recent Wisconsin elections.

G. The Partisan Skew in Wisconsin's Seats/Votes Relationship Is Robust

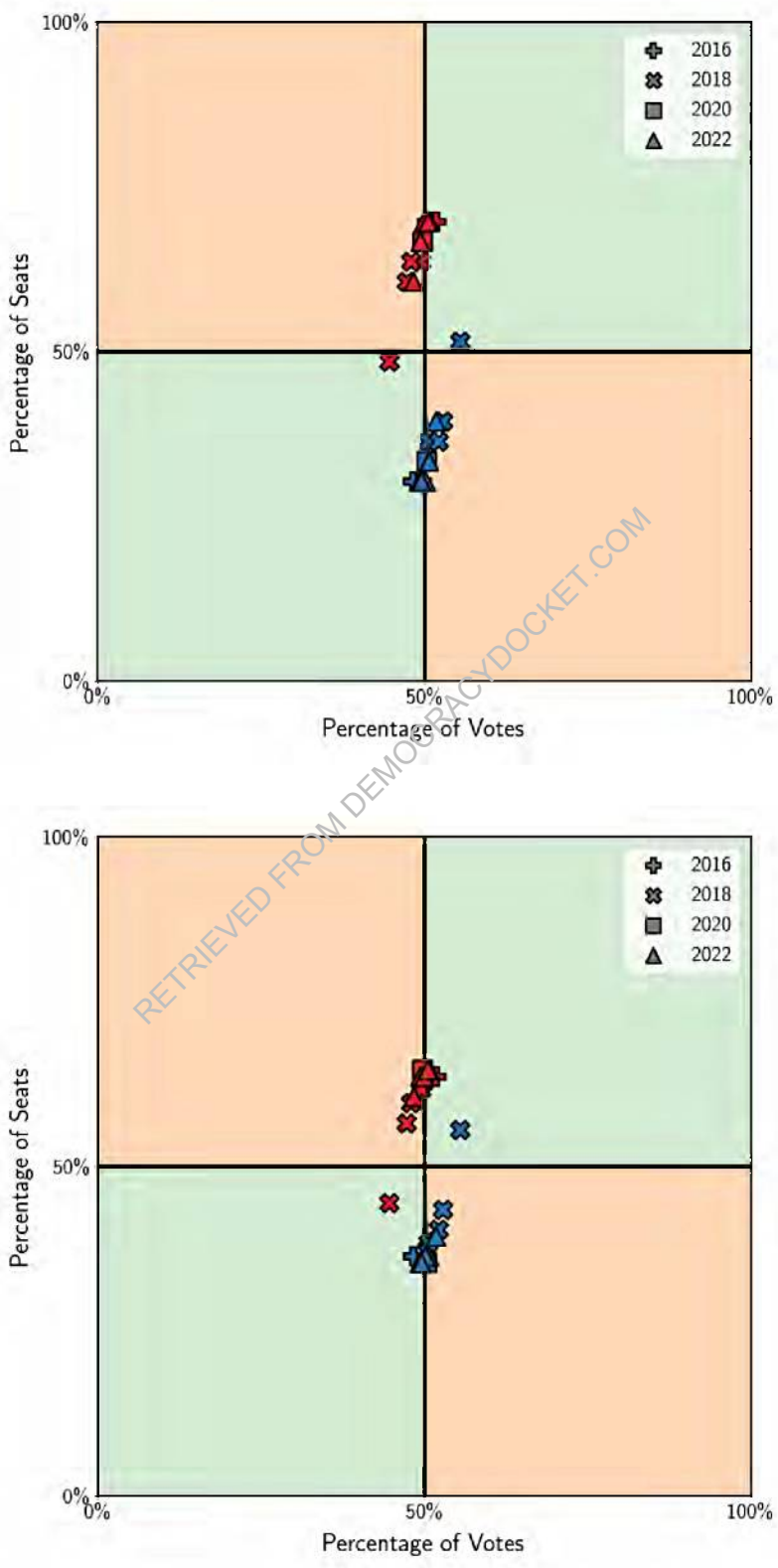
99. The partisan skew shown above in Part IV.E and Figure 7 is robust across a broad set of statewide elections. Figure 9 shows all statewide partisan general elections since 2016: two elections for President/Vice President (2016, 2020); three elections for U.S. Senator (2016, 2018, 2022); and two elections for each of the four statewide executive contests, Governor/Lieutenant Governor (on the same ticket), Attorney General, Secretary of State, and State Treasurer (2018, 2022).

100. The x-axis tracks each candidate's percentage of the major-party vote. As noted earlier, in Wisconsin, these elections are usually competitive. In most of these 19 elections, the gap between the candidates was less than 3.5 percentage points. And in 18 of the 19 elections, both the Democratic and the Republican candidate garnered between 46% and 54% of the major-party vote, so the winner prevailed by less than 8 percentage points. The one outlier was U.S. Senator Baldwin's 2018 victory by nearly 11 percentage points.

101. The y-axis tracks the number of 2022 senate districts (in the top graph) or 2022 assembly districts (in the bottom graph) that the statewide candidate carried (that is, where the candidate received more votes than his or her opponent). As before, blue dots signify Democratic candidates, red

dots Republican candidates. Given the tight relationship between partisan voting patterns in legislative elections and in statewide elections, this is a reasonable proxy for likely outcomes in legislative elections.

Figure 9: Seats/Votes for Wisconsin's Statewide Elections



102. Five features of Figure 9 stand out:

- Again, both parties' vote shares are clumped together, almost always falling between 46% and 54%.
- By contrast, with only one exception, seat shares fall into two distinct clumps, based on party.
- When a Republican candidate prevails statewide, he or she carries at least 63% of the seats in both chambers.
- When a Democratic candidate prevails statewide, he or she almost always carries fewer than half the seats and (in the Senate) sometimes fewer than one third (33%) of the seats.
- The only exception was in 2018 when Senator Baldwin won reelection by nearly 11 percentage points—and even with that unusually strong margin, she carried four ***fewer*** senate districts and six ***fewer*** assembly districts than Governor Walker carried when he lost his bid for reelection on the very same election day, on the very same ballot.

103. Table 1 presents the same data as Figure 9 above, but in tabular form. The cells in Table 1 are white when partisanship is evenly divided but turn deeper blue as the Democratic percentage increases or deeper red as the Republican percentage increases. The column showing the statewide vote percentages contains many white or nearly white cells, because many

of the statewide contests were tightly contested. Again, only the 2018 U.S. Senator's race is colored in a relatively deep shade (of blue), because Senator Baldwin garnered 55.42% of the major-party vote. By contrast, the two columns showing the legislative-district outcomes are a sea of deep red because Democrats who lost statewide and even most Democrats who won statewide failed to carry anything close to half the seats in either chamber. Even President Obama, who defeated Governor Romney by more than seven percentage points statewide, carried only 15 of the Legislative Plans' 33 senate districts and only 46 of the Plans' 99 assembly districts.

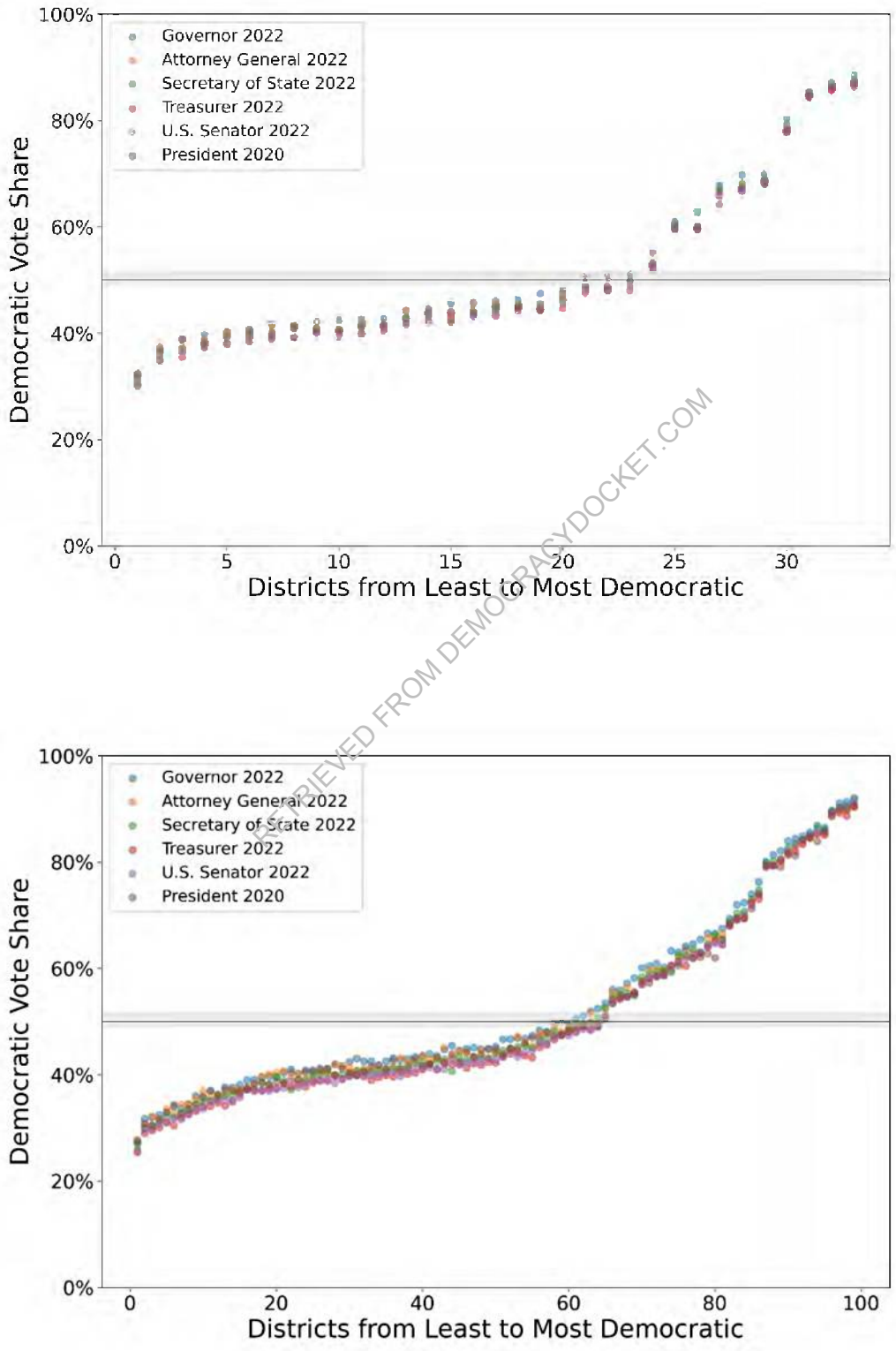
Table 1: Districts Carried by Each Democratic Statewide Candidate

