IN THE SUPREME COURT OF WISCONSIN

No. 2021AP001450 OA

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

Petitioners,

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

Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN in her official capacity as a member of the Wisconsin Elections Commission, JULIE GLANCEY in her official capacity as a member of the Wisconsin Elections Commission, ANN JACOBS in her official capacity as a member of the Wisconsin Elections Commission, DEAN KNUDSON in his official capacity as a member of the Wisconsin Elections Commission, ROBERT SPINDELL, JR. in his official capacity as a member of the Wisconsin Elections Commission and MARK THOMSEN in his official capacity as a member of the Wisconsin Elections Commission,

Respondents,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, in his official capacity, and JANET BEWLEY SENATE DEMOCRATIC MINORITY LEADER, on behalf of the Senate Democratic Caucus,

Intervenors-Respondents.

BRIEF OF INTERVENORS-PETITIONERS CITIZEN MATHEMATICIANS AND SCIENTISTS

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2. Should the Court modify existing maps using a "least change" approach, and if not, what approach should the Court use?
3. Is the partisan makeup of districts a valid factor for the Court to consider in evaluating or creating new maps?
4. As the Court evaluates or creates new maps, what litigation process should the Court use to determine a constitutionally sufficient map?

INTRODUCTION

As this Court has previously recognized, cases such as this raise "important state and federal legal and political issues that go to the heart of our system of representative democracy." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶4, 249 Wis. 2d 706, 709, 639 N.W.2d 537, 538. There is perhaps no principle more sacred in our system of representative democracy than one person, one vote. Undertaking the process of redistricting to guarantee equal representation in the election of state legislators and congressional representatives is a solemn obligation—and a difficult one. Redistricting requires compliance with multiple State and Federal criteria and satisfying all these criteria simultaneously is the core challenge for anyone seeking to redistrict in the public interest.

Citizen Mathematicians and Scientists offer this Court a unique perspective on these issues. With cutting-edge computational methods and resources, they can develop maps that approach being "Pareto optimal," which means that they are so strong on each redistricting criterion that improving the map on any one criterion necessarily worsens it on another. As a practical matter, these ideal, or nearly ideal, maps cannot be devised by hand, even with the best commercial redistricting software and weeks to draw them. But these maps can be discovered through "computational redistricting," which is the use of algorithms designed to optimize maps across multiple criteria simultaneously.

This approach to redistricting simply was not available to courts in prior redistricting cycles. But it is available now. Citizen Mathematicians and Scientists submit that this is the approach the Court should use in this case. The Court should ask each party to submit its best maps meeting all the required criteria. Citizen

Mathematicians and Scientists believe that the maps that they submit will be the best. And because they are generating these maps not in the service of a political party, a set of incumbent officeholders, or a particular demographic group, but rather in service of the common interest that all Wisconsinites share in having effective representation in Congress and in the Legislature, the maps will be fair.

Accordingly, Citizen Mathematicians and Scientists respectfully offer their perspective on the questions posed by the Court. Citizen Mathematicians and Scientists: (1) provide eleven well-defined factors the Court should consider based on State and Federal law; (2) propose a "best map" approach that takes into account the valid concerns underlying the "least change" approach without requiring the Court to freeze existing districts in place; (3) explain why the Court has an obligation to ensure that any maps it adopts do not result in partisan advantage for one party over another; and (4) suggest guidelines for a simple, streamlined litigation process.

ARGUMENT

I. WHEN EVALUATING OR CREATING NEW MAPS, THE COURT SHOULD CONSIDER TRADITIONAL, NEUTRAL REDISTRICTING PRINCIPLES UNDER STATE AND FEDERAL LAW AND SHOULD ADHERE TO THE "HIGHER STANDARDS" THAT APPLY TO COURT-ORDERED MAPS.

Citizen Mathematicians and Scientists submit that there are at least eleven traditional, neutral redistricting principles that the Court should consider under the relevant State and Federal laws when evaluating or creating new legislative or congressional maps: (1) population equality; (2) requirements regarding minority voting rights; (3) partisan fairness; (4) nesting; (5) proper numbering of districts; (6) contiguity; (7) respect for political subdivisions; (8) geographic compactness; (9) respect for communities defined by actual shared interests; (10) competitiveness or responsiveness; and (11) stability. Because stability is addressed in the second part of this brief and partisan fairness and competitiveness/responsiveness are addressed in the third part, this first part will focus on the other eight redistricting criteria.

The first three factors listed above flow mostly from Federal law and apply to both legislative and congressional districts (although not always in identical fashion). The other factors flow mostly from State law and apply directly to legislative districts; but the Court in its discretion may want to apply some of the same principles to congressional districts, as well.

Before addressing the specific factors, one point merits highlighting: Maps ordered into effect by courts are "held to higher standards" than maps enacted into law by legislatures. *Abrams v. Johnson*, 521 U.S. 74, 98 (1997); *accord Chapman v. Meier*, 420 U.S.

1, 26 (1975); *see Connor v. Finch*, 431 U.S. 407, 414 (1977) ("a court will be held to stricter standards … than will a state legislature"). So, while mapmaking precedents established by previous Wisconsin legislatures and governors provide helpful benchmarks as to several redistricting criteria, the Court should treat those precedents as a "floor" for what qualifies as a good map, not as a ceiling.

A. Equal Population

Congressional districts should be as equal as possible in total population.

Legislative districts should be within one percent of their ideal population.

So, using the 2020 Census Redistricting Data:

- **Wisconsin's eight congressional districts should each have either 736,714 or 736,715 residents.**
- **Wisconsin's 33 senate districts should each have between 176,812 and 180,383 residents.**
- **Wisconsin's 99 assembly districts should each have between 58,938 and 60,127 residents.**

Congressional plans and legislative plans are not subject to the same equal-population standards. The United States Constitution requires that Members of the House of Representatives "be apportioned among the several States ... according to their respective Numbers" and "chosen every second Year by the People of the several States." U.S. Const. art. I, § 2. The U.S. Supreme Court held in *Wesberry v. Sanders*, 376 U.S. 1 (1964), that these commands require that "as nearly as is practicable one man's vote in a congressional election is to be worth as

much as another's." *Id*. at 7–8. Although this "as nearly as is practicable" standard does not require a State to draw its congressional districts with precise mathematical equality, many States have chosen to do exactly that, perhaps to avoid any need to justify population differences among their congressional districts. *See* National Conference of State Legislatures, *2010 Redistricting Deviation Table* (Jan. 15, 2020) (showing 30 States with a zero- or one-person deviation in their congressional plans, based on the 2010 Census).[1]

Wisconsin has done the same. In 2002, the population of Wisconsin's largest congressional district exceeded that of its smallest by only five persons; and in 2011, the Legislature reduced the deviation to a single person, in keeping with the majority trend among the States. *See* National Conference of State Legislatures, *Table 3: Population Equality of 2000s Districts*.[2] Because court-ordered plans must be "held to higher standards" than legislatively enacted plans, *Abrams*, 521 U.S. at 98; *accord Chapman*, 420 U.S. at 26, this Court should adopt a population-equality standard no less rigorous than the one implemented by the Wisconsin Legislature. Therefore, the largest and smallest congressional districts in a new Court-ordered map should differ by only one person.

