

FILED  
11-08-2023  
CLERK OF WISCONSIN  
SUPREME COURT

IN THE SUPREME COURT OF WISCONSIN

No. 2023AP1399

REBECCA CLARKE, RUBEN ANTHONY, TERRY DAWSON, DANA  
GLASSTEIN, ANN GROVES-LLOYD, CARL HUJET, JERRY IVERSON,  
TIA JOHNSON, ANGIE KIRST, SELIKA LAWTON, FABIAN MALDONADO,  
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JOOSTEN (PARI) SCHILS, NATHANIEL SLACK, MARY  
SMITH-JOHNSON, DENISE SWEET AND GABRIELLE YOUNG,

*Petitioners,*

GOVERNOR TONY EVERS IN HIS OFFICIAL CAPACITY, NATHAN  
ATKINSON, STEPHEN JOSEPH WRIGHT, GARY KRENZ, SARAH J.  
HAMILTON, JEAN-LUC THIFFEAULT, SOMESH JHA, JOANNE KANE AND  
LEAH DUDLEY,

*Intervenors-Petitioners,*

v.

WISCONSIN ELECTIONS COMMISSION, DON MILLIS, ROBERT F.  
SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE  
BOSTELMANN, CARRIE RIEPL, 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; ANDRE JACQUE, TIM  
CARPENTER, ROB HUTTON, CHRIS LARSON, DEVIN LEMAHIEU,  
STEPHEN L. NASS, JOHN JAGLER, MARK SPREITZER, HOWARD  
MARKLEIN, RACHAEL CABRAL-GUEVARA, VAN H. WANGGAARD, JESSE  
L. JAMES, ROMAINE ROBERT QUINN, DIANNE H. HESSELBEIN, CORY  
TOMCZYK, JEFF SMITH AND CHRIS KAPENGA IN THEIR OFFICIAL  
CAPACITIES AS MEMBERS OF THE WISCONSIN SENATE,

*Respondents,*

WISCONSIN LEGISLATURE, BILLIE JOHNSON, CHRIS GOEBEL, ED  
PERKINS, ERIC O'KEEFE, JOE SANFELIPPO, TERRY MOULTON,  
ROBERT JENSEN, RON ZAHN, RUTH ELMER AND RUTH STRECK,

*Intervenors-Respondents.*

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BRIEF OF AMICI CURIAE  
WISCONSIN JUSTICE INITIATIVE, INC. & WISCONSIN FAIR MAPS  
COALITION

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## INTEREST OF AMICI CURIAE

Wisconsin Justice Initiative, Inc. (WJI) is a § 501(c)(3) nonprofit organization that educates the public about all branches of state government, numerous facets of Wisconsin's justice system, and voting; and advocates for progressive changes in government and the justice system to effect more just outcomes, especially for minority and low-income individuals.

Wisconsin Fair Maps Coalition (FMC) is an unincorporated coalition of unincorporated citizen activist groups, including North Shore Fair Maps, SW Fair Maps, Jefferson County Fair Maps, Dane County Fair Maps, Columbia County Fair Maps, Iowa County Fair Maps, Midstate Fair Maps, 8th Congressional District (CD) Fair Maps, 7th CD East Fair Maps, 7th CD West Fair Maps, 4th CD Fair Maps, 3rd CD Fair Maps, Western Wisconsin for Nonpartisan Voting Districts, and Wisconsin Maps Assessment Project. FMC members met regularly when redistricting maps were being considered by the legislature and this Court. The work of these groups is guided by the FMC Lead Team, which includes Wisconsin Democracy Campaign, League of Women Voters–Wisconsin, Wisconsin Conservation Voters, Common Cause Wisconsin, and others.

Amici provide public education about redistricting, elections, and democracy. They advocate for districting maps that fairly reflect and address the needs, interests, and desires of all Wisconsinites.



## INTRODUCTION

In *Rucho v. Common Cause*, 588 U.S. \_\_\_, 139 S. Ct. 2484 (2019), the Supreme Court acknowledged that extreme partisan gerrymandering is undemocratic. While the Court found partisan gerrymandering not justiciable for maps adopted through legislative processes, it said it did not condone partisan gerrymandering and did not “condemn complaints about districting to echo in the void.” *Id.* at 2507.