Office/Year	Statewide Democratic Vote Percentage	Democratic Senate Districts	Democratic Assembly Districts
Attorney General 2014	46.83	11	35
Governor 2014	47.13	11	35
Treasurer 2014	47.82	12	36
U.S. Senator 2016	48.27	10	36
Treasurer 2022	49.24	10	35
U.S. Senator 2022	49.50	10	35
President 2016	49.59	10	35
Secretary of State 2022	50.15	10	36
President 2020	50.32	11	35
Attorney General 2018	50.33	11	37
Governor 2018	50.56	12	38
Attorney General 2022	50.66	11	36
Governor 2022	51.72	13	39
Secretary of State 2014	51.93	14	45
Treasurer 2018	52.11	12	40
Secretary of State 2018	52.79	13	43
U.S. Senator 2012	52.85	15	47
President 2012	53.52	15	46
U.S. Senator 2018	55.42	17	55

H. The Legislative Plans' Robust Partisan Skew Is Evident at the Individual District Level

104. The partisan skew that infects Wisconsin's Legislative Plans is consistent not only across this body of statewide elections, but also across individual districts. Figure 10 separately plots the results of each of the last six statewide elections (2022 Governor/Lieutenant Governor, 2022 Attorney General, 2022 Secretary of State, 2022 State Treasurer, 2022 U.S. Senator, and 2020 President/Vice President) in each of the 33 senate districts (in the top graph) and does the same in each of the 99 assembly districts (in the bottom graph). In each graph the districts are arranged from the most Republican (on the left) to the most Democratic (on the right). The y-axis measures how Democratic the district voted in a particular statewide election. So a dot above the horizontal black 50% line signifies a district that was carried by the Democratic candidate in the particular statewide election, and a dot below that line signifies a district carried by the Republican statewide candidate. The thin gray band around the horizontal black 50% line shows the range of statewide results in these same six elections, from a low of 49.24% for the Democratic candidate for State Treasurer to a high of 51.72% for the Democratic candidate for Governor. Each of the six statewide elections has a set of dots with its own distinct color.

Figure 10: Partisan Skew at the Individual District Level



105. Four features of Figure 10 stand out:

- Each vertical "stack" of six dots, representing election results in the same legislative district, is quite tight; indeed, the dots often overlap. This shows that, even at the district-specific level, there is great consistency across these six statewide elections, despite involving different candidates in different election years.
- A large number of districts, in both the Senate and the Assembly, fall consistently (that is, in all six elections) below the horizontal black 50% line. These are largely districts designed to reliably elect Republican candidates—and to "crack" large numbers of Democratic voters, wasting their voting strength in districts that they are unlikely ever to win.
- The most lopsided districts (the ones furthest from the horizontal black line) are all Democratic districts. The five most lopsided senate districts and the 14 most lopsided assembly districts are all Democratic. These are largely districts designed to "pack" Democratic voters, wasting their voting strength in districts where their preferred candidates are likely to win by landslide margins, rather than spreading that strength to neighboring districts, where

their votes might alter the outcomes and thus impact the composition of the Legislature.

- This combination of "cracking" Democrats in many districts and "packing" Democrats in landslide proportions in a smaller number of districts is what gives rise to the anti-majoritarian outcome that is the hallmark of a Republican gerrymander.
- Very few districts are competitive. Only three senate districts and eight assembly districts even partly overlap the gray zone (which reflects the competitiveness of these six contests on a statewide basis).
- Fully 20 of the 33 senate districts and 57 of the 99 assembly districts are consistently not only Republican, but more Republican than even the strongest Republican candidate who ran statewide in the past two elections, State Treasurer Leiber. By contrast, only 10 senate districts and only 34 assembly districts are consistently more Democratic than the strongest Democratic candidate who ran statewide in the past two elections, Governor Evers.

I. Partisan Gerrymandering: Connecting the Dots

106. So far, the seats/votes graphs have been presented with specific dots, or points, each representing a particular election in a particular

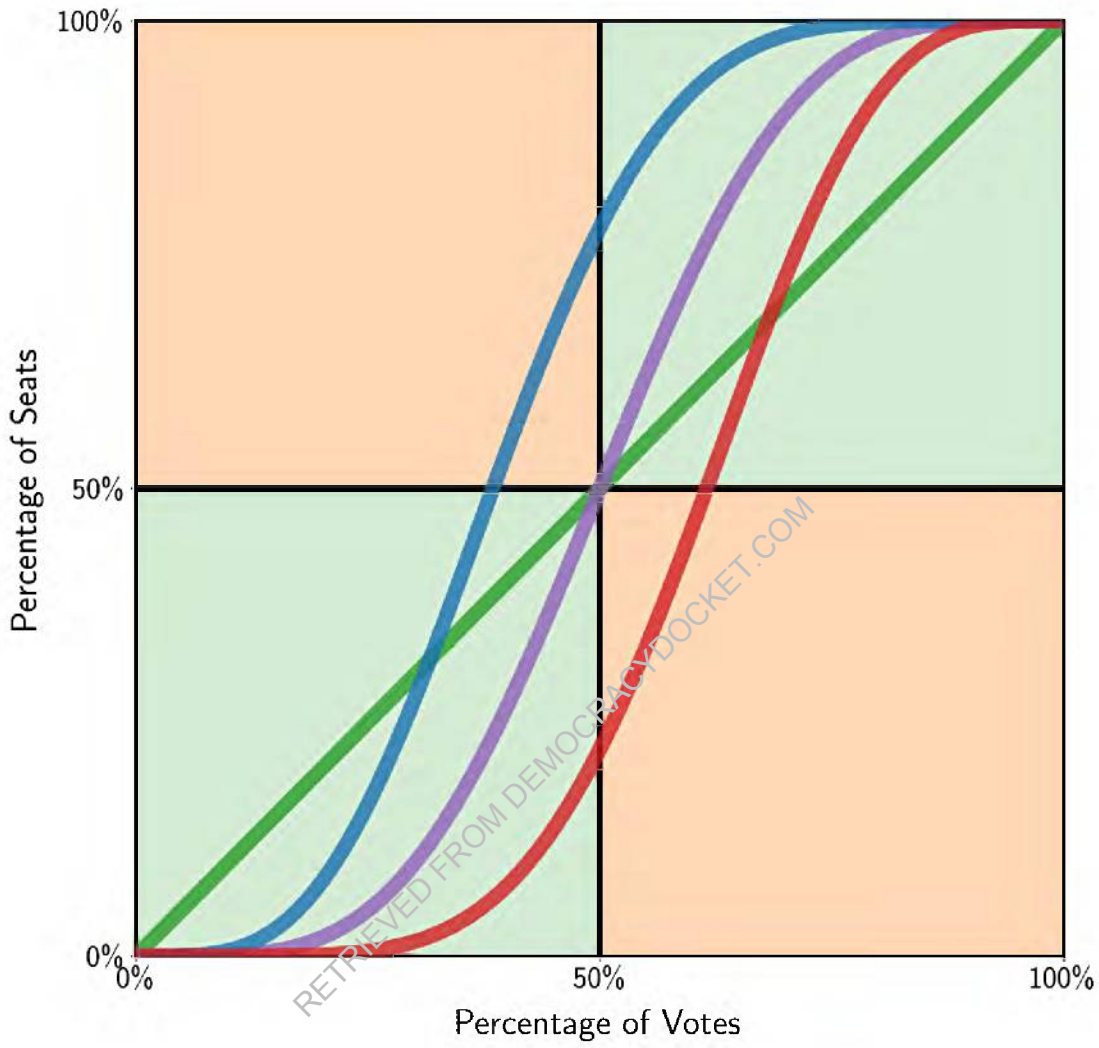
year. It is possible, however, to interpolate and extrapolate from seats/votes ***points*** to seats/votes ***curves***. A seats/votes curve, properly drawn, can provide an estimate of seat share for any given vote share, including vote shares that have not occurred in actual elections. One might ask, for example, what seat share would be expected if Democrats prevailed statewide at a level halfway between the levels of the 2022 attorney-general and gubernatorial elections, where the Democrats' winning margins were about 1.3 and 3.4 percentage points, respectively. A seats/votes curve could help estimate an answer to this question. And, importantly, a seats/votes curve also could help estimate an answer to the question of what might be expected if Democrats and Republicans were so close in popular support that the statewide vote were essentially tied.

107. A seats/votes curve, like a plot of seats/votes points, can be expressed in terms of either political party. Here, the seats/votes curves represent Democratic percentages of seats and votes. But a figure representing Republican percentages would be perfectly symmetrical and thus would share the same mathematical properties and lead to the same factual conclusions.

108. Figure 11 shows four hypothetical seats/votes curves (one of which is actually a straight line). The green straight line represents a

hypothetical districting map that awards both major political parties a fraction of seats that matches its fraction of votes. This is sometimes referred to as proportional representation or proportionality. Like all seats/votes curves, this green line starts at the origin (0%, 0%), where Democratic candidates get no votes and thus no seats, and ends at the square's top-right corner (100%, 100%), where Democratic candidates get 100% of the major-party votes and thus 100% of the seats. In between, the green line passes through the square's dead center (50%, 50%), where each major political party gets half the votes and half the seats. Importantly, none of the points along this green line fall into the square's problematic upper-left or lower-right quadrants. Winners get gold medals, and runners-up get silver.

