No. 2021AP001450 – OA

SUPREME COURT OF WISCONSIN

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 Election 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.

NON-PARTY *AMICUS CURIAE* BRIEF OF LEGAL SCHOLARS IN SUPPORT OF NO PARTY

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INTEREST OF AMICI

Amici, identified in the Appendix, are eight legal scholars with nationally recognized expertise in election law, including redistricting. They have researched and published extensively in this area and have a professional interest in the integrity of redistricting law and practice.

INTRODUCTION

For three straight decades, the federal courts that redistricted Wisconsin rejected all party-submitted maps and produced their own more neutral plans. For two reasons, this court should either do the same or again let a federal court act.

First, the proposed maps flout foundational principles of impartiality and equity. Regardless of whether Wisconsin law bars partisan gerrymandering by legislators, courts have long regarded it as obvious and uncontroversial that they cannot adopt politically tainted maps as their own. They appreciate that acting neutrally and independently means casting aside plans that embody the "political agendas" of their drafters or "represent[] one political party's idea of how district boundaries should be drawn." *Burling v. Chandler*, 804 A.2d 471, 483 (N.H. 2002); *Peterson v. Borst,* 786 N.E.2d 668, 675 (Ind. 2003).

Here, most of the proposed maps come from partisan actors, and all use undeniably partisan prior maps as their template. "Selecting any of them would be a political act, inappropriate for a judge to take." *Corbett v. Sullivan*, 202 F.Supp.2d 972, 974 (E.D.Mo. 2002). Defying traditional equitable precepts, it also

would allow the legislature, which breached its constitutional duty to redistrict, "to take advantage of [its] own wrong." *R.H. Stearns Co., v. United States*, 291 U.S. 54, 62 (1934).

Second, as the parties' submissions reveal, a least-change approach is not a viable framework for selecting remedial maps. Because Wisconsin law nowhere delineates the approach, applying it requires the court to create operative standards out of whole cloth and make a slew of discretionary policy judgments. Such judicial lawmaking needlessly complicates matters, neglects legally grounded redistricting criteria, and fails to vindicate the people's "constitutional right … to an equitable apportionment" that reflects current conditions. *State ex rel. Reynolds v. Smith*, 19 Wis.2d 577, 586, 120 N.W.2d 664, 669 (1963).

Courts tasked with providing redistricting remedies should indeed be "modest and restrained," *Johnson v. Wis. Elections Comm'n* (hereinafter "Op."), 2021 WI 87, ¶82, __Wis.2d__, __N.W.2d__ (Hagedorn, J., concurring), but performing freewheeling judicial lawmaking while carrying forward partisan schemes is just the opposite. The federal courts that previously produced maps for the state identified sounder ways to advance those laudable values. Drawing upon their successful model, this court should craft remedial maps with assistance from an independent expert, prioritizing legally delineated redistricting principles. Or, most modest and restrained of all, the court should simply bow out. Three times, federal courts adopted maps that Wisconsinites widely accepted as fair and legitimate. They are well positioned to do so again.

ARGUMENT

I. NONE OF THE PROPOSED MAPS SATISFY LAW AND EQUITY.

A. Separate from nonjusticiable questions of partisan fairness, this court must reject politically biased maps.

Even if courts "pay little heed to cries of gerrymandering" in legislatively drawn maps, they are dutybound to guard against political bias when they adopt maps themselves. *Prosser v. Elections Bd.,* 793 F. Supp. 859, 867 (W.D.Wis. 1992). The duty derives from the institutional imperatives of independence and impartiality, and from the equitable nature of judicial redistricting remedies. *Cf. Williams-Yulee v. Florida Bar*, 575 U.S. 433, 445, 447 (2015) (emphasizing that judges must "exercis[e] strict neutrality and independence" and "'observe the utmost fairness'") (quoting John Marshall). Guided by "enlightened conscience," courts of equity must "do substantial justice" based on "all the facts and circumstances." *Rahn v. Milwaukee Elec. Ry. & Light Co.*, 103 Wis. 467, 79 N.W. 747, 748 (1899); *Muscoda Bridge Co. v. Worden-Allen Co.*, 196 Wis. 76, 219 N.W. 428, 437 (1928). This means fashioning remedies that do not produce or perpetuate an "unfair advantage" or otherwise operate as "an instrument of injustice." *La Rosa v. Hess*, 258 Wis. 557, 560, 46 N.W.2d 737, 738 (1951). Even if the law does not bar politicians from advantaging themselves, equity bars courts from ratifying such conduct when *they* redistrict.