The Wisconsin people have clearly demanded fair voting maps. Amici ask this Court to recognize the will of the people and the integral role of the one state official who represents all people of Wisconsin in the redistricting process: the governor. The people’s demands were heard by Gov. Tony Evers, whose power regarding the redistricting process is as important as the legislature’s. In adopting the present maps for state legislative districts, this Court negated the role of the governor in redistricting and voided the will of the people of Wisconsin, violating separation of powers requirements of the Wisconsin Constitution.

If this Court invalidates the present districting maps, the court must consider the partisan effects of any maps it creates and correct those effects to maintain its neutrality. The Court should consider the demands of the people of Wisconsin. To ignore the demands of the people would leave them aggrieved and echoing in the void.

## BACKGROUND

The redistricting plan adopted by this Court in *Johnson v. Wisconsin Elections Commission (Johnson III)*, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559, was devised under a “least-change” theory, meaning the court began with outdated maps from 2011 Wis. Act 43. Those maps are the foundation of voters’ aggrievement.

After the 2011 redistricting cycle, Wisconsin voters realized that extreme partisan gerrymandering had occurred. Politicians who drew the maps were now choosing their voters, instead of the reverse. Wisconsinites found their municipalities divided into two or more districts, or their counties split into two, three, even four districts. Wisconsinites learned that while mapmakers sliced and diced communities they moved 2,357,592 people—41.4% of the population—from one Assembly voting district to another.<sup>1</sup>

Voters, particularly those who held views different from their representatives, found their representatives less responsive. Candidates refused to debate opponents during election cycles. Bob Tatterson, 24th District Voter Forum cancelled when

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<sup>1</sup> Wisconsin’s population in 2010 was 5,686,986. Univ. of Wis.–Madison Applied Population Laboratory, *2010 Census Chartbook: Demographic Trends in Wisconsin* (Dec. 2014), [https://cdn.apl.wisc.edu/publications/2010\\_census\\_chartbook\\_wi.pdf](https://cdn.apl.wisc.edu/publications/2010_census_chartbook_wi.pdf). In *Baldus v. Members of Wisconsin Government Accountability Board*, 849 F. Supp. 2d 840, 849 (E.D. Wis. 2012), the court wrote: “Only 323,026 people needed to be moved from one assembly district to another in order to equalize the populations numerically, but instead Act 43 moves more than seven times that number—2,357,592 people—for a net change that results in districts that are roughly equal in size. Similarly, only 231,241 people needed to move in order to create equal senate districts, but Act 43 moves 1,205,216—more than five times as many. Even accepting the argument urged by the GAB that one cannot change one district without affecting another, these are striking numbers.”

Knodl declines to appear, Sept. 20, 2022, <https://www.bobtatterson.com/news/24th-district-voter-forum-cancelled-when-knodl-declines-to-appear>. Others ran unopposed in “safe” districts. Baylor Spears, *Wisconsin’s least competitive legislative races happening Tuesday*, Wis. Examiner, Nov. 8, 2022.

Wisconsinites know that during early litigation over the 2011 maps, the legislature was ordered to turn over computers to forensic investigators. Those investigators found evidence, buried in the computers’ hard drives, proving that numerous maps had been drawn and measured for partisan advantage, before the final map under which “Republicans could expect to win 59 Assembly seats, with 38 safe Republican seats, 14 leaning Republican, 10 swing, 4 leaning Democratic, and 33 safe Democratic seats.” *Whitford v. Gill*, 218 F. Supp. 3d 837, 851 (W.D. Wis. 2016). Only Republican leaders saw the entire map. Individual Republican members entered a locked room to view their new district and were given a memo discussing the partisan makeup of the district but saying nothing about contiguity, compactness, or core population. *Id.* at 847-53.

Work on the redistricting plan that became 2011 Wis. Act 43 began in secret in April 2011. The bill was introduced in the legislature on July 11, 2011. It had one public hearing two days later, passed the legislature the next week, and was promptly signed into law. *Whitford*, 218 F. Supp. 3d at 853.

Once the legislation was in place, certain Republican legislators gloated. One told a Democratic Assemblywoman her district was changed to “screw[]” her for “running against Alberta.” Another told a Democratic Assemblywoman “We f—

ed you good.” *Gill v. Whitford*, No. 16-1161, Amicus Br. of Bipartisan Group of 65 Current and Former State Legislators 13-14 (U.S. filed Sept. 5, 2017), [https://www.brennancenter.org/sites/default/files/legal-work/Gill\\_AmicusBrief\\_BipartisanLegislators\\_InSupportofAppellees.pdf](https://www.brennancenter.org/sites/default/files/legal-work/Gill_AmicusBrief_BipartisanLegislators_InSupportofAppellees.pdf).

