IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, ROGER ANCLAM, EMILY BUNTING, MARY LYNNE DONOHUE, HELEN HARRIS, WAYNE JENSEN, WENDY SUE JOHNSON, JANET MITCHELL, ALLISON SEATON, JAMES SEATON, JEROME WALLACE, and DONALD WINTER, Plaintiffs, v. BEVERLY R. GILL, JULIE M. GLANCEY, ANN S. JACOBS, STEVE KING, DON MILLIS, and MARK L. THOMSEN. Defendants.	)	No. 15-cv-421-bbc

---

PLAINTIFFS' BRIEF ON REMEDIES

Peter G. Earle
LAW OFFICE OF PETER G. EARLE
839 North Jefferson Street, Suite 300
Milwaukee, WI 53202
(414) 276-1076
peter@earle-law.com

Michele Odorizzi
MAYER BROWN, LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600
modorizzi@mayerbrown.com

J. Gerald Hebert
Ruth Greenwood
Annabelle Harless
Danielle Lang
CAMPAIGN LEGAL CENTER
1411 K Street NW, Suite 1400
Washington, DC 20005
(202) 736-2200
ghebert@campaignlegalcenter.org
rgreenwood@campaignlegalcenter.org
aharless@campaignlegalcenter.org
dlang@campaignlegalcenter.org

Nicholas O. Stephanopoulos
UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th St., Suite 510
Chicago, IL 60637
(773) 702-4226
nsteph@uchicago.edu

Douglas M. Poland
RATHJE & WOODWARD, LLC
10 East Doty Street, Suite 507
Madison, WI 53703
(608) 960-7430
dpoland@rathjewoodward.com

Dated: December 21, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities **Page(s)**

INTRODUCTION

In its November 21, 2016 opinion, this Court held that Wisconsin's Act 43 (the "Current Plan") is an unconstitutional partisan gerrymander. The Court concluded that the Current Plan "was intended to burden the representational rights of Democratic voters throughout the decennial period," that the Plan "has had its intended effect," and that this "discriminatory effect is not explained by the political geography of Wisconsin nor is it justified by a legitimate state interest." Trial Op. (Dkt. 166) at 2-3. The Court also instructed the parties to file briefs regarding "the nature and timing of all appropriate remedial measures," including "all evidentiary and legal support they believe is required for the court to make its ruling." *Id*. at 116. This submission responds to the Court's order.

In plaintiffs' view, a set of overarching principles should guide the remedy phase of this litigation. With respect to *timing*, any appeal by defendants of this Court's ruling on liability should be decided by the Supreme Court during its 2017 term, and the Current Plan should be replaced by a proper remedial map in the 2018 and 2020 elections. With respect to *substance*, a proper remedial map is one that treats the major parties reasonably symmetrically over a range of plausible electoral conditions (and that also complies with all other federal and state legal requirements). And with respect to *process*, this Court has a great deal of discretion, which it should exercise so as to ensure that the timing and substance goals are met.

Plaintiffs develop these themes below while addressing a series of more specific issues. *First*, the Court should immediately enjoin any further use of the Current Plan so that defendants may appeal if they wish; at the same time, the Court should begin the remedy phase of this litigation, which should proceed simultaneously with any appeal. *Second*, the Court may, but need not, give Wisconsin's elected branches the chance to enact a proper remedial map. The

elected branches' illegal conduct in passing and defending the Current Plan, as well as their own position that they are barred by the Wisconsin Constitution from redistricting again until the 2020 cycle, are compelling reasons for the Court not to extend them this opportunity. *Third*, if the Court nevertheless permits the elected branches to design a remedy, it should provide them with a firm timetable, clear line-drawing criteria, and concrete disclosure instructions. *Fourth*, if the Court becomes responsible for crafting a remedial map—either in the first instance or because the elected branches are unable or unwilling to act—it would be bound by even stricter line-drawing constraints, but would be free to select from an array of procedural options. And *fifth*, to assist the Court with scheduling, plaintiffs include a calendar with suggested deadlines for all relevant actors and actions.

ARGUMENT

A. The Court Should Immediately Enter an Injunction and Start the Remedial Process.

To begin with, as soon as possible, the Court should enter an injunction barring any further use of the Current Plan. Such an injunction is the usual first step in the remedial process whenever a district map has been found to violate a federal or state legal requirement. *See, e.g.*, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 861 (E.D. Wis. 2012) (*Baldus II*) ("enjoining [defendants] from implementing Act 43 in its current form" after finding a Voting Rights Act violation); *Baumgart v. Wendelberger*, 2002 WL 34127471, at *1 (E.D. Wis. May 30, 2002) (entering "an order enjoining the eight members of the Wisconsin Elections Board from taking any actions related to elections under the existing [and unconstitutional] apportionment plan"); *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 632 (E.D. Wis. 1982) ("enter[ing] an order . . . enjoining the defendant state Elections Board from preparing for

or administering any elections using the current [and unconstitutional] Senate and Assembly districts").

Beyond its consistency with judicial practice, an immediate injunction will allow defendants (if they wish) to appeal this Court's liability ruling to the Supreme Court on a timetable enabling the Supreme Court to reach a decision during its 2017 term (and so before the 2018 election). At present, defendants cannot appeal because this Court has not yet entered "an order granting or denying . . . an interlocutory or permanent injunction." 28 U.S.C. § 1253. As soon as the Court enjoins any further use of the Current Plan, defendants *will* be able to appeal, with a deadline of "thirty days from the judgment, order or decree, appealed from, if interlocutory." *Id*. § 2101(b); *see also id*. (specifying a sixty-day deadline for appeal from a *final* judgment). As described further below, an appeal on this timetable will likely result in a Supreme Court decision by June 2018 at the latest. However, if this Court were to delay significantly the entry of an injunction—for example, until the remedial process has concluded—then it is likely that any Supreme Court appeal would not be resolved until the 2018 term or even later (and so after the 2018 election).