Here, the parties' submissions—and, indeed, their very identities—make plain that this court faces inherently political choices. As the court observed (Op. ¶51), political actors commonly draft maps to benefit themselves and their allies. And many of the litigants here are undeniably political actors. Even within the least-change framework, they had space to advance partisan objectives and seek to "reallocate political power" in their favor. Op. ¶86 (Hagedorn, J. concurring). To keep the judiciary "distinct" from the political branches and "distinctly non-partisan in character," this court must be clear-eyed about this reality and reject maps imbued with self-serving partisan agendas. *Cf.* Op. ¶¶70, 74) (quotation marks omitted)

Courts have a long track record of jettisoning politically tainted maps. The federal court that redistricted Wisconsin post-1990 rejected proposals from political actors that "b[o]r[e] the marks of their partisan origins." *Prosser,* 793 F.Supp. at 865. Judges, the court explained, "should not select a plan that seeks partisan advantage," nor allow any party to "do better than it would under a plan drawn up by persons having no political agenda." *Id.* at 867. This court later quoted that passage approvingly, establishing it as binding precedent. *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶12, 249 Wis.2d 706, 639 N.W.2d 537. The post-2000 federal court similarly decried the "evident" "partisan origins" of litigants' proposals and rejected them all as "unredeemable," stressing its obligation to "avoid[] the creation of partisan advantage." *Baumgart v. Wendelberger*, No. 01–C–0121, 2002 WL 34127471, *3-4, *6 (E.D.Wis. May 30, 2002);

see also Wisconsin State AFL-CIO v. Elections Bd., 543 F.Supp. 630, 634, 638 (E.D.Wis. 1982) (rejecting all party-proposed plans and noting suspicions about their "political end[s]"). Significantly, none of these courts tied this established remedial practice to the availability of a cognizable partisan gerrymandering claim. The inquiries are distinct and should not be conflated.

Institutional and equitable considerations make the legislature's proposed maps an especially inappropriate remedy:

First, the whole reason for this litigation is that the legislature breached its constitutional duty to redistrict by failing to pass a bill with gubernatorial support or a veto-proof majority. *Cf.* Op. ¶79 ("[T]he legislature must implement a redistricting plan each cycle."). Because the legislature caused the legal wrong and is not itself an injured party, it is in no position to seek equitable relief, much less receive special deference. Consistent with the principle that those who seek equity "must come with clean hands," "equitable remedies are not available to one whose own inaction results in the harm." *Madregano v. Wisconsin Gas & Elec.*, 181 Wis. 611, 195 N.W. 861, 864 (1923); *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶25, 290 Wis.2d 352, 714 N.W.2d 900.

Second, the legislature asks the court to insert itself directly "into the actual lawmaking function" by validating the very maps the legislature failed to navigate through the political process. Op. ¶71. Although the legislature now portrays its maps as faithful to the court's criteria, they were not drafted with those criteria in mind; they were created to advance the legislature's own

preferences as a "political body" *before* the court's criteria were announced. Op. ¶3.

Third, those legislative maps, passed solely by Republicans and vetoed by a Democrat, are not just political, but palpably partisan. As other courts have understood, adopting redistricting plans "uniformly endorsed by members of one party and uniformly rejected by members of the other, does not conform to applicable principles of judicial independence and neutrality." *Peterson*, 786 N.E.2d at 673; *see also Maestas v. Hall*, 274 P.3d 66, 77 (N.M. 2012) ("The courts should not select a plan that seeks partisan advantage."); *Wilson v. Eu*, 823 P.2d 545, 576-77 (Cal. 1992) (considering itself "compelled to reject" legislator-drawn plans with "calculated partisan political consequences").

