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Supreme Court of Wisconsin

No. _____

ELIZABETH BOTHFELD, JO ELLEN BURKE, MARY COLLINS, CHARLENE GAEBLER-UHING, PAUL HAYES, SALLY HUCK, TOM KLOOSTERBOER, ELIZABETH LUDEMAN, and LINDA WEAVER,

Petitioners,

vs.

WISCONSIN ELECTIONS COMMISSION; DON MILLIS, ROBERT F. SPINDELL, JR., MARGE BOSTELMANN, ANN S. JACOBS, MARK L. THOMSEN, and CARRIE RIEPLE, in their official capacities as commissioners of the Wisconsin Election Commission; and MEAGAN WOLFE, in her official capacity as administrator of the Wisconsin Elections Commission,

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR AN ORIGINAL ACTION

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INTRODUCTION

Partisan gerrymandering, where mapmakers manipulate district boundaries to maximize one party's advantage and guarantee the outcome of elections before anyone casts a ballot, is incompatible with the fundamental rights guaranteed by the Wisconsin Constitution. Gerrymandered maps systematically discriminate against disfavored citizens because of what those citizens believe about the day's most important political issues, who they associate with to advance those beliefs, and how they vote to translate those beliefs into public policy. In a democracy, these acts—thinking, mobilizing, voting—are sacred. They represent the first-order constituent elements of freedom. And their preservation ultimately rests with this Court.

In 2011, Wisconsin's Republican leaders, newly in charge of the state's legislative process, were enchanted by the prospect of permanent political power. To achieve it, they drew congressional boundaries that assigned Wisconsinites to districts in a manner that systematically favored their own candidates, while systematically disadvantaging their opponents. Map-drawers maximized the number of seats held by Republicans by filling as many districts as they could with enough Republican voters to ensure a favorable outcome, before then topping them off with Democratic voters who would be powerless to elect their preferred candidates. The state's remaining Democratic voters were packed

into a few congressional districts, minimizing their influence. It was the quintessential partisan gerrymander.

For a decade, the gerrymander held. Even as the two parties enjoyed a near-even split among Wisconsin's voters statewide, Republicans maintained an ironclad 5-3 advantage in the congressional delegation. But in 2018, voters elected Democrat Tony Evers to the governorship, a statewide office impervious to gerrymandering. Honoring his constitutional oath, Governor Evers vetoed the Republican legislature's 2021 effort to renew the 2011 gerrymander for another decade.

That should have been the end of Wisconsin's misadventure in partisan gerrymander. With the political branches deadlocked, the decennial redistricting task fell to this Court, an institution that is constitutionally committed to political neutrality. But the Court grievously erred. Rather than select a map based on neutral legal criteria, the Court eschewed any consideration of partisan fairness, and—over the protestations of multiple parties warning about the partisan distortions that would result—required instead a "least-change" map that closely approximated the 2011 gerrymander. *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶ 81, 399 Wis. 2d 623, 967 N.W.2d 469 (2021) ("*Johnson I*").[1]

[1] In dicta, *Johnson I* rejected a right to "proportional representation" and to "partisan fairness." 2021 WI 87, ¶¶ 45–50, 52–53, 61. As Justice Dallet noted in her dissent, "Without an excessive partisan-gerrymandering claim before us, there is no reason for the majority to issue an advisory opinion about

To its credit, the Court quickly recognized the scope of its error. Adjudicating a challenge to the state legislative maps that were adopted in the *Johnson* litigation, in 2023 the Court acknowledged that the "least-change" concept was not as simple as it might have first appeared, "did not fit easily or consistently into the balance of other requirements and considerations essential to mapmaking," and is "unworkable in practice." *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶¶ 61–63, 410 Wis. 2d 1, 53–55, 998 N.W.2d 370, 397 ("*Clarke I*"). The Court thus expressly overruled any portions of its decisions in the *Johnson* litigation that required a least-change approach to redistricting, and—emphasizing its obligation to hold itself "to a different standard than the legislature regarding the partisanship of remedial maps"—it reaffirmed the importance of "consider[ing] partisan impact when evaluating remedial maps." *Id.* ¶¶ 69–71.

Petitioners request that this Court exercise its original jurisdiction to complete the course correction. The current congressional map violates the fundamental rights of Petitioners and other Democratic voters who remain effectively silenced, isolated, and disenfranchised by the antidemocratic subversion of the least-change process. The court-adopted congressional map discriminates against Democratic voters, suppresses their speech

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whether such claims are cognizable under the Wisconsin Constitution." *Id.* ¶ 103 (Dallet, J., dissenting).

and effective association, and vitiates other fundamental rights in violation of the Wisconsin Constitution. *See* Wis. Const. art. I, § 1 (guaranteeing a right to equal treatment); *id.* §§ 3–4 (guaranteeing rights to speech and association); *id.* § 22 (identifying fundamental principles, including justice and temperance, necessary to maintain the blessings of free government). Each of these provisions outlaws partisan gerrymandering regardless of which government branch is responsible for the map.

