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IN THE SUPREME COURT OF WISCONSIN

No. _______________

KATE FELTON, LOREN DE LONAY, KYLE JOHNSON, RAYMOND SPELLMAN, VALERIA CERDA, LYNN CAREY, RAFAEL SALAS, CURTIS GAUTHIER, and PATRICIA SCIESZINSKI,

Petitioners,

v.

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

Respondents.

PETITIONERS' MEMORANDUM OF LAW

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INTRODUCTION

Wisconsin's congressional map, imposed by this Court in the *Johnson* litigation, is unconstitutionally malapportioned in violation of Article I, Section 1 of the Wisconsin Constitution because it fails to achieve population equality among all eight districts. At the time the Court imposed the map, the *Johnson* majority excused this inequality because the chosen map scored best on the "least change" metric among the parties' submissions, even though other proposed maps achieved population equality. This Court has since overruled "least change" as a required, or even permissible, metric for judicial remedial map selection. "Least change" is thus not a compelling—or even legitimate—justification for the map's population inequality.

This problem created by the failure to abide by a basic constitutional requirement is compounded because the map was imposed by the Court. Professor Nathaniel Persily articulated the problem well in his 2022 special master report to the New Hampshire Supreme Court after that court appointed him to redraw the state's congressional map. Explaining that minor population deviations may not be a "functional difference," he cautioned that "[w]hen it comes to court-imposed plans, however, the strict population equality requirement serves other purposes besides political equality of potential voters . . . . The equal population requirement is stricter for court-drawn plans because courts are not in the best position to subordinate population equality, which can be easily measured and objectively defined, to other legitimate policy objectives, which the legislature might deem sufficiently weighty to justify population deviations." *Norelli v. Sec'y of State*, No. 2022-0184, 2022 WL 1749182, at *6 (N.H. May 27, 2022).

Throughout the *Johnson* litigation, the judicially-invented "least change" policy was elevated over all other considerations—including the most basic constitutional requirement of one-person one-vote and also traditional redistricting principles like minimizing county splits, resulting in the map splitting nearly twice as many counties as necessary. The *Johnson II* majority, over a strong dissent, offered a single justification for the map's population inequality: the map scored best on the "least change" metric. *Johnson v. Wisconsin Elections Commission*, 2022 WI 14, ¶24, 400 Wis. 2d 626, 971 N.W.2d 402 ("*Johnson II*"). But three justices concurring in the majority took issue with the adoption of "least changes" as a metric. *Id.* ¶¶53-63 (Walsh Bradley, J., concurring). Since then, this Court in *Clarke* overruled *Johnson*'s adoption of the "least change" metric and held that it cannot supersede constitutional requirements for redistricting. *Clarke v. Wisconsin Elections Commission*, 2023 WI 79, ¶¶60-63, 410 Wis. 2d 1, 998 N.W.2d 370.

The *Clarke* holding confirms that the map is unconstitutional: it violates the Wisconsin Constitution's population equality requirement with no compelling justification. This Court has not previously held otherwise. At the time the *Johnson* Court imposed the congressional map, the majority observed that "no party develop[ed] an argument that the Wisconsin Constitution requires something for congressional districts not already necessary under the United States Constitution." *Johnson II*, 2022 WI 14, ¶20. The Court thus expressly declined to address the state-law question of population equality, *id.* ¶20 n.13, and instead assessed the map's deviation from perfect equality under the federal law standard.

This Petition arises exclusively under state law and raises the question that no party in *Johnson* pressed and that this Court thus expressly declined to resolve: Does the Wisconsin Constitution impose a stricter requirement for apportioning congressional maps—particularly when courts are undertaking the task—than federal law requires? Federal law allows a small degree of flexibility to states in populating congressional districts—under federal law, states must try to achieve precise mathematical equality for congressional districts, and any deviation—"no matter how small"—must be justified by some legitimate state objective. *Karcher v. Daggett*, 462 U.S. 725, 730 (1983).[1] But federal law does not compel state courts to interpret their own state constitutional provisions as accepting that flexibility, particularly where the court itself, not the legislature, performs the redistricting. Unlike other states' constitutions, which expressly impose competing requirements for configuring congressional districts (*e.g.*, maintaining whole counties (West Virginia and Iowa) or maintaining cores of prior districts (New York)), Wisconsin's Constitution contains no competing requirement to balance against its command for equally populated congressional districts.

Article I, Section 1 of the Wisconsin Constitution guarantees that similarly situated Wisconsinites be treated equally. When fundamental rights are at stake, this Court evaluates equal protection claims under strict scrutiny. As explained below, Article I, Section 1 imposes a stricter requirement for population equality on congressional maps than it does

[1] That standard is stricter where a court imposes a map—the deviation "must be supported by enunciation of *historically significant* state policy or unique features." *Chapman v. Meier*, 420 U.S. 1, 26 (1975) (emphasis added).

for state legislative and local apportionment—it requires congressional maps to achieve as close to precise mathematical equality as possible, particularly in court-imposed maps. And because the right to vote on equal terms without one's voting power being weakened compared to others is fundamental, any deviation from that precise mathematical equality must satisfy strict scrutiny, *i.e.*, it must be narrowly tailored to further a compelling state interest. In this way, Article I, Section 1 imposes a more stringent equality requirement with respect to congressional maps than the federal Constitution requires Wisconsin to adopt. Article I, Section 1 of the Wisconsin Constitution must be given its full, independent meaning.

Because "least change" is not a compelling state interest sufficient to warrant the congressional map's failure to achieve equal apportionment, Wisconsin's congressional map violates Article I, Section 1 and must be enjoined. This is so regardless of the size of the population deviation at issue. Under the Wisconsin Constitution, all Wisconsinites must stand on equal footing with respect to their representation in U.S. House of Representatives—the only federal body intended to represent individuals. Moreover, as Petitioners explain below, the solution is not as simple as the concededly small size of the population deviation. Indeed, the map's excessive splitting of counties would only be worsened by another "least change" approach to remedying the legal violation.