Since 2011, books and films have documented what happened in Wisconsin, including David Daley, *Ratf\*\*ked: Why Your Vote Doesn't Count* (2016), and its sequel David Daley, *Unrigged: How Americans are Fighting Back* (2020). Jordan Ellenberg's *Shape* (Penguin Press 2021) includes a chapter on Wisconsin gerrymandering titled “How Math Broke Democracy (and Might Still Save It).” One of the ways in Matthew Rothschild, *Twelve Ways to Save Democracy in Wisconsin* (University of Wisconsin Press 2021) is ending partisan gerrymandering. See also the documentaries *Slay the Dragon* (Magnolia Pictures 2019) and *Can You Hear Us Now* (Twelve Letter Films 2020) and the podcast series *Mapped Out*, Wis. Public Radio, <https://www.wpr.org/wpr-reports/mappedout>.

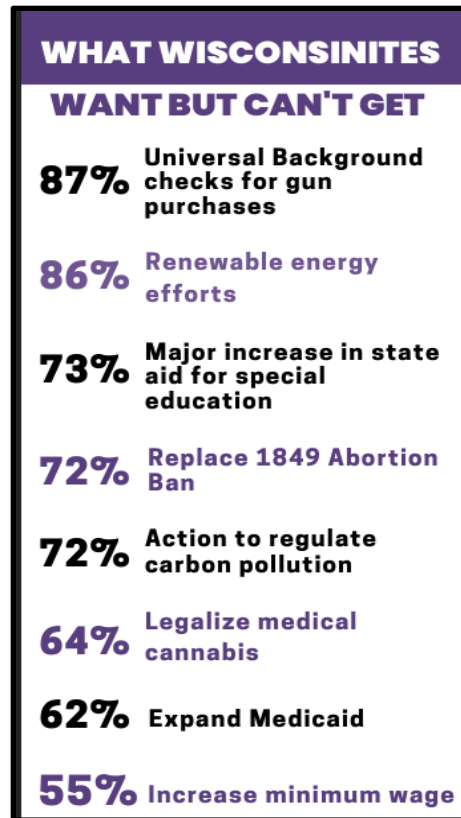
Wisconsin voters flipped the parties in statewide races in 2018, but they could not flip the legislature. They then saw the legislature's response: it entrenched its power through lame-duck-session laws curbing the governor's and attorney general's powers.

Since 2011, Wisconsinites have witnessed a legislature more interested in investigating unsupported claims of election fraud and choosing a state cocktail than working on issues the vast majority of Wisconsinites want addressed. The chart to the right shows issues that Wisconsinites overwhelmingly support but the Legislature has refused to address. The chart, based on data collected by FMC, is part of the Wisconsin League of Women Voters "Fair

Maps Toolkit," [https://drive.google.com/file/d/1OTbVHSvv4tw2\\_q0NXH08qJ-meidjmX5s/view](https://drive.google.com/file/d/1OTbVHSvv4tw2_q0NXH08qJ-meidjmX5s/view) (FMC polling data and sources are available at <https://docs.google.com/document/d/1zMarHSJooTi7F9r7WY3jLDFsmgBA65yC7titFvbQg6M/edit>).

Polling data shows that by overwhelming margins citizens who vote for both parties want a nonpartisan redistricting process.

Seventy-two percent of voters say they prefer redistricting of legislative and congressional districts to be done by a nonpartisan commission, while 18 percent prefer redistricting be done by the legislature and governor. Majorities in each partisan group favor a nonpartisan commission for redistricting.... Less than 30 percent of each group preferred redistricting be done by the legislature and governor.



Charles Franklin, *New Marquette Law School Poll finds some issues less divisive amid continuing partisan divide*, Marquette Law School, Jan. 24, 2019, <https://law.marquette.edu/poll/2019/01/24/mlsp51release/>.

Nearly nine-in-ten (87% of voters) oppose drawing voting districts to help one political party or certain politicians win an election. Across the board, gerrymandering is deeply unpopular with Wisconsinites—this includes 91% of Democrats, 88% of independents and unaffiliated voters, and 84% of Republicans who oppose gerrymandering. This bipartisan opposition to gerrymandering extends to people who voted for Donald Trump (81% oppose) and people who voted for Joe Biden (93% oppose).