The judicial adoption of the current congressional map, however, inflicts an independent—and especially pernicious—legal violation. As *Clarke I* recognized, courts' "political neutrality must be maintained regardless of whether a case involves an extreme partisan gerrymandering challenge." 2023 WI 79, ¶ 70. That is, *even if* the legislature is granted power (contra the state Constitution's text) to redistrict in favor of the party in power, the judiciary may never trade the referee's stripes for the athlete's captain patch and run up the score for favored partisans. But the *Johnson* Court did exactly that. Rather than respect its constitutional duty to faithfully select and apply redistricting criteria that mitigate partisan bias, the *Johnson* Court delivered the Republican Party an astounding advantage that even the political process could not deliver. Whatever the constitutional restrictions on partisan gerrymandering more generally, that grossly exceeded judicial authority.

This Court should enjoin any further use of the current congressional map—either because the map violates one or more of the Wisconsin Constitution's several prohibitions against partisan gerrymandering, or on the independent grounds that the judiciary is prohibited from facilitating this partisan favoritism—and replace the map with a lawful alternative. This memorandum provides additional analysis and explanation of the legal provisions at issue.

ARGUMENT

I. The Petition satisfies this Court's criteria for original actions.

"This court has long deemed redistricting challenges a proper subject for the court's exercise of its original jurisdiction." *Clarke v. Wis. Elections Comm'n*, 2023 WI 70, 409 Wis. 2d 372, 374, 995 N.W.2d 779, 780 ("*Clarke II*") (collecting examples). Like previous redistricting cases that this Court has adjudicated under its original jurisdiction, this one raises constitutional issues pertaining to governmental powers and individual rights that are of fundamental statewide importance. And the matter is ripe for resolution now: Petitioners—Democratic voters packed into uncompetitive districts or otherwise arbitrarily prevented from electing their preferred candidates—are being harmed anew by the violation of their constitutional rights every election cycle.

This Court is well suited to evaluate and resolve these constitutional claims. For instance, whether this Court complied with its constitutional obligations in *Johnson* (*see* Pet., Count IV) is a pure question of law—and if the Court grants relief on that claim, there will be no need to reach the other three counts. Should the Court reach the partisan gerrymandering issues, moreover, written expert analysis of the map's partisan skew will be well within the competency of this Court to evaluate. *See, e.g.*, *Johnson v. Wis. Elections Comm'n*, 2022 WI 14, ¶ 11, 400 Wis. 2d 626, 971 N.W.2d 402 ("*Johnson II*") (selecting maps after reviewing quantitative expert analysis); *Clarke I*, 2023 WI 79, ¶ 75 (inviting expert evidence to assist with selection of remedial map).

II. The congressional map violates the Wisconsin Constitution's prohibitions on partisan gerrymandering.

The legal defense of partisan gerrymandering usually takes the form of a shrug: no matter how pernicious the practice, no matter how antithetical it is to every precondition of a free people self-governing in a free society, apologists maintain there is simply nothing to be done. True or not in other jurisdictions, that defeatism does not apply in Wisconsin.

Article 1, section 9 of the Wisconsin Constitution provides, without any ambiguity, 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." The plain text of this expansive guarantee is distinct from federal justiciability rules, where the judiciary's authority is cabined to a subset of cases or controversies delineated in Article III, section 2 of the U.S. Constitution, and further restricted by justiciability doctrines developed by federal courts. Thus, when the U.S. Supreme Courted voted 5-4 in 2019 to turn victims of partisan gerrymandering away from federal court, it pointed to where they should take their claims. *Rucho v. Common Cause*, 588 U.S. 684, 719 (2019). The Court's decision did not condemn claims of partisan gerrymandering to "echo into a void," the majority promised, because "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.*

State courts across the country have applied their state constitutions to do exactly that, finding partisan gerrymandering claims justiciable, carefully adjudicating them, and supplying the necessary remedy where violations are proven. *See, e.g.*, *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194, at *46 (Md. Cir. Ct. Mar. 25, 2022) (adjudicating partisan gerrymandering claims under state constitution); *League of Women Voters of Pa. v. Pennsylvania*, 645 Pa. 1, 178 A.3d 737, 814, 821 (Pa. 2018) (same); *In re 2021 Redistricting Cases*, 528 P.3d 40, 92 (Alaska 2023)

(same); *Grisham v. Van Soelen*, 539 P.3d 272, 284 (N.M. 2023) (same); *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363, 416 (Fla. 2015) (same, noting "there can hardly be a more compelling interest than the public interest in ensuring that the Legislature does not engage in unconstitutional partisan political gerrymandering").[2]