Figure 11: Hypothetical Seats/Votes Curves



109. The purple S-shaped curve also passes through those same three points, but it represents a map that awards a disproportionately large number of districts to the more popular party, sometimes called a "winner's bonus," and a disproportionately small number of districts to the less popular party. At least in a highly competitive State like Wisconsin, a districting map that tracks this S-shaped curve might well be deemed fair

because it is perfectly symmetrical. For any point on this curve, if the tables were turned and the electoral percentages for Democrats and Republicans were swapped, the seat totals would be swapped, as well. While at first blush it may sound unfair if a map awards 60% of the seats to Democrats who earned only 54% of the votes statewide, that outcome is symmetrical and arguably fair if Republicans likewise would carry 60% of the seats with only 54% of the statewide vote. Tellingly, as with the green line, no points along this purple S-shaped curve fall into the square's problematic upper-left or lower-right quadrants. Again, the "medal winners" are intuitively sensible: Winners get gold, runners-up get silver.

110. Critically important, Petitioners' partisan-gerrymandering claims are ***not*** demands for maps that track the straight green line in Figure 11—what the *Johnson I* Court repeatedly derided as "proportional party representation." *Johnson I*, at ¶¶ 42–50. Petitioners nowhere contend, for example, that they would be "entitled" to 52% of legislative seats if Democratic candidates in a particular election garnered 52% of the votes. Nor are Petitioners demanding maps that track the purple S-shaped curve in Figure 11. Rather they are demanding maps that do not thwart majority rule and systematically dilute certain citizens' voting strength on the basis of their political viewpoint or partisan affiliation. For examples of

seats/votes curves representing systematically dilutive, majority-thwarting maps, look at the blue and red curves in Figure 11, as they represent the kinds of extreme partisan gerrymanders that violate voters' rights.

111. By contrast to the green line and the purple curve, the blue and red curves do not exhibit partisan symmetry because each curve describes a map that favors one political party at the expense of the other. The blue curve, which is consistently higher than the purple curve, translates Democratic votes into a notably large number of Democratic seats. For example, in an election where the voters are evenly divided, 50/50, this curve suggests that Democrats would get a supermajority of the seats, leaving Republicans with only a small minority. A large, and important, portion of the blue curve resides in the square's problematic upper-left quadrant. Democrats finish second among the voters yet walk off with the gold medal.

112. The red curve is similarly asymmetric, but it is consistently lower than the purple curve, as it favors Republicans and disfavors Democrats. Again, a tied election would generate a supermajority of seats, but with Republicans now being advantaged. And here, a large and important portion of the red curve resides in the square's problematic lower-right quadrant. Democrats win the competition for votes, yet are relegated to silver-medal status.

113. These blue and red curves represent prototypical Democratic gerrymanders and Republican gerrymanders, respectively. They give "one political party an unfair advantage by diluting the opposition's voting strength." *Gerrymandering*, BLACK'S LAW DICTIONARY (11th ed. 2019), *quoted in Johnson I*, 2021 WI 87, ¶ 41.

J. Wisconsin's Seats/Votes Curves Show Extreme Republican Gerrymandering

114. Wisconsin's senate and assembly maps give rise to seats/votes curves most closely resembling the red curve in Figure 11—an extreme Republican gerrymander.

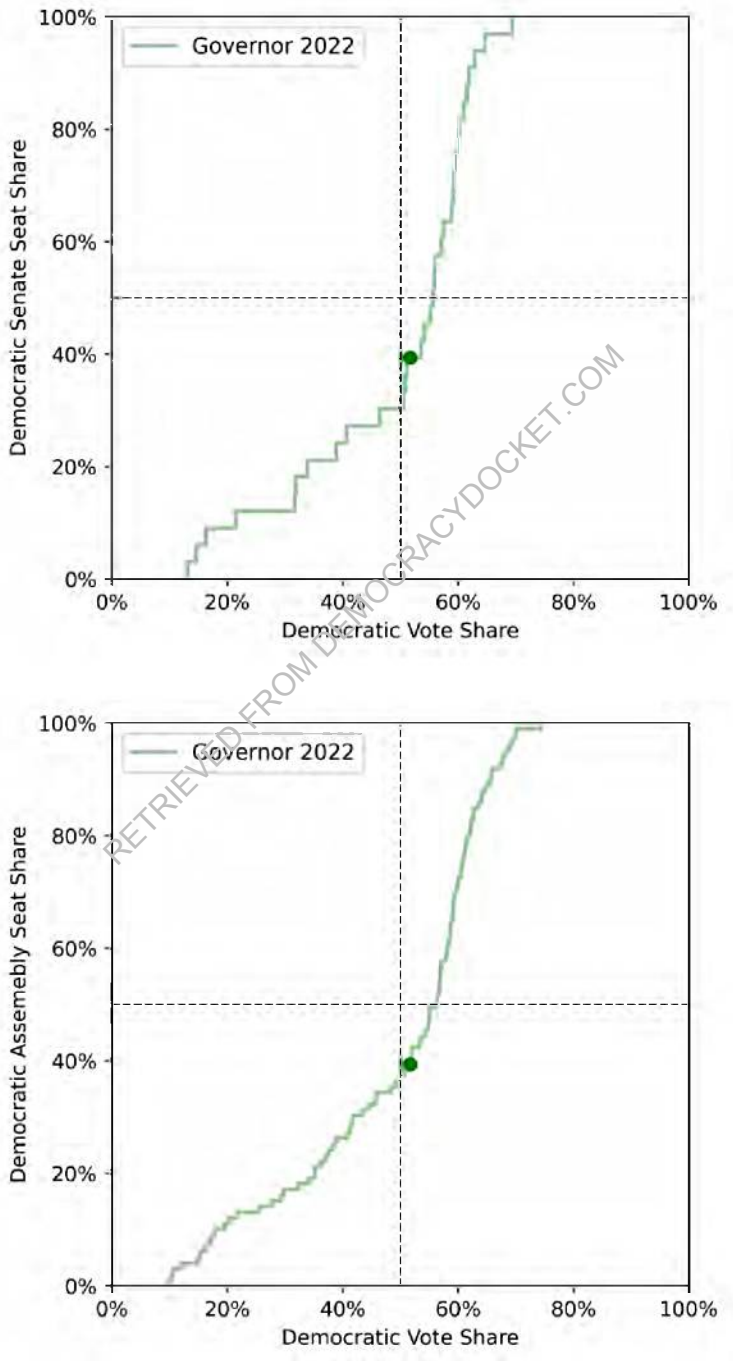
115. Recall that a seats/votes point reflects the number of districts that a political party's candidates carried in a particular election. So it reflects whether the party received more than 50%, or less than 50%, of the major-party vote in each specific district in that one election, but it does not reflect how much above 50%, or how much below 50%, the actual vote percentage was in that specific district. By contrast to seats/votes point plots, seats/votes curves make good use of the additional data—that is, they account for whether each specific district was barely carried, or easily carried, by a particular party's candidate, and they further account for the exact percentage breakdown of each district's major-party vote.

116. A seats/votes point can be transformed into an estimated seats/votes curve using the simple assumption that if either political party benefits from a "wave" election, its percentage of the vote will increase by a uniform percentage in each district—a reasonable assumption given the strong correlations demonstrated in the four graphs of Figure 8. Figure 12 shows the 2022 gubernatorial election as an example. The large dot shows that Governor Evers earned 51.72% of the major-party vote statewide, yet carried only 39.39% of the districts—13 of the 33 senate districts (shown in the top graph) and 39 of the 99 assembly districts (shown in the bottom graph).

117. Focusing for a moment on the top graph, we can ask how much Governor Evers would have had to increase his vote percentage (assuming the same percentage increase everywhere in the State) to carry a 14th district, and how much he would have had to increase beyond that level to carry a 15th district, and so on. Likewise, we can ask how much ground he could have lost (everywhere) to carry only 12 districts, only 11 districts, etc. Each of these senate districts is about 3% of the total number of senate districts (1 out of 33), so plotting answers to these questions creates a function that resembles a "staircase," where each "riser" steps up about 3%

on the y-axis, and each "tread" varies in width (along the x-axis), depending on the statewide candidate's district-by-district results.

Figure 12: A Seats/Votes Curve for the 2022 Gubernatorial Election



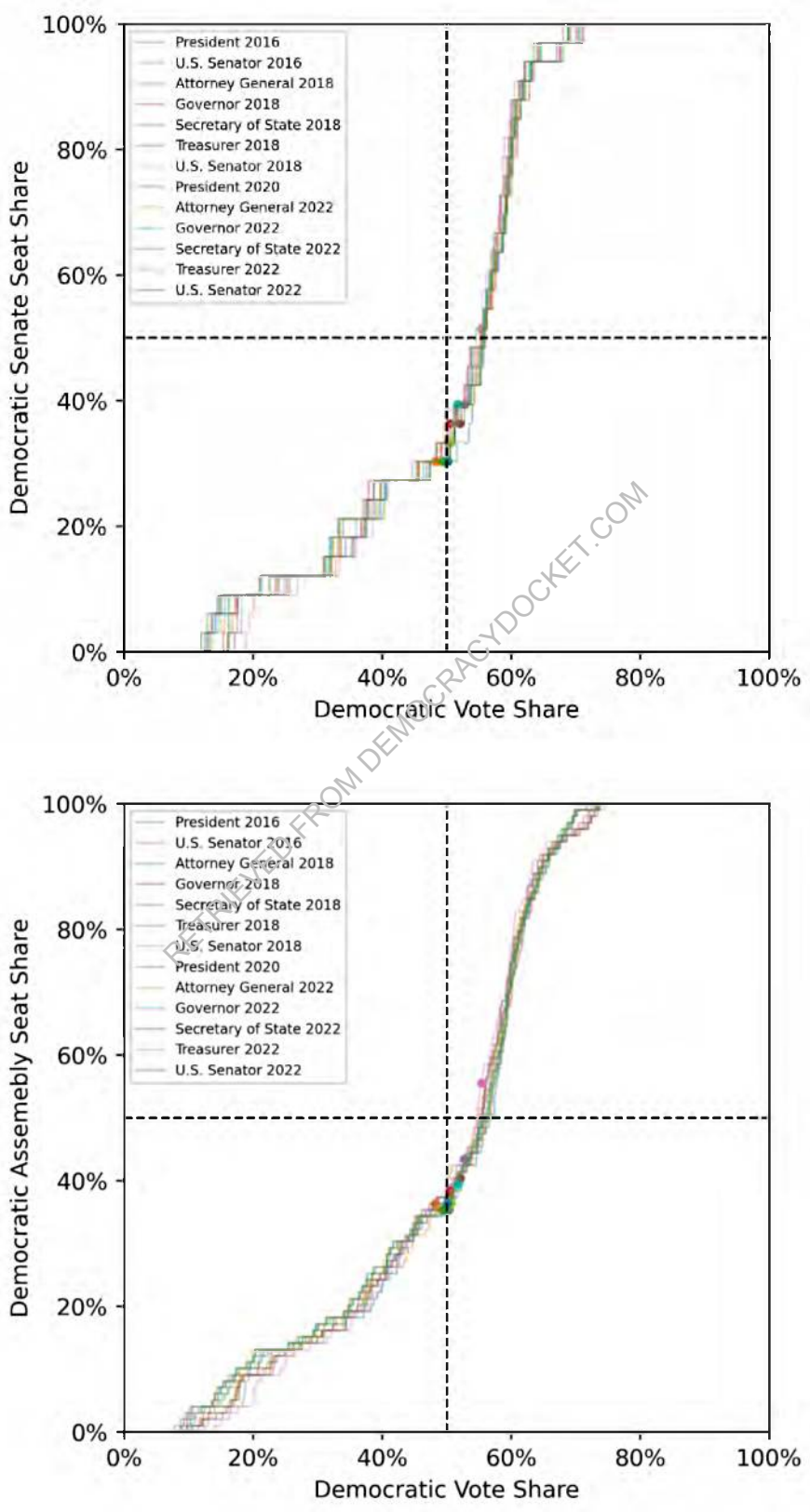
118. Four features of Figure 12 stand out:

- Although this "staircase" function, like all seats/votes curves, starts at the origin (0%, 0%) and ends at the square's top right corner (100%, 100%), in between those two points, it misses—by a very substantial margin— the square's dead center (50%, 50%), where a tied election results in an equal division of seats.
- Indeed, at 50% of the vote, it is estimated that Governor Evers would have carried barely 30% of the Senate districts (10 of 33) and 37% of the Assembly districts (37 of 99). That is hardly a symmetric, fair outcome.
- A significant piece of each "staircase" function resides in the square's problematic bottom-right quadrant, where Democrats would have won the vote statewide yet carried fewer than half the districts. And this is true in both chambers.
- Looking back at Figure 11, the Governor Evers "staircase" function most closely resembles the red hypothetical seats/votes curve—the paradigmatic Republican gerrymander.

119. Similar "staircase" functions can be drawn for any statewide contest and legislative map. Figure 13 does exactly that for all 13 of the 2016, 2018, 2020, and 2022 statewide contests (including the Governor Evers

reelection contest shown in the prior Figure). Again, the top graph analyzes the 2022 senate map, and the bottom graph analyzes the 2022 assembly map. The color dots have been reduced in size to improve visual clarity.

Figure 13: Seats/Votes Curves for 13 Elections



120. Five features of Figure 13 stand out:

- For each graph, although each of the staircases is created from a distinct dataset, all 13 staircases are remarkably similar. Indeed, they largely overlap. This shows that the partisan patterns are highly consistent from election to election.
- Even using a body of 13 separate statewide elections spread across four election cycles (2016, 2018, 2020, 2022), not a single one of these staircase functions hits the "50/50" dead center of the square, unlike (for example) the purple S-curve in Figure 11. Indeed, none of these 13 staircase functions even comes close.
- With an evenly divided vote, these seats/votes curves suggest that Democrats would fall short of Republicans by 9 to 13 senate seats and by 21 to 29 assembly seats.
- Thus, there is no basis here to expect that Democrats could narrowly (or even not so narrowly) outpoll Republicans statewide and be awarded with majority control of either chamber of the Wisconsin Legislature. Democrats can finish first, but they're assured the silver medal.

121. It is the ***consistency*** and ***durability*** of this severe partisan skew—the certainty with which the maps deny voters of one party the

ability to exercise majority control of the Legislature despite casting the majority of votes statewide—that render the Republican gerrymandering of the Senate and the Assembly ***extreme*** and thus presumptively invalid under the Wisconsin Constitution.

K. The Extreme Partisan Skew of Wisconsin's Senate and Assembly Maps Is Not "Natural"

122. There is no legitimate justification for the severe, persistent partisan skew in Wisconsin's senate and assembly maps. That skew does not "naturally" and "necessarily" flow from where Wisconsin's Democratic and Republican voters reside.

123. Here, again, the *Johnson I* Court simply made certain unjustified assumptions—and then used them to build legal conclusions about nonjusticiability—rather than relying on objective analysis of empirical data. Citing a half sentence of dicta from a 2002 opinion, the *Johnson I* Court asserted that Wisconsin "Democrats tend to live together in urban areas, whereas Republicans tend to disperse into suburban and rural areas," and that compact districts therefore lead "to grouping large numbers of Democrats in a few districts and dispersing rural Republicans among several." *Johnson I*, 2021 WI 87, ¶ 48. And then, citing neither record evidence nor academic scholarship, the Court offered its opinion on "natural" packing, seemingly reversing cause and effect: "Democrats in

urban cities may win by large margins, thereby skewing the proportion of Democratic votes statewide relative to the proportion of Democratic victories." *Id.* These observations were offered up not in response to maps drawn under the latest Census—none had been submitted to the Court when *Johnson I* was decided—but rather as explanations for why the Court would ignore the partisan makeup of proposed districts and the partisan unfairness of entire maps when selecting remedial plans.

124. Had the *Johnson* Court allowed the parties to present evidence regarding proposed districts' partisan makeup, it might well have learned that its assumptions about causation were misguided, and that the Legislative Plans' partisan skew was deliberate and gratuitous, rather than being an inevitable consequence of the State's political geography. Petitioners hope to have the opportunity to present evidence on these points in this case. Here, at the Petition stage, they will briefly make only two points: one based on the Prior CMS Plans that were presented to this Court in *Johnson*, the other based on a set of plans that citizens have posted on a popular redistricting website.

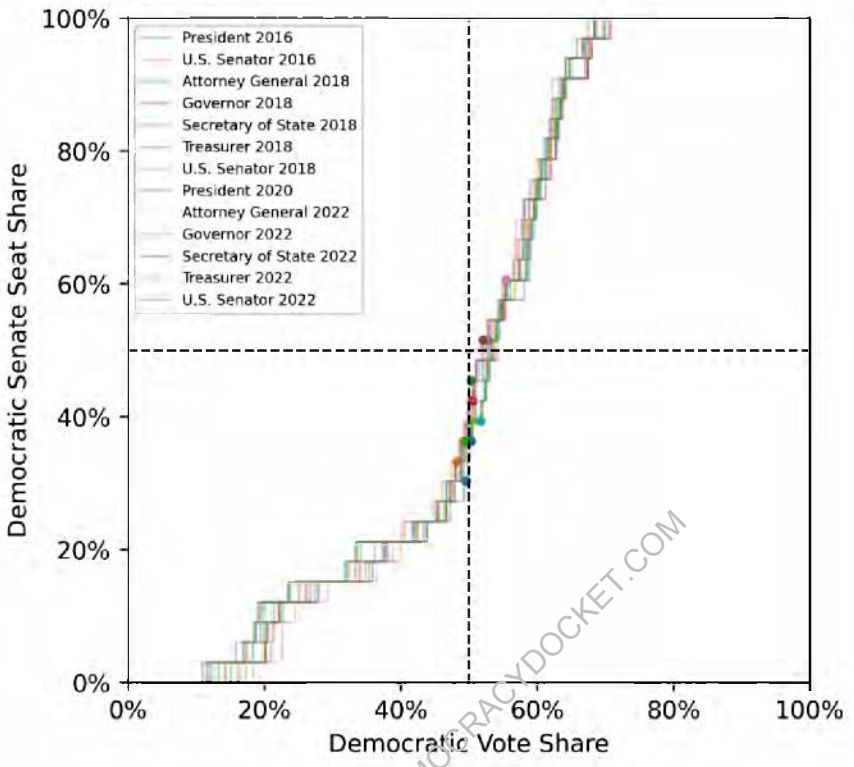
125. The Prior CMS Plans were offered by many of the Petitioners here in response to the *Johnson I* Court's request for "least change" maps. As an effort to limit changes to the 2011 Plans, which themselves were

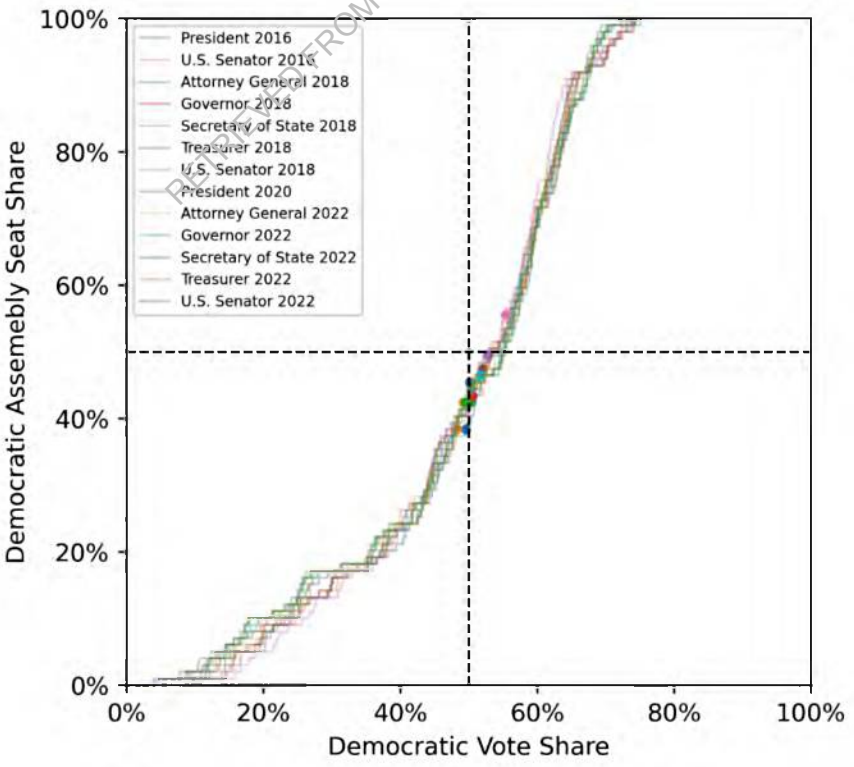
highly gerrymandered to foster Republican entrenchment, the Prior CMS Plans necessarily re-created some of the partisan skew that was baked into the 2011 Plans. But because the Prior CMS Plans, unlike the Legislative Plans, were not drawn intentionally to shore up vulnerable Republican incumbents or to push vulnerable Democratic incumbents into retirement or defeat, the Prior CMS Plans had much less pro-Republican partisan skew than the Legislative Plans.