RepresentUS, *Wisconsin Polling: Voters See Gerrymandering as a Major Problem, Want Reform*, Aug. 24, 2021, <https://represent.us/wp-content/uploads/2021/08/WI-Rep-US-Polling-Memo-Draft.pdf>.

In November 2019, nearly 200 voters met in Marshfield for the Fair Maps for Wisconsin Summit. Amicus FMC was a product of that meeting. Activists formed regional teams and recruited thousands of volunteers. Since November 2019 FMC members and volunteers

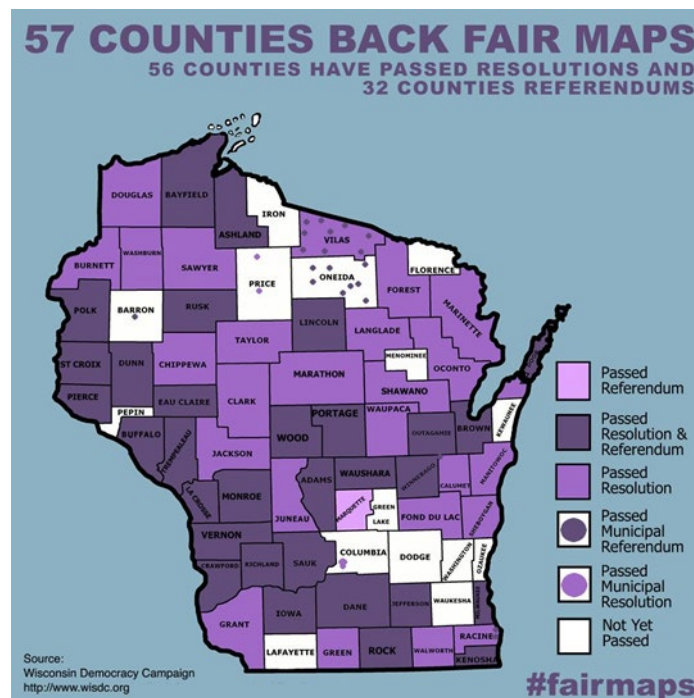
- Educated voters about everyday issues impacted by gerrymandered maps
- Built teams of local activists around the state
- Gathered thousands of petition signatures calling for nonpartisan redistricting reform
- Conducted exit surveys with February 2020 voters regarding their thoughts on redistricting

- Livestreamed the *Slay the Dragon* documentary for 1000+ people, followed by a panel discussion
- Purchased billboards opposing partisan gerrymandering
- Sent thousands of emails opposing partisan gerrymandering to state legislators
- Helped pass county board resolutions and countywide referendums demanding nonpartisan redistricting processes
- Rallied in support of nonpartisan redistricting legislation proposed in the legislature in May 2021
- Testified before the People's Maps Commission (PMC) about what fair representation looks like
- Trained and assisted people to create community-of-interest maps
- Submitted 1000+ maps to the PMC and Wisconsin Legislature's map portals
- Participated in a virtual legislative lobby day for the PMC's maps and against the least-change approach to new maps
- Wrote hundreds of letters to editors
- Appeared in national magazines and local newspapers, radio interviews, and television spots
- Taught students about the redistricting process
- Distributed 10,000+ brochures about gerrymandering
- Dispersed hundreds of yard signs and bumper stickers
- Hosted dozens of educational events for local groups

- Mailed thousands of postcards to voters, urging them to vote
- Staged marches and rallies at the State Capitol and around the state
- Testified against the gerrymandered 2021 maps
- Created and posted “Mad About Maps” videos to social media
- Held 17 simultaneous “Fair Courts = Fair Maps” rallies around the state in 2021.

Wis. Fair Maps Coal., *About the Fair Maps Coal.*,  
<https://www.fairmapswi.com/aboutfmc>.

Since 2013, fifty-seven counties and multiple municipalities have declared support for fair voting maps through resolutions, advisory referendums, or both.



Wisconsin Democracy Campaign, *Redistricting Toolkit*,  
<https://www.wisdc.org/reforms/118-redistricting/6392-toolkit-for-banning->



[gerrymandering-in-wisconsin](#); see also People’s Maps Commission, *Final Report* ex. 2 (2021), [https://evers.wi.gov/Documents/PMC/PMC\\_Report\\_Final\\_Full-compressed%20\(2\).pdf](https://evers.wi.gov/Documents/PMC/PMC_Report_Final_Full-compressed%20(2).pdf).