Respondents must be enjoined from further use of the map and the Legislature and Governor should be provided an opportunity to remedy the violation through the political process, as happened in *Clarke*. Should that effort fail, this Court should follow the same remedial process and standards it set forth in *Clarke*—declining to follow the "least

change" approach, complying with applicable legal requirements, and assuring itself that any judicially-imposed map lacks a partisan skew.

Johnson elevated "least change"—an atextual and ahistoric approach to Wisconsin redistricting—over the requirements of the Wisconsin Constitution and over traditional redistricting principles. That led directly to the congressional map's unconstitutionality. Wisconsin cannot hold elections for any more election cycles under a congressional map that violates the state's Constitution.

ARGUMENT

I. Wisconsin's congressional map is unconstitutionally malapportioned in violation of the equality guarantee of Article I, Section 1 of the Wisconsin Constitution.

Wisconsin's congressional map is unconstitutionally malapportioned in violation of Article I, Section 1 of the Wisconsin Constitution, which guarantees that "[a]ll people are born equally free." Wis. Const. art. I, § 1. As Justice Dallet has observed, Article I, Section 1 "was written independently of the United States Constitution and we must interpret it as such, based on its own language and our state's unique identity." *Matter of Adoption of M.M.C.*, 2024 WI 18, ¶50, 411 Wis. 2d 389, 5 N.W.3d 238 (Dallet, J., concurring).[2] By its plain text and history, Article I, Section 1 "provid[es] broader protections for individual liberties than the Fourteenth Amendment." *Id.* With respect to the equality component of

[2] At times the Court has uncritically assumed that Article I, Section 1 provides the "same equal protection and due process rights afforded by the Fourteenth Amendment to the United States Constitution." *Mayo v. Wis. Injured Patients & Families Compensation Fund*, 2018 WI 78, ¶35, 383 Wis. 2d 1, 914 N.W.2d 678. But as Justice Dallet observed, this is because "litigants often overlook state constitutional claims" in favor of more developed federal law and "[i]t is up to us—judges, lawyers, and citizens—to give effect to the fundamental guarantees of Article I, Section 1." *Matter of Adoption of M.M.C.*, 2024 WI 18, ¶¶58 & 59.

Article I, Section 1, the Court has explained that it prohibits the State from "treat[ing] members of similarly situated classes differently." *Tomczak v. Bailey*, 218 Wis. 2d 245, 261, 578 N.W.2d 166 (1998).

When the State's action "interferes with the exercise of a fundamental right," the Court applies strict scrutiny. *Id.* (quoting *State v. Annala*, 168 Wis. 2d 453, 468, 484 N.W.2d 138 (1992)). Under that analysis, the Court asks whether the State's action is "narrowly tailored to serve a compelling state interest." *Matter of Visitation of A.A.L.*, 2019 WI 57, ¶18, 387 Wis. 2d 1, 927 N.W.2d 486. "Strict scrutiny is an exacting standard, and it is the rare case in which a law survives it." *State v. Roundtree*, 2021 WI 1, ¶27, 395 Wis. 2d 94, 952 N.W.2d 765. The right to vote on an equal footing as other Wisconsinites—and to equal representation in Congress—is fundamental and the Court should apply strict scrutiny. *See Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶23, 357 Wis. 2d 469, 851 N.W.2d 262 ("Without question, the right to vote is a fundamental right and in many respects, it is protective of other rights.").[3] This is especially so in the context of a court-imposed congressional map.

[3] In *Milwaukee Branch of NAACP*, plaintiffs' claims were about access to the ballot, not the unequal configuration of districts. The majority—borrowing federal "*Anderson/Burdick*" case law regarding electoral access restrictions—applied a test that imposes strict scrutiny on "severe restrictions" to the franchise and lesser scrutiny to "reasonable, nondiscriminatory regulations." 2014 WI 98, ¶33 (internal quotations omitted). Chief Justice Abrahamson dissented, explaining that "Wisconsin case law sets forth a stringent standard of review for voting rights cases" that differs from federal law. *Id.* ¶83 (Abrahamson, C.J., dissenting). Other state supreme courts, interpreting their own state constitutions, agree with Chief Justice Abrahamson's view. *See, e.g.*, *Montana Democratic Party v. Jacobsen*, 2024 MT 66, 416 Mont. 44, 545 P.3d 1074, 1089-90 (rejecting federal "*Anderson/Burdick*" test and holding that voting restrictions are subject to strict scrutiny under the Montana Constitution).

This question does not present itself here. Sensibly, neither this Court nor the U.S. Supreme Court has extended *Anderson/Burdick* to unequal representation cases. No administrative concerns warrant reduced scrutiny to congressional maps that fail the one-person, one-vote test, and thus strict scrutiny should apply.

This Court has never considered the application of Article I, Section 1 to population equality in congressional apportionment. *See Johnson v. Wisconsin Elections Commission*, 2021 WI 87, ¶13 n.4, 399 Wis. 2d 623, 967 N.W.2d 469 ("*Johnson I*") (noting that "this court has never held any provision of the Wisconsin Constitution imposes a one person, one vote requirement on congressional districts").[4] But the *Johnson* litigation was the first time this Court had ever adjudicated a congressional malapportionment claim. In *Johnson*, the Court noted that "no party develop[ed] an argument that the Wisconsin Constitution requires something for congressional districts not already necessary under the United States Constitution." *Johnson II*, 2022 WI 14, ¶20. Instead, the "Congressmen" parties in *Johnson*—which consisted of the Republican members of the Wisconsin congressional delegation at the time—contended "at oral argument" that the chosen map violated *federal law* because of its failure to achieve precise mathematical equality of population. *Id.* ¶¶20-21; *see also* Oral Argument at 5:23:20, *Johnson v. Wisconsin Elections Commission*, WisconsinEye (Jan. 19, 2022), https://wiseye.org/2022/01/19/wisconsin-supreme-court-oral-arguments-johnson-v-wisconsin-elections-commission/ (Attorney Misha Tseytlin on behalf of Congressman arguing that the map ultimately selected by the Court was unconstitutionally malapportioned under federal law).