126. Petitioners certainly do not propose that the Court now adopt the Prior CMS Plans, tethered as they were to this Court's "least change" directive. *Cf. Johnson II*, 2022 WI 14, ¶ 59 (Ann Walsh Bradley, J., concurring) ("If this process has shown us anything, it is that the court should depart from the 'least change' approach if and when redistricting arrives before it in the decades to come."). Rather, Petitioners analyze the Prior CMS Plans here to create a point of comparison with the Legislative Plans that they are now challenging.

127. Figure 14 presents senate and assembly seats/votes graphs generated using precisely the same method as Figure 13, except Figure 14 applies that method to the Prior CMS Plans rather than the Legislative Plans.

Figure 14: Seats/Votes Curves for the Prior CMS Plans





128. Five features of Figure 14 stand out:

- The Prior CMS Plans, which were designed as "least change" proposals to comply with this Court's directive, are much less skewed than the Legislative Plans: they come closer to the 50/50 mark and do not veer as far into the problematic lower-right quadrant. This is true for both the senate and the assembly maps.
- The Prior CMS Plans do, however, retain a considerable fraction of the pro-Republican partisan skew of the Legislative Plans. This is true for both the senate and the assembly maps.
- But the Prior CMS Plans, unlike the Legislative Plans, do not exacerbate the maps' pro-Republican partisan skew.
- With an evenly divided vote, the Prior CMS Plans' seats/votes curves suggest that Democrats would fall short of Republicans by 5 to 11 senate seats and by 11 to 21 assembly seats. Recall that the shortfalls in Figure 13, showing the Legislative Plans, were considerably higher: roughly 9 to 13 senate seats and 21 to 29 assembly seats.
- In other words, a sizable fraction of the partisan skew in the Legislative Plans does not appear in the "least change" Prior CMS Plans and thus could have been avoided—while reducing population

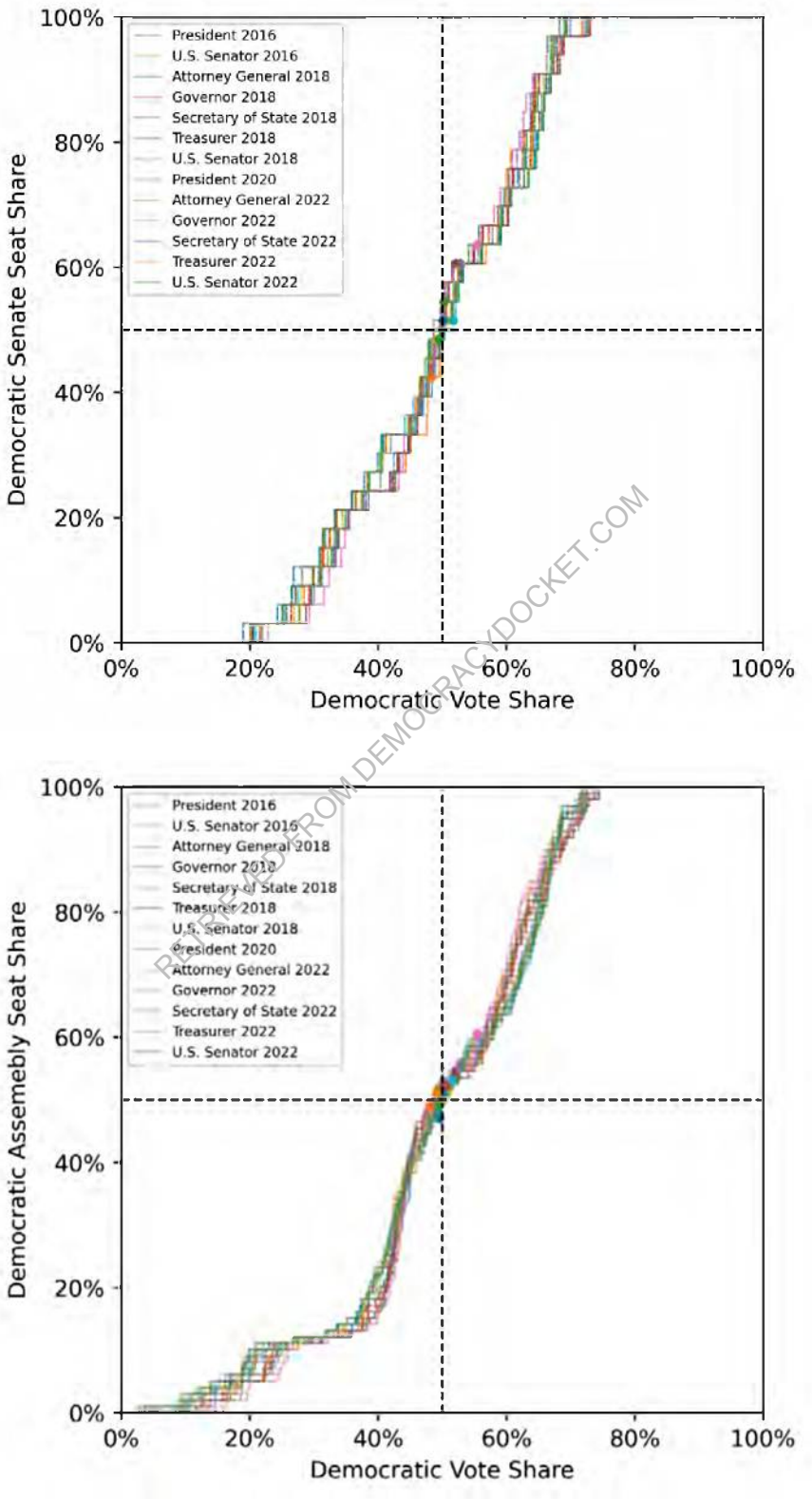
inequalities, better respecting counties, and improving districts' geographic compactness.

129. Because the Prior CMS Plans were significantly constrained by the *Johnson I* Court's "least change" edict, the question remains whether maps freed from that edict could generate truly symmetric results that unfairly favor neither major political party. It is premature to answer that question. But a sampling of maps submitted by members of the public to a free redistricting website called "Dave's Redistricting App" (see "Notable Maps" at https://davesredistricting.org/maps#state::WI) suggests that symmetry and fairness are attainable today in Wisconsin.

130. Figure 15 shows two sets of seats/votes curves, one for senate maps (the top graph), the other for assembly maps (the bottom graph). Here, instead of overlaying 13 statewide elections on a single map, the 13 elections were overlaid on four senate maps and then on four assembly maps, creating 52 overlapping "staircases" for each chamber. Petitioners and their experts have not studied any of these eight maps, or even confirmed that they fully comply with all federal and state legal requirements. And Petitioners certainly are not in any way endorsing any of these maps or suggesting that they could or should be adopted by this Court. Rather, Petitioners use them merely to show that there is reason to believe that both the massive pro-

Republican partisan skew in the Legislative Plans and the significantly lessened pro-Republican skew in the Prior CMS Plans that flowed from the least-change goal are not permanent or "natural" features of Wisconsin's political geography, but rather are functions of how district lines are drawn.

Figure 15: Seats/Votes Curves for Plans Publicly Submitted Online



131. Two features of Figure 15 stand out:

- Unlike the Legislative Plans, all eight maps, four for each chamber, come close to the 50/50 dead center of these graphs, which suggests that in extremely close elections no political party would be repeatedly consigned to minority status. Control of both legislative chambers in that scenario would be genuinely up for grabs.
- None of the eight maps contains long "flights" of "stairs" in the lower-right quadrant—or, for that matter, in the upper-left quadrant. (Recall that severely pro-Republican outcomes can be found in the former and severely pro-Democratic outcomes in the latter.) Where these maps "miss" the 50/50 dead center of the graphs, they do not miss by much, and they do not always "miss" in the same (that is, pro-Republican) direction.

132. Again, this analysis presents only one method for disaggregating the partisan skew, if any, caused by a State's political geography from the partisan skew caused by the mapmakers' political choices—that is, by partisan gerrymandering. Other—perhaps superior—methods are available. But the graphic difference between Figure 15 and the Legislative Plan graphs in Figure 13 suggests that the partisan skew in

the Legislative Plans flows from gerrymandering, not (as the *Johnson I* Court speculated) from Wisconsin's "natural" political geography.

133. Figure 15 also resonates with the 2016 finding of the three-judge federal district court in *Whitford* that "Wisconsin's modest, pro-Republican political geography cannot explain the burden that [the 2011 assembly map] imposes on Democratic voters in Wisconsin." 218 F. Supp. 3d at 923 (three-judge court) (finding that the 2011 map was not justifiable based on proffered legitimate districting considerations or neutral circumstances). Here, too, nonpartisan factors neither explain nor justify the Legislative Plans' extreme partisan gerrymandering. The maps instead reflect the partisan choices of Republican legislators who sought to entrench their majority, or supermajority, status for yet another decade, regardless of the will of the people of Wisconsin.

134. Collectively, Figures 1 through 15 demonstrate that gerrymandering in Wisconsin has reached the point where one political party guarantees itself a supermajority of seats, even when it wins only a minority of the votes. Democracy requires majority rule. But Wisconsin's Legislative Plans stand democracy on its head by promising to invert popular minorities into governing majorities. The Wisconsin Constitution must provide a remedy for Petitioners and all Wisconsin voters. And this

Court must order it into effect before the next state-legislative elections in 2024.