As part of his first budget as governor, Evers proposed a nonpartisan redistricting process in preparation for the 2020 census. The request was struck from the final budget, with no funds allocated by the Republican-led Joint Committee on Finance.

Not deterred, Evers initiated a redistricting process himself. In January 2020, Evers formally created the PMC as part of the Department of Administration. Exec. Order No. 66 (2020). The PMC’s core objective was to “carry out the overwhelming preference among Wisconsin voters that the redistricting maps be prepared by a nonpartisan committee or commission.” PMC Final Report 5. One objective was to “[l]isten to the people of Wisconsin to understand what the voters of this state want when it comes to drawing new electoral maps and the redistricting process.” *Id.* 9.

The PMC comprised members from Wisconsin’s eight congressional districts, plus one at-large commissioner. The PMC heard public testimony from residents of every congressional district and maintained a website for written testimony and access to its work product. In April 2021, the PMC opened a website portal, and more than 1000 citizen-drawn maps—of communities of interest, voting districts, or complete voting maps—were submitted. PMC Final Report 7-13. The PMC’s October 2021 Final Report is a thorough summary of the formation and workings of the PMC.

On November 18, 2021, Evers vetoed the redistricting maps passed by the legislature as SB621 and SB622, stating in a video message to Wisconsinites that he had promised he would never sign gerrymandered maps and his veto delivered on that promise. Evers referenced the PMC and the input of people from every corner of the state. He said he would continue to fight for nonpartisan redistricting. Tony Evers, Statement on Veto of SB621/SB622, Youtube (Nov. 18, 2021) <https://www.youtube.com/watch?v=GveF69dqSNc>; *see also* Office of the Governor, *Gov. Evers Vetoes GOP's "Gerrymandering 2.0" Maps*.

#### ARGUMENT

- I. The maps imposed by this Court in *Johnson III* usurp the role of the governor as the voice of the people and violate separation of powers requirements.

The people of Wisconsin have no direct means to enact law. Wisconsin law does not permit amendment of the Wisconsin Constitution or enactment of laws through citizen-initiated petitions and referendums, as are permitted in several other states.

Further, Wisconsinites no longer are even permitted to make their wishes known through advisory referendums. Until this year, Wisconsinites could propose and advocate for advisory referendums, such as those frequently seen at the municipal level, to gauge public opinion. For instance, voters in numerous municipalities made their views on marijuana legalization known through referendums in 2018 and 2022. However, the shared-revenue law, 2023 Wis. Act 12, generally eliminated the advisory-referendum process. *See* 2023 Wis. Act 12;

Wisconsin Legislative Council, Act Memo on Act 12, at 8, <https://docs.legis.wisconsin.gov/2023/related/lcactmemo/act012.pdf>.

As a result, Wisconsinites' statewide voices rest in the governor. "Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor." Wis. Const. art. V, § 10(1)(a). When the governor vetoes a bill, it may become law only if two-thirds of each legislature house override the veto. § 10(2)(a).

Legislators represent constituents of individual districts, and when, whether due to gerrymandering or other reasons, disproportionate representation in the legislature permits a minority view to frequently predominate over a majority view (such as regarding marijuana legalization or creation of nonpartisan districting maps), the governor's role in the legislative process counteracts that imbalance, protecting the needs and desires of those who are underrepresented in or unheard by the legislature. The governor is the voice of the people who disagree with the legislature.

In 1964, this Court rejected the legislature's attempt to bypass the governor's role in redistricting through use of a joint resolution, saying "it would be unreasonable to hold that the framers of the constitution intended to exclude from the reapportionment process the one institution guaranteed to represent the majority of the voting inhabitants of the state, the Governor." *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 558, 126 N.W.2d 551 (1964). It is similarly unreasonable, and unconstitutional, to bypass the governor's role in redistricting

through the Court's adoption of the exact maps that failed the legislative process. "Both the Governor and the legislature are indispensable parts of the legislative process." *Id.*

In *Reynolds*, this Court contrasted the process of amending the constitution, which does not involve the governor's participation, with the redistricting process. Regarding constitutional amendments, "voters are given a chance to express themselves and there is no need for them to speak through the governor, who is the only person involved in the legislative process that represents the people as a whole." *Id.* at 559.