This growing chorus reflects the fact that—as the majority recognized in *Rucho*—state constitutions can and often do extend protections beyond those provided by the U.S. Constitution. As this Court has explained, "The United States Constitution established a government of limited and enumerated powers. Consequently, the national government possesses only those powers delegated to it. State constitutions, on the other hand, typically establish governments of general powers, which possess all power not denied by the state constitution." *Jacobs v. Major*, 139 Wis. 2d 492, 506, 407 N.W.2d 832, 839 (1987) (citations omitted). Thus, this Court "has demonstrated that it will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens'

[2] Notably, these courts have had little trouble identifying judicially manageable standards to adjudicate claims of unlawful partisan gerrymandering. *See Rucho*, 588 U.S. at 722 (Kagan, J., dissenting); *see also id.* at 735 (identifying and applying such standards).

liberties ought to be afforded." *State v. Doe*, 78 Wis. 2d 161, 172, 254 N.W.2d 210, 216 (1977).

As detailed below, numerous provisions in Wisconsin's Constitution protect against partisan gerrymandering, even where the federal Constitution does not. Some of the Wisconsin provisions are broader than their federal analog; others are unique to Wisconsin and have no federal law parallel at all. For each provision, this Court should interpret Wisconsin's Declaration of Rights to mean what it says. Partisan gerrymandering violates fundamental principles of political equality, and this violation requires a remedy.

A. Wisconsin's congressional map is a partisan gerrymander in violation of the Wisconsin Constitution's Equal Protection Clause.

Wisconsin's Constitution opens with the promise that "[a]ll people are born equally free and independent, and have certain inherent rights." Wis. Const. art. I, § 1. The current congressional map violates this guarantee because it deprives a disfavored class of Wisconsin voters of an equal opportunity to elect members of the U.S. House of Representatives.

1. The Wisconsin Constitution guarantees the right to an equally weighted and equally effective vote.

It is "elementary" that the Wisconsin Constitution "condemn[s] laws which grant special privileges to a favored class." *In re Christoph*, 205 Wis. 418, 237 N.W. 134, 135 (1931). Article I,

section 1 encompasses this equal protection guarantee, which is not merely a rhetorical flourish. This Court has explained that Wisconsin's founders "made equality before the law the very corner stone of their plan of government," and preserved in Article I, section 1—the very first words of that foundational charter—an "emphatic protest against special privileges to any favored person or class of persons." *Black v. State*, 113 Wis. 205, 89 N.W. 522, 527 (1902). "It is certain" that Article I, section 1 "must mean equality before the law, if it means anything." *Id.*[3]

Article I, section 1 enshrines a "right to vote . . . in the same manner, at the same time, *and with the same effectiveness*" that any other similarly situated voter enjoys. *State ex rel. Binner v. Buer*, 174 Wis. 120, 127, 182 N.W. 855, 860 (1921). In this Court's first redistricting case, Justice Pinney recognized "the rights of the people to have full effect given to the political power of each elector, and a fair and constitutional apportionment of the representative bodies." *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51

[3] Although Wisconsin's equal protection clause has generally been considered similar to the Fourteenth Amendment, the two provisions are far from identical and should not be interpreted as such. Article 1, section 1 of the Wisconsin Constitution "paraphras[es] the United States Declaration of Independence (not the federal constitution)," *Jacobs*, 139 Wis. 2d at 535 n.5 (Abrahamson, J., concurring in part, dissenting in part). It is thus focused on "the protection of individual freedom." *Id.*at 535. Considering the Wisconsin Constitution's distinct text and purpose, it is "[c]ertainly . . . the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court under the Fourteenth Amendment." *Doe*, 78 Wis. 2d at 171.

N.W. 724, 735 (1892) (Pinney, J., concurring). This Court has consistently maintained this "right to secure equal representation." *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 55, 132 N.W.2d 249, 255 (1965); *Buer*, 174 Wis. at 133 (recognizing the right to vote includes "the right to make use of the vote in a most effectual manner"). In *Sylvester*, this Court adopted the one-person-one-vote principle to strike down a law under which "a small minority of citizens in many counties [could] control a majority of votes cast" for the county board of supervisors. 26 Wis. 2d at 47, 132 N.W.2d at 255. In so doing, the Court affirmed that Wisconsin's equal protection clause is based on "the basic principle of equality among voters" and "the fundamental principle that representative government is one of equal representation[.]" *Id.* at 54; *see also id.* at 58 (recognizing "an increase or diluation [*sic*] of the weight of votes on the basis of political subdivisions or of the character of the area in which people live" could not be justified "within the constitutional restrictions of the equal-protection clause"); *La Crosse County v. City of La Crosse*, 108 Wis. 2d 560, 562, 322 N.W.2d 531, 532 (Ct. App. 1982) (Wisconsin's equal protection clause guarantees "the right not to have one's vote diluted by the unequal distribution of state legislative seats.").