STATEMENT OF THE REASONS WHY THE COURT SHOULD TAKE JURISDICTION

135. By providing that "[t]he supreme court … may hear original actions and proceedings," Article VII, Section 3(2) of the Wisconsin Constitution confers upon this Court original jurisdiction over this case. This Court has exercised its original jurisdiction "when the case concerns 'the sovereignty of the state, its franchises or prerogatives, or the liberties of its people.'" *Johnson I*, 2021 WI 87, ¶ 20 (quoting *Petition of Heil*, 230 Wis. 428, 436, 284 N.W. 42, 45 (1939)). Specifically, this Court has held that "[t]here is no question" that legislative redistricting cases "warrant[] this court's original jurisdiction" because "***any*** reapportionment or redistricting case is, by definition, publici juris, implicating the sovereign rights of the people of this state." *Id.* (quoting *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 17, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam) (emphasis added)); *see also id.*; *Moore v. Harper*, 143 S. Ct. 2065, 2083 (2023) (recognizing that the state entity "responsible for redistricting … remain[s] subject to constraints set forth in the State Constitution"). A memorandum of law accompanying this Petition further explains why this Court should commence an original action.

STATEMENT OF THE RELIEF SOUGHT

136. As noted below, Petitioners request that this Court establish new legislative plans that fully comply with Wisconsin's constitutional criteria and fully cure the constitutional violations in the existing Legislative Plans. Petitioners believe that they are uniquely well-positioned to assist the Court in this respect. Petitioners have assembled a team of experts who specialize in "computational redistricting"—using high-performance computers to draw maps that attempt to optimize multiple redistricting criteria.

137. The premise behind computational redistricting is simple: "Given the number of [redistricting] criteria typically present and the spatial nature of how the criteria operate, it is not easy for humans to find optimal redistricting outcomes on their own. … Put simply, good maps are needles in a haystack of bad or at least worse maps. Enter redistricting algorithms. They are capable of meticulous exploration of the astronomical number of ways in which a state can be partitioned. They can identify possible configurations of districts and zero in on the maps that best meet the redistricting criteria. The algorithms sort through the haystack more efficiently and more systematically so that the needle—the better maps—

can be found."[3] In this way, a "computer program essentially substitutes for a very large body of neutral experts and the viable, neutral maps they draw."[4]

138. Computational redistricting is particularly well equipped to draw alternative maps that demonstrate how to comply with Article IV's redistricting criteria and Wisconsin's traditional redistricting principles, while also creating competitive districts that do not systematically crack and pack one party's voters and are instead responsive to the will of the entire electorate. Computational redistricting is thus an ideal tool for remedying partisan-gerrymandering claims. Importantly, in remedying a partisan-gerrymandering claim, it is not enough for the Court simply to adhere to traditional districting principles and stay blind to political consequences. *See Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results.").

[3] Emily Rong Zhang, *Bolstering Faith with Facts: Supporting Independent Redistricting Commissions with Redistricting Algorithms*, 109 CALIF. L. REV. 987, 1012–13 (2021) (internal quotation marks and footnotes omitted).

[4] Bruce E. Cain, et al., *A Reasonable Bias Approach to Gerrymandering: Using Automated Plan Generation to Evaluate Redistricting Proposals*, 59 WM. & MARY L. REV. 1521, 1536–37 (2018).

Rather, computational redistricting can ensure that the Court is not, inadvertently, adopting maps that systematically treat voters who prefer one political party better than voters who prefer another political party.

139. It is critical to note that even a redistricting map with districts that are all equally populated, contiguous, reasonably compact, and respectful of counties, municipalities, and wards can be severely biased in favor of one political party and against another. As Justice Scalia correctly stated, "packing and cracking" along partisan lines, "whether intentional or no, are quite consistent with adherence to compactness and respect for political subdivision lines." *Vieth v. Jubelirer*, 541 U.S. 267, 298 (2004) (plurality opinion). Thus, remedial redistricting maps often can be best drawn by deploying computational redistricting to systematically satisfy traditional districting criteria and achieve partisan fairness.

140. In Wisconsin, the present partisan gerrymandering in the Legislative Plans is so extreme that it must be eradicated entirely in time for the 2024 elections. Every Wisconsin voter should have the opportunity to vote for both senate and assembly members in 2024 and for the remainder of the decade under legislative plans that comply with the Wisconsin Constitution. Petitioners therefore request that the Court order special

elections for two-year terms in the Senate in 2024 in odd-numbered districts, where elections otherwise would not occur until 2026.

141. The practice of truncating senate terms and holding special elections following redistricting is not uncommon. The Florida Supreme Court, for example, has held that the state constitution requires all senate districts to hold elections following statewide redistricting, even though Florida otherwise has staggered senate elections. *See In re Apportionment L. Appearing as Senate Joint Resol. 1 E*, 414 So. 2d 1040, 1047 (Fla. 1982). Other state courts in States with staggered senate elections likewise have upheld truncation under state constitutional law. *See, e.g.*, *Kelsh v. Jaeger*, 641 N.W.2d 100, 110 (N.D. 2002) ("When reapportionment results in a substantial constituency change, the constitutional requirement that a senator be elected from a district may justify truncating an incumbent senator's term to give the electorate in the newly drawn district an opportunity to select a senator from that district."); *Egan v. Hammond*, 502 P.2d 856, 873–74 (Alaska 1972) ("A need to truncate the terms of incumbents may arise when reapportionment results in a permanent change in district lines which either excludes substantial numbers of constituents previously represented by the incumbent or includes numerous other voters who did not have a voice in the selection of that incumbent. The [governor's]

discretionary authority to require mid-term elections when necessary is well established."); *see also Moore v. McCuen*, 876 S.W.2d 237, 239–40 (Ark. 1994) (upholding a lot-drawing system to restore staggered terms after reapportionment); *In re Legislative Districting of Gen. Assembly*, 193 N.W.2d 784, 791 (Iowa) (same).

142. Here, the same principles apply. Voters who already have been forced to endure multiple election cycles under an extreme partisan gerrymander that dilutes and debases their votes should not be required to wait three more years for a remedy. If the Court orders new legislative plans into place, it should likewise order that senate elections must take place in all districts in 2024, for two-year terms in all odd-numbered senate districts and four-year terms in all even-numbered senate districts.

143. As set forth more fully below, Petitioners pray for relief with respect to the following violations of their rights under the Wisconsin Constitution.

COUNT I
Unlawful Partisan Gerrymandering in Violation of the Wisconsin Constitution's Equal Protection Clause, Article I, Section 1

144. Petitioners incorporate paragraphs 1–143 as if fully set forth herein.

145. The Equal Protection Clause of Article I, Section 1 of the Wisconsin Constitution provides that "[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

146. The equal-protection guarantees of Article I, Section 1 are "consistent" with those provided by the Fourteenth Amendment to the Federal Constitution. *Blake v. Jossart*, 2016 WI 57, ¶ 28, 370 Wis. 2d 1, 884 N.W.2d 484. This Court has expressly adopted, as a matter of state constitutional law, the "basic principle of equality among voters within a state and the fundamental principle that representative government is one of equal representation for equal numbers of people without regard to race, sex, economic status, or place of residence." *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 54–55, 132 N.W.2d 249, 255 (1965) (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)). This Court agreed that "legislators represent people … and must be elected by voters, … if the form of our government is to remain representative." *Id.* at 55, 132 N.W.2d at 255.

147. Article I, Section 1 therefore "guarantees the opportunity for equal participation by all voters in the election" of legislators. *Reynolds v. Sims*, 377 U.S. 533, 566 (1964). That opportunity "can be denied by a

debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 555. The "one person, one vote" principle prohibits the creation of districts with significantly different populations. The State cannot thus "dilute[e] the weight of votes because of place of residence." *Id.* at 566; *see also Sonneborn*, 26 Wis. 2d at 55 ("[T]he basic principle of representative government is that the weight of a citizen's vote cannot be made to depend on where he lives.").

148. "The constitutional injury in a partisan gerrymandering case is much the same, except that the dilution is based on party affiliation." *Rucho*, 139 S. Ct. at 2514 (Kagan, J., dissenting). Partisan mapmakers aim to reduce the weight of certain citizens' votes, depriving them of their right to equal electoral participation.

149. The Legislative Plans violate the Wisconsin Constitution's Equal Protection Clause by intentionally entrenching in power the political party favored by the mapmakers (the Republican Party) while diluting the votes of voters favoring the rival party (the Democratic Party) and preventing voters of the latter party from translating their votes into representation in the state legislature.

150. No compelling or legitimate interest justifies the extreme partisan gerrymandering in the Legislative Plans.

151. These violations of the Equal Protection Clause harm Petitioners in the districts where they reside (by packing or cracking Democratic voters) and statewide (by unfairly preventing them from aggregating their votes with those of other Democratic voters across Wisconsin to translate their votes into representation in the state legislature). Petitioners thus satisfy any "district specific" injury requirement. *Whitford*, 138 S. Ct. at 1930.

152. The U.S. Supreme Court's holding in *Rucho*—that partisan-gerrymandering claims are not justiciable in federal courts—does not mean that extreme partisan gerrymandering is legal or constitutional. Quite the opposite. In *Rucho*, the majority agreed that extreme partisan gerrymandering is "incompatible with democratic principles," *Rucho*, 139 S. Ct. at 2506 (quotation marks omitted), that "each person must have an equal say in the election of representatives," *id.* at 2501, and that the real question facing the Court was how to "separate[e] constitutional from unconstitutional partisan gerrymandering," *id.* at 2504; *see also id.* at 2509 (Kagan, J., dissenting) (reading the majority as having recognized the maps' unconstitutionality, and criticizing the Court's "refus[al] to remedy a constitutional violation"); *id.* at 2515 (stating that the majority "acknowledged" the constitutional violation). And the *Rucho* majority never

disagreed with a bevy of prior statements declaring partisan gerrymandering unconstitutional. *See, e.g.*, *Vieth*, 541 U.S. at 293 (plurality opinion) ("[A]n excessive injection of politics [in districting] is unlawful." (emphasis omitted)); *id.* at 316 (Kennedy, J., concurring) ("[P]artisan gerrymandering that disfavors one party is [im]permissible."); *id.* at 361–62 (Breyer, J., dissenting) (gerrymandering causing political "entrenchment" violates the Equal Protection Clause); *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion) ("[U]nconstitutional discrimination" occurs "when the electoral system is arranged in a manner that will consistently degrade [a voter's] influence on the political process."); *id.* at 165 (Powell, J., concurring) ("Unconstitutional gerrymandering" occurs when "the boundaries of the voting districts have been distorted deliberately" to deprive voters of "an equal opportunity to participate in the State's legislative processes."). Thus, to the extent this Court applies Wisconsin's Equal Protection Clause in lockstep with its federal counterpart, the U.S. Supreme Court has said that extreme partisan gerrymandering is unconstitutional under the federal Equal Protection Clause, even if federal courts lack the power to remedy it.