In addition to enabling defendants to appeal this Court's liability ruling, an immediate injunction will begin the remedy phase of this litigation. This phase can and should unfold simultaneously with any appeal. Under Federal Rule of Civil Procedure 62(c), "While an appeal is pending from an interlocutory order . . . that grants, dissolves, or denies an injunction, *the court may suspend, modify, restore, or grant an injunction on terms . . . that secure the opposing party's rights.*" Fed. R. Civ. P. 62(c) (emphasis added). This Court thus plainly has jurisdiction to impose further remedies after entering its initial injunction, even if that injunction is appealed. *See, e.g., Robbins v. Pepsi-Cola Metro. Bottling Co.*, 800 F. 2d 641, 643 (7th Cir. 1986)

(discussing the district courts' "'long-recognized power to grant injunctions pending appeal'"); *United States v. Articles of Food and Drug*, 441 F. Supp. 772, 774 (E.D. Wis. 1977) ("[W]hen an appeal is taken from an interlocutory injunction, the Court in its discretion may suspend or modify the operation of the injunction during the pendency of the appeal.").

Indeed, in redistricting cases, courts typically deny attempts by defendants to stay remedial proceedings until their merits appeals have been decided. *See Larios v. Cox*, 305 F. Supp. 2d 1335, 1336 (N.D. Ga. 2004) (*Larios I*) ("[D]istrict courts evaluating redistricting challenges have generally denied motions for a stay pending appeal."). The reason why these efforts are rebuffed is simple: Staying the remedial process until the merits appeal is over may significantly delay the imposition of a new district plan—and thus result in another election conducted under the unlawful old map. *See id*. at 1344 ("[T]he practical effect of a stay would be that the State of Georgia would conduct the 2004 elections again using unconstitutional apportionment plans."); *see also, e.g. Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("[I]t would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan."); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 560 (E.D. Va. 2016) ("To force the Plaintiffs to vote again under the Enacted Plan even if the Supreme Court affirms our finding that the Plan is unconstitutional . . . constitutes irreparable harm to them . . . ."); *Johnson v. Mortham*, 926 F. Supp. 1540, 1543 (N.D. Fla. 1996) ("Plaintiffs will suffer significant and irreparable injury if the stay is granted.").

This logic is squarely applicable here. If this Court were to postpone this case's remedy phase until after the Supreme Court disposed of any merits appeal by defendants, then it would be very difficult to put in place a new plan in time for the 2018 election, and plaintiffs would likely be forced to suffer another election held using state assembly districts this Court has held

to be unconstitutional. As noted above (and further explained below), the Supreme Court will probably decide any merits appeal by defendants by June 2018. The remedial process could also take as much as a year to play out, especially if Wisconsin's elected branches are unable or unwilling to act and this Court must design a remedial plan. Clearly, if this process unfolds *after* a Supreme Court decision, rather than *during* any appeal to that Court, then plaintiffs may well have to wait until 2020—the last election of the decade—before finally enjoying their constitutional right to vote under a lawful map.

Accordingly, this Court should enjoin at once any further use of the Current Plan. As soon as this injunction is entered, the Court should also commence the remedy phase of this litigation. Furthermore, the Court should reject any motion by defendants to stay the remedial process. In this way, the Court can ensure *both* that any merits appeal by defendants is resolved during the Supreme Court's 2017 term *and* that a proper remedial map is enacted in time for the 2018 election.

B. The Court Should Not Permit Wisconsin's Elected Branches to Try to Enact a Proper Remedial Plan.

After the Current Plan is enjoined, what then? The next step in redistricting cases is usually (but not necessarily) for the court to give the elected branches a reasonable opportunity to enact a map that complies with all applicable legal requirements. As the Supreme Court has stated, "When a federal court declares an existing apportionment scheme unconstitutional, it is . . . appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *see also, e.g.*, *Reynolds*, 377 U.S. at 586 (noting that "judicial relief becomes appropriate only when a legislature fails to reapportion in a timely fashion after having had an adequate opportunity to do so").

This policy is rooted in the political nature of redistricting, a feature that is thought (in most cases) to render the elected branches preferable to the judiciary for mapmaking purposes. *See, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973) ("[T]he apportionment task, dealing as it must with fundamental 'choices about the nature of representation' . . . is primarily a political and legislative process."). However, as the above citations indicate, judicial deference to the elected branches is *not* absolute. Rather, the elected branches get the first shot at passing a remedial map only when this approach is "practicable," and their opportunity to act lasts only so long as is "reasonable" and "timely." "[W]hen those with legislative responsibilities do not respond, or . . . it [is] impractical for them to do so," courts must "devise and impose a reapportionment plan." *Wise*, 437 U.S. at 540.

Courts therefore incur responsibility for redistricting under one of two scenarios. The first is when they have invalidated a plan and the elected branches fail to enact a proper remedial map within a specified timeframe. Such failure can result from legislative gridlock, from disagreement between the legislature and the governor, or from other factors. *See Who Draws the Lines?*, All About Redistricting, http://redistricting.lls.edu/who-courtstate10.php (showing that, in the current cycle, courts designed full state legislative plans in Kansas, Minnesota, Nevada, and New Mexico, and partial plans in Texas and Wisconsin[1]). The second scenario arises when, based on past experience, courts do not believe that the elected branches are likely to produce a valid remedial map. In this circumstance, courts do not provide the elected branches with an opportunity that will probably be squandered, but rather impose a suitable remedy themselves.

[1] The *Baldus* court redrew certain state assembly districts in Milwaukee after it struck down the original districts on Voting Rights Act grounds and Wisconsin's elected branches failed to enact a remedial plan (or, indeed, to submit any remedial proposal to the court). *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860, 862 (E.D. Wis. 2012) (*Baldus III*).