Redistricting plans that disadvantage voters who favor a particular political party deprive those voters of an equally weighted and equally effective vote. That is why state courts across

the country have applied these fundamental equal protection principles to prohibit partisan gerrymanders. *See, e.g.*, *In re 2021 Redistricting Cases*, 528 P.3d at 57, 92 (recognizing that "partisan gerrymandering is unconstitutional" under "two principles of equal protection"—the right to an equally weighted vote and the right to an equally powerful vote (citation omitted)); *Grisham*, 539 P.3d at 284 (applying state equal protection clause and holding that "egregious partisan gerrymandering can effect vote dilution to a degree that denies individuals their inalienable right to full and effective participation in the political process") (emphasis removed and internal quotations omitted).

This Court's dicta about this clause in *Johnson I* does nothing to undermine Wisconsinites' right to equal voting power. The Court's superficial analysis of Article I, section 1 not only failed to grapple with the plain text of Wisconsin's equal protection guarantee, but it also paid no heed to decades of history interpreting Article I, section 1 to guard against partisan gerrymandering. Indeed, the Court's reliance on *Cunningham* to reject a partisan gerrymandering claim is baffling, *see* 2021 WI 87, ¶ 54; that case explained in no uncertain terms that the constitutional restrictions on redistricting "were supported and adopted upon the express ground that they would prevent the legislature from gerrymandering the state." *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1892).

Partisanship in redistricting was thus of paramount concern to the founders, and the equal protection guarantee cannot be read in isolation of that fact.

2. The congressional map dilutes the weight and effectiveness of Democratic votes.

The congressional map currently in effect violates the Wisconsin Constitution's guarantee that the right to vote "shall be free and equal." *See State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473, 480 (1949); Wis. Const. art. I, § 1. The plan dilutes the weight of Democratic votes through packing and cracking to guarantee that Republican votes will be more effective at electing congressional candidates of choice. "Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (non-partisan) map. In short, the mapmaker has made some votes count for less, because they are likely to go for the other party." *Rucho*, 588 U.S. at 730 (Kagan, J., dissenting) (citation omitted).

For example, the adopted map packs Democrats into Congressional Districts 2 and 4, which have large Democratic supermajorities, thereby "wasting" votes that could help Democrats compete in other areas. And it cracks Democrats into small groups across Districts 1, 3, 5, and 6, so they cannot achieve a majority in any one of those districts. Democratic votes across the state are thus diluted and Democrats are prevented from

electing anything approaching a proportionate share of the state's members of Congress.

As a result of this packing and cracking, the adopted map is heavily skewed toward Republicans. In the 2022 statewide elections, although voters demonstrated a slight but consistent preference for Democrats, the current congressional map delivered 75% of Wisconsin's congressional districts to Republicans. Pet. ¶ 66. This extreme bias illustrates that the intentional packing and cracking engineered by the 2011 legislature has endured through the present to thwart the majority will. This dramatic mismatch between voter preferences and election outcomes continued in the 2024 elections. In statewide races, Wisconsin voters again were relatively evenly split—but the congressional map continued to produce a distorted 6-2 split in favor of Republican congressional candidates. Pet. ¶ 67.

As the New Mexico Supreme Court recently recognized, the consequences of a partisan gerrymander like the adopted map "include that ensuing elections are effectively predetermined, essentially removing the remedy of the franchise from a class of individuals whose votes have been diluted." *Grisham*, 539 P.3d at 284. Such a result is baldly inconsistent with Wisconsin's guarantee that all qualified citizens' votes carry equal weight and equal effectiveness.

B. Wisconsin's congressional map is a partisan gerrymander in violation of the Wisconsin Constitution's free speech and associational rights.

The current congressional map also violates the Wisconsin Constitution's robust guarantees of speech and associate rights. Article I, section 3 of Wisconsin's Constitution provides: "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." And Article 1, section 4 provides: "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." These clauses proscribe the distortions and discrimination readily observable in the congressional map.

1. Wisconsin's Constitution affords extensive protection to individual rights to free speech and association.

Speech and association rights are closely related to each other, and to the right to vote. *See Weber v. City of Cedarburg*, 129 Wis. 2d 57, 68, 384 N.W.2d 333, 339 (1986) ("The constitutional basis for the freedom of association appears to be several constitutional guarantees, including the various rights of free speech, free press, petition, assembly, and voting."). This bundle of rights is sacrosanct and represents a "corner stone[]" of Wisconsin's democratic institutions. *State v. Pierce*, 163 Wis. 615,

158 N.W. 696, 698 (1916). "Political speech," this Court has emphasized, is "a fundamental right and is afforded the highest level of protection. Indeed, freedom 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. And Wisconsin's provision guaranteeing this right is "more definite and sweeping" than similar provisions contained in other constitutions. *Pierce*, 163 Wis. at 615.