153. Regardless, this Court's interpretation of Article I, Section 1 of the Wisconsin Constitution need not be eternally bound to the U.S. Supreme

Court's interpretation of the Federal Constitution. "This court has the power, perhaps the duty, to make sure that the protections of our state constitution remain relevant in light of changing conditions, emerging needs and acceptable changes in social values." *Jacobs v. Major*, 139 Wis. 2d 492, 520, 407 N.W.2d 832, 843–44 (1987). The "breadth and adaptability" of the Wisconsin Constitution's provisions reflect its framers' understanding that "it would be up to future judges and interpreters to decide what they mean." *Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 2023 WI 38, ¶106, 407 Wis. 2d 87, 990 N.W.2d 122 (Dallet, J., concurring). And "[t]here is no reason … that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed in the same way" as the Federal Constitution. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174 (2018). Indeed, state constitutions "are a font of individual liberties," nested in a federal system that "provides a double source of protection for the rights of our citizens." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491, 503 (1977).

154. Moreover, although the federal clause and its Wisconsin counterpart are both called the Equal Protection Clause, they are different

clauses textually. Unlike the Fourteenth Amendment's text, Article I, Section 1 of the Wisconsin Constitution is express that governments must "deriv[e] their just powers from the consent of the governed." And where government is set up by consent of the governed, authority "is to be controlled by public opinion, not public opinion by authority." *West Virginia Bd. of Educ. V. Barnette*, 319 U.S. 624, 641 (1943). The Legislative Plans turn that principle on its head by allowing legislators not only to choose their constituents, but to escape democratic accountability by systematically expunging electoral competition.

COUNT II
Unlawful Partisan Gerrymandering in Violation of the Wisconsin Constitution's Free Speech and Right to Assemble and Petition Clauses, Article I, Sections 3 and 4

155. Petitioners incorporate paragraphs 1–154 as if fully set forth herein.

156. Article I, Section 3 of the Wisconsin Constitution provides in relevant part: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press."

157. Article I, Section 4 of the Wisconsin Constitution provides in relevant part: "The right of the people peaceably to assemble, to consult for

the common good, and to petition the government, or any department thereof, shall never be abridged."

158. Wisconsin citizens' "right to associate with organizations that engage in constitutionally protected speech" is "fundamental." *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 37, 358 Wis. 2d 1, 851 N.W.2d 337. At the core of this protection is the right of "association for the purpose of advancing ideas and airing grievances." *Lathrop v. Donohue*, 10 Wis. 2d 230, 236, 102 N.W.2d 404, 407–08 (1960) (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960)), *aff'd*, 367 U.S. 820 (1961). "[F]reedom of speech, especially political speech, is the right most fundamental to our democracy." *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶ 47, 363 Wis. 2d 1, 866 N.W.2d 165.

159. This Court "treat[s] the rights protected under the Wisconsin and United States Constitutions to be coextensive" when evaluating "associational rights claims." *Madison Teachers, Inc.*, 2014 WI 99, ¶ 23 n.9 (citing *Lawson v. Hous. Auth. of Milwaukee*, 270 Wis. 269, 274, 70 N.W.2d 605, 608 (1955)). And "[d]espite the differences in their language … Wisconsin courts consistently have held that Article I, § 3 of the Wisconsin Constitution guarantees the same freedom of speech rights as the First

Amendment of the United States Constitution." *Cnty. of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, ¶ 21, 588 N.W.2d 236 (1999).

160. The First Amendment principles enshrined in the Wisconsin Constitution prohibit extreme partisan gerrymandering. "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in [support of] candidates who espouse their political views." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). These constitutional guarantees are threatened when a State targets disfavored political organizations and affiliations, such that "an individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained, and support for his party is diminished." *Elrod v. Burns*, 427 U.S. 347, 356 (1976).

161. As a result, "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring). "By diluting the votes of certain citizens, the State frustrates their efforts to translate those affiliations into political

effectiveness." *Rucho*, 139 S. Ct. at 2514 (Kagan, J., dissenting). Gerrymandering has a powerful "impact on effective competition in the marketplace of political ideas. For without a fair opportunity to elect representatives, freedom of political association yields no policy fruit." ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 499 (1968).

162. The Legislative Plans thus violate the Free Speech and Right to Assemble and Petition Clauses by diluting the voting power of Petitioners and other Democratic voters who seek to vote for and associate with the disfavored political party and by impairing the effectiveness of political speech and expression because of their content. Moreover, Petitioners and other Democratic voters who seek to speak in favor of and associate with the disfavored political party—by working to elect that party's candidates—cannot effectively do so because of the extreme partisan gerrymanders reflected in the Legislative Plans. And voters' engagement with, and interest in, Wisconsin's elections will decline—because mapmakers have effectively predetermined the results.

163. No compelling or legitimate state interest justifies the extreme partisan gerrymandering reflected in the Legislative Plans.

164. These violations of the Free Speech and Right to Assemble and Petition Clauses harm Petitioners by diluting their voting power in the districts where they reside (by packing or cracking Democratic voters) and statewide (by diluting the voting power of Democratic voters with whom Petitioners seek to associate, by burdening Petitioners' ability to associate with "like-minded people across the State . . . in a political party," to "carry out [the party's] activities and objects," and to "pursue their political interests and goals." *Whitford*, 138 S. Ct. at 1939–40 (Kagan, J., concurring) (citing *Vieth*, 541 U.S. at 315 (Kennedy, J. concurring))).

COUNT III
Unlawful Partisan Gerrymandering in Violation of the Wisconsin Constitution's Free Government Clause, Article I, Section 22

165. Petitioners incorporate paragraphs 1–164 as if fully set forth herein.

166. Article I, Section 22 of the Wisconsin Constitution provides: "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles."

167. This Court has rejected the notion that the "general declared purposes of the Constitution" are "mere embellishments," instead stating that "the declared purposes of the Constitution are among the most valuable

restraints upon legislative authority, and should be given all the force which they were intended to have." *State ex rel. Milwaukee Med. Coll. V. Chittenden*, 127 Wis. 468, 520–21, 107 N.W. 500, 517 (1906). And this Court has specifically recognized that the Free Government Clause is "an implied inhibition against governmental action with which any legislative scheme must be in compliance." *Jacobs*, 139 Wis. 2d at 509 (internal quotation marks omitted).

168. The Constitution's framers "foresaw the likelihood and danger of the security of personal rights, which the fundamental law was intended to firmly entrench with the judiciary as its efficient defender, being jeopardized at times by excessive regulation of the ordinary affairs of life, and with that in view incorporated in the fundamental law at section 22, art. 1, that admonition so full of meaning." *State v. Redmon*, 134 Wis. 89, 102, 114 N.W. 137, 139 (1907). In fact, "more than a mere admonition," the Free Government Clause is "a declaration giving emphasis to the declared purpose of the fundamental law as involving restraint of anything in legislation invading inherent rights,—that freedom … for the conservation of which and security of the blessings for which governments are instituted among men, deriving their just powers from the ***consent of the governed.***"

Mehlos v. City of Milwaukee, 156 Wis. 591, 597, 146 N.W. 882, 884 (1914) (internal quotation marks omitted).

169. The Legislative Plans violate the Free Government Clause by intentionally entrenching in power the political party favored by the mapmakers (the Republican Party) while diluting the votes of voters favoring the rival party (the Democratic Party) and preventing voters of the rival party from translating their votes into representation in the state legislature.

170. No compelling or legitimate interest justifies the extreme partisan gerrymandering in the Legislative Plans.

171. This violation of the Free Government Clause causes harm to Petitioners, who are denied their constitutional rights. When gerrymandering attempts to entrench one political faction and thus threatens the blessings of a free government, "it behooves [this Court] to heed the admonitions of [the Free Government Clause] … and to consider and determine whether the thing attempted is contrary to those principles." *Stierle v. Rohmeyer*, 218 Wis. 149, 167, 260 N.W. 647, 655 (1935).

COUNT IV
Unlawful Partisan Gerrymandering in Violation of the Wisconsin Constitution's Redistricting Requirements, Article IV, Sections 3, 4, and 5

172. Petitioners incorporate paragraphs 1–171 as if fully set forth herein.

173. Article IV, Section 3 of the Wisconsin Constitution provides in part that "members of the senate and assembly [shall be apportioned and districted] according to the number of inhabitants."

174. Article IV, Section 4 of the Wisconsin Constitution provides: "The members of the assembly shall be chosen biennially, by single districts, on the Tuesday succeeding the first Monday of November in even-numbered years, by the qualified electors of the several districts, such districts to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable."

175. Article IV, Section 5 of the Wisconsin Constitution provides: "The senators shall be elected by single districts of convenient contiguous territory, at the same time and in the same manner as members of the assembly are required to be chosen; and no assembly district shall be divided in the formation of a senate district. The senate districts shall be numbered in the regular series, and the senators shall be chosen alternately from the odd and even–numbered districts for the term of 4 years."