Legislative districting, however, is subject to a less strict standard. Senate districts, and especially assembly districts, are much smaller than congressional districts, and the Federal Constitution's Equal Protection Clause, *see* U.S. Const. amend. XIV, permits the Legislature "to deviate somewhat from perfect population equality to

[1] *Available at* https://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx.

[2] *Available at* https://www.ncsl.org/Portals/1/Documents/Redistricting/ Redistricting_2010.pdf#page=59.

accommodate traditional districting objectives, among them, preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016) (citing *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983)). A legislative map presumptively complies with the Federal Constitution's one-person, one-vote rule if the "maximum population deviation" between the largest and smallest district is less than 10% of the average, or ideal, district's population. *Brown v. Thomson*, 462 U.S. 835, 842 (1983). "Maximum population deviation is the sum of the percentage deviations from perfect population equality of the most- and least-populated districts …. For example, if the largest district is 4.5% overpopulated, and the smallest district is 2.3% underpopulated, the map's maximum population deviation is 6.8%." *Evenwel*, 136 S. Ct. at 1124 n.2 (citation omitted).

Bare compliance with the Federal constitutional standard, however, will not suffice here. The Wisconsin Constitution contains an independent equal-population rule requiring the Legislature to draw senate and assembly districts "according to the number of inhabitants." Wis. Const. art. IV, § 3. That provision, longstanding practice in Wisconsin, and the more stringent requirements placed on court-ordered maps suggest that the maximum population deviation here should be much smaller than the outer limits tolerated by the Federal Constitution. The following table shows the maximum population deviations in Wisconsin's legislative plans, for both houses, over the last three decades:

Maximum Population Deviation

Year	Senate	Assembly
2012	0.62%	0.76%
2002	0.98%	1.60%
1992	0.52%	0.92%

These precedents demonstrate that redistricters can keep all of Wisconsin's senate and assembly districts within 1% of the ideal population, for a 2% maximum population deviation.

Mandating an even tighter standard, however, would render it more difficult to comply with other traditional districting principles required by the Wisconsin Constitution (and discussed below), such as respect for political subdivisions and compactness. *See Prosser v. Elections Bd.*, 793 F. Supp. 859, 865–66 (W.D. Wis. 1992) (three-judge court) (rejecting a tighter population equality standard because it "rests on the fallacy of delusive exactness," and explaining that "[b]elow 1 percent, there are no legally or politically relevant degrees of perfection"); *see also Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *2 (E.D. Wis. May 30, 2002) (three-judge court), *amended*, 2002 WL 34127473 (E.D. Wis. July 11, 2002) (three-judge court) (reaffirming this conclusion).

Therefore, Citizen Mathematicians and Scientists propose capping tolerable deviations at plus or minus 1%, for a 2% maximum population deviation, in the legislative map.

B. Requirements Regarding Minority Voting Rights

No map is permitted to intentionally or unintentionally dilute the voting strength of minority citizens on account of race or ethnicity, and all maps must

avoid the excessive and unjustified use of race and racial data.

The United States Constitution's Equal Protection Clause prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. And the Fifteenth Amendment to the United States Constitution prohibits a State from denying or abridging "[t]he right of citizens of the United States to vote … on account of race [or] color." U.S. Const. amend. XV. Together, these constitutional provisions bar legislative or congressional redistricting plans marred by the excessive and unjustified use of race and racial data, *see Shaw v. Reno*, 509 U.S. 630, 639–57 (1993), or by the intentional dilution of minority voting strength, *see Rogers v. Lodge*, 458 U.S. 613, 616–28 (1982).

Section 2 of the Voting Rights Act (VRA), 52 U.S.C. § 10301, also prohibits the dilution of minority voting strength, but it sweeps more broadly than the Constitution, as it prohibits not only intentional but also unintentional vote dilution. *See Thornburg v. Gingles*, 478 U.S. 30, 43–44 (1986). Section 2 prohibits a redistricting plan that abridges any citizen's right to vote "on account of race or color [or membership in a language-minority group]." 52 U.S.C. § 10301(a); *see id*. § 10303(f)(2). "[B]ased on the totality of circumstances," members of a racial or language-minority group must not "have less opportunity than other members of the electorate" to "nominat[e]" and "elect representatives of their choice." *Id*. § 10301(b).

Where all sizable demographic groups (majority and minority alike) consistently favor the same candidates, a redistricting plan cannot dilute minority citizens' voting strength, so Section 2 plays no role. *See Gingles*, 478 U.S. at 48. But where voting is racially polarized in primaries, general elections, or both, Section 2 can require

replacing one or more districts that elect candidates preferred by the majority group with districts that would nominate and elect candidates preferred by one or more minority groups. *See Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994). Specifically, Section 2 applies when, under the relevant plan, a bloc-voting majority usually will defeat "candidates supported by a politically cohesive, geographically insular minority group." *Gingles*, 478 U.S. at 49. But even in such cases, a statewide districting plan can survive VRA scrutiny if it provides effective opportunities to nominate and elect minority-preferred candidates in a number of districts that is "roughly proportional" to the minority group's share of the State's citizen voting-age population, or CVAP. *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 436–38 (2006); *see De Grandy*, 512 U.S. at 1000.

Compliance with Section 2 necessarily requires detailed consideration of race and racial data. But the excessive use of race can give rise to a presumptively unconstitutional "racial gerrymander" under the Equal Protection Clause. *Miller v. Johnson*, 515 U.S. 900, 904–05, 910–20 (1995). Thus, districts should not be drawn to "maintain a particular numerical minority percentage" or to meet arbitrary or "mechanical racial targets" that are unrelated to the district's actual ability to nominate and elect minority-preferred candidates. *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 267, 275 (2015); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1469 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799, 801–02 (2017); *Bush v. Vera*, 517 U.S. 952, 969–72 (1996).

Consistent with those constitutional concerns, a district in which a minority group constitutes less than 50% of the voting-age population yet can still nominate and elect minority-preferred candidates "can … [and] should" count as a minority-effective district when assessing

compliance with the Voting Rights Act. *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (plurality opinion); *see also Cooper*, 137 S. Ct. at 1469-72 (holding that the Act did not require the State to "ramp up" the Black percentage in an effective "crossover" district, where Black voters had scored consistent victories despite lacking an arithmetic majority of the voting-age population). In other words, this Court should focus not on the percentage of minority citizen voting-age population in a particular district, but rather on actual electoral opportunity for minority voters—a track record of effectiveness in elections.

C. Nesting

Three assembly districts should be nested in each senate district.