The *Hays* litigation that defendants have extensively cited in their earlier briefing provides a good example of a court declining to permit a legislature with a poor record to try to craft a remedial plan. Louisiana's elected branches had "persist[ed] in defending the indefensible," "doggedly clinging to an obviously unconstitutional plan." *Hays v. Louisiana*, 936 F. Supp. 360, 372 (W.D. La. 1996). The court found that "the Legislature has left [it] no basis for believing that, given yet another chance, it would produce a constitutional plan," and ordered into effect its own map. *Id*. Similarly, in *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. 1991), *aff'd sub nom. Richards v. Terrazas*, 505 U.S. 1214 (1992), the court faced Texas officials preoccupied with "partisan concerns and preservation of incumbents" rather than "minimal protection to the electoral interests of racial and ethnic minorities." *Id*. at 838. Seeing "no real hope that further deference to the legislature . . . would yield any result other than continued protection of some members' self-interests to the exclusion of minorities' rights," the court put into place its own plan. *Id*. at 839; *see also, e.g.*, *LULAC v. Perry*, 457 F. Supp. 2d 716, 721 (E.D. Tex. 2006) (court immediately imposing its own remedy in Voting Rights Act case); *Johnson v. Miller*, 929 F. Supp. 1529, 1567 (S.D. Ga. 1996) (same in racial gerrymandering case).

These cases are directly on point here, where Wisconsin's elected branches have compiled a record every bit as objectionable as Louisiana's in *Hays*, Texas's in *Terrazas* and *LULAC*, and Georgia's in *Johnson*. In its liability ruling, the Court held that the pursuit of raw partisan advantage suffused most of the line-drawing choices that the Current Plan's drafters made. *See* Trial Op. (Dkt. 166) at 63-74. Wisconsin's elected branches also violated the Voting Rights Act when they enacted the Plan, denying Latino voters in Milwaukee the opportunity to elect their candidates of choice. *See Baldus II*, 849 F. Supp. 2d at 854-58. And as discussed

below, both the Plan's drafters and Wisconsin's elected branches were extraordinarily deceptive and secretive about their mapmaking activities. They repeatedly lied about the criteria they employed and asserted a fraudulent legislative privilege in an effort to prevent their behavior from becoming public. *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 843 F. Supp. 2d 955, 958-60 (E.D. Wis. 2012) (*Baldus I*). This shameful performance should give the Court no confidence that Wisconsin's elected branches have suddenly become capable of enacting a proper remedial plan.

That is all bad enough. But there is another reason why the Court should not allow Wisconsin's elected branches to try to produce a valid remedy. During the *Baldus* litigation, defendants argued emphatically that, under the Wisconsin Constitution, the elected branches may enact only one state legislative plan per decade. Defendants based this position on a provision stating that, "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. According to defendants, this provision, as construed by the Wisconsin Supreme Court, "means the Legislature may enact only one redistricting statute every ten years." Defs' Br. Regarding Art. 4, Section 3 of the Wis. Const. Relating to Redist. at 3, *Baldus v. Members of Wis. Gov't Accountability Bd.*, No. 11-CV-562-JPS-DPW-RMD (E.D. Wis. Feb. 22, 2012) (attached as Ex. A). There is "a longstanding and unbroken prohibition against a second redistricting," *id.* at 10, so "[o]nce the Legislature has enacted a redistricting plan . . . the Legislature's power to pass any other redistricting plan is 'exhausted,'" *id.* at 4 (quoting *State ex rel. Att'y Gen. v. Cunningham*, 51 N.W. 724, 740 (Wis. 1892)).

Due to this construction of the Wisconsin Constitution, defendants warned at the *Baldus* trial that they could not settle with plaintiffs. Settlement would have required the passage of a new state legislative map, but "there is, unfortunately, this impediment to proceeding in that fashion." Tr. of Court Trial (II) at 27, *Baldus v. Members of Wis. Gov't Accountability Bd.*, No. 11-CV-562-JPS-DPW-RMD (E.D. Wis. Feb. 21, 2012). Sure enough, defendants did not settle. Nor, after losing the case and having the court invalidate two districts under Section 2 of the Voting Rights Act, did defendants submit (or the elected branches enact) a remedial plan. *See Baldus III* 862 F. Supp. 2d at 862 ("We thus have nothing at this stage from the Legislature to guide us in resolving this final problem."). Again, according to defendants, for the elected branches to have passed a new map in response to a court order would have violated the Wisconsin Constitution.

Assuming defendants' arguments in *Baldus* were made in good faith, there is a clear implication for this Court: It must impose a remedy itself because Wisconsin's elected branches are constitutionally barred from engaging again with redistricting until the 2020 cycle. If defendants now maintain that the elected branches *are* empowered to enact a remedial plan, they should explain to the Court what has changed between 2012 and today. Notably, Article 4, Section 3 of the Wisconsin Constitution has *not* been amended in this period, nor has the provision been construed by any Wisconsin court.[2]

[2] Nor can defendants rely on Judge Wood's ruling at the *Baldus* trial. She explained that, under the provision's text, the Legislature is free to tackle redistricting more than once *during its first session after the decennial census*. *See* Tr. of Court Trial (III) at 65, *Baldus v. Members of Wis. Gov't Accountability Bd.*, No. 11-CV-562-JPS-DPW-RMD (E.D. Wis. Feb. 22, 2012) (attached as Ex. B) ("We see nothing in Article IV, Section 3 that forecloses the General Assembly from revisiting its plans of redistricting and reapportionment *during its current session*." (emphasis added)); *id*. at 66 (noting "the Legislature's authority to amend the redistricting plan *before the end of the current session*" (emphasis added)); *id*. at 68-69 (observing that "the state Legislature might correct any possible flaws in the legislation *while it is still in its first session after the census*" (emphasis added)); *id*. at 70-71 ("Our conclusion, therefore, is that the Wisconsin Constitution requires only that the Legislature discharge its redistricting and reapportionment duties *during its first session after the 2010 decennial census* . . . ." (emphasis

C. If the Court Does Allow Wisconsin's Elected Branches to Try to Design a Valid Remedy, It Should Give Them a Strict Deadline and Detailed Instructions.