Finally, the legislative maps take as their template the highly skewed post-2011 maps. Describing those maps, a federal court lamented that their creators "chose a sharply partisan methodology." *Baldus v. Members of Wis. GAB*, 849 F. Supp.2d 840, 844 (E.D.Wis. 2012). The court found that "partisan motivation … clearly lay behind" the maps, and it was "almost laughable" for the drafters to deny it. *Id.* at 851. Even if those lawmakers remained "strictly 'within the law,'" their gerrymandered maps do not reflect the sort of "good faith, honesty, or righteous dealing" that a "court of conscience" can endorse. *David Adler & Sons v. Maglio*, 200 Wis. 153, 228 N.W. 123, 125 (1929) (quotation marks omitted).

Of course, per this court's instructions, every party anchored its proposals in the post-2010 maps, meaning all indelibly "bear

the marks of their partisan origins." *Prosser*, 793 F.Supp. at 865. Applying a least-change approach "in the face of credible claims that the existing map is politically biased" is simply "inconsistent with the judiciary's distinctive institutional role." Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. Rev. __, 50-51 (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3910061. A court that knowingly takes gerrymandered maps as its own breaches its duty to act as an "apolitical and neutral arbiter[]." *Cf.* Op. ¶72.

B. The parties' submissions expose the shortcomings of a least-change approach.

This court endorsed a least-change approach to avoid judicial lawmaking and respect "the judiciary's properly limited role in redistricting." Op. ¶72. The parties' submissions reveal that these purported benefits are illusory. Far from helping the court avoid policy choices, a least-change approach turns out to require an array of subjective judgments unmoored from legal text.

The court must first determine what minimizing change even means. The parties offer numerous potential measures and metrics, which can be combined and balanced in myriad ways. Choosing among these possibilities is more a matter of taste than law. Because new maps can resemble or diverge from their predecessors along many dimensions, discerning "least-change" primacy is akin to determining which children are most like their parents.

Making matters worse, the court must also mesh its extra-legal least-change approach with legally delineated criteria and

other traditional redistricting principles. Again, as the litigants' divergent views indicate, this involves untold discretionary judgments. The court deemed partisan fairness off-limits partly because of a supposed "lack of standards." Op. ¶41. On this score, the least-change inquiry fares worse. "[D]eciding how much of a 'core' to preserve, as against other redistricting considerations, is itself a highly subjective—and potentially partisan—endeavor … best resolved by the political branches." *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223, *8 (E.D.N.Y. Mar.19, 2012).

State law offers no meaningful guidance. Indeed, no Wisconsin constitutional or statutory provision, including the redistricting plans codified in 2011, establishes a least-change redistricting policy at all. The codified plans merely list the political subdivisions and census blocks comprising each district—districts now unconstitutionally malapportioned and thus "absolutely void" and "of no effect whatever." *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 728 (1892). They do not articulate operative principles for reconfiguring districts based on today's different population distributions, demographics, and conditions. It simply cannot be said that minimizing changes from now-invalid districts respects prior legislative policy choices when (1) those choices were context-specific; (2) the law does not identify the criteria underlying them; and (3) applying the same unstated criteria in a distinct context may well yield substantially reconfigured maps. Notably, lawmakers in 2011 did not seek to preserve the prior decade's maps; they overhauled them. Least-

change was not the legislature's policy choice in 2011 and should not be the court's policy choice in 2021.

Prior Wisconsin redistricting precedents underscore the novelty of this court's chosen path. During its one prior foray into mapmaking, this court said nothing about carrying forward decade-old maps, and it expressed no interest in whatever policy choices those maps might have embodied. Instead, the court directly applied the standards of "the Wisconsin constitution itself." *State ex rel. Reynolds v. Zimmerman*, 22 Wis.2d 544, 126 N.W.2d 551, 561 (1964). Likewise, none of the federal courts that redistricted Wisconsin in the 1980s, 1990s, and 2000s solicited "least-change" plans from litigants. The post-2000 court did take the prior *court-drawn* maps "as a template," but it did not offer any standard for minimizing change or compare party-submitted maps for continuity, and it acknowledged that its "process involved some subjective choices." *Baumgart*, 2002 WL 34127471, *7.