The Wisconsin Constitution provides that "no assembly district shall be divided in the formation of a senate district." Wis. Const. art. IV, § 5. The Wisconsin Constitution also provides: "The number of the members of the assembly shall never be less than fifty-four nor more than one hundred. The senate shall consist of a number not more than one-third nor less than one-fourth of the number of the members of the assembly." *Id*. § 2. Given the modern population-equality standard, this means that each senate district must contain the same number of assembly districts. Since 1973, membership in the Wisconsin Legislature has been fixed at 33 State Senators and 99 Representatives to the Assembly, with three assembly districts nested in each senate district. *See* Wisconsin Legislative Reference Bureau, *Redistricting in Wisconsin 2020: The LRB Guidebook* 19 n.80 (2020).[3]

[3] *Available at* https://docs.legis.wisconsin.gov/misc/lrb/wisconsin_elections_project/redistricting_wisconsin_2020_1_2.pdf.

D. Numbering Districts

Senate and assembly districts should be numbered in a regular series to track the districts they replace.

The Wisconsin Constitution provides that "senate districts shall be numbered in the regular series." Wis. Const. art. IV, § 5. This matters because "the senators shall be chosen alternately from the odd and even-numbered districts for the term of 4 years." *Id*. State Senators were elected from odd-numbered districts in 2018 and even-numbered districts in 2020. All things being equal, it is preferable to keep voters from old odd-numbered districts in new odd-numbered districts (and likewise for even-numbered districts), to minimize disruption to the normal cycle of voting for a State Senator once every four years. However, that policy must bend to accommodate Federal law and State constitutional requirements such as population equality. *See Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 852 (E.D. Wis. 2012) (three-judge court) (rejecting claim based on shifting of voters from odd- to even-numbered districts and vice versa, since the evidence "did not indicate that any particular group will suffer more disenfranchisement than the remainder of the population"). Assembly districts, being nested in senate districts, shall be numbered in a regular series that tracks senate-district numbers, with assembly districts 1, 2, and 3 nested in senate district 1; assembly districts 4, 5, and 6 nested in senate district 2; and so on.

E. Contiguity

Each new district should consist of convenient contiguous territory, rather than pieces of detached territory.

The Wisconsin Constitution requires assembly districts "to consist of contiguous territory," Wis. Const. art. IV, § 4, and senate districts to consist of "convenient contiguous territory," *id.* § 5. Because assembly districts are smaller than, and nested in, senate districts, they too should consist of territory that is not only contiguous but convenient. This Court has defined "contiguous" to mean that a district "cannot be made up of two or more pieces of detached territory." *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 148, 53 N.W. 35, 57 (1892); *but cf. Prosser*, 793 F. Supp. at 866 (holding that the Wisconsin Constitution does not require "literal contiguity" where a town had annexed noncontiguous "islands" and "the distance between town and island is slight").

F. Political Subdivisions

Unless inconsistent with other legal requirements, assembly-district boundaries (and hence senate-district boundaries) should follow county lines, municipal lines, or ward lines.

The Wisconsin Constitution requires assembly districts "to be bounded by county, precinct, town or ward lines." Wis. Const. art. IV, § 4. In 1971, in a formal opinion addressed to the members of the Joint Committee on Legislative Organization, Wisconsin Attorney General Robert W. Warren opined that (1) Wisconsin's county-line requirement "'should be followed insofar as it does not compel disregard'" for population equality; (2) Wisconsin's "town and ward lines should be followed" "insofar as [they] may be consistent with population equality"; (3) precinct lines, although expressly listed in the Wisconsin Constitution, should be disregarded because this Court held in 1892 that precincts had ceased to exist as political subdivisions; and (4) village lines, which are not expressly listed in the Wisconsin Constitution, may

be used in forming legislative districts because modern-day Wisconsin villages are the equivalent of "towns" or "wards" at the time the Constitution was framed. 60 Op. Att'y Gen. 101, 106–09 (Wis. Att'y Gen. 1971) (quoting *State ex rel. Atty. Gen. v. Cunningham*, 81 Wis. 440, 514, 520, 51 N.W. 724 (1892)).

The Federal courts adjudicating Wisconsin legislative-redistricting cases over the last four decades have taken a similar approach, seeking where possible to avoid dividing political subdivisions. *See Baldus*, 849 F. Supp. 2d at 850 ("avoidance of breaking up counties, towns, villages, wards, and neighborhoods [is] … necessary to achieve" representative democracy); *Baumgart*, 2002 WL 34127471, at *3, *7 (observing that "respect for the prerogatives of the Wisconsin Constitution dictate[s] that wards and municipalities be kept whole where possible" and that the court was guided by the "neutral principle[] of maintaining municipal boundaries"); *Prosser*, 793 F. Supp. at 863 (trumpeting efforts to "mak[e] district boundaries follow (so far as possible) rather than cross the boundaries of … political subdivisions" and to avoid "breaking up counties, towns, villages, [and] wards"); *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 636 (E.D. Wis. 1982) (three-judge court) ("We believe that municipal splits should be used sparingly and we have tried to do so in our plan.").[4]

G. Geographic Compactness

The least compact district in any new map should be at least as compact as the

[4] Municipalities in Wisconsin include cities (which tend to be larger incorporated municipalities), villages (typically smaller incorporated municipalities), and towns (which are unincorporated). *See* Wis. Const. art. XI, § 3(1) (cities and villages are incorporated); Wis. Stat. §§ 61.188, 61.189 (primary difference between cities and villages is size); *City of Marshfield v. Towns of Cameron, etc.*, 24 Wis. 2d 56, 63, 127 N.W.2d 809, 813 (1964) ("towns are denominated 'quasi-municipal corporations'" and are "political subdivisions and governmental agencies of the state" (additional internal quotation marks omitted)).

least compact district in the map being replaced, based on both "Polsby-Popper" and "Reock" district compactness scores.

The Wisconsin Constitution requires assembly districts, in addition to being equal in population, contiguous, and respectful of political-subdivision lines, to "be in as compact form as practicable." Wis. Const. art. IV, § 4. Because the geographic compactness requirement—unlike the Wisconsin Constitution's equal-population, contiguity, and political-subdivision requirements—is qualified by the phrase "as practicable," it presumably has a lower priority than the other three requirements. *See Wis. State AFL-CIO*, 543 F. Supp. at 634 (describing the compactness criterion as "secondary" and "subservient" to both "population equality" and "natural or political subdivision boundaries," and noting that "districts should be reasonably, though not perfectly, compact"); *see also Prosser*, 793 F. Supp. at 863 (rejecting compactness as a basis for "breaking up counties, towns, villages, wards, even neighborhoods"). And of course compactness also has a lower priority than any Federal-law requirement. *See* U.S. Const. art. VI, cl. 2.

Although compactness is not required by Federal law and is not required for Wisconsin's congressional districts, Federal case law sometimes considers compactness as a defense to certain Federal constitutional claims. *See, e.g.*, *Shaw v. Reno*, 509 U.S. at 647; *Brown*, 462 U.S. at 842; *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973). And it is appropriate to treat the level of compactness in existing maps as a floor because a map ordered into effect by a court should be held to higher standards than one enacted by a legislature and signed into law by a governor. *See Chapman*, 420 U.S. at 26.