In considering the argument that the *Johnson* map violated federal constitutional equal population standards, the *Johnson* court applied federal precedent, which is characterized by two key principles. First, the U.S. Supreme Court has interpreted Article

[4] The Court has held that Article I, Section 1 prohibits malapportionment of county board districts. *See State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 58, 132 N.W.2d 249 (1965).

I, Section 2 of the federal Constitution to impose a stricter requirement on population equality for congressional districts than the Fourteenth Amendment's equal protection clause imposes on state legislative and local districting. In *Karcher*, the Supreme Court held that Article I, Section 2 of the federal constitution requires that congressional districts be apportioned "to achieve population equality 'as nearly as is practicable.'" 462 U.S. at 730 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964)). "[T]he 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve *precise mathematical equality*. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, *no matter how small*." *Id.* (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969)) (emphasis added) (internal citations omitted).

Second, as the *Johnson II Court* noted, in *Tennant v. Jefferson County Commission*, the U.S. Supreme Court subsequently upheld West Virginia's congressional map, notwithstanding its failure to achieve mathematical equality, because the deviation was justified by the legislature's adherence to the state constitution's prohibition on dividing counties in configuring congressional districts. 567 U.S. 758, 764-65 (2012) (per curiam). The Court explained that, under Article I, Section 2, a two-prong test applies to federal challenges to population deviations in congressional districts. "First, the parties challenging the plan bear the burden of proving the existence of population differences that could practicably be avoided." *Id.* at 760 (cleaned up). "If they do so, the burden shifts to the State to show with some specificity that the population differences were *necessary* to achieve some legitimate state objective." *Id.* (cleaned up) (emphasis added). This burden

is "flexible" in that it "depends on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." *Id.* (cleaned up). Nevertheless, the U.S. Supreme Court has held that there is no "*de minimis* level of population differences" among congressional districts that is "acceptable" in the absence of that necessary to further a legitimate state interest. *Karcher*, 462 U.S. at 731-32.

Applying this federal case law to the congressional map proposed by the Governor, the *Johnson II* majority concluded that the map's "minor population deviation is justified . . . by our least change objective. . . . [T]he Governor's map does far better on this metric than any other map." 2022 WI 14, ¶24. Yet three of the four justices in the *Johnson II* majority concurred, noting that they disagreed that "least change" was a legitimate metric. *Id.* ¶¶53-65 (Walsh Bradley, J., concurring). And Chief Justice Ziegler, Justice Grassl Bradley, and Justice Roggensack vociferously dissented and concluded that the congressional map's failure to achieve mathematical equality rendered it unconstitutional under the federal Constitution. *Id.* ¶78 (Ziegler, C.J., dissenting) ("[U]nder well-established constitutional law, there is no *de minimis* deviation for congressional districts. The Governor explained that his deviation was caused by his lack of understanding that a lower deviation was required. But carelessness is not a valid justification for excessive deviation. The Governor's (and now Wisconsin's) congressional maps are unconstitutional."); *see id.* ¶¶165-75 (same).

This Court subsequently overruled *Johnson*'s holding regarding "least change." *Clarke*, 2023 WI 79, ¶61. As this Court noted, "least change did not fit easily or consistently into the balance of other requirements and considerations essential to the mapmaking process. . . . We cannot allow a judicially-created metric, not derived from the constitutional text, to supersede the constitution." *Id.* ¶62. Holding that "least change" is an "unworkable" criteria for court-drawn maps, this Court expressly "overrule[d] any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach." *Id.* ¶63.

This means not only that the existing congressional map—which will govern congressional elections in 2026, 2028, and 2030—is not equally apportioned but that this Court has rejected the sole justification proffered to explain the deviation. The congressional map violates Article I, Section 1 of the Wisconsin Constitution and should be enjoined.[5]

A. Article I, Section 1 requires congressional districts to achieve mathematical equality unless deviations withstand strict scrutiny.

Article 1, Section 1 of the Wisconsin Constitution, through its guarantee of equality, requires that congressional districts be apportioned as close to mathematical equality with any population deviation permissible only if narrowly tailored to further a compelling state interest—particularly where the map is court-imposed. All Wisconsinites are equally

[5] This sequence also explains the timing of this Petition. It was not until *Clarke* that this Court overruled "least change" and thus the justification for the congressional map's deviation. By then, it was not feasible to challenge the congressional map on malapportionment grounds in time for the spring 2024 election deadlines. Petitioners thus timely file this action well in advance of the November 2026 election. *See Clarke*, 2023 WI 79 ¶42 (rejecting laches defense for claim filed in August preceding the next election).

situated with respect to their representatives to the federal government and the State cannot "treat members of similarly situated classes differently." *Tomczak*, 218 Wis. 2d at 261.

The U.S. Supreme Court has explained that, because the House is the only federal body that represents "the people as individuals," *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964), "unusual rigor" must apply to ensure equality of representation among congressional districts. *Karcher*, 462 U.S. at 732. "Because of that rigor, we have required that absolute population equality be the paramount objective of apportionment only in the case of congressional districts." *Karcher*, 462 U.S. at 732. Nonetheless, when it comes to the U.S. Constitution, basic principles of federalism give states some flexibility—the U.S. Supreme Court has been willing to "defer" to "legitimate, consistently applied [State] policy" that may require small deviations in population equality. *Karcher*, 462 U.S. at 740-41. But the federalism and separate sovereigns logic underlying the U.S. Supreme Court's rule has no application in the context of the Wisconsin Constitution. In application of the state Constitution's equal population requirement, there is no justification for "defer[ring]" to any policy interest not set forth in the state Constitution itself to warrant a court-imposed congressional map failing to achieve precise population equality.

Article I, Section 1 accordingly requires strict equality in congressional representation. In applying that provision to county board apportionment, this Court observed that "the basic principle of representative government is that the weight of a citizen's vote cannot be made to depend on where he lives." *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d at 56; *see also State ex rel. Binner v. Buer*, 174 Wis. 120, 182 N.W. 855, 857 (1921) (upholding under Article I, Section 1 a law that put residents "on a perfect

equality with reference to all things pertaining to the exercise of the right of suffrage"). Article I, Section 1's historical context—derived from the Founding era Virginia Declaration of Rights—confirms as much. It was a "statement of revolutionary, republican, egalitarian ideology." *Matter of Adoption of M.M.C.*, 2024 WI 18, ¶¶56-57 (Dallet, J., concurring).