If the Court nevertheless grants Wisconsin's elected branches the opportunity to try to design a valid remedy, what directions should it give to them? *First*, the Court should require the Wisconsin Legislature to pass, and the Governor to sign into law, new state legislative maps by April 1, 2017.[3] As described below, this deadline is necessary in order to allow sufficient time for a court-supervised remedial process to unfold if the elected branches are unable or unwilling to act. This deadline would also give the elected branches *100 days* from the filing of this brief—and *130 days* from the Court's ruling on liability on November 21, 2016—to enact new maps. By comparison, the drafting and passage of Act 43 took about three months (April to July 2011), and only *nine days* (July 11-20, 2011) elapsed between the bill's introduction and the Assembly's and Senate's votes in favor of it. *See* Trial Op. (Dkt. 166) at 7-15. There can thus be no doubt that this deadline is reasonable, especially since the elected branches would already have at their disposal all the data they previously assembled.

Indeed, the deadline is quite generous compared to courts' scheduling orders in other redistricting cases. In *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016), for instance, after finding North Carolina's congressional plan unconstitutional due to racial gerrymandering,

---

added)). Judge Wood never suggested (nor could have given the provision's plain text) that the Legislature has the power to enact a new state legislative plan in its *fourth* session after the decennial census.

And nor can defendants argue that the Wisconsin Constitution is preempted by the Federal Constitution. State law is preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" federal law. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also, e.g., Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995) ("Once a court has found a federal constitutional or statutory violation . . . a state law cannot prevent a necessary remedy."). Here, though, the Wisconsin Constitution does *not* "stand[] as an obstacle to," or "prevent a necessary remedy." If *this Court* imposes a proper remedial map, then Wisconsin's elected branches will not have to breach their constitutional duty not to redraw district lines more than once per decade. In other words, it is perfectly possible here to satisfy *both* the Wisconsin Constitution *and* the federal constitutional prohibition on partisan gerrymandering.

[3] Only Wisconsin's state assembly plan has been challenged in this litigation. However, because state assembly districts are nested within state senate districts, *see* Wis. Const. art. IV, § 5, any new state assembly map will also necessarily result in a new state senate map.

the court "require[d] that new districts be drawn within *two weeks* of the entry of this opinion." *Id*. at 627 (emphasis added). Likewise, in *Larios I*, after determining that Georgia's state legislative plans were malapportioned, the court gave Georgia's elected branches *nineteen days* to enact new maps. *See* 305 F. Supp. 2d at 1336; *see also, e.g*., *Vieth v*. *Pennsylvania*, 195 F. Supp. 2d 672, 679 (M.D. Pa. 2002) (ordering a new congressional plan to be enacted within three weeks); *Johnson*, 926 F. Supp. at 1494 (ordering a new congressional plan to be enacted within thirty-five days).

Second, this Court should make clear to Wisconsin's elected branches that a proper remedial state assembly plan, in addition to complying with all other federal and state legal requirements, must treat the major parties reasonably symmetrically over a range of plausible electoral conditions. *See, e.g*., *Gorin v*. *Karpan*, 775 F. Supp. 1430, 1446 (D. Wyo. 1991) (deeming it an "appropriate function of this court . . . to provide the legislature with guidelines for legislative action"). This requirement for the elected branches stems from their obligation to remedy fully—and the Court's duty to *ensure* they have remedied fully—their constitutional violation. *See, e.g*., *White v*. *Weiser*, 412 U.S. 783, 797 (1973) ("The District Court should not . . . refrain from providing remedies fully adequate to redress constitutional violations which have been adjudicated and must be rectified."); *LULAC v*. *Clements*, 986 F.2d 728, 814 (5th Cir. 1993) (the elected branches must "develop a plan that fully remedies the current vote dilution"). Here, an essential component of the constitutional offense is a large and durable partisan asymmetry. *See* Trial Op. (Dkt. 166) at 90. It cannot be allowed to persist in any remedial map.

The asymmetry of any plan enacted by the elected branches can be assessed using either statewide seat and vote shares, *see id*. at 74-80, or a measure of symmetry such as the efficiency gap, *see id*. at 80-90. In both cases, because the map will not yet have been used in an election,

its performance will have to be analyzed through some version of the methods employed by Professor Mayer, *see id*. at 24-25, and Professor Gaddie, *see id*. at 12-13. *See also id*. at 75-78 (discussing both experts' techniques). Under these methods, the following steps are advisable:

1. Construct ward-level models in which state assembly votes in a prior election are a function of presidential votes in that same election, demographic variables, and incumbency status. *See* Mayer Rpt. (Dkt. 54, Tr. Ex. 2) at 5-28 (describing this process and noting that it is standard in the literature).

2. Use these models to produce estimates of the numbers of Democratic and Republican votes if each ward is placed in an open-seat district, a district with a Democratic incumbent, or a district with a Republican incumbent. *See id*. at 31-34 (summarizing this stage of the analysis).

3. Aggregate these ward-level estimates to the district level, taking into account the presence or absence of incumbents, and thus predict each party's votes in each new district. *See* Mayer Rebuttal Rpt. (Dkt. 95, Tr. Ex. 114) at 22-25.

4. Use these district-level vote predictions to calculate each party's statewide seat and vote shares as well as the efficiency gap. *See* Mayer Rpt. (Dkt. 54, Tr. Ex. 2) at 38-47.

5. Conduct a swing analysis, shifting each party's statewide vote share up and down by several percentage points in each direction, and recalculate each party's statewide seat share and the efficiency gap for each shift. *See* Trial Op. (Dkt. 166) at 75-80, 83-84, 88 (discussing and relying on sensitivity testing); Mayer Rebuttal Rpt. (Dkt. 95, Tr. Ex. 114) at 26-29; Jackman Decl. Ex. D (Dkt. 58-4, Tr. Ex. 93) at 1-6.