This Court has the power and duty to ensure that these protections "remain relevant in light of changing conditions, emerging needs and acceptable changes in social values," consistently with the plain meaning of the constitutional text. *Jacobs*, 139 Wis. 2d at 520. A key feature of that text is to prevent the legislature not only from outright denying, but also from *abridging*—that is, inhibiting or rendering less effective—individual rights to speech and association. *See Pierce*, 163 Wis. at 615 ("The ordinary meaning of the word 'abridge' is to diminish or to lessen, but not to cut off entirely."). The plain text of these provisions is incompatible with partisan gerrymandering, and an urgent need has emerged for this Court to recognize as much.

2. Wisconsin's congressional map violates Petitioners' rights to free speech and association.

Wisconsin's congressional map violates constitutional speech and association guarantees by diluting the voting power of citizens who seek to vote for and associate with the disfavored political party. The map impairs the effectiveness of political speech and expression because of the partisan content of that speech. And the map retaliates against voters who seek to speak in favor of and associate with the disfavored political party by working to elect that party's candidates. Ultimately, voters' engagement with, and interest in, Wisconsin elections will decline because mapmakers have effectively determined the results.

The congressional map violates Wisconsin's "definite and sweeping" free speech guarantee, *Pierce*, 163 Wis. at 615, by burdening protected expression based on viewpoint. The map privileges preferred Republican voters relative to disfavored Democratic voters by spreading Republican voters across six congressional districts where they can elect their preferred candidates, while confining an approximately equal number of Democratic voters to merely two districts where they can elect their preferred candidates. This packing and cracking ensures that Democratic voters are significantly less likely than Republican voters to be able to elect the candidate who shares their views. The fact that Democratic voters can still cast ballots under

gerrymandered maps changes nothing. The government unconstitutionally burdens speech where it renders disfavored speech less effective, even if it does not ban such speech outright. *Cf. United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000) (holding, in First Amendment context, "[t]he Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans").

The congressional map also severely burdens association rights. By virtually guaranteeing that many Democratic voters will never be able to elect their preferred congressional candidates, the congressional map forecloses the meaningful political association that they desire to pursue. "Members of the disfavored party in the State, deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives) . . . By placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions." *Gill v. Whitford*, 585 U.S. 48, 81 (2018) (Kagan, J., concurring) (citations omitted).

There is no legitimate—much less compelling—state interest justifying the congressional map's partisan gerrymander. Cementing one party's hold on power indefinitely, regardless of

shifts in political opinion, makes elections virtually meaningless and deprives voters of their fundamental rights. The congressional map's systematic partisan skew cannot be explained or justified by Wisconsin's geography or any legitimate redistricting criteria. That skew muffles political speech and inhibits effective association in flagrant violation of the Wisconsin Constitution.

C. Wisconsin's congressional map is a partisan gerrymander in violation of the Wisconsin Constitution's Free Government Guarantee Clause.

The Wisconsin Constitution's Declaration of Rights guarantees the citizens of the state a free government: "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." Wis. Const. art. I, § 22 (the "Free Government Guarantee"). Partisan gerrymandering, which constitutes an immoderate and intemperate legislative assault on the people's right to a free government, is actionable under the Free Government Guarantee.

1. The Free Government Guarantee protects Wisconsin citizens against legislative overreach that threatens the foundations of democratic rule.

As this Court has steadfastly maintained for over a century, the Free Government Guarantee is an "'implied inhibition' against governmental action with which any legislative scheme must be in

compliance." *Jacobs*, 139 Wis. 2d at 509 (quoting *State ex rel. Milwaukee Med. Coll. v. Chittenden*, 127 Wis. 468, 521, 107 N.W. 500, 517–18 (1906)). Although it is implied, the inhibition that the Free Government Guarantee imposes on legislative action has "quite as much efficiency as would express limitations." *Id.* (quoting *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 15, 128 N.W. 1041, 1046 (1910)). No "mere embellishment[]," the Free Government Guarantee is, as one of the Constitution's declared purposes, "among the most valuable restraints upon legislative authority" at this Court's disposal. *Chittenden*, 127 Wis. at 517. The Article I declared purposes are particularly important in construing Wisconsin's Constitution because the framers eschewed "a detailed specification of rights" out of a fear that it "might weaken the document." John Sundquist*, Construction of the Wisconsin Constitution: Recurrence to Fundamental Principles*, 62 Marq. L. Rev. 531, 558 (1979); *see also Ekern v. McGovern*, 154 Wis. 157, 254, 142 N.W. 595, 624 (1913) ("When it came to forming our state Constitution, it was supposed that the safety of human rights was sufficiently provided for by the general declaration and the detail provisions associated therewith, emphasized by the significant admonishment as to 'the importance of a frequent recurrence to fundamental principles.'"). Accordingly, the Free Government Guarantee is a cornerstone of this Court's commitment not to be "bound by the minimums which are imposed

by the Supreme Court of the United States" when the Wisconsin Constitution requires "that greater protection of citizens' liberties ought to be afforded." *State v. Forbush*, 2011 WI 25, ¶ 70, 332 Wis. 2d 620, 796 N.W.2d 741 (Abrahamson, C.J., concurring) (quoting *Doe*, 78 Wis. 2d at 172).