Indeed, Article I, Section 1 imposes a *stricter* equality requirement for congressional districts than Article I, Section 2 of the federal Constitution requires Wisconsin to adopt. Owing to federalism, the U.S. Supreme Court has allowed *some* flexibility, as described above, to States in apportioning congressional districts. *See Karcher*, 462 U.S. at 740 ("[W]e are willing to defer to state legislative policies, so long as they are consistent with constitutional norms."). But States are not required to accept that flexibility in how they interpret their *own* Constitution's provisions regarding equality of representation. *See Florida v. Powell*, 559 U.S. 50, 59 (2010) ("state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution"). And the Wisconsin Constitution holds congressional apportionment, particularly when done by the Court, to a higher standard.

Unlike certain other states,[6] the Wisconsin Constitution contains no competing provisions that would allow the flexibility for "some legitimate state objective," *Tennant*,

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[6] The *Tennant* case involved West Virginia's congressional districts, which the state constitution requires be composed of whole counties. *See* W. Va. Const. art. I, § 4. Iowa's Constitution likewise requires congressional districts to be composed of whole counties. *See* Iowa Const. art. III, § 37. At least 13 states have equivalent express requirements—such as compactness, contiguity, respect for county or municipal

567 U.S. at 760, to be weighed against Article I, Section 1's command of equal treatment with respect to congressional apportionment. In the absence of a competing requirement in the Wisconsin Constitution for the configuration of Wisconsin congressional districts, Article I, Section 1's demand for equality must be strictly followed. As a result, the ordinary principles of equal protection under Article I, Section 1 in the context of a fundamental right control—deviations from equal treatment must be narrowly tailored to advance a *compelling* state interest. This is especially so when it is the court, rather than the legislature, that is configuring districts.[7]

This strict application of Article I, Section 1, to congressional districts does not extend to apportionment of Wisconsin's state legislative and local government districts.

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lines, preserving the cores of prior districts, respect for natural boundaries, *etc.*—for the configuration of congressional districts in their state constitutions. *See* Ariz. Const. art. 4, pt. 2, § 1; Cal. Const. art. 21, § 2; Colo. Const. art. V, § 44.3; Iowa Const. art. III, § 37; Fla. Const. art. III, § 20; Me. Const. art. IX, § 24; Mich. Const. art. IV, § 6; Mo. Const. art. III, § 45; N.Y. Const. art. III, § 4(c); Ohio Const. art. XIX, § 2; Va. Const. art. II, § 6; Wash. Const. art. II, § 43; W. Va. Const. art. I, § 4. Those state constitutions accept the U.S. Supreme Court's invitation for a degree of flexibility—consistent with principles of federalism—to justify population deviations that further legitimate state interests.

[7] Indeed, most court-imposed congressional maps achieve precise mathematical equality. Five of the seven court-ordered congressional maps imposed since the 2020 Census are perfectly populated. *See Singleton v. Allen*, No. 2:21-cv-1291-AMM, 2023 WL 6567895, at *16 (N.D. Ala. Oct. 5, 2023) (Alabama); *Wattson v. Simon*, 970 N.W.2d 56, 58 n.1 & 59 (Minn. 2022) (Minnesota); *Norelli*, 2022 WL 1749182 at *5 (New Hampshire); *Harkenrider v. Hochul*, 197 N.E.3d 437, 456 (N.Y. 2022) (map imposed on remand: N.Y. State Legislative Task Force on Demographic Research and Reapportionment: 2022 Congressional Maps, 2022 NYS Congress Population Report, https://latfor.state.ny.us/maps/congress2022/congress_population_2022.pdf (New York); Bernard Grofman and Sean Trende, *Memorandum to The Chief Justice and Justices of the Supreme Court of Virginia Re: "Redistricting maps"*, 8 (Dec. 27, 2021) https://www.vacourts.gov/static/courts/scv/districting/2021_virginia_redistricting_memo.pdf (Virginia).

Aside from this Court's decision in *Johnson II*, only the Pennsylvania Supreme Court imposed a congressional map with a 2-person deviation. The court reasoned that "attempts to reach zero deviation required not only the manipulation of several census blocks, but also the additional split of a Vote Tabulation District." *Carter v. Chapman*, 270 A.3d 444, 467 (Pa. 2022). The Pennsylvania Supreme Court has for decades approved minor population deviations in congressional maps to avoid that outcome. *See id.* In contrast to Pennsylvania, Wisconsin law requires ward lines to be redrawn to adhere to congressional district boundaries, making this a nonissue here. Wis. Stat. § 5.15(1)(c).

The Wisconsin Constitution contains several requirements for state legislative districts that must be balanced against the requirement of equal population. Those districts must be apportioned in the first legislative session following each Census "according to the number of inhabitants." Wis. Const. art. IV, § 3. Assembly districts must be "bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable." *Id.* art. IV, § 4. And senate districts must be composed of whole assembly districts and consist of "convenient contiguous territory." *Id.* art. IV, § 5. Just as *Tennant* recognized that West Virginia's whole-county rule necessitated some population deviation among congressional districts, *see Tennant*, 567 U.S. at 764, the Wisconsin Constitution's requirement that assembly districts be bounded by "county, precinct, town or ward lines" invariably necessitates some deviation from population equality. And this Court has recognized as much in balancing the various constitutional requirements for legislative districts. *See, e.g.*, *Johnson II*, 2022 WI 14, ¶35 ("Our concern is simply whether districts are . . . sufficiently equal in population to comply with the constitution"); *id.* ¶36 (concluding that legislative districts with population deviations under 2% complied with Article IV, § 3's requirement that districts be apportioned "according to the number of inhabitants").