The give and take of the 2021 legislative process resulted in *rejection* of maps this Court adopted in *Johnson III*. Those maps, vetoed by the one official in the process who represents all Wisconsinites and protects the views of those without a voice in the legislature, should have been ineligible for Court consideration. Those maps violate the separation of powers because the Court judicially overrode Gov. Evers's veto.<sup>2</sup>

This Court in *Johnson v. Wisconsin Elections Comm'n (Johnson I)*, 2021 WI 87, ¶¶ 3, 46, 399 Wis. 2d 623, 967 N.W.2d 469, said the state constitution requires the *legislature* to establish legislative districts, and that laws enacted by the *legislature* reflect policy choices. But the constitution also includes the governor's

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<sup>2</sup> If the Court then had no eligible submitted set of maps, it could have followed what the court in *Prosser v. Elections Board*, 793 F. Supp. 859, 865 (W.D. Wis. 1992), did—reject the initial decision to choose a map submitted by a party and instead formulate its own plan, combining the best features of multiple plans.

choice to veto the legislature's districting and policy choices. The plurality in *Johnson I* said the people vested the power for redistricting "in the legislature—not the executive and certainly not the judiciary." *Id.*, ¶ 69. Amici assert that that statement is incorrect. The people vested the power for redistricting in the legislature *and* the executive. Wis. Const. art. V, § 10; *Reynolds*, 22 Wis. 2d at 558.

This Court in *Johnson I* said nothing in the state constitution vested the Court with the legislature's power to enact new maps. 2021 WI 87, ¶ 3. Yet in *Johnson III* this Court vested itself with the legislature's power to override a veto. The *Johnson I* plurality initially rejected the legislature's proffer of its 2021 maps as an expression of the preferences of the state because the maps "did not survive the political process." 2021 WI 87, ¶ 72 n.8. Yet the *Johnson III* court accepted them.

This Court's adoption of maps Evers rejected read the voice of the people out of the legislative process. This Court could not judicially override the governor's veto. Only the legislature could do that, and it failed to do so. The maps submitted by the legislature should have been ineligible for consideration. Their adoption violated separation of powers principles and Wis. Const. art. V, § 10. *See Johnson III*, 2022 WI 19, ¶ 187 (Karofsky, J, dissenting).

A court-adopted redistricting plan is subject to subsequent court review for compliance with law. *See Jensen v. Wis. Elections. Bd.*, 2002 WI 13, ¶ 16, 249 Wis. 2d 706, 639 N.W.2d 537; *Johnson III*, 2022 WI 19, ¶ 152, 401 Wis. 2d 198 (Hagedorn, J., concurring); *Johnson I*, 2021 WI 87, ¶ 34 (stating that the court must be mindful "not to inadvertently choose a remedy that solves one constitutional

harm while creating another”). This Court should declare the maps it selected in *Johnson III* unconstitutional.

II. The remedy must be truly nonpartisan and must consider the will of the people.

This Court understandably wants to avoid involvement in political decisions, but involvement is unavoidable when the political redistricting process fails. Politics and districting are inseparable, and district lines “are rarely neutral phenomena.” *Gaffney v. Cummings*, 412 U.S. 736, 753, 93 S. Ct. 2321 (1973). Regardless of whether maps are created through the legislature and governor or a court, “[r]edistricting determines the political landscape for the ensuing decade and thus public policy for years beyond.” *Jensen*, 2002 WI 13, ¶ 10. When redistricting is placed in the judicial branch, judges are required to “judicially legislat[e], that is, writ[e] the law rather than interpret[] it.” *Id.*

*Johnson I* cited *Rucho* in adopting the “least change” method for choosing new maps. According to *Johnson I*, *Rucho* means that “there are no legal standards by which judges may decide whether maps are politically ‘fair,’” 2021 WI 87, ¶ 3.

*Rucho*, however, involved the review of maps adopted through legislative processes in Maryland and North Carolina, *not* court-created maps. *Rucho* held that whether maps adopted through state legislation are impermissible partisan gerrymanders is a political matter outside of court jurisdiction. But *Rucho* says nothing binding about how a court choosing maps in the first instance goes about doing so. Whether the legislature and executive may constitutionally engage in

partisan gerrymandering is a different question than whether the judiciary may do so.