To reduce the potential for subjectivity, courts have relied on various mathematical measures of compactness, including the Polsby-Popper and Reock scores. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. at 1475; *Prosser*, 793 F. Supp. at 863–64; *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 283 (Fla. 2015); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 818 (Pa. 2018); *Vesilind v. Va. State Bd. of Elections*, 813 S.E.2d 739, 743 (Va. 2018); *see also Baumgart*, 2002 WL 34127471, at *4,*7 (using "perimeter to area" and "smallest circle" measures).

The Polsby-Popper score measures a district's jaggedness by comparing its area to the length of its perimeter. A circle, which has a very smooth perimeter, gets a perfect Polsby-Popper score. The Reock score measures a district's elongation by comparing its area to the area of the smallest circle that could circumscribe the district. Again, a circle, which is not at all elongated, gets a perfect Reock score. Both scores, however, are dependent on various factors, such as the shape of the State's exterior boundary, that are not relevant to the reasons for demanding geographically compact districts. Therefore, the measures are less useful for comparing districts across different States than for comparing districts within the same State.

Citizen Mathematicians and Scientists therefore recommend that the Court not accept any new map whose least compact district scores worse—using either the Polsby-Popper measure or the Reock measure—than the lowest-scoring district in the 2011 map that is being replaced.

H. Communities Defined by Actual Shared Interests

In Wisconsin, districts generally will respect communities defined by actual shared interests so long as they are bounded by county, municipal, and

ward lines and comply with the Voting Rights Act.

Like compactness, respect for communities of interest is a traditional districting principle that is not required by Federal law but that can be invoked as a defense against certain Federal constitutional claims. *See, e.g.*, *Vera*, 517 U.S. at 964; *Miller*, 515 U.S. at 919–20. Many States struggle, however, to precisely identify geographic areas that constitute "communities of interest," or what the U.S. Supreme Court has sometimes called "communities defined by actual shared interests." *Miller*, 515 U.S. at 919.

Wisconsin law, like Federal law, does not require districting plans to respect communities of interest. Wisconsin law does, however, provide a solid basis for identifying relevant geographic areas. And it effectively encourages redistricters to respect communities by following political-subdivision lines (generally) and ward lines (specifically). *See Wis. State AFL-CIO*, 543 F. Supp. at 636 (noting the close relationship between "preserving identifiable communities of interest" and "maintaining the integrity of county and municipal lines"). With 72 counties, nearly 2,000 municipalities, and more than 7,000 wards, Wisconsin's political-subdivision lines provide redistricters with significant guidance about the contours of the State's actual communities.

With limited exceptions, the governing bodies of Wisconsin municipalities—local governments—are required by statute to take into account communities of interest when drawing ward boundaries. *See* Wis. Stat. § 5.15(1)(b) ("To suit the convenience of the voters residing therein each ward shall, as far as practicable, be kept compact and observe the community of interest of existing neighborhoods and

other settlements."). Accordingly, following ward boundaries when drawing districts enhances respect for communities of interest.

Compliance with the Voting Rights Act can also protect communities of interest. As the U.S. Supreme Court has explained, "[a] State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests." *Miller*, 515 U.S. at 920. However, a district cannot remedy a Voting Rights Act violation if it connects two distant minority communities that have "divergent needs and interests, owing to differences in socio-economic status, education, employment, health, and other characteristics." *LULAC*, 548 U.S. at 424, 434–35 (internal quotation marks omitted and citations omitted).

* * *

The greatest challenge in redistricting is balancing all the criteria described above (as well as the criteria described below in Parts II and III of this brief). Some of the individual criteria are hard to measure. And even once a criterion or metric is agreed upon, questions inevitably arise about "how much is enough." Perhaps hardest of all is assessing the tradeoffs between scoring well on one criterion or metric and on another, given that each is essential to ensuring fair and effective representation for all Wisconsinites.

Citizen Mathematicians and Scientists suggest two solutions that fit neatly together.

First, the Court should look to recent past precedents—including the legislative and congressional maps that the Wisconsin Legislature enacted in 2011 and Governor Walker signed into law—and treat them as benchmarks, and then hold itself to the "stricter standards" that should always apply to Court-ordered maps. *Connor*, 431 U.S. at 414; *see Abrams*, 521 U.S. at 98 ("higher standards");

Chapman, 420 U.S. at 26 (same). This means, for example, keeping at least as many counties and municipalities and wards whole and intact as the Legislature did in 2011, and attaining minimum Polsby-Popper and Reock compactness scores that are at least as good as the ones the Legislature achieved in 2011.

Second, given the extraordinarily tight timeframe imposed by the U.S. Census Bureau's late release of redistricting data this year, the Court should take full advantage of computational redistricting to measure all these criteria and to develop maps that meet the "stricter" standards that apply to courts. Then no fair-minded Wisconsinite can claim that the Court's maps are not constitutional, neutral, and fair. While it is imaginable that a skilled mapmaker could achieve this successful outcome by manually drawing maps one at a time, it is hardly surprising that a computer that creates—and evaluates—hundreds of thousands of maps overnight can do the job far better. This technology clearly was not available in the 1960s, when the courts first entered this "political thicket." And it was not available even a decade ago. But it is here today. And Citizen Mathematicians and Scientists, through their experts, stand ready to assist the Court by submitting the very best maps they can generate to effectuate the factors and approaches the Court identifies as serving the interests of the People of Wisconsin.

II. WHILE SOME DEFERENCE TO LEGITIMATE POLICY CHOICES REFLECTED IN THE 2011 MAPS IS APPROPRIATE, THIS COURT CANNOT PRIORITIZE A "LEAST CHANGE" APPROACH OVER LEGALLY MANDATED REDISTRICTING CRITERIA AND SHOULD INSTEAD ADOPT A "BEST MAP" APPROACH.

The Court's Order noted that the Petitioners have asked the Court to modify the existing maps using a "least change" approach.

The Court has asked whether it should use that approach, and if not, which approach it should use.

Citizen Mathematicians and Scientists respectfully submit that the "least change" approach that Petitioners advocate, which focuses on equalizing district populations to the exclusion of other redistricting criteria under State and Federal law, is not appropriate. This Court can, and should, look to the legitimate policy choices the Wisconsin Legislature and Governor Walker made in 2011 as benchmarks, but the Court is held to a higher standard for purposes of a court-ordered plan. Ultimately, that plan must comply with all constitutionally and statutorily mandated criteria, not just equal population.

Citizen Mathematicians and Scientists therefore suggest that instead of a "least change" approach, the Court should adopt a "best map" approach similar to the one employed by the three-judge courts in both *Prosser*, 793 F. Supp. at 863–71, following the 1990 Census, and *Baumgart*, 2002 WL 34127471, at *2–*3, following the 2000 Census.

A. A Proper "Least Change" Approach that Respects Prior Legislative Choices Has Some Value, But Should Not Be Prioritized over Other Criteria Under State and Federal Law.