Likewise, reduced scrutiny is warranted for population equality among local government districts. The Wisconsin Constitution expressly authorizes the legislature to enact laws governing the organization and structure of county, town, city, and village governments. *See* Wis. Const. art. IV, § 22; *id.* art. XI, § 3. And the legislature has done so, requiring "substantial" population equality and adherence to ward, municipal, and Census

block lines. *See* Wis. Stat. § 59.10(2) & (3) (requiring county supervisory districts to be "substantially equal in population" and to "consist[] of contiguous whole wards or municipalities"); *id.* § 5.15(1)(a) (requiring aldermanic or supervisory districts to be "substantially equal in population") *id.* § 5.15(2)(c) (permitting the division of Census blocks only to the extent necessary to create aldermanic districts that are "substantially equal in population"); *id.* § 64.15 (applying same rules for city councils to village trustees). In holding that both the Fourteenth Amendment and Article I, Section 1 of the Wisconsin Constitution prohibit malapportioned county board districts, this Court recognized the balance that must be struck at the local level given the legislature's choice to require county board districts to be bounded by town, village, and city lines. *Sylvester*, 26 Wis. 2d at 61 (directing that substantial population equality be achieved nevertheless). Wisconsin's Constitution thus recognizes the legislature's power to set policies on how local governments are organized. And Wisconsin's choice to balance state interests in the formation of state legislative and local districts is also prudent. While the state has clear interests in the organization of its state government, it sensibly places its citizens' equality of representation in the federal Congress as a paramount individual right unencumbered by other state objectives devised by a court imposing a redistricting map.[8]

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[8] Moreover, because there are only eight congressional districts and they cover the entire state, there are not the same practical hurdles to achieving precise mathematical equality among them as there are in smaller districts where the population of the available Census Blocks may not permit precise apportionment.

Sylvester did not explore the possibility that Article I, Section 1 has a broader reach than the Fourteenth Amendment. Nor were congressional districts at issue, and so the Court had no occasion to consider whether Article I, Section 1 imposes a stricter requirement for congressional apportionment than it does for state legislative and local government apportionment.

In sum, Article I, Section 1 requires that congressional districts be equally populated. As with any state action that treats similarly situated people differently in a manner that affects fundamental rights, a congressional map's deviation from mathematically precise population equality must therefore be narrowly tailored to further a compelling state interest. While the legislature could certainly formulate policy choices in configuring congressional districts that may satisfy this standard, Wisconsin courts imposing a redistricting map must adhere to the constitutionally mandated population equality requirement. As Petitioners explain below, Wisconsin's congressional map fails that test.[9]

B. Wisconsin's congressional map is not equally populated and its deviation fails strict scrutiny.

Wisconsin's congressional map is not equally populated, and its population deviation is not narrowly tailored to further a compelling state interest. As this Court has already noted, according to the 2020 Census, Wisconsin's population is 5,893,718, which means that "[a]n ideal congressional district should have 736,715 people." *Johnson I*, 2021 WI 87, ¶15; *Johnson II*, 2022 WI 14, ¶21.[10] Because the population is not wholly divisible by 8 (the number of congressional districts Wisconsin is apportioned), the closest result to

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[9] If the Court grants relief and cites or relies upon federal cases or law in its decision, it should expressly state that it is doing so for its persuasive value and that its decision rests on an adequate and independent state ground. *See, e.g.*, *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (holding that state court that "indicates clearly and expressly that [its decision is] based on bona fide separate, adequate, and independent state grounds" will not be subject to review by U.S. Supreme Court).

[10] *See also* U.S. Census Bureau, Wisconsin, https://www.census.gov/data/tables/time-series/demo/popest/2020s-counties-total.html. The Court can take judicial notice of Census data. *See State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 738 (Wis. 1892) ("It seems to be well established that courts will take judicial notice of a census . . . .").

precise mathematical equality is for six congressional districts to contain 736,715 people and two congressional districts to contain 736,714 people. But as this Court has previously found, the districts in the current congressional map "have either 736,714 people, 736,715 people, or 736,716 people." *Johnson II*, 2022 WI 14, ¶21. Moreover, as this Court has already found—it is possible to configure a Wisconsin congressional map with as close to precise mathematical equality as is possible.[11] *See id.* ¶24 (noting that several parties submitted proposed congressional maps "with a maximum deviation of one person").[12]

The current map's population deviation is not narrowly tailored to further a compelling state interest. The *Johnson II* majority assessed the map under *federal law*. The Court observed that the two-person deviation was small and justified it only with "least change": "this minor population deviation is justified . . . by our least change objective. . . . [T]he Governor's map does far better on this metric than any other map." *Johnson II*, 2022 WI 14, ¶24.

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[11] The legislature had no trouble meeting this standard the last time it enacted congressional districts. *See* Appendix to 2011 Wisconsin Act 44 at 1 (Statistics and Maps), https://docs.legis.wisconsin.gov/2011/related/rd/act44.pdf (reporting as close to precise mathematical equality as possible). Nor did most parties submitting proposed congressional maps in the *Johnson* litigation.

[12] It is irrelevant that Wisconsin's population has undoubtedly shifted since the 2020 Census. In *League of United Latin American Citizens v. Perry*, the U.S. Supreme Court held that States must operate under a "legal fiction" that the Census data is valid for the entire decade, even when engaging in mid-decade redistricting. 548 U.S. 399, 421 (2006); *see also Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003). Wisconsin's congressional map must meet equal population standards as assessed by the most recent Census. In any event, the Census Bureau projects that the population centers of CD3 (Eau Claire, La Crosse, and Portage Counties) have all grown since 2020 while Milwaukee County is projected to have lost population, worsening the effect of CD3's overpopulation based upon the official 2020 Census count. *See* U.S. Census Bureau, *Annual Estimates of the Resident Population for Counties: April 1, 2020 to July 1, 2024*, https://www.census.gov/data/tables/time-series/demo/popest/2020s-counties-total.html.

But scoring highest on "least change" among a handful of submitted proposed maps is not a compelling state interest sufficient to justify the map's failure to satisfy Article I, Section 1's equality requirement. This Court has held as much. "Because no majority of the court agreed on what least change actually meant, the concept amounted to *little more than an unclear assortment of possible redistricting metrics*." *Clarke*, 2023 WI 79, ¶61 (emphasis added). The Court also observed that "[w]e cannot allow a judicially-created metric, not derived from the constitutional text, to supersede the constitution." *Id.* ¶62. "We overrule any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach. It is impractical and unfeasible to apply a standard that (1) is based on fundamentals that never garnered consensus, and (2) is in tension with established districting requirements." *Id.* ¶63.