Precedents from elsewhere are similarly unsupportive. Contrary to this court's assertion, least-change analysis has not gained "general acceptance." Op. ¶73. It is a minority approach; few courts have ever done what this court seeks to do. Of the cases the court string-cited as exemplars, more than half addressed municipal-level redistricting in Georgia. The least-change approach there hinged on two considerations absent here. First, Georgia was subject to VRA Section 5, which called for consideration of prior district configurations to preserve existing minority representation. Second, Georgia had a "specific historical preference" for maintaining district cores. *Bodker v. Taylor*,

No.Civ.A.1:02-CV-999ODE, 2002 WL 32587312, *7 (N.D.Ga. June 5, 2002). Neither the Georgia cases nor the others cited offer meaningful guidance about how to operationalize least-change mapmaking. While those courts accepted continuity as a general principle, they did not conduct least-change beauty pageants among party-submitted maps. Instead, they typically gave experts a general directive to limit changes and left them to make discretionary judgments. They also generally took pains to guard against partisan bias. *See supra*.

Mapmaking courts more often decline to prioritize continuity, rejecting calls to preserve old maps. *See, e.g.*, *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1094 (D. Kan. 2012) ("pushing a re-set button" rather than using least-change); *Favors*, 2012 WL 928223, *8 (refusing requests to "give core preservation greater weight"); *Good v. Austin*, 800 F. Supp. 557, 564 (E.D.&W.D. Mich. 1992) (declining to pursue "preservation of 'population and geographic core areas'" of prior districts); *In re Legislative Districting of State*, 805 A.2d 292, 328 (Md. 2002) (rejecting "us[ing] an existing plan as a constraint").

To underscore the difficulties ahead, consider a partial list of questions the court now faces that "call[] for the exercise of judgment and a balancing of considerations in the field of policy," *Zimmerman*, 126 N.W.2d at 571:

- Should least-change maps minimize population shifts, geographic changes, or some combination?
- Do some measures of population and/or geographic change deserve more weight than others? If so, which, and why?

- When might a strong showing on some variables offset weaker showings on others?
- Is it preferable to keep more districts fully intact or to alter more districts but move somewhat fewer people overall?
- What weight, if any, should be given to core-retention differentials by race/ethnicity?
- Should population shifts between even- and odd-numbered senate districts factor into least-change analysis, be addressed as a supplemental discretionary factor, or not considered at all?
- Should protecting incumbents from head-to-head contests be part of least-change analysis, or is it an off-limits political consideration? If considered, what weight is appropriate?[1]
- Should least-change analysis be conducted before or after assessing legally enunciated redistricting requirements?
- Do efforts to minimize change justify minor population deviations, or is near-perfect population equality preferred even if it requires somewhat more change?
- To what extent does improving compactness or reducing county/municipal splits justify somewhat greater changes? Can minimizing change really mean avoiding improvement along these legally delineated dimensions?

[1] Courts often hold that efforts to prevent incumbent face-offs "have no place in a plan formulated by the courts," partly because catering to current officeholders risks "actual or apparent partisan bias." *Favors*, Magistrate Judge's R&R, 2012 WL 928216, *17 (quoting *Wyche v. Madison Parish Police Jury*, 769 F.2d 265, 268 (5th Cir.1985)); *Favors*, 2012 WL 928223, *7; *see also Baumgart*, 2002 WL 34127471, *3 (rejecting "[a]voiding unnecessary pairing of incumbents" as a proper criterion).

- Can accommodating communities of interest and/or advancing other traditional redistricting principles justify change? If so, when and to what extent?