When considering whether to adopt a "least change" approach, it is critical to first define what is meant by "least change." Petitioners have posited that "least change[]" means "making the least number of changes to the existing maps as are necessary to meet the requirement of equal population." Omnibus Amended Petition ¶118 (Oct. 21, 2021). In other words, Petitioners would have this Court essentially freeze the lines of the existing map in place, moving them only where absolutely necessary to remedy malapportionment. In so doing, they would privilege the precise district lines enacted in 2011 over the

actual, legitimate policy choices that the Wisconsin Legislature and Governor Walker made in selecting those lines. And they would pretend that nothing in Wisconsin has changed in the last decade other than raw population numbers. That would be a mistake.

As the case law makes clear, "least change" is not about freezing the existing districts in place. Rather, the animating principles behind "least change" are twofold: *first*, to ensure that the judicial branch respects legitimate policy choices made by the legislative and executive branches, which are primarily charged with the responsibility for redistricting; and *second*, to promote stability and accountability.

1. As to the first of these principles, this Court already recognized in its Order accepting original jurisdiction that Wisconsin law vests the Legislature and the Governor with primary responsibility for redistricting. Order Granting Petition at 2 (Sept. 22, 2021, *amended* Sept. 24, 2021). As other State supreme courts have recognized, "courts engaged in redistricting lack the authority to make the political decisions that the Legislature and the Governor can make through their enactment of redistricting legislation." *Hippert v. Ritchie*, 813 N.W.2d 391, 397 (Minn. 2012) (citation omitted). But courts can look for guidance on how the Legislature and the Governor have approached redistricting in past enactments. Accordingly, where the legislative and executive branches fail to enact a new redistricting plan, courts sometimes use the prior enacted plan as a "benchmark" because the "last validly enacted plan … is the 'clearest expression of the legislature's intent.'" *Below v. Gardner*, 963 A.2d 785, 794–95 (N.H. 2002) (per curiam) (citation omitted).

During the 2011 redistricting cycle, the Wisconsin Legislature and Governor Walker made several legitimate policy choices that this Court can and should consider when evaluating or creating a new

redistricting map. As noted above, with regard to the congressional plan, they chose a map with the best possible population equality, a maximum deviation of only one person. That choice should continue to be respected by this Court as to any new congressional plan. Similarly, with regard to the legislative plan, the Legislature and Governor Walker adopted a map with a maximum population deviation of less than 2% in each house, consistent with the longstanding practice in Wisconsin. That choice should continue to be respected. *See supra* Part I-A. To achieve population equality in the 2011 legislative plan, 1,205,216 people were moved out of their existing senate districts and into new districts, and 2,357,592 people were moved out of their existing assembly districts and into new districts. *See Baldus*, 849 F. Supp. 2d at 849; *cf. id.* (noting that new, lawful senate and assembly districts could have moved as few as 231,341 and 323,026 people, respectively). Accordingly, any court-ordered plans should move no more than those numbers of people to achieve population equality in a new legislative-redistricting map. The following table depicts the choices the Wisconsin Legislature and Governor Walker made with respect to population equality in the 2011 legislative map.

	Senate	Assembly
Population Deviation	0.62%	0.76%
Number of People Moved	1,205,216	2,357,592

As to the other constitutionally and statutorily mandated redistricting criteria, Citizen Mathematicians and Scientists suggest that a true "least change" approach means the Court should ensure, to the greatest extent possible, that any map it adopts does at least as well as, if not better than, the prior map on each required criterion, a measure of performance consistent with benchmarking from the last validly enacted map.

This approach of respecting the choices of the State's legislative and executive branches reflects the origins of the "least change" principle, which is rooted in federalism and the constraint on Federal courts during the remedial phase of redistricting litigation. *See generally White v. Weiser*, 412 U.S. 783, 795–97 (1973) (discussing limits of federal-court authority in remedial redistricting litigation); *Upham v. Seamon*, 456 U.S. 37, 40–43 (1982) (same). A *Federal* court "seeking to remedy an unconstitutional apportionment [must] right the constitutional wrong while minimizing disturbance of legitimate state policies." *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 202 (1972) (Stewart, J., dissenting). Federal courts "are never free to 'make' the policy choices underlying redistricting decisions, but must discover and faithfully apply the State's own choices." Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself*, 4 J.L. & POL. 653, 664–65 (1988).

A State supreme court, however, has more leeway than a Federal court with respect to deciding State redistricting policy. As the U.S. Supreme Court made clear in *Growe v. Emison*, 507 U.S. 25 (1993), "state courts have a significant role in redistricting." *Id.* at 33. Likewise, in *Scott v. Germano*, 381 U.S. 407 (1965) (per curiam), the U.S. Supreme Court "encouraged" the State Judiciary to take the lead in "formulat[ing] a valid redistricting plan" when the State's legislative and executive branches had failed to do so. *Id.* at 409. Accordingly, unlike a Federal court that should have no role in deciding a State's redistricting policy, this Court's role is to ensure that the State holds itself to the highest possible standards when deciding on a new redistricting plan. *See Jensen*, 249 Wis. 2d 706, ¶22 (recognizing that "the institutions of state government are primary in matters of redistricting, and federalism requires deference to state high courts for

their resolution"). Some judicial deference to the legislative and executive actors primarily charged with redistricting under the State Constitution is appropriate, but this Court is not bound by their prior choices in the same way a Federal court might be. Instead, this Court is bound by the higher standards applicable to State judicial redistricting.

2. As to the second principle animating a "least change" approach, Citizen Mathematicians and Scientists agree that there is some value in stability and continuity for both voters and representatives. Indeed, that is why redistricting takes place only once per decade, after each Census. *Cf.* U.S. Const. art. I, § 2, cl. 3 (mandating "an actual Enumeration … within every … Term of ten Years"). As the U.S. Supreme Court observed in its canonical malapportionment case: "Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system." *Reynolds v. Sims*, 377 U.S. 533, 583 (1964). The Court recognized that "daily, monthly, annual or biennial reapportionment" would be a bad idea. *Id.* Accordingly, decennial redistricting is the established federal constitutional requirement. But "[s]tability is a value to be optimized, not maximized. It serves important purposes in an electoral system, but it is not an unalloyed good. Dynamism is also vital, and it is necessary to strike a healthy balance." Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. REV. (forthcoming 2022) (draft at 27), https://ssrn.com/abstract=3910061.

Citizen Mathematicians and Scientists respectfully submit that the Court should not choose to maximize stability without first assessing the tradeoffs that Petitioners' proposed "least change" approach would require. Citizen Mathematicians and Scientists stand ready to apply the principles of computational redistricting to give this

Court a complete picture of these tradeoffs. If the Court would find it helpful, they can provide the Court with a set of maps (and associated data) that demonstrate precisely what the Court would be giving up with respect to various other criteria when Petitioners' version of "least change" is applied. For example, does prioritizing Petitioners' "least change" approach mean that there will be less respect for the integrity of counties, municipalities, or wards? Does it mean the districts will be less compact? Does it mean there will be insufficient opportunity for minority voters?