An undefined interest that is "little more than an assortment of possible redistricting metrics" and has been characterized by a majority decision of this Court as an impermissible metric to "supersede the constitution" is plainly not a compelling justification for a map that fails to comply with Article I, Section I's equal population requirement for congressional districts. On this point this Court is now nearly unanimous. In addition to the four justices in the majority in *Clarke*, Chief Justice Ziegler and Justice Grassl Bradley have soundly rejected the least change "core retention" metric as a justification for the congressional map's population deviation. Chief Justice Ziegler, in a dissent Justice Grassl Bradley joined, rejected "core retention" as a singular metric that could override constitutional requirements, concluded that it was not the actual justification for the population deviation in the Governor's proposed map, and would have held that the

map was "fatally and constitutionally flawed" under federal law because of its population deviation. *Johnson II*, 2022 WI 14, ¶¶160-75 (Ziegler, C.J., dissenting). Justice Grassl Bradley, in a dissent joined by Chief Justice Ziegler, wrote that the *Johnson II* Court's "dispositive guidepost—core retention—exists nowhere in the United States Constitution, the Wisconsin Constitution, or any statutory law." *Id.* ¶211 (Grassl Bradley, J., dissenting). Justice Grassl Bradley further characterized it as a "subjective policy preference[]," *id.* ¶211, a "dangerous doctrine" that "effectively overrule[s] the Wisconsin Constitution," *id.* ¶220, and concluded that the *Johnson II* majority imposed a "congressional map with unconstitutional population deviations," *id.* ¶214.[13]

After *Clarke*, six of seven justices have now explicitly rejected the sole justification the *Johnson II* majority cited under the federal law standard to show "some legitimate goal" achieved by the population deviation. *Karcher*, 462 U.S. at 731. For that reason, "least change" falls short of the more exacting standard of Article I, Section 1 of the Wisconsin Constitution for population deviations in congressional maps to be narrowly tailored in furtherance of a *compelling* state interest.

[13] It is true that the U.S. Supreme Court has identified "preserving the cores of prior districts" as a legitimate interest that, if "consistently applied," a state could show necessitated "some variance" in population equality in congressional districts so as to satisfy the federal Constitution. *Tennant*, 567 U.S. at 761; *see Karcher*, 462 U.S. at 740 (noting that any such state interest must be "nondiscriminatory"). For example, the New York Constitution expressly provides that in configuring congressional districts, the state's redistricting "commission shall consider the maintenance of cores of existing districts." N.Y. Const. art. III, § 4(c)(5). But Wisconsin's Constitution contains no such provision. That states are *permitted* under the federal Constitution to adopt a particular objective and favor it over absolute equality of congressional representation does not somehow mean that they are *required* to do so in contravention of their state constitution. *See, e.g.*, *Powell*, 559 U.S. at 59 (recognizing that state constitutional provisions may offer greater protections than the federal constitution). Whether "least change"—or any other potential priority—could be a compelling interest advanced by the *legislature* to justify a minor population in an enacted congressional map is not a question before the Court. It surely cannot stand as a justification for a court-imposed map failing to achieve population equality.

Nor is it relevant that the population deviation in the current congressional map is small. Even under the more relaxed federal standard, "the State must justify each variance, *no matter how small*." *Karcher*, 462 U.S. at 730 (quoting *Kirkpatrick*, 394 U.S. at 530-31) (emphasis added). So too under Article I, Section 1 of the Wisconsin Constitution—except under Wisconsin law the proffered interest must be compelling, not merely "some legitimate goal" that might be sufficient under federal law. A small population deviation that serves *no* legitimate or compelling justification is just as unconstitutional as a large one. Wisconsin's congressional map violates Article I, Section 1 of the Wisconsin Constitution.[14]

C. The congressional map improperly elevates "least change" over minimizing county splits.

The current congressional map also improperly elevates "least change" over minimizing county splits. Although the Wisconsin Constitution does not expressly require adherence to county lines—and thus a court-imposed map could not preference maintaining county lines over achieving population equality—minimizing the number of split counties *is* a traditional districting principle in Wisconsin, unlike "least change." *See*

[14] This Court is the final arbiter of Wisconsin law regarding congressional redistricting. *See Growe v. Emison*, 507 U.S. 25, 32-37 (1993) (holding that federal courts must defer to state courts in redistricting matters, which involve "difficult questions of state law bearing on important matters of state polic[ies]" and because "[t]he 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 . . . has been specifically encouraged" (cleaned up)).

Moreover, a decision holding that Article I, Section 1 of the Wisconsin Constitution requires congressional districts to achieve precise mathematical equality with deviations subject to strict scrutiny cannot possibly be characterized as "interpreting state law" in a manner that "so exceeds the bounds of ordinary judicial review" so as to implicate the Federal Elections Clause and trigger the U.S. Supreme Court's jurisdiction. *Moore v. Harper*, 600 U.S. 1, 37 (2023). Indeed, the U.S. Supreme Court has repeatedly held that states are *required* to pursue precise mathematical equality in apportioning congressional districts.