The question for this Court is *not* whether maps created through the legislative process are unconstitutional but instead what the best maps are. When a court must choose districting maps, the court should not back off from the challenges of addressing partisanship under the cloak of *Rucho*.

The panel in *Prosser v. Elections Board*, 793 F. Supp. 859, 867 (W.D. Wis. 1992), noted this distinction when it created Wisconsin's maps after the 1990 census. The *Prosser* court said it would “pay little heed to cries of gerrymandering” regarding a redistricting plan enacted by a legislature. *Id.* But when a court itself does the redistricting, 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.*

Failing to address partisan districting is not appropriate when a court crafts the maps itself. A “politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results.” *Gaffney*, 412 U.S. at 753. Justice Rebecca Dallet recognized this in her *Johnson I* dissent, 2021 WI 87, ¶ 111, stating that as contradictory as it sounds, to *avoid* unintentionally acting in a partisan manner, the court must consider a map's likely partisan effects. *Also see id.*, ¶ 109 (stating there is “a significant difference between second-guessing the partisan fairness of a map drawn by an inherently partisan legislature” and the court's choice of a plan “most consistent with judicial neutrality”).

This case provides the Court the opportunity to correct its mistake in *Johnson* when it adopted the least-change approach. By using the legislature’s severely partisan 2011 maps as the starting point, this Court adopted partisanship as its own position, disregarding that voters in 2018 chose a different party to lead the executive branch. Amici urge this court to reconsider use of the least-change approach when crafting the remedy in this case.

Even if the Court maintains the least-change approach, in adopting new maps it should adjust any starting maps to take into consideration a potential map’s partisan effects. By not doing so, the Court unintentionally may act in a partisan manner.

That dicta in *Rucho* says there are no clear standards in a constitution for determining whether a districting map treats a political party fairly, 139 S. Ct. at 2501, does not mean the Court throws away all fairness principles when creating districting maps. Judges make judgment calls all the time. *Rucho* itself recognized instances in law when judges must exercise judicial discretion and where “matters of degree are left to the courts”, *id.* at 2505. Justice Hagedorn recognized in *Johnson I* that legal standards “are not the only permissible judicial considerations when constructing a proper remedy.” 2021 WI 87, ¶ 83 (Hagedorn, J., concurring).

The Court may reject proportional representation mapping, *see Johnson I*, 2021 WI 87, ¶ 42, yet acknowledge the need to address severe disproportionality. At some point disproportional representation endorsed by the court becomes a political choice by the Court. To argue that because the Court cannot determine the



exact line between fair and unfair proportions would be to accept the fallacy of the beard. *See Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 2023 WI 38, ¶ 85, 407 Wis. 2d 87, 990 N.W.2d 122 (Grassl Bradley, J., concurring) (“In this argument, the fact of continuous variation has been used to undermine the reality of the difference. Because there is no sharp dividing line, it has been suggested that there is no difference. This is clearly a piece of crooked argument[.]”) (quoting Robert H. Thouless, *Straight and Crooked Thinking* 169-70 (1932)).

The overwhelming majority of Wisconsinites expect this Court to redistrict in a neutral way. Amici urge this Court, in fashioning a remedy in this case, to address the effects of the maps it chooses to avoid acting in a partisan manner. Amici also urge this Court to consider and incorporate the desires of the people as exhibited through the governor (representing all Wisconsinites), the PMC, advisory referendums, and other evidence that the Court may accept. To avoid acting in a partisan manner, the Court should ensure that its remedy is truly nonpartisan. Nonpartisan maps are what the majority of Wisconsinites want, and they reinforce the Court’s legitimacy as apolitical.

### CONCLUSION

By adopting redistricting maps that failed the legislative process, this Court judicially overrode the governor’s veto, in violation of the Wisconsin Constitution. This Court should declare the maps it selected in *Johnson III* unconstitutional.

Though the Court does not like being placed in a political position, it cannot avoid it when creating its own redistricting maps. By not considering partisan effects

of the maps it chooses, the Court actually acts in a partisan manner. In crafting a remedy, the Court must be careful not to adopt partisan maps that do not reflect the will of the people.

Dated: November 8, 2023

Respectfully submitted by:

/s/ Margo S. Kirchner

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of the brief is 4358 words (4273 words in text and footnotes as counted by Word plus 85 words within images).

/s/ Margo S. Kirchner

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Margo S. Kirchner