Prioritizing Petitioners' "least change" approach almost certainly means that the maps would not score well with respect to partisan fairness. Citizen Mathematicians and Scientists do not repeat here the extensive factual findings from prior court cases about the partisan intent and effects of the 2011 maps, but understand them to have concluded that one political party has benefited from a significant counter-majoritarian advantage, enabling it to keep a majority (and even a supermajority) of legislative seats when its candidates could not garner a majority (or even a plurality) of the statewide vote. Consequently, freezing the 2011 district lines in place could likewise freeze a counter-majoritarian partisan advantage in place.

Other State supreme courts have chosen not to prioritize a "least change" approach that cements in partisan advantage because such an approach would be inconsistent with the judicial role in redistricting. For example, the Minnesota Supreme Court's Special Redistricting Panel "decline[d] to adopt criteria regarding the preservation of prior district cores," because the court's role should be "neither to maximize nor minimize political opportunities for any political party or incumbent." Order at 10-11, *Zachman v. Kiffmeyer*, No. C0-01-160

(Minn. Spec. Redistricting Panel Dec. 11, 2001) (Order Stating Redistricting Principles and Requirements for Plan Submissions).[5]

Prioritizing the "least change" approach also would mean placing a high value on protecting incumbents. Certainly, as noted above, there is some value to stability and accountability with respect to the relationship between representatives and their constituents, but incumbent protection should not come at the cost of sacrificing adherence to other redistricting criteria. *See Hippert*, 813 N.W.2d at 402 (while "the impact of redistricting on incumbent officeholders" may be considered "to determine whether a plan results in either undue incumbent protection or excessive incumbent conflicts," districts "shall not be drawn for the purpose of protecting or defeating incumbents" (internal quotation marks omitted)); *Holloway v. Hechler*, 817 F. Supp. 617, 628 (S.D. W. Va. 1992) ("recognition of incumbency concerns is not unconstitutional *per se*" but cannot "justify a population malapportionment of unconstitutional magnitude"), *aff'd*, 507 U.S. 956 (1993); *In re Legis. Districting of Gen. Assembly*, 193 N.W.2d 784, 789 (Iowa) (holding that "the considerations of the protection of incumbent legislators in both houses … resulted in impermissible deviations from population equality and territorial compactness," thereby rendering plan unconstitutional under State law), *supplemented*, 196 N.W.2d 209 (Iowa), *amended sub nom. Matter of Legislative Districting of Gen. Assembly*, 199 N.W.2d 614 (Iowa 1972). In past redistricting cycles, three-judge Federal courts in Wisconsin have considered the degree to which submitted maps protected incumbents when determining whether those plans were too partisan. *See, e.g.*, *Prosser*, 793 F. Supp.

[5] *Available at* https://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/2001Redistricting/Criteria_Order.pdf.

at 867. But these courts made clear that "[a]voiding unnecessary pairing of incumbents" is not a required redistricting criterion in Wisconsin, and indeed incumbent protection has been "expressly rejected." *Baumgart*, 2002 WL 34127471, at *3 (describing the 1982 redistricting).

As a practical note, adopting a "least change" approach also would eliminate incentives for the Legislature to reach compromise with the Governor. Adopting a "least change" approach effectively tells legislators that, in the event of an impasse, they not only will be rewarded by the Judiciary with a continuation of the status quo, but also will avoid political accountability because blame for any partisan skew will fall on the Judiciary, rather than the Legislature. If members of the Legislature know that they need not enact a map because the Judiciary will do the Legislature's job for it, then there may be little hope that the Legislature ever will adopt its own plans. *See* Yablon, *Gerrylaundering*, *supra*, at 54.

B. A "Best Map" Approach Is Preferable to a "Least Change" Approach.

Citizen Mathematicians and Scientists respectfully suggest that a "best map" approach is preferable to a "least change" approach. At the conclusion of this briefing, the Court will have the views of all the parties on all of the criteria the Court is required to consider. Citizen Mathematicians and Scientists propose the Court then do a version of what the three-judge Federal courts in the 1990s and 2000s did—tell the parties the criteria the Court will consider, and ask the parties to submit their "best" map or maps, showing how they have satisfied those criteria and what tradeoffs they have made. Certainly, the extent to which a map promotes stability or continuity for voters and representatives and thereby creates the "least change" is one factor the

Court can consider. But that should be just one *factor*, not the overall *approach*.

The "best map" approach was adopted by courts in Wisconsin in both the 1990s and 2000s. As the *Prosser* court described its approach in the 1990s, the question was: "What plan shall we as a court of equity promulgate in order to rectify the admitted constitutional violation? What is the best plan?" *Prosser*, 793 F. Supp. at 865. To answer that question, the court "asked the parties at the outset whether they had any objection to [the court] treating their plans in the manner of 'final offer arbitration,' that is, to [the court] selecting the best of the submitted plans rather than trying to create [its] own plan, whether from the ground up or out of bits and pieces of the plans submitted by the parties." *Id*. The court then "permitted the parties to submit multiple plans and to amend their plans." *Id*. Ultimately, "[a]fter considering the plans, [the court] decided to retract [its] threat to choose the 'best' no matter how bad it was." *Id*. This was because the court found that the two "best plans" still bore "the marks of their partisan origins." *Id*. The court therefore "decided to formulate [its own] plan, which combine[d] the best features of the two best plans." *Id*.

A similar process played out in the 2000s, with a total of 16 plans ultimately submitted to the court by the parties. The court allowed parties to submit multiple plans if they chose to do so, and some did. For example, one of the parties filed nine plans that were all "variations on a theme with different standards of population equality." *Baumgart*, 2002 WL 34127471, at *4. Again, the court found that the plans reflected their "partisan origins" or were "riddled with … partisan marks." *Id*. "Having found various unredeemable flaws in the various plans submitted by the parties, the court was forced to draft one of its own." *Id*. at *6.

Although in both the 1990s and the 2000s, the courts ultimately drew their own maps rather than choosing one from among the parties' submissions, that was largely because the courts found that all of the submitted maps were too partisan. Citizen Mathematicians and Scientists are confident that they can provide the Court with maps that directly answer the question, "What is the best plan?" And they will do so as nonpartisans.

III. THE PARTISAN MAKEUP OF DISTRICTS IS A FACTOR THE COURT MUST CONSIDER IN EVALUATING OR CREATING NEW MAPS.

The Court has asked whether the "partisan makeup of districts [is] a valid factor for [the Court] to consider in evaluating or creating new maps." Order Requesting Briefing at 2 (Oct. 14, 2021). Citizen Mathematicians and Scientists respectfully submit that the partisan makeup of districts is not only a valid factor the Court *may* consider in evaluating or creating new maps, but also a required factor the Court *must* consider to ensure that any new map does not violate the United States Constitution. Furthermore, the Court also must consider the partisan makeup of districts to evaluate whether a map will have the effect of denying minority citizens an equal opportunity to nominate and elect representatives of their choice and thus violate the Voting Rights Act.