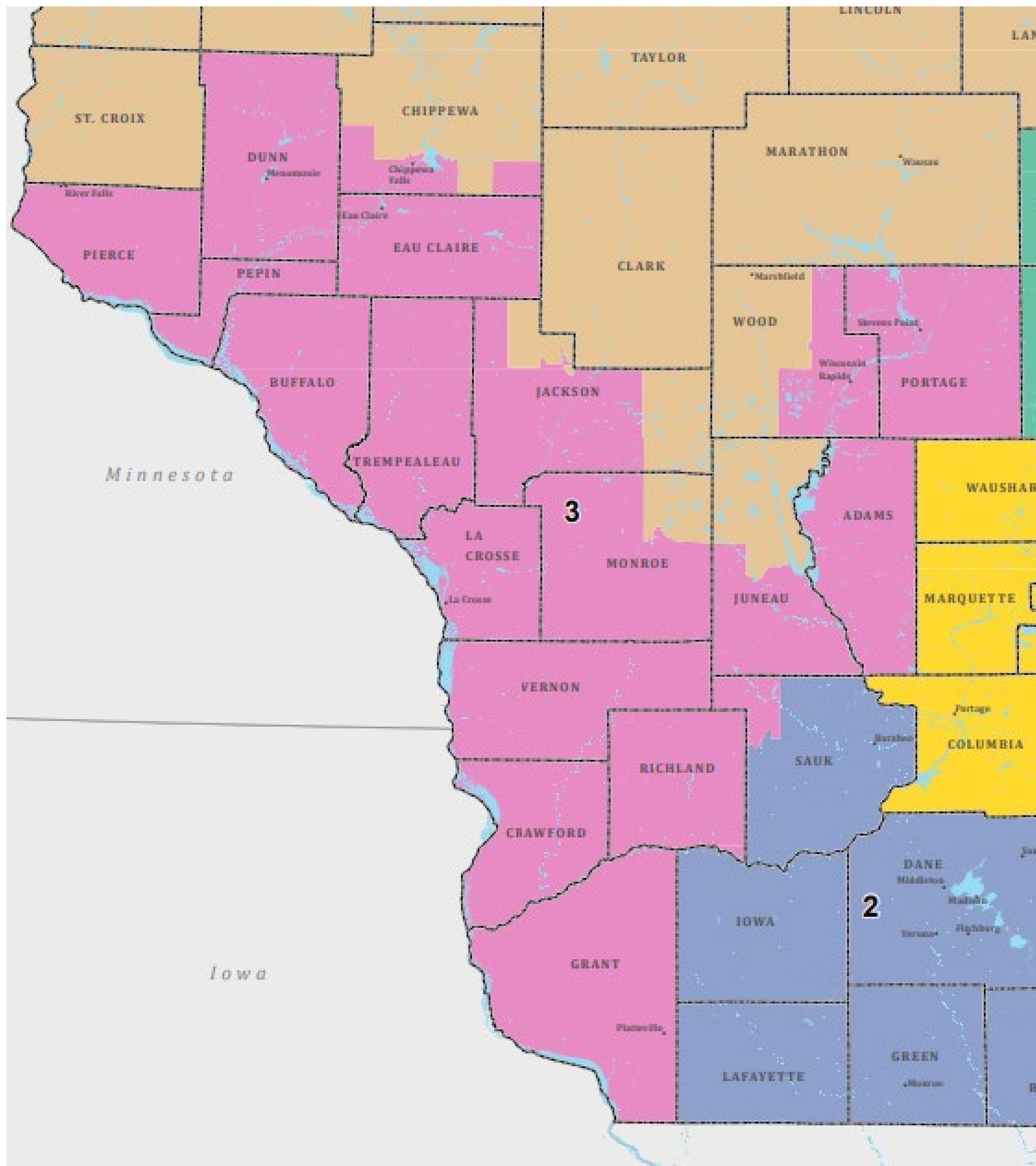
Clarke, 2023 WI 79, ¶68 (explaining that the court will consider, as lower tier than constitutional requirements, "traditional districting criteria not specifically outlined in the Wisconsin or United States Constitution[s]"). Indeed, it is an express constitutional requirement for legislative maps. *See* Wis. Const. art. IV, § 4.

Rather than impose an equally populated congressional map that minimized the number of Wisconsin counties split among congressional districts, the *Johnson* Court imposed an unequally populated congressional map that splits nearly twice as many counties as necessary to achieve population equality. The current map splits twelve counties, some more than once.[15] An eight-district map need only have seven county splits to achieve population equality.

Consider CD3—which is also the map's overpopulated district. As shown below, the district splits a remarkable *six* counties:[16]

[15] This is judicially noticeable. *See* Wis. Legislature, Congressional Districts, State of Wisconsin 2023, https://legis.wisconsin.gov/ltsb/gisdocs/Johnson_v_WEC/Statewide/Congressional_30x40_Map_2023.pdf.

[16] *See* Wis. Legislature, Congressional Districts, State of Wisconsin 2023, https://legis.wisconsin.gov/ltsb/gisdocs/Johnson_v_WEC/Statewide/Congressional_30x40_Map_2023.pdf.



Or consider Milwaukee County, which because of its population must be split between two congressional districts but instead contains all or part of three districts, as shown below:

In addition to preferencing "least change" over the Wisconsin Constitution's population equality requirement, *Johnson II* elevated "least change" over minimizing split counties—a traditional redistricting principle in Wisconsin. As a result, Wisconsinites were left with an unequally configured congressional map that needlessly splits apart its counties—and thus its communities of interest. The current congressional map is unconstitutional because of its malapportionment, but it is likewise an improper court-

imposed remedy for its foregoing of historic, traditional districting criteria in favor of a judicially-invented and undefined "least change" objective.

II. The Court should enjoin Respondents from further use or implementation of the congressional map and schedule a remedial process.

The Court should enjoin Respondents from using the current congressional map for all future elections and schedule a remedial process to ensure that a new, constitutional map is in place for the 2026 election. An unconstitutional map cannot be permitted to govern for the next six years spanning three election cycles.[17]

The Court should follow the remedial process it set forth in *Clarke*, allowing time for the Legislature and Governor to seek to enact a remedial map while simultaneously preparing for the possibility of a court-ordered map becoming necessary. Importantly, the Court cannot solve this constitutional violation with a remedial map that moves a single person, despite the overall population deviation being a single-person too large. This is so because CD3 (the overpopulated district) shares boundaries with two underpopulated districts, CD6 and CD8. As shown below, those boundaries follow county lines dividing Portage from Waupaca County (CD3 & CD8) and Portage and Adams from Waushara, Marquette, and Columbia Counties (CD3 & CD6).[18]