In practical effect, the Free Government Guarantee is a longstanding check on excessive legislation that "plainly violates . . . fundamental principles of justice." *Chittenden*, 127 Wis. at 517; *see also State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 532, 90 N.W. 1098, 1099 (1902). This Court's cases applying the Guarantee illustrate its scope and vitality. For instance, in *In re Christoph*, 205 Wis. at 420–21, the Court considered the constitutionality of a law granting "to owners of 200 acres or more of agricultural lands located in cities of the fourth class the right or privilege to secede or to become detached from such cities," but denying that same right "to the owners of lands of like character, area, and location situated in cities of the first, second, or third classes." The Court held the Free Government Guarantee (along with Article I, section 1 of the Wisconsin Constitution) forbade legislation "based on a classification which is arbitrary and unreasonable." *Id.* It therefore struck down the statute as one granting "special privileges to a favored class." *Id.*

Similarly, in *Stierle v. Rohmeyer*, 218 Wis. 149, 260 N.W. 647, 649 (1937), this Court held unconstitutional in part a

statutory scheme imposing certain notice and affidavit filing requirements upon a mortgage holder seeking to redeem a chattel mortgage. The penalty for noncompliance was to render the mortgage fully satisfied and canceled—meaning that a mortgagee who filed an affidavit eighteen days late, and for a mortgage sale that recovered just a few hundred dollars, was to suffer discharge of a mortgage worth over $4,000. *Id.* Invoking Section 22 and several other provisions of the state and federal Constitutions, this Court held the extremely disproportionate forfeiture rule unconstitutional. *Id.* at 167. The Court explained that "[w]hen things so monstrous as this are contemplated as within the language of the statutory provisions under consideration, it behooves us to heed the admonitions of sec. 22, art. 1, of our state Constitution"—that is, of the Free Government Guarantee. *Id.*

2. The congressional map violates the Free Government Guarantee.

Partisan gerrymandering violates the Free Government Guarantee. This is clear, first of all, from the Guarantee's plain text. Section 22 requires Wisconsin's lawmakers to maintain an adherence to "justice, moderation, [and] temperance" in their work so as to preserve "the blessings of a free government" for Wisconsin's people. Partisan gerrymandering is not just, moderate, or temperate—to the contrary, it constitutes an act of extreme legislative self-interest by which the presiding legislative majority party attempts to insulate its party and candidates

against democracy itself. By design, partisan gerrymandering deprives the voters of their right to participate in meaningful elections that determine the composition of a "free government." Few legislative schemes could more plainly violate the Free Government Guarantee.

Treating partisan gerrymandering as a violation of the Free Government Guarantee is also wholly consistent with this Court's precedents applying section 22 to invalidate other sorts of legislation. As *Christoph* and *Stierle* illustrate, the Free Government Guarantee precludes legislative schemes that disproportionately reward (*Christoph*) or punish (*Stierle*) classes or individuals on unreasonable grounds. *See Christoph*, 205 Wis. at 420–21; *Stierle*, 218 Wis. at 167. Partisan gerrymandering does just that—it operates by advantaging one set of voters and punishing another based on their respective support for or opposition to the party and legislators already in power. *See supra* I.B.2. Section 22, in turn, operates to prohibit such "encroachment on the liberty and freedom of the citizens of this state, either by legislative enactment or by courts or other officers of the law." *Allen v. State*, 183 Wis. 323, 329, 197 N.W. 808, 810 (1924).

Recognizing a cause of action under section 22 to challenge partisan gerrymandering also comports with this Court's proper role. Through "the fundamental law" it sets out in this section, the Wisconsin Constitution ensures "the security of personal rights"

and at the same time establishes "the judiciary as its efficient defender." *State v. Redmon*, 134 Wis. 89, 114 N.W. 137, 139 (1907). Allowing Wisconsinites to challenge partisan gerrymandering under the Free Government Guarantee will ensure that the State's government continues to derive its "just powers from the consent of the governed"—precisely the aim the framers of section 22 intended to achieve. *Mehlos v. City of Milwaukee*, 156 Wis. 591, 146 N.W. 882, 885 (1914).