In short, the least-change approach is a standardless morass. It neither cabins this court's discretion nor gives Wisconsinites a legally adequate remedy. The political branches failed to make constitutionally required judgments about how to configure this state's districts given current circumstances. That dereliction of duty cannot be cured by perpetuating distinct judgments that have reached the end of their shelf life. *See Jensen*, 2002 WI 13, ¶10 (recognizing the "give-and-take" of redistricting as a "decennial exercise"); *Favors*, 2012 WL 928223, *6 (explaining that courts owe little "deference to the outdated policy judgments of a now unconstitutional plan"). None of the parties' supposed least-change maps is satisfactory.

II. THE COURT SHOULD CREATE ITS OWN EXPERT-DRAWN MAPS USING UPDATED CRITERIA OR DISMISS THIS ACTION.

Rejecting the parties' deficient proposals would reaffirm this court's independence and convey that the court is not beholden to partisans of any stripe. It would also align this court with the federal courts that for three consecutive decades declined to rely on litigants with parochial interests to produce maps suitable for courts.

The court should choose one of two alternative paths. First, consistent with the prior federal cases, the court should generate its own maps. It should follow the routine practice of appointing

an experienced, credentialed, and credibly unaligned/nonpartisan expert to handle the technical line-drawing work. The expert should be instructed to apply the legally required redistricting criteria outlined in the court's prior opinion, but should *not* be directed to carry forward prior districts. As the parties' submissions and above discussion underscore, the least-change approach is untenable. It has no basis in Wisconsin law, makes mapmaking more complex and subjective, inequitably perpetuates a partisan scheme, and does not adequately remedy the constitutional harm.

The court's expert should not consider political data, including incumbents' addresses, with two limited exceptions. First, such data may be necessary for Voting Rights Act compliance. Second, to avoid creating accidental inequities, the expert should, after completing maps, use established partisan bias metrics to ensure they are indeed mainstream neutral maps given Wisconsin's political geography. Such expert-aided processes have a track record of success and would insulate the court from charges of partisan deck-stacking, thus safeguarding its institutional integrity.

A second straightforward option is for the court to vacate its rulings and dismiss this action. Although federal courts must give state courts the first opportunity to redistrict, no law compels this court to act. A capable federal court panel is waiting. For three decades, federal courts successfully redistricted Wisconsin, and this court understandably remained on the sidelines. Each panel acted unanimously and without generating significant

controversy. In Justice Roggensack's words, "the federal courts have done a very good job, and the federal courts are not elected officials that are apt to be seen as partisans when they do the job of redistricting …. Redistricting is a huge danger to put that on the court's plate and it is a danger we do not need to accept…. [I]t threatens in my view the integrity of the court …. [I]t's not appropriate for this court to take this on." Wisconsin Supreme Court Open Administrative Conference, 34:43-38:46 (Jan.22, 2009) (Roggensack, J.), https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/; *see also id.* 1:05:33-42 (Ziegler, J.) ("We have a federal court who … has lifetime appointments, and they've done this three times and apparently have done it successfully.").

What this court should not do is continue down its current, misguided path. The notion that a makeshift least-change principle found nowhere in Wisconsin law compels this court to perpetuate what are likely the most politically biased maps in state history simply does not pass muster. Wisconsinites will see such a ruling for what it is, and they will judge this court harshly. If the court is serious about not "plac[ing] [its] thumb on any partisan scale," it should refuse to preserve maps that place a thumb on the partisan scale. *Cf.* Op. ¶76. No court should sacrifice its own legitimacy while giving a free pass to politicians who failed to do their jobs.

CONCLUSION

The court should reject all party-proposed maps and proceed consistent with the foregoing analysis.

Dated this 4th day of January, 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 3,296 words.

Dated: January 4, 2022

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CERTIFICATION OF SERVICE

I hereby certify that on this date I caused an electronic copy of the Motion of Legal Scholars For Leave to File a Non-Party *Amius Curiae* Brief In Support of No Party, and the foregoing proposed brief to be sent by email to clerk@wicourts.gov on or before 12:00 noon. In addition, I will cause a paper original and ten copies of these materials with a notation that "This document was previously filed via email" to be filed with the clerk no later than 12:00 noon tomorrow. I further certify that on this date, I sent true and correct email copies of these materials to all counsel of record.

Dated: January 4, 2022

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