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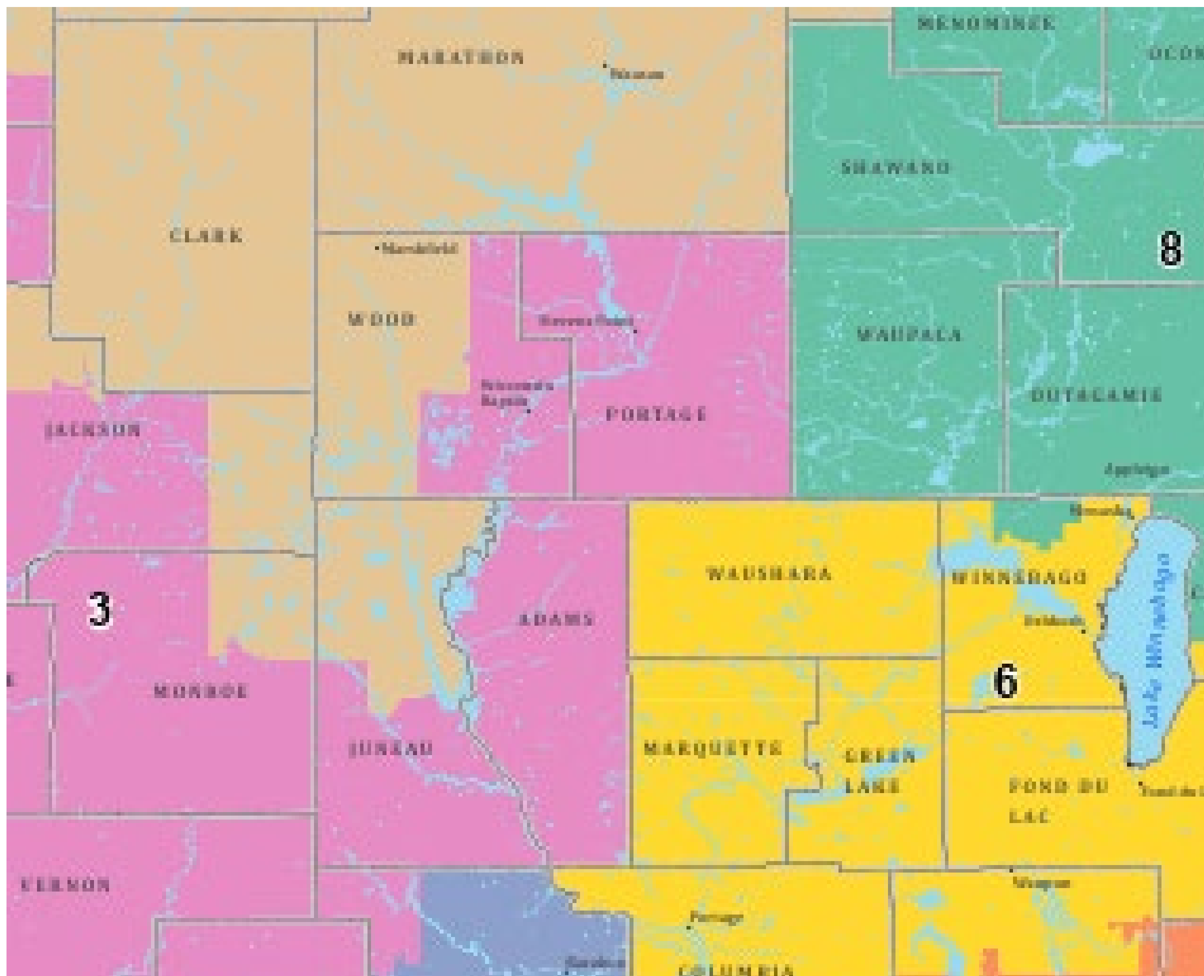
[17] It is not possible to enjoin further use or implementation of only the overpopulated district—CD3—because equally populating the map will require changes outside of CD3.

[18] *See* Wis. Legislature, Congressional Districts, State of Wisconsin 2023, https://legis.wisconsin.gov/ltsb/gisdocs/Johnson_v_WEC/Statewide/Congressional_30x40_Map_2023.pdf.



Moving a single person from CD3 to either CD6 or CD8 would require identifying a 1-person Census Block along the boundary. Even if such a Census Block exists, the transfer of that person from CD3 to either CD6 or CD8 would necessarily result in a new split of either Adams or Portage Counties. But as explained *supra* Section I.C., the court-imposed map already splits twice as many counties as necessary. Worse, that single person would require their own ward because they would be the only person in the county assigned to a different congressional district and Wisconsin law prohibits ward boundaries from crossing congressional district boundaries. *See* Wis. Stat. § 5.15(7). But such a single-person ward would necessarily reveal candidate choices of that voter when the ward's

congressional results are published, violating the Wisconsin Constitution's guarantee of a secret ballot. *See* Wis. Const. art. III, § 3.[19] If additional people are shifted between districts to address the secret ballot issue, even more county splits will necessarily follow. None of that is necessary to create an equally populated congressional map.

"Least change" would not work here even if this Court had not already rejected it as an approach. The Court should require that proposed congressional maps comply with Article I, Section 1's population equality requirement, "comply with all applicable federal law," *Clarke*, 2023 WI 79, ¶67, provide that the Court will "consider other traditional districting criteria not specifically outlined in the Wisconsin or United States Constitution, but still commonly considered by courts tasked with formulating maps," which "will not supersede constitutionally mandated criteria, such as equal population requirements," *id.* ¶68, and finally provide that the Court will consider partisan impact to ensure that the judiciary retains political neutrality and "avoid[s] selecting [a] remedial map[] designed to advantage one political party over another." *Id.* ¶71. As in *Clarke*, the Court should appoint consultants to evaluate the parties' submissions pursuant to the Court-ordered criteria and submit a report to the Court, with costs borne equally by all parties offering proposals.

CONCLUSION

The Court should grant the Petition, enjoin Respondents from further use or implementation of the current congressional map, and set a remedial schedule in the event the Legislature and Governor fail to enact a constitutionally compliant congressional map.

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[19] The ward could not be combined with other wards in the county for reporting purposes to protect privacy (as Wisconsin law allows in other circumstances) because of the different congressional districts.

Dated this 8th day of May, 2025.

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*Application for admission *pro hac vice* forthcoming