The passing dicta discussing the Free Government Guarantee in *Johnson I*, 2021 WI 87, ¶ 62, should not foreclose this action. Section 22 need not be read, in that opinion's phrasing, as "an open invitation" to impose "subjective policy preferences" for this case to proceed. *Id.* To the contrary, the Guarantee puts an affirmative burden on this Court to preserve the "blessings of free government" for the people in the face of legislative overreach. Partisan gerrymandering endangers "free government" far more directly than the statutory schemes at issue in cases like *Christoph* and *Stierle*. And insofar as section 22 is broad in scope, that is because it was intentionally drafted that way. Sundquist, *supra*, at 558; *Ekern*, 154 Wis. at 254. In short, *Johnson I* ignored the Free Government Guarantee's text, its origins, and this Court's longstanding reliance on it to constrain abusive government action. Thus, to the extent that *Johnson I* made law about section 22—which is doubtful—that law is both "unsound in principle" and

"detrimental to coherence and consistency." *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶¶ 98–99, 264 Wis. 2d 60, 665 N.W.2d 257; *Clarke I*, 2023 WI 79, ¶ 63.

III. In any event, the Court-adopted congressional map violates the Wisconsin Constitution's separation of powers.

Independent of the constitutional guarantees prohibiting partisan gerrymandering discussed above, the current congressional map also runs afoul of constitutional provisions that specifically constrain the judiciary as an apolitical body. Irrespective of whether partisan gerrymandering is justiciable or permissible under Wisconsin law, the judiciary is constitutionally prohibited from intentionally conferring or entrenching a partisan political advantage when tasked with drawing electoral maps.

Wisconsin's Constitution "created three branches of government, each with distinct functions and powers, and the separation of powers doctrine is implicit in this tripartite division." *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 11, 376 Wis. 2d 147, 897 N.W.2d 384 (citations omitted). The "judicial power" was exclusively vested in this Court, "and that judicial power confers on [this Court] an *exclusive* responsibility to exercise *independent* judgment in cases over which [it] preside[s]." *Id.* ¶ 46 (emphasis added). The separation of powers doctrine "prevents [this Court] from abdicating [its] core power." *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 48, 382 Wis. 2d 496, 914 N.W.2d 21.

This Court's duty to exercise independent judgment is especially important in redistricting cases, which require this Court to resolve disputes between the legislative and executive branches. To strike the careful balance required in such cases, the Court "must consider numerous constitutional requirements when adopting remedial maps" and "cannot allow a judicially-created metric, not derived from the constitutional text, to supersede the constitution." *Clarke I*, 2023 WI 79, ¶ 62. But when faced with a controversy over redistricting after the 2020 census, this Court declined to exercise its independent judgment and failed to "balance . . . requirements and considerations essential to the mapmaking process." *Id.* Instead, this Court "declared that the overarching approach to adopting remedial maps was for them to 'reflect the least change necessary' from the previous maps." *Id.* ¶ 62 (quoting *Johnson I*, 2021 WI 87, ¶ 72). The adopted map was thus flawed from the start.

This Court was explicit that the purpose of the least-change framework was to "minimize judicial policymaking," *Johnson II*, 2022 WI 14, ¶ 11, and to defer to the "policy choices of the legislature" as constituted a decade earlier, *Johnson I*, 2021 WI 87, ¶ 81. But the Court's effort to "remov[e] [itself] from the political fray," *id.* ¶ 77, ignored three key principles regarding the judiciary's duty in resolving questions about redistricting maps.

First, "it is not possible to remain neutral and independent by failing to consider partisan impact entirely." *Clarke I*, 2023 WI 79, ¶ 71. Indeed, to maintain judicial independence, this Court has an affirmative duty to "take care to avoid selecting remedial maps designed to advantage one political party over another." *Id.* That is because a "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results." *Id.* ¶ 60 (internal quotation omitted).

Courts in Wisconsin have recognized the judiciary's duty of independence in this context. *See, e.g.*, *Prosser v. Elections Bd.*, 793 F. Supp. 859, 867 (W.D. Wis. 1992) (when "comparing submitted plans with a view to picking the one (or devising our own) most consistent with judicial neutrality," "[j]udges should not select a plan that seeks partisan advantage—that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda—even if they would not be entitled to invalidate an enacted plan that did so"); *Baumgart v. Wendelberger*, Nos. 01-C-0121, 02-C-0366, 2002 WL 34127471, at *4 (E.D. Wis. May, 30, 2002) (rejecting party's proposed plans because "the partisan origins of the Jensen plans are evident" and "appear to have been designed to ensure Republican control of the Senate" while the "Baumgart plans are riddled with their own partisan marks"). This is consistent with the ordinary approach across the country. *See, e.g.*, *Carter v.*

Chapman, 270 A.3d 444, 470 (Pa.), *cert. denied sub nom. Costello v. Carter*, 143 S. Ct. 102, 214 L. Ed. 2d 22 (2022) (deeming it "appropriate to evaluate proposed plans through the use of partisan fairness metrics"); *Maestas v. Hall*, 2012-NMSC-006, ¶ 28, 274 P.3d 66, 76 ("To avoid the appearance of partisan politics, a judge should not select a plan that seeks partisan advantage."); *Wilson v. Eu*, 1 Cal. 4th 707, 765, 823 P.2d 545, 576 (1992) (rejecting plans submitted by the parties because each had calculated partisan political consequences, the details of which were unknown, leaving no principled way for the court to choose between the plans, while knowing that the court would be endorsing an unknown but intended political consequence if it chose one of the plans); *Burling v. Chandler*, 148 N.H. 143, 156, 804 A.2d 471, 483 (2002) (same).