A. Courts Adopting Remedial Redistricting Maps Have an Affirmative Obligation to Avoid Maps with Excessively Partisan Effects.

Severe partisan gerrymandering is unconstitutional, even though partisan-gerrymandering claims are no longer justiciable in Federal court. In 2004, all nine Justices agreed in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), that "an excessive injection of politics" in redistricting is "unlawful" under the Federal Constitution, though they disagreed on

"whether it is for the courts to say when a violation has occurred, and to design a remedy." *Id.* at 292–93 (Scalia, J., writing for the plurality); *see id.* at 316 (Kennedy, J., concurring) (noting the plurality's agreement that severe partisan gerrymandering is unlawful). Nothing in the Supreme Court's cases since *Vieth* has disturbed that conclusion. Indeed, in its recent opinion in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), all nine Justices again agreed that excessive partisanship in districting is "incompatible with democratic principles." *Id.* at 2506 (internal quotation marks omitted). While "different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: Extreme partisan gerrymandering … violates the Constitution." *Id.* at 2514–15 (Kagan, J., dissenting) (citing cases).

Thus, even though partisan gerrymandering is not justiciable in Federal courts, this Court must ensure that any new maps it adopts do not result in extreme partisan advantage or disadvantage to one political party. It is not enough for the Court to adhere to "traditional" districting principles and stay blind to political consequences. Rather, the Court must actively ensure that it is not, inadvertently, adopting maps that systematically treat voters who prefer one political party better than voters who prefer another political party. As the Supreme Court explained this obligation nearly 50 years ago in *Gaffney v. Cummings*, 412 U.S. 735 (1973):

> It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.

Id. at 753. Thus, all courts faced with the unwelcome task of redistricting are obligated to refrain from taking a "politically mindless

approach" that could unintentionally result in severe partisan advantage. *Id*. It is critical to note that even a redistricting map with districts that are all equally populated, contiguous, reasonably compact, and respectful of counties, municipalities, and wards can be severely biased in favor of one political party and against another. As Justice Scalia correctly stated, "packing and cracking" along partisan lines, "whether intentional or no, are quite consistent with adherence to compactness and respect for political subdivision lines." *Vieth*, 541 U.S. at 298 (plurality opinion). Thus, expressly checking for partisan consequences in a remedial redistricting map is necessary.

While the Court may not invalidate an *enacted* map on the basis of partisanship alone, this Court previously has recognized that the Court itself cannot enact a map tainted by partisan unfairness. In *Jensen v. Wisconsin Elections Board*, 249 Wis. 2d 706 (2002), this Court quoted with approval the Federal three-judge court's opinion in *Prosser*, stating that when the Court is "not reviewing an enacted plan" (which would have "the virtue of political legitimacy") and instead finds itself "comparing submitted plans with a view to picking the one … most consistent with judicial neutrality," the Court "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." *Id.* ¶12 (internal quotation marks omitted). The three-judge court drawing Wisconsin's legislative districts in 2002 drew on this same language in holding that "avoiding the creation of partisan advantage" is a "traditional" Wisconsin districting principle to be applied by courts. *Baumgart*, 2002 WL 34127471, at *3.

Petitioners' argument that this Court "need not and should not take into account projections of the likely political impact of the maps,"

Omnibus Amended Petition ¶127, is incorrect. Indeed, when deciding on new Wisconsin legislative districts following the 1990 Census, the three-judge Federal court was faced with the same argument that Petitioners make here—"that political fairness is irrelevant" and that "their plan or plans should be preferred, regardless of political fairness," because "perfect numerical equality" is "all that counts." *Prosser*, 793 F. Supp. at 866–67. The court rejected that argument and instead conducted a searching inquiry into the submitted plans' partisan performance. *Id*. at 865. The court conducted extensive checks to ensure that its map was "the least partisan" of all the plans and that it "create[d] the least perturbation in the political balance of the state." *Id*. at 871; *see id*. (noting there was no allegation that the existing districts were "politically biased from the start").

Other State supreme courts have taken a similar approach when faced with the unwelcome obligation of adopting a redistricting plan to fill the void left by the political branches' impasse. *See, e.g.*, *Maestas v. Hall*, 274 P.3d 66, 80 (N.M. 2012) (court-ordered plan should "avoid … political advantage to one political party and disadvantage to the other"); *Peterson v. Borst*, 786 N.E.2d 668, 673 (Ind. 2003) (rejecting plan that "was uniformly endorsed by members of one party and uniformly rejected by members of the other," because it "does not conform to applicable principles of judicial independence and neutrality"); *Burling v. Chandler*, 804 A.2d 471, 483 (N.H. 2002) (rejecting plans that "openly embrace political agendas," because "political considerations," while "tolerated in legislatively-implemented redistricting plans, … have no place in a court-ordered plan"); *Wilson v. Eu*, 823 P.2d 545, 576–77 (Cal. 1992) (en banc) (rejecting plans that have "calculated partisan political consequences," to avoid "endorsing an unknown but intended political consequence").

These cases all reflect the principle that Citizen Mathematicians and Scientists have emphasized throughout this brief—a "court-ordered plan … must be held to higher standards" than a State Legislature's plan. *Chapman*, 420 U.S. at 26.

Thus, the Court can and must consider the partisan makeup of districts in either evaluating or creating new maps, to ensure that the maps do not unfairly disadvantage some voters. As the U.S. Supreme Court stated in *Reynolds v. Sims*, 377 U.S. 533 (1964): "Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators." *Id.* at 565. At a minimum, this logic suggests that a map should not *systematically* award most of the seats to one political party if another party's candidates earned most of the votes.

Of course, in some States perfect partisan symmetry may not be possible because voters affiliated with one political party are far more geographically concentrated than other voters. And the law of course does not demand the impossible. But so long as partisan fairness can be achieved while respecting equal population, contiguity, compactness, and political subdivisions, partisan fairness should—and indeed, must—be respected. And even if a State's unique political geography prevents attaining "perfect" partisan fairness, maps should still take that goal into consideration, while maintaining respect for the traditional geographic principles. Just as the odd shape of a State like Maryland, in contrast to a Colorado or Wyoming, does not justify abandoning geographic compactness as a legitimate districting principle, the asymmetric spatial distribution of the two major parties' voters in any given State cannot justify abandoning partisan fairness.

Another reason the Court should consider the partisan makeup of districts is to ensure that at least some of them are competitive and thus that the map as a whole is responsive to shifts in public opinion. Neither competitiveness nor responsiveness is mandated by the Equal Protection Clause, or any other constitutional provision. But it is arguably essential to guaranteeing Wisconsin a republican form of government. *Cf.* U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government …."); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 116 (2000) ("[E]ntrench[ing] a particular political faction against effective political challenge … is in obvious tension with the values of Republicanism."). When a map is devoid, or nearly devoid, of competitive districts, elections lose their point and democracy is frustrated. *See Hall v. Moreno*, 270 P.3d 961, 973 (Colo. 2012) (en banc) (holding that "consideration of competitiveness is consistent with the ultimate goal of maximizing fair and effective representation"). If the outcome in every district is preordained, voters have no incentive to turn out on Election Day. And representatives have no incentive to attend to their constituents' needs or legitimate interests. *See Maestas v. Hall*, 274 P.3d at 80 (concluding that "a more competitive district should have been created if at all practicable" and observing that "competitive districts allow for the ability of voters to express changed political opinions and preferences"); *Gonzalez v. State Apportionment Comm'n*, 53 A.3d 1230, 1250 (N.J. Super. Ct. App. Div. 2012) ("Lack of viable contests in competitive districts can lead to representatives that fail to work diligently on behalf of the people, and to voter apathy."). But the Court can evaluate and compare competing maps on this criterion only if it considers the partisan makeup of each district.