To be clear, these steps are not a homework assignment for the elected branches, which should be free to conduct as little (or as much) analysis as they see fit. Rather, the steps represent plaintiffs' view—based on the academic literature, the expert opinions in this case, and the Court's own liability ruling—as to how the size and the durability of a plan's partisan asymmetry should be evaluated when that plan has not yet been used in an election. *See* Trial Op. (Dkt. 166) at 89-90 n.314 (noting that "even absent an actual electoral outcome," the resilience of a plan's asymmetry can be ascertained "by employing a swing analysis"). The Court should rely on the steps' conclusions (which would be supplied by experts) to determine whether any remedial plan

enacted by the elected branches does, in fact, fully remedy the constitutional violation by treating the major parties reasonably symmetrically over a range of plausible electoral conditions.

This approach, it is worth noting, is methodologically but *not* conceptually novel. To the contrary, it is exactly how remedial plans are assessed in contexts such as one-person, one-vote and Section 2 of the Voting Rights Act. In these areas, the elected branches also have the discretion to craft new maps without employing any particular technique. But with the aid of litigants and experts, courts then *scrutinize* the elected branches' outputs using well-accepted methods to ensure that the plans are consistent with the Constitution's equal population requirement and the Act's promise of representation for minority voters. The *tools* here are different: precinct-level models and swing analyses rather than population deviations and racial polarization estimates. But the *idea* is the same: harnessing social science to make certain the law is followed. *Cf*. Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1517, 1518 (2002) ("Law and social science are perhaps nowhere more mutually dependent than in the voting-rights field.").[4]

Lastly, the Court should require defendants to disclose all information that may be relevant to assessing the validity of any remedial plan that Wisconsin's elected branches enact. These materials include: (1) shape files that can be inputted into, and analyzed using, standard redistricting software; (2) all legislative history for the plan, such as transcripts of committee hearings and floor debates; (3) a description of the process that was followed in designing the

[4] How symmetric (and how durably so) a remedial plan must be is not a question that must be answered at this early juncture. In its prior decisions, this Court has held that how *asymmetric* a map must be to satisfy the discriminatory effect prong of the test for partisan gerrymandering is an issue that can be resolved in due time, as courts gain more experience with these kinds of cases. *See* Trial Op. (Dkt. 166) at 89 n.311 ("we need not reach the propriety" of any particular asymmetry threshold); Summ. Jdgmt. Op. (Dkt. 94) at 26 ("determining a threshold may be something that can wait for another day"). The same logic applies here. If Wisconsin's elected branches manage to enact a remedial plan, the map may be obviously defective because it is severely and persistently asymmetric. Conversely, the map may be self-evidently valid because it is highly symmetric across all plausible electoral conditions. The Court need not attempt ex ante to draw a line whose location may not have to be set at all.

plan, including the identity and role of all participants involved in the process; (4) a statement of the criteria that were applied in designing the plan; (5) all correspondence among legislators, staffers, attorneys, political scientists, and anyone else involved in designing the plan; (6) all documents shown to legislators about their new districts; (7) all analyses of the plan's electoral performance; (8) all analyses of the plan's performance in terms of other redistricting criteria; (9) all earlier drafts of the enacted plan; and (10) all analyses of these earlier drafts.

The Court should further order (1) all parties involved in the redistricting process to preserve all materials related to the process, including electronically stored information and hard copies; (2) all parties involved in the redistricting process to conduct their activities using computers that can be made available and accessible should any question arise regarding the completeness of the production; and (3) the heads of Wisconsin's elected branches (State Assembly Speaker Robin Vos, State Senate Majority Leader Scott Fitzgerald, and Governor Scott Walker) to swear under oath that all relevant materials have been produced.

Plainly, all of this information could shed light on the propriety of any remedial plan enacted by Wisconsin's elected branches. Indeed, the Court relied heavily on exactly this kind of evidence in ruling that discriminatory intent underlay the Current Plan, *see id*. at 63-74, and that the Plan's discriminatory effect was unjustified, *see id*. at 103-07. Moreover, it is best practice in remedial redistricting proceedings for courts to insist on the disclosure of such materials. Last month, the court in *Covington v*. *North Carolina*, No. 1:15-CV-399 (M.D.N.C. Nov. 29, 2016), did so, ordering that "defendants provide the Court and the plaintiffs with the information needed to evaluate the constitutionality of the new districts" after striking down the old districts on racial gerrymandering grounds. Slip Op. at 5. So too did the court in *League of Women Voters in Fla*. *v*. *Detzner*, 179 So. 3d 258 (Fla. 2015), "requir[ing] that each party submitting an alternative plan

'identify every person involved in drawing, reviewing, directing or approving the proposed remedial plan'" after finding Florida's congressional plan to be a partisan gerrymander in violation of the Florida Constitution. *Id*. at 261-62.

The release of these materials is particularly important here, where the Current Plan's authors were exceptionally deceptive and secretive about their redistricting activities. The authors lied outright in their testimony in *Baldus*, claiming they "did not know if partisan makeup was considered, that [they] had no access to voting data from past elections, and that only 'population equality, municipal splits, compactness, contiguity, [and] communities of interest' were considered." *Baldus II*, 849 F. Supp 2d at 845. The Legislature also repeatedly asserted privilege over documents and correspondence pertaining to the Plan's design, prompting a series of stunning rebukes from the *Baldus* court. *See Baldus I*, 843 F. Supp. 2d at 958 ("the Legislature . . . now attempts to cloak the record of that action behind a charade masking as privilege"); *id*. at 959 ("the Legislature and the actions of its counsel give every appearance of flailing wildly in a desperate attempt to hide from both the Court and the public the true nature of exactly what transpired in the redistricting process"); *id*. at 960 (sanctioning defendants because the court "will not suffer the sort of disinformation, foot-dragging, and obfuscation now being engaged in by Wisconsin's elected officials and/or their attorneys"); *id*. at 960 (condemning "a poorly disguised attempt to cover up a process that should have been public from the outset"). Plaintiffs fear that history will repeat itself unless this Court makes it unmistakably clear from the start that all relevant information must be preserved and disclosed.