Second, courts "called upon to perform redistricting are, of course, judicially legislating." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶¶ 9–11, 249 Wis. 2d 706, 639 N.W.2d 537. Indeed, federal courts defer to state courts on redistricting matters precisely *because* it is a "highly political task." *Growe v. Emison*, 507 U.S. 25, 33 (1993); *see also id.* ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965)).

State courts are thus empowered to independently craft redistricting plans when legislatures "refuse[] to reapportion themselves" because "citizens have a right to have their legislature properly apportioned and their congressional districts properly drawn and the responsibility for seeing that this right is enforced rests with the states, not the federal courts." *Alexander v. Taylor*, 2002 OK 59, ¶¶ 14–16, 51 P.3d 1204, 1209, *as corrected* (June 27, 2002).

Deferring to a biased, decade-old map—enacted by a decade-old legislative body and signed by a Governor who is no longer in office—does not properly discharge this responsibility. Indeed, given the glaring departure from justice, moderation, temperance, and virtue—principles that are *especially* critical in the judicial branch—it violates the same Free Government Guarantee that binds the legislature. *See* Wis. Const. art. I, § 22; *Allen*, 183 Wis. at 329 (holding that under Free Government Guarantee, "[n]o stealthy encroachment on the liberty and freedom of the citizens of this state, either by legislative enactment *or by courts* or other officers of the law, is to be permitted or tolerated") (emphasis added); *cf. State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 127, 334 Wis. 2d 70, 113 & n.12, 798 N.W.2d 436, 458 & n.12 (Abrahamson, J., dissenting in part on behalf of three justices) (accusing majority opinion of violating the Free Government Guarantee by "fail[ing] to abide by the court's Constitutional

authority" to the detriment of "the rights of the people from whom our authority derives"); Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. Rev. 985, 1052–55 (2022) (discussing how the least-change approach facilitates such encroachment); *Clarke I*, 2023 WI 79, ¶ 63.

Third, to maintain its independence, the judiciary's role in redistricting cannot be circumscribed by blind and absolute deference to any one political branch. When a state court is "thrust into the position of choosing a redistricting plan due to the political stalemate between the Legislature and the Governor," it must "endeavor[] to adopt a plan" that is "superior or comparable to all of the plans submitted" based "[f]irst and foremost" on "the traditional core criteria" that guide the state's redistricting decisions. *Carter*, 270 A.3d at 451, 461–62 (quotation omitted); *see also Hippert v. Ritchie*, 813 N.W.2d 391, 395 (Minn. 2012) (adopting a remedial plan by utilizing "redistricting principles that advance the interests of the collective public good and preserve the public's confidence and perception of fairness in the redistricting process").

There are no shortcuts to this endeavor. State courts cannot fulfill their redistricting duties and maintain their independence by robotically deferring to prior plans. *See, e.g.*, *Carter*, 270 A.3d at 464 (recognizing the court's duty to ensure that the remedial map "satisfie[d] the requisite traditional core criteria while balancing

the subordinate historical considerations" and was "reflective of and responsive to the partisan preferences of the Commonwealth's voters."); *Wattson v. Simon*, 970 N.W.2d 42, 45–46 (Minn. 2022) (balancing seven core principles to guide its task of drawing new legislative districts); Final Order at 4, *Zachman v. Kiffmeyer*, No. C0–01–160 (Minn. Spec. Redistricting Panel Mar. 19, 2002) (adopting a Congressional redistricting plan "different from any submitted by the parties, but ultimately balanced" and "fundamentally fair" by considering a range of redistricting criteria).

In sum, this Court has a constitutional duty to independently develop and analyze the merits of proposed redistricting plans by applying a wide range of redistricting criteria, including partisan outcomes. This Court's failure to discharge that duty with respect to Wisconsin's congressional maps was an unconstitutional affront to the separation of powers doctrine.

CONCLUSION

Petitioners respectfully request that this Court grant the petition for original action; declare that the congressional map is a partisan gerrymander in violation of the identified provisions of Wisconsin's Constitution and/or declare, at the very least, that the judiciary's knowing adoption of a congressional map that confers or entrenches an extreme partisan advantage to one political party

violates the separation of powers principles of Wisconsin's Constitution; and order a remedy in advance of the 2026 congressional elections.

Dated: May 7, 2025

By: *Electronically Signed By Barret V. Van Sicklen*

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**Pro hac vice application forthcoming*

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