B. The Court Also Must Consider Partisan Data to Ensure that a New Map Complies with the Voting Rights Act.

Beyond considering partisan data to ensure that districting maps meet basic thresholds of fairness and responsiveness, the Court also will need to consider partisan data when evaluating whether a new or proposed map complies with the VRA. As noted above, Section 2 of the VRA prohibits a redistricting plan that abridges any citizen's right to vote "on account of race or color [or membership in a language-minority group]." 52 U.S.C. § 10301(a); *id.* § 10303(f)(2). A map violates Section 2 if, based on the "totality of circumstances," members of a racial or language-minority group have "less opportunity than other members of the electorate" to "nominat[e]" and "elect representatives of their choice." *Id.* § 10301(b). In assessing whether a redistricting plan provides equal electoral opportunity under Section 2, Congress expressly permitted legislators and judges alike to consider recent election outcomes, namely, "[t]he extent to which members of a protected class have been elected to office." *Id.* The statute also mandates consideration of electoral outcomes to identify the "representative of [the minority group's] choice." *Id.*

To assess minority electoral opportunities under a districting plan, courts need to consider the votes cast for each candidate in recent statewide elections, district by district, to learn which districts gave more votes to the minority-preferred candidate. Because a minority-preferred candidate can be thwarted in either a primary election or a general election, this necessarily requires analysis of districts' partisan makeup. As noted above, as a general rule of thumb, if a statewide plan provides effective opportunities to nominate and elect minority-preferred candidates in a number of districts roughly proportional to the

minority group's share of the State's CVAP, the plan likely complies with Section 2. *See, e.g.*, *LULAC*, 548 U.S. at 436–38; *De Grandy*, 512 U.S. at 1000. Thus, assessing compliance with the VRA will require analyzing recent election returns within each district, which in turn will require the Court to consider the partisan makeup of districts.

IV. THE LITIGATION PROCESS CAN BE SIMPLE AND STREAMLINED TO IDENTIFY CONSTITUTIONAL MAPS.

Citizen Mathematicians and Scientists hope this Court can design a relatively simple, streamlined litigation process to evaluate or create new, constitutionally sufficient maps. As stated in Citizen Mathematicians and Scientists' October 13, 2021 letter brief, "this proceeding should not require extensive fact-finding or discovery. Rather, proceedings will focus on proposals for remedial maps, with briefs and expert reports followed by rebuttal briefs and reports, and then a hearing." Letter Br. of Citizen Mathematicians and Scientists at 5 (Oct. 13, 2021) (footnote omitted).

By granting not only the petition but also intervention motions from seven sets of parties, each with unique interests (*see* Wis. Stat. § 803.09), the Court is assured an opportunity to review a broad array of remedial maps and arguments favoring and opposing each map. As the Court noted in its October 14, 2021 Order, this breadth is exactly why "Wisconsin courts view intervention favorably." Order on Intervention at 2 (Oct. 14, 2021) (citing *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶38, 307 Wis. 2d 1, 9, 745 N.W.2d 1; *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 548–49, 334 N.W.2d 252 (1983)).

Citizen Mathematicians and Scientists are less focused on the details of the litigation process than on the mapmaking process. No

matter what litigation process this Court adopts, its success will be advanced by using high-performance computers to create large numbers of maps, evaluate them systematically, and then select the best map to present to the Court.

One litigation-process point the Court should consider now is whether to request from each set of parties a single "best" map (that is, one for Congress, and one for the houses of the Wisconsin Legislature, with nested districts) or multiple maps. Because the Court will have to focus on several factors or criteria, each of which at some point will come into tension with the others, it may be useful to illuminate the tradeoffs concretely. If the Court would find it helpful, Citizen Mathematicians and Scientists stand ready to provide the Court with a set of maps based on different prioritization of the factors described in this brief. For example, if the Court would like to see the inevitable tension between greater population equality and closer adherence to political-subdivision boundaries, Citizen Mathematicians and Scientists can provide maps to illustrate that tradeoff.

However, if the Court would, understandably, prefer to confine the number of maps it reviews, Citizen Mathematicians and Scientists can simply present their "best" map, balancing all relevant factors in a manner intended to foster fair and effective representation for all Wisconsinites. When in doubt about how best to weight one factor against another, Citizen Mathematicians and Scientists will look to what the Legislature and Governor Walker did in 2011 and to what courts in Wisconsin did in prior decades.

Citizen Mathematicians and Scientists endorse the "best map" approach over the possibility of the Court retaining a "special master" to manually draw maps for the Court, for four reasons. First, retaining a special master can be costly and time-consuming, as it adds an

additional layer of decision-making, and the Court's timetable is already compressed. Second, this Court should be the decision-maker on the parties' maps, not an unelected special master. Third, announcing early on that the Court will ultimately draw its own map incentivizes the parties to stretch the "Overton window" by submitting only the most extreme maps. By contrast, announcing that the Court will choose the most reasonable map submitted to it will instead encourage the parties to moderate their positions.

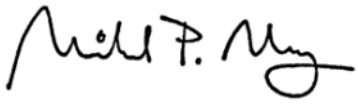
Fourth and most important, Citizen Mathematicians and Scientists are confident that it will be difficult, and perhaps impossible, to improve on the best map they present to the Court. If the Court (or its special master) begins with a map submitted by the Citizen Mathematicians and Scientists and seeks to improve it incrementally, the Court will soon discover that taking a step forward on one criterion will likely cause the map to take two steps backward on other criteria. After all, the computer will have been programmed precisely to seek out incremental improvements that take one step forward and zero steps back; and the Citizen Mathematicians and Scientists will not submit a map to this Court until that incremental-improvement process has exhausted itself.

CONCLUSION

Citizen Mathematicians and Scientists stand ready to provide the Court with maps that neutrally implement all the required redistricting criteria to ensure fair and effective representation for all Wisconsinites and look forward to complying with whatever schedule the Court sets for this litigation.

Dated this 25th day of October 2021.

BOARDMAN & CLARK LLP
By



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FORM & LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,152 words.

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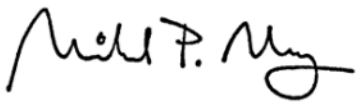

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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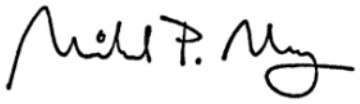

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