176. This Court has held that these requirements "are absolutely binding upon the legislature" and the Legislature "has no power, much less discretion, to dispense with any one of them." *Lamb*, 83 Wis. At 148; *see Cunningham*, 81 Wis. at 486 (Sections 3, 4, and 5 of Article IV are "mandatory and imperative, and are not subject to legislative discretion"); *see also Johnson I*, 2021 WI 87, ¶ 38 ("[W]e will ensure preservation of … rights explicitly protected under … Article IV, Sections 3, 4, or 5 of the Wisconsin Constitution."). This Section therefore "limits legislative discretion" when necessary to achieve and secure "equality of representation." *Lamb*, 83 Wis. At 149–50. After all, as this Court has explained, "[h]ad the constitution … remained silent" about redistricting, "it is quite obvious that the legislature would have possessed [sweeping] discretionary powers." *Id.* at 147. But it was precisely "because the framers of the constitution were unwilling to vest such discretionary and unlimited powers in the legislature that they prescribed specific methods, restrictions, and limitations upon the exercise of such powers." *Id.*

177. First, the Legislative Plans violate Article IV, Sections 3, 4, and 5 because in drawing their "least change" plans, the Republican leadership of the Legislature improperly seized the "discretionary and unlimited powers" that the Wisconsin Constitution prohibits. *Lamb*, 83 Wis.

At 147. The Constitution does not allow the Legislature to override Article IV's requirements to manipulate legislative districts for purely self-interested or partisan purposes. The people of this State—through their Constitution—forbade such self-dealing and permanent entrenchment. And yet, the Legislature failed to abide by Article IV's requirements. The Legislature failed to maximize population equality, needlessly splintered counties, and subordinated geographic compactness—all in an effort to maximize partisan advantage.

178. Second, the Legislative Plans violate Section 3, 4, and 5 of Article IV because they are objectively inferior to other plans that were proposed to this Court that better complied with these constitutional requirements, thus demonstrating that compliance with the constitutional requirements is achievable if the mapmaker is not subordinating constitutional requirements to partisan gain. For example, the Legislative Plan for the Senate had a larger population deviation than the Prior CMS Senate Plan, had compactness scores that were inferior to those of the Prior CMS Senate Plan (on four distinct metrics), and broke more counties (42 rather than only 28) into more pieces (115 rather than only 86) than did the Prior CMS Senate Plan. Likewise, the Legislative Plan for the Assembly had a larger population deviation than the Prior CMS Assembly Plan, had

compactness scores that were inferior to those of the Prior CMS Assembly Plan (on four distinct metrics), and broke more counties (53 rather than only 40) into more pieces (212 rather than 175) than did the Prior CMS Assembly Plan. And both the Prior CMS Senate Plan and the Prior CMS Assembly Plan preserved wholly intact all of Wisconsin's 7,136 wards—a perfect record of ward integrity. *See* DeFord Report at 13–19 (App. 250–83). In sum, the Legislative Plans do not adhere to the requirements of Article IV, which can be demonstrated by comparing them to the Prior CMS Plans.

179. Third, the Legislative Plans violate Article IV, Sections 3, 4, and 5 because the "least change" approach adopted by the Legislature ***itself*** overrode the Constitution's express redistricting provisions. Instead of prioritizing the actual constitutional criteria that districts contain an equal number of inhabitants, that they be bounded by county, town, or ward lines, and that they be contiguous and in as compact form as practicable, the Legislature urged this Court to prioritize "least change" in its directive to the parties about the remedial plans they could submit to the Court.

180. Nothing in Wisconsin's Constitution "licenses the legislature to adopt a map that subordinates these criteria to an extra-legal preference for core retention or the avoidance of incumbent pairings." Yablon, *Gerrylaundering*, 97 N.Y.U. L. REV. at 1040. "If lawmakers had practical

options for splitting fewer subdivisions and improving compactness, they were presumably obliged to take them." *Id.* Here, they did not take those practical options. These principles, more broadly, are why this Court's "least change" order is such an outlier. "It is highly unusual for courts to prioritize continuity in the face of credible claims that the existing map is politically biased." *Id.* at 1053; *see id.* (noting that "the courts that have adopted least-change plans have done so only after assuring themselves that their updated map will not create or perpetuate a partisan inequity").

181. The Legislative Plans' failure to adhere to the redistricting requirements set forth in Article IV, Sections 3, 4, and 5 harms Petitioners, who have been cracked or packed into districts that dilute and debase their votes for partisan gain, rather than living in districts that adhere to Article IV of the Wisconsin Constitution.

COUNT V
Unlawful Partisan Gerrymandering in Violation of the Wisconsin Constitution's Separation-of-Powers Requirements, Article V, Section 10

182. Petitioners incorporate paragraphs 1–181 as if fully set forth herein.

183. The Wisconsin Constitution "embodies a structural separation of powers among the three branches of government, restraining this court from exercising anything but judicial power." *Johnson I*, 2021 WI 87, ¶ 65.

184. Article V, Section 10(2)(a) of the Wisconsin Constitution provides in relevant part: "If the governor rejects [a] bill, the governor shall return the bill, together with the objections in writing, to the house in which the bill originated. The house of origin shall enter the objections at large upon the journal and proceed to reconsider the bill. If, after such reconsideration, two-thirds of the members present agree to pass the bill notwithstanding the objections of the governor, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present it shall become law."

185. The veto power gives the Governor "such an important role … in the entire legislative process" that it is "reasonable to conclude that the framers of the constitution intended to require [the Governor's] participation in all decisions relating to legislative reapportionment, a specific issue which obviously affects the legislative process as a whole." *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 557, 126 N.W.2d 551, 559 (Wis. 1964). Redistricting, of course, affects the entire legislative process to an equal or greater degree; the Governor's role in approving or rejecting redistricting maps provides a necessary check on self-interested legislators who may seek to maximize their reelection odds in a particular

district. Unlike individual legislators, the Governor is "the one institution guaranteed to represent the majority of the voting inhabitants of the state." *Id.* at 556–57, 126 N.W. 2d at 558.

186. The doctrine of separation of powers is "implicit in the division of governmental power among the judiciary, legislature, and executive branches." *State ex rel. Friedrich v. Cir. Ct. for Dane Cnty.*, 192 Wis. 2d 1, 13, 531 N.W.2d 32, 36 (1995) (quoting *State v. Holmes*, 106 Wis. 31, 42, 315 N.W.2d 703, 708 (1982)). The three branches are separate, co-equal branches of government, and "no branch [may] arrogate to itself control over the other except as is provided by the constitution, and no branch [may] exercise the power committed by the constitution to another." *Id.* (quotation marks omitted). Separation of powers is a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 7, 376 Wis. 2d 147, 897 N.W.2d 384. The Governor's veto, for instance, is an essential tool in checking the power of the Legislature. *Bushnell v. Town of Beloit*, 10 Wis. 195, 225 (1860).

187. Thus, if the Legislature passes a redistricting map, the map is vetoed by the Governor, and the Legislature then "fail[s] to override his veto," the vetoed map "did not survive the political process," was not

enacted into law, and thus should not be used by this Court even "as a starting point," *id.* ¶ 17 (majority opinion); *id.* ¶ 72 n.8 (plurality opinion)—much less as an end point that the Court orders into effect.

188. The Legislative Plans thus violate Article V, Section 10 of the Wisconsin Constitution because it was a violation of separation of powers for this Court to enact precisely the same legislative map that was vetoed by the Governor but not overridden by the Legislature. By adopting the exact map for which the Legislature could muster enough votes to pass initially but not to override the veto, this Court improperly served as a super-legislature, supplying the extra floor votes to put the override over the top. Although the Court effectively overrode the Governor's veto—an act that even the Legislature had not attempted—the Judiciary does not share this power with the legislative branch. *See Stern v. Marshall*, 564 U.S. 462, 483 (2011) ("Under the basic concept of separation of powers," the judicial power to interpret and apply the law "can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto" (internal quotation marks omitted)).

189. Without two-thirds support in the state legislature, a Governor's veto typically precludes a bill from becoming law. Here,

however, the Court nullified the effect of the Governor's veto and the power vested in one-third of the Legislature (plus one) to prevent the override of that veto. When "the power of judging [is] joined with the legislative, the life and liberty of the subject [is] exposed to arbitrary control." FEDERALIST PAPERS NO. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961). In choosing the same map vetoed by the Governor, the Judiciary "substantially interfere[d]" with the Governor's role in the lawmaking process, thereby violating separation of powers. *State v. Horn*, 226 Wis. 2d 637, 644, 594 N.W.2d 772, 776 (1999); *In re Grady*, 118 Wis. 2d 762, 776, 348 N.W.2d 559, 566 (1984); *see also Johnson III*, 2022 WI 19, ¶ 187 (Karofsky, J., dissenting) ("Here, the Legislature, having failed to override the gubernatorial veto, submitted the very same proposal to us. By now implementing that failed bill, this court judicially overrides the Governor's veto, thus nullifying the will of the Wisconsin voters who elected that governor into office. But our constitution provides only one avenue to override such a veto; no judicial override textually exists.").

190. This violation of Article V, Section 10 harms Petitioners as citizens for whose benefit this separation of powers was designed.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for the following relief to be entered forthwith:

a. a declaration that the senate and assembly districting plans violate the Equal Protection Clause in Article I, Section 1;
b. a declaration that the senate and assembly districting plans violate the Free Speech and Right to Assemble and Petition Clauses in Article I, Sections 3 and 4;
c. a declaration that the senate and assembly districting plans violate the Free Government Clause in Article I, Section 22;
d. a declaration that the senate and assembly districting plans violate the redistricting requirements in Article IV, Sections 3, 4, and 5;
e. a declaration that the senate and assembly districting plans violate the Wisconsin Constitution's separation-of-powers requirements, including the veto provisions in Article V, Section 10;
f. an injunction prohibiting Respondents from administering any senate or assembly election until new senate and assembly redistricting plans that comply with the Wisconsin Constitution are established;

g. the establishment of new senate and assembly redistricting plans that comply with the Wisconsin Constitution and fully cure all constitutional violations in the current senate and assembly redistricting plans;

h. following the establishment of new senate and assembly redistricting plans that fully comply with the Wisconsin Constitution, an order providing for special senate elections in 2024, for two-year terms, in all odd-numbered senate districts; and

i. any such other relief that this Court deems just and proper.

Dated: August 4, 2023

Respectfully submitted,

Electronically signed by Sarah A. Zylstra

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