To recap, then, if the Court gives Wisconsin's elected branches the opportunity to enact a remedial plan, it should specify three conditions for them. Any such plan must be passed and signed into law by April 1, 2017. Any such plan must treat the major parties reasonably

symmetrically over a range of plausible electoral conditions. And all materials relevant to assessing the validity of any such plan must be turned over to plaintiffs.

D. If the Court Imposes a Remedy Itself, It Would Be Bound by Stricter Substantive Constraints but Free to Choose Among Several Procedural Options.

If the Court ends up with responsibility for crafting a remedy—either in the first instance or because the elected branches fail to pass a proper remedial map by April 1, 2017—how should it proceed? Substantively, there are four ways in which a court-ordered plan would differ from one produced by the elected branches. *First*, while the elected branches are free to use multimember districts (if they are permitted by state law), a court-ordered plan must use only single-member districts. *See*, *e.g.*, *Wise*, 437 U.S. at 540; *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975). *Second*, while a plan enacted by the elected branches may have a total population deviation as high as 10% without becoming presumptively unconstitutional—unless "it is more probable than not that illegitimate considerations were the predominant motivation behind the plan's deviations," *Harris v. Ariz. Indep. Redist. Comm'n*, 136 S. Ct. 1301, 1309 (2016)—a court-ordered plan should strive for "little more than *de minimis* variation." *Abrams v. Johnson*, 521 U.S. 74, 98 (1997); *see also*, *e.g.*, *Connor v. Finch*, 431 U.S. 407, 414 (1977) (same); *Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir. 1985) (requiring "the [judicial] fashioning of a near-optimal apportionment plan").

Third, the same logic that impels almost perfect population equality in a court-ordered plan also demands almost perfect partisan symmetry.[5] Near-absolute population equality is required because, having found that a plan is malapportioned, a court has no good reason not to cure the violation fully. The *elected branches* may implement policies that are better achieved

[5] Since a plan must be *durably* asymmetric in order to be unlawful, the same logic demands a court-ordered remedial map that is *persistently* symmetric over a range of plausible electoral conditions.

through some level of malapportionment, but a *court* has no license to do so. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 42 (1982) ("This stricter standard applies . . . to remedies required by the nature and scope of the violation."); *Larios v. Cox*, 314 F. Supp. 2d 1357, 1360 (N.D. Ga. 2004) (*Larios II*) ("Because the core constitutional wrong to be remedied in this case was a violation of the Fourteenth Amendment's one person, one vote principle, equality of population was a paramount concern in redrawing the maps."). Here, by the same token, the elected branches may pursue goals that are consistent with a modest degree of partisan asymmetry. But a court has no equivalent prerogative; its aim must be to remedy as scrupulously as possible the partisan gerrymandering violation it has identified.

Another reason why a court-ordered plan must strive for almost perfect partisan symmetry is the Supreme Court's admonition that such a plan must be "'free from any taint of arbitrariness or discrimination.'" *Connor*, 431 U.S. at 414 (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)); *see also, e.g.*, *White*, 412 U.S. at 799 (Marshall, J., concurring in part) ("[T]he judicial remedial process in the reapportionment area . . . should be a fastidiously neutral and objective one, free of all political considerations . . . ."). To avoid partisan unfairness, many courts in *malapportionment* cases have taken into account election results when designing district plans, and tried to ensure that both major parties are treated equitably. *See, e.g.*, *Avalos v. Davidson*, 2002 WL 1895406, at *8 (D. Colo. Jan. 25, 2002); *Balderas v. Texas*, 2001 WL 36403750, at *3 (E.D. Tex. Nov. 14, 2001); *Diaz v. Silver*, 978 F. Supp. 96, 102-04 (E.D.N.Y. 1997); *Good v. Austin*, 800 F. Supp. 557, 566 (E.D & W.D. Mich. 1992); *Prosser v. Elections Bd.*, 793 F. Supp. 859, 871 (W.D. Wis. 1992); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 659 (N.D. Ill. 1991). It would be very odd, to say the least, if courts in *partisan*

gerrymandering cases did not have to exhibit the same sensitivity to their maps' electoral consequences.

And *fourth*, a court-ordered map must respect, not flout, the elected branches' legitimate redistricting objectives. These objectives are typically "expressed in statutory and constitutional provisions." *White*, 412 U.S. at 795; *see also, e.g.*, *Upham*, 456 U.S. at 42 (discussing the "substantive constitutional and statutory standards to which such state plans are subject"). Partisan advantage is *not* a valid redistricting goal. *See, e.g.*, *Personhuballah*, 155 F. Supp. 3d at 564 ("[W]e have found no case holding that we must maintain a specific political advantage in drawing a new plan . . . ."); *Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618, 629 (D.S.C. 2002) ("[I]t is inappropriate for the court to engage in political gerrymandering."). Nor is the protection of incumbents when this aim is a pretext for partisan gain. *See, e.g.*, *Cox v. Larios*, 542 U.S. 947, 949 (2004) (Stevens, J., concurring) (criticizing "drafters' efforts at selective incumbent protection"). And even the *evenhanded* shielding of incumbents ranks low in importance because it is "'inherently more political.'" *Abrams*, 521 U.S. at 84; *see also, e.g.*, *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1091 (D. Kan. 2012) ("subordinating the protection of incumbents to the other legislative goals").[6]

Here, Wisconsin's criteria for state assembly districts are specified by Article 4, Sections 4-5 of the Wisconsin Constitution. The districts must "consist of contiguous territory," "be bounded by county, precinct, town or ward lines," "be in as compact form as practicable," and nest within state senate districts. Wis. Const. art. IV, §§ 4-5. These, then, are the legitimate

[6] Incumbency protection would be an especially problematic goal here, where the current incumbents won their seats under a plan that the Court held is an unlawful partisan gerrymander. To shield these incumbents from competition would mean preserving the fruit of the gerrymander and preventing the constitutional violation from being fully remedied.

redistricting objectives to which the Court must defer in designing a plan—in addition to using single-member districts and pursuing almost perfect population equality and partisan symmetry.

This leaves the question of process: If the Court has to craft a remedy, how should it go about doing so? There is no single answer; rather, over the years, courts have employed a range of procedures when called upon to draw districts. "The modal arrangement involves the appointment of a special master who then submits a plan to the court for its approval or modification." Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131, 1148 (2005). Under this approach, the court provides explicit criteria to the special master, and then verifies (with the parties' assistance) that the criteria have, in fact, been followed. *See, e.g.*, *Favors v. Cuomo*, 2012 WL 928223, at *2 n.5 (E.D.N.Y. Mar. 19, 2012) (noting the changes made by the court to the special master's plan in response to the parties' submissions); *Larios II*, 314 F. Supp. 2d at 1359 (describing "a series of guidelines to inform the Special Master in the process of preparing reapportionment maps").

A second option "involves more active participation by the court, which hires its own expert to help the judges draw the plan themselves." Persily, *supra*, at 1148. This method entails less separation between the court and the plan; the court itself, not a court-appointed special master, is the plan's author. *See, e.g.*, *Essex*, 874 F. Supp. 3d at 1079 ("[F]aced with the daunting prospect of redrawing four new plans on essentially ten days' notice, the Court secured [a redistricting expert] to serve as a technical advisor . . . ."); *Prosser*, 793 F. Supp. at 865 ("We have decided to formulate our own plan, which combines the best features of the two best [proposed] plans.").

A final possibility is for the court to "place the burden of proposing a remedy on the parties to the litigation or, for that matter, any interested party willing to suggest a redistricting

plan." Persily, *supra*, at 1149. "Under this procedure, the court sits back and evaluates alternatives, and selects from a buffet of options presented to it." *Id*. Of course, this approach is only feasible if the court specifies criteria for the submissions; otherwise the court risks being inundated by legally or practically flawed proposals. *See, e.g.*, *Perez v. Texas*, 891 F. Supp. 2d 808, 825 (W.D. Tex. 2012) (analyzing and adopting a "compromise map" that "Plaintiffs and Intervenors conferred and developed"); *Baldus II*, 849 F. Supp. 2d at 864 (ordering that "the parties (and any non-parties who may wish to do so) submit suggested maps that they believe will comply with the applicable provisions found in the VRA, the United States Constitution, and the Wisconsin Constitution").

All three of these options have worked well in the past, and can do so again. But however the Court proceeds (if it becomes responsible for imposing its own remedy), plaintiffs make two recommendations. *First*, the Court should identify, as clearly as possible, its line-drawing criteria. These criteria should be conveyed to any special master the Court appoints, any expert the Court hires, and any parties wishing to submit plans. *Second*, the Court should permit interested parties to make submissions, preferably accompanied by analyses of the plans' electoral consequences and compliance with other legal requirements. These submissions should be made to any special master or expert before she begins her work, or to the Court itself if the Court decides to design a map on its own.[7]

Plaintiffs note, in this regard, that if and when the Court begins to accept submissions, they intend to tender a plan that will unquestionably be a proper remedial map. This plan will treat the major parties *highly* symmetrically over a range of plausible electoral conditions. The plan will also meet all other federal and state legal requirements. The plan will be a "viable . . .

[7] Even if they were not allowed to try to *enact* a remedial plan, Wisconsin's elected branches could certainly *submit* a proposal to the Court. They would not be excluded from the remedial process, then, even if the Court chose to impose its own remedy.

alternative" to the Current Plan as well—one that takes into account practical considerations, commands the support of plaintiffs and a bipartisan coalition of other stakeholders, and could realistically be imposed in its submitted form. Trial Op. (Dkt. 166) at 111. Plaintiffs believe this plan will help the Court to evaluate any map that Wisconsin's elected branches enact (if they are given a chance to do so) and/or to craft its own remedy (if it incurs this duty).

E. The Court Should Set a Schedule for All Relevant Actors and Actions.

Finally, the Court should set a schedule so that any appeal of its liability ruling can be decided during the Supreme Court's 2017 term and the Current Plan can be replaced by a proper remedial map in the 2018 and 2020 elections. For the reasons outlined earlier, the Court should also proceed with the remedy phase while any appeal of its liability ruling is pending.

Starting with the timing of any appeal, the thirty-day clock for filing a notice to appeal will begin ticking as soon as the Court enters an injunction barring any further use of the Current Plan. *See* 28 U.S.C. §§ 1253, 2101(b). After filing a notice of appeal, defendants would then have sixty days, renewable for good cause for up to another sixty days, to file a jurisdictional statement with the Supreme Court. *See* U.S. Sup. Ct. R. 18(3). Next, plaintiffs would have thirty days to file a motion to affirm. *See id*. 18(6). At this point, defendants would have fourteen days to file an opposition to the motion to affirm before the briefs were distributed to the Justices. *See id*. 18(7). Given this schedule, the Court would be able to decide whether to note probable jurisdiction at the beginning of its 2017 term. If the Court expeditiously noted probable jurisdiction, the appeal would be briefed and argued during this term, and the Court would issue a decision by the term's end in June 2018.

To illustrate: If this Court were to enjoin any further use of the Current Plan on February 1, 2017—within a month of the close of the briefing ordered by the Court, *see* Trial Op. (Dkt. 166) at 116—approximately the following timetable would result for any appeal:

- February 1, 2017: Entry of this Court's injunction.
- March 1, 2017: Deadline for defendants' notice of appeal to the Supreme Court.
- July 1, 2017: Deadline for defendants' jurisdictional statement (given a sixty-day extension).
- August 15, 2017: Clerk's distribution of materials to the Justices.
- September 25, 2017: Supreme Court's first conference of the 2017 term.
- October 1, 2017: Probable jurisdiction noted.
- Nov. 15, 2017 – Jan. 15, 2018: Merits briefing.
- Feb. 1, 2018: Oral argument.

Under this timetable (which assumes rapid action by the Justices), any appeal could not be argued before the Supreme Court until the winter of 2018, or more than a year from now. If the Supreme Court took until the end of its term to decide the case—a distinct possibility—roughly nineteen months would have elapsed between this Court's liability ruling and the Supreme Court's judgment. To prevent any more delay, and to ensure that the Supreme Court is able to rule on any appeal during its 2017 term, this Court should therefore enjoin any further use of the Current Plan as soon as possible, and no later than February 1, 2017.

Turning from any appeal to the case's remedy phase, the best way to come up with a reasonable schedule is to work backward. While the Wisconsin Elections Commission has not yet set deadlines for the 2018 election, candidates are likely to be able to begin compiling signatures to place their names on the primary ballot in the early spring of 2018. *See GABIS-009 Ballot Access Checklist – Legislative Candidates*, Wis. Elections Comm'n,

http://elections.wi.gov/forms/gabis-9. A rule of thumb is that a proper remedial plan should be in place "no later than one month before candidates may begin qualifying for the primary ballot." Persily, *supra*, at 1147. Erring on the side of caution, this means that January 1, 2018 should be the deadline for a final remedy to be imposed. This deadline would give candidates enough time to familiarize themselves with the new districts, and to decide whether and where to run.

Next, it would be prudent for the Court to set aside six months for the judicial design of a remedy (if one is required). In the first three months of this period, the Court-appointed special master, the Court-hired expert, or the Court on its own, would receive party submissions, hold hearings, assemble data, and produce a draft plan. In the latter three months, parties would comment on the draft map, more hearings would likely be necessary, and the Court would finalize the map. Redistricting by the elected branches often takes six months or longer, and that is without the greater transparency and fairness that are appropriate for a judicial process. *Cf*. California Redistricting Commission, Final Report on 2011 Redistricting (Aug. 15, 2011) (showing that California's independent redistricting commission needed seven months, from January to August 2011, to draft and finalize its maps).

Similarly, the Court should allocate three months for the parties to analyze and comment on any remedial plan enacted by Wisconsin's elected branches (if they are given the opportunity to pass one) and for the Court to assess the plan's validity. This stage is likely to require further discovery, new expert opinions, briefing by the parties, and possibly another hearing or oral argument. It would be best for all concerned for the stage not to be rushed so the Court would have enough time to consider fully the plan's propriety. *See, e.g.*, *Covington*, Slip Op. at 4 (criticizing "the State's proposed schedule" for failing to "build in any time for the Court to

make changes should the State's new districts be inadequate to remedy the constitutional violation").

Putting these pieces together, plaintiffs recommend the following schedules for the case's remedial phase. (The first schedule assumes Wisconsin's elected branches are given a chance to pass a remedial map. The second assumes they are not, and thus lengthens the periods for judicial action; it could easily be abbreviated in order to conclude this phase sooner.)

Schedule 1:

- April 1, 2017: Deadline for the Wisconsin Legislature to pass, and the Governor to sign into law, a new state legislative plan. All materials required to be disclosed to plaintiffs should also be produced on this date.
- July 1, 2017: Deadline for the Court to determine the elected branches' plan's validity.
- October 1, 2017: Deadline for the Court to produce a draft plan of its own (if the elected branches' plan is found invalid).
- January 1, 2018: Deadline for the Court to finalize its plan (if the elected branches' plan is found invalid).
- Early Spring, 2018: State legislative candidates begin compiling signatures to place their names on the primary ballot.

Schedule 2:

- July 1, 2017: Deadline for the Court to produce a draft plan of its own.
- January 1, 2018: Deadline for the Court to finalize its plan.
- Early Spring, 2018: State legislative candidates begin compiling signatures to place their names on the primary ballot.

As explained earlier, the first schedule leaves ample time for Wisconsin's elected branches to enact a remedial plan: 130 days from the Court's liability ruling, or nearly 50 percent longer than it took for the Current Plan to be designed and passed in 2011. The second schedule also allows more than enough time for the Court to draft and then finalize a remedial map of its

own: roughly six months each for drafting and then finalizing the map. Plaintiffs therefore believe that both of these schedules are eminently reasonable—and indeed, much more deliberately paced than many remedy phases in previous redistricting cases.

CONCLUSION

For the foregoing reasons, the Court should enter an injunction barring any further use of the Current Plan as soon as possible. The Court should then conduct the case's remedial phase as detailed above, with the goal of putting into place a proper remedial map in time for the 2018 and 2020 elections.

Respectfully submitted,

s/ Nicholas O. Stephanopoulos
One of the attorneys for plaintiffs

Peter G. Earle
LAW OFFICE OF PETER G. EARLE
839 North Jefferson Street, Suite 300
Milwaukee, WI 53202
(414) 276-1076
peter@earle-law.com

Michele Odorizzi
MAYER BROWN, LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600
modorizzi@mayerbrown.com

J. Gerald Hebert
Ruth Greenwood
Annabelle Harless
Danielle Lang
CAMPAIGN LEGAL CENTER
1411 K Street NW, Suite 1400
Washington, DC 20005
(202) 736-2200
ghebert@campaignlegalcenter.org
rgreenwood@campaignlegalcenter.org
aharless@campaignlegalcenter.org
dlang@campaignlegalcenter.org

Nicholas O. Stephanopoulos
UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th St., Suite 510
Chicago, IL 60637
(773) 702-4226
nsteph@uchicago.edu

Douglas M. Poland
RATHJE & WOODWARD, LLC
10 East Doty Street, Suite 507
Madison, WI 53703
(608) 960-7430
dpoland@rathjewoodward.com