STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP1450-OA

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

Petitioners,

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

Intervenors-Petitioners,

v.

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

a member of the Wisconsin Elections Commission and MARK THOMSEN in his official capacity as a member of the Wisconsin Elections Commission,

Respondents,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, in his official capacity, and JANET BEWLEY Senate Democratic Minority Leader, on behalf of the Senate Democratic Caucus,

Intervenors-Respondents.

ORIGINAL ACTION

RESPONSE BRIEF OF INTERVENOR-RESPONDENT GOVERNOR TONY EVERS

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INTRODUCTION

While several points made in the initial briefs merit response, the most concerning is the Legislature's proposal that this Court should accept its plans as the presumptive plans.[1] In reality, the Legislature is proposing to use this Court to override a gubernatorial veto—not only to involve the Court in politics but to undermine the role of another branch of government. This Court must unequivocally reject that proposal, which encroaches on another branch and disregards the evenhandedness required of this Court in this redistricting process.

The Legislature's view that the existing maps should enjoy presumptive weight fares no better. Rather, absent a political-branch agreement, it is this Court's role to "develop" the new maps. *Growe v. Emison*, 507 U.S. 25, 36 (1993). This "state court" will be the State's "agent[] of apportionment" "designing those districts." *Id.* at 34–35 (explaining that state redistricting may be done either by the state's political branches or by state courts).

It is no secret that the old maps were drawn under one-party control and were designed for substantial and enduring partisan advantage. If this Court were to adopt those maps as the starting point for its task, it would not be neutral or apolitical—instead, it would be highly partisan, something courts designing maps must studiously avoid.

In the face of the old, extremely partisan maps, the Legislature proposes that fairness is none of this Court's business when drawing the maps that govern our democracy.

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[1] For brevity's sake, this response speaks in terms of the Legislature's brief and focuses on the issues of greatest importance, but the responses here would apply equally to similar arguments in the briefs of the Johnson petitioners and the Congressmen.

Instead, according to the Legislature, this Court is supposed to close its eyes to the facts—that the last plan was partisan and that the Legislature's new plan will be more of the same—and either simply adopt the Legislature's proposed plan or constrain itself to making minor tweaks to the prior plan.

This argument is based on a misunderstanding of what is at issue here—a court *doing* the State's redistricting—as opposed to what was at issue in federal cases the Legislature relies upon, like *Whitford* and *Rucho*, where a federal panel sat in *review* of a plan enacted by a state's political branches. As *Growe* recognizes, this Court will be *creating* the State's plan in the face of an almost-certain impasse in the State's other branches. That map-making must be done without this Court enshrining a partisan plan, much less a dramatically partisan plan, under a pretense that this is somehow neutral or apolitical.

This Court's task must not "involve the judiciary in the politics of the people," *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 561, 126 N.W.2d 551 (1964). It cannot adopt as a starting point a plan that is "politically biased from the start." *Prosser v. Elections Bd.*, 793 F. Supp. 859, 871 (W.D. Wis. 1992). But both the Legislature's presumption and the so-called "least change" concept would do just that. The Legislature's gambit that a non-statutory and non-constitutional "core retention" concept should dominate has the same problem.

Tellingly, the Legislature ignored what it now asserts is sacrosanct in the last round of redistricting. *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 849 (E.D. Wis. 2012). It cannot be the rule that moving voters is fine to consolidate Republican control but then subsequently is forbidden forever, making that control

indefinite. That is a rule of win-at-all-costs politics, not of judicial redistricting.

Judicial redistricting is nothing new. Courts have done it for decades, and the courts do not blindly apply the presumptions that the Legislature seeks to insert into this process. Like in any case, the Court should impartially evaluate each party's evidence, proposals, and arguments in light of all of the legal requirements and principles. There is no justification for pre-deciding that it will favor one party's preferred outcome, as the Legislature seeks.

I. Response to question one: the Legislature's proposal that its plans should receive presumptive weight ignores the applicable legal principles and Wisconsin's system of government.

The Legislature's proposals for blindly pre-deciding that its proposed plan, or the now-illegal old plan, should be given presumptive weight are unprecedented and contrary to our system of government. This Court is tasked with developing Wisconsin's districts for the new decade on behalf of the State, in the face of an almost certain political impasse. This Court, the U.S. Supreme Court, and courts nationwide recognize what should be obvious: courts, as impartial bodies, must guard against politics invading that process. Rather, this Court should evenhandedly view the evidence, criteria, and proposals to produce maps governed by law and principle, not political advantage.

A. The Legislature's preferences for the next decade's maps are entitled to no presumption or preference, especially where the Governor vetoes those proposed maps.

To start, the Legislature mischaracterizes its role in the redistricting process. It cites caselaw that uses the word "legislature" as shorthand for joint acts of the legislature and governor in enacting law. Those cases in no way support the Legislature's bold invention that it, alone, sets the State's redistricting policy, regardless of whether a bill becomes law. (Leg. Opening Br. 18–21.) The cases it cites discuss "enacted" legislation, not proposed bills. *See Upham v. Season*, 456 U.S. 37, 38 (1982).

Legislation does not become law—does not become the *State's* policy or proposal—unless also signed by the Governor. "Both the Governor and the legislature are indispensable parts of the legislative process"; the Governor "has the general power of veto, and when he has vetoed a bill it cannot become law unless both houses of the legislature vote to override that veto." *Reynolds*, 22 Wis. 2d at 557.

Not only does that remain true when it comes to redistricting, but it has special force: "the framers of the [Wisconsin] constitution intended to require [the Governor's] participation in all decisions relating to legislative reapportionment." *Id.* And it is the Governor, not the Legislature, who most squarely represents the people's interests in redistricting: he is "the one institution guaranteed to represent the majority of the voting inhabitants of the state." *Id.* at 556–57.

This Court's precedents do not support giving special weight to the Legislature's bill. To the contrary, it is the Governor who was most recently selected by the people of

Wisconsin through the democratic process (one not subject to any gerrymander). At a minimum, his views deserve equal weight.

The Legislature half-heartedly attempts to cast doubt on *Reynolds* (Leg. Opening Br. 21–22), but does not ask for this Court to actually revisit it, and for good reason. What the Legislature alludes to already was squarely addressed by this Court. *Reynolds*, 22 Wis. 2d at 555 (explaining that many provisions lack the "by law" language yet indisputably require presentment to the Governor). The principles discussed in *Reynolds* are basic features of our system of government and Wisconsin's history. For example, this Court observed that "[h]istorically, all apportionment of Wisconsin legislative districts has been accomplished by the joint efforts of the legislature and the governor in passing and signing into law a particular reapportionment bill." *Id.* at 558. Indeed, this Court's 1952 decision in *State ex rel. Broughton v. Zimmerman*, 261 Wis. 398, 408, 52 N.W.2d 903 (1952), observed that governors had been signing apportionment bills into law over "the past 104 years"—in other words, since Wisconsin's Constitution was ratified, which further confirms how solidly grounded *Reynolds* is in the original meaning of the Wisconsin Constitution. *See State v. Halverson*, 2021 WI 7, ¶ 22, 395 Wis. 2d 385, 953 N.W.2d 847 (explaining that a key consideration when interpreting the constitution is "the practices at the time the constitution was adopted" (citation omitted)).

It remains the case that only after a bill were signed by the Governor (or a veto were overridden) would there be a "state-proposed plan" in the sense discussed in the cases. Lacking that, this Court will be developing that state plan.

B. The Legislature mischaracterizes this Court's task; it is developing maps for the State in the face of an impasse, a process that must guard against partisanship.

After the new census, the Wisconsin Constitution tasks the State with redistricting "anew." Wis. Const. art. IV, § 3; *Reynolds*, 22 Wis. 2d at 554. Ideally, that redistricting is done through "joint action" of the Governor and Legislature. *Reynolds*, 22 Wis. 2d at 559. But where, as here, there is almost certain to be a political impasse, it will be this Court's job to act on behalf of the State by designing the new districts itself.

Not only is this true as a matter of fact, but the U.S. Supreme Court's decision *Growe* makes this Court's role unmistakable. It is premised on the State redistricting *either* through the political process *or* through court-drawn maps. For example, to stave off federal intervention, the "State of Illinois, including its Supreme Court, may validly redistrict." *Growe*, 507 U.S. at 33 (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965)). Restated, in the case of a political impasse, "the state court" stands in to "develop a redistricting plan" for the State, which includes "designing" the map's districts. *Id.* at 35–36. The Legislature has relied on *Growe* in moving to stay the federal redistricting litigation, yet does not recognize that it is this Court, and not it, that will be developing the State's plan.

The post-hoc review of an already-enacted State plan for a new census—like in *Rucho* or *Whitford*—thus is the wrong lens. The kinds of plans reviewed in those proceedings will be the *result* of this proceeding.

To further illustrate, the Legislature relies heavily on *Upham v. Season*, 456 U.S. 37 (1982), for the proposition that courts should only make limited modifications to plans to cure

defects. But the Legislature omits the completely different circumstances of *Upham*. It was a federal court reviewing a state plan for a new census already "enacted" into law. *Id.* at 38. In turn, the federal court addressed whether that enacted law complied with the Voting Rights Act. *Id.* The Court explained that, in those circumstances, federal courts should "follow the policies and preferences of the State" and should not interfere with the State other than to correct violations of federal law. *Id.* at 41–42 (citation omitted). The federal district court thus erred when not selecting a plan that "approximated the *state-proposed* plan." *Id.* at 42 (emphasis added).

Other redistricting cases highlighted by the Legislature follow a similar pattern—they address states' new plans that then were evaluated in terms of federal law. *See White v. Weiser*, 412 U.S. 783, 784, 795–96 (1973) (discussing federal review of a new congressional redistricting plan—"a duly enacted statute" that "the Governor of the State of Texas signed into law"—and addressing a federal constitutional challenge to that enacted map while respecting "the policies and preferences of the State"); *North Carolina v. Covington*, 138 S. Ct. 2548, 2554–55 (2018) (addressing a federal constitutional challenge to a newly enacted map based on racial gerrymandering, and explaining the remedy should be limited to that federal claim).

Upham and the like provide no support for the Legislature's unprecedented proposal here. (*See also* Congressmen Br. 17–21 (making a similar argument).) This Court will be *creating* the "state-proposed plan" reviewed in cases like *Upham*. It will "develop a redistricting plan" for the State in the first instance. *Growe*, 507 U.S. at 36. As discussed here and in the opening brief, the Court must do so without

promoting or adopting partisan advantage, from the beginning of the process to its end.

II. Response to question two: the Legislature's "least-change" concept is anything but apolitical and cannot be the guiding principle for the judicial redistricting process here.

As an alternative to presumptively adopting its new maps, the Legislature argues that the old maps should be given presumptive weight. (Leg. Opening Br. 32–40.) As discussed in the opening brief, not only does that have no basis in the law, but it would contravene it. The Legislature's notion of "judicial restraint" under the present circumstances is anything but.

A. The Legislature's proposed presumption for the old maps improperly involves the Court in partisan politics.

The Legislature's proposed presumptions—for its new preferred maps or the now-illegal old ones—improperly make this Court a political actor. It is forbidden for courts to engage in map-development that advantages a political party. Adopting the Legislature's proposed map, or the old one, would do just that.

As court after court has recognized, the requirement that courts not adopt partisanship is true from the beginning to the end of the process. Adopting old politically-biased maps would squarely "involve the judiciary in the politics of the people." *Reynolds*, 22 Wis. 2d at 561. Courts thus do not adopt an old plan as the starting point when it is "politically biased from the start." *Prosser*, 793 F. Supp. at 871. The rule is simple and necessary: "Judges should not select a plan that seeks partisan advantage." *Id.* at 867. Unsurprisingly, this Court has quoted that very proposition with approval. *Jensen*

v. Wis. Elections Bd., 2002 WI 13, ¶ 12, 249 Wis. 2d 706, 639 N.W.2d 537.

Prosser is no anomaly. Time and again courts take that approach—they must, to preserve courts' impartiality. For example, *Baumgart* in 2002 explained that not only is "avoiding the creation of partisan advantage" proper, but it justifies deviations from population equality. *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002). In turn, the court rejected using maps that showed signs of partisanship, including plans that showed partisanship through party-based pairing of incumbents and pizza-like line-drawing for partisan advantage. *Id.* at *4. While the Legislature holds out *Baumgart* as an example of taking an existing map as a starting point, there the existing map was judicially created; it lacked the political taint of the present one. (*See* Leg. Opening Br. 35.) And, as summarized above, the court did not blindly adopt anything; rather, it vetted the options for political bias. *Id.* at *4.

These are just the local examples. Other parties identified similar cases throughout the country where courts, instead of adopting partisan maps as a starting point, instead vet potential maps or proposals for partisanship. (*E.g.*, BLOC Opening Br. 50–52; Hunter Opening Br. 9–10; Citizen Mathematicians Opening Br. 32–33.)

Put differently, a court-designed map that adopts partisan bias as a starting point would have courts participating in acts contrary to our democracy. "[P]artisan gerrymanders . . . [are incompatible] with democratic principles." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015) (alterations in original) (*quoting Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion) (Kennedy, J., concurring)); *Rucho v.*

Common Cause, 139 S. Ct. 2484, 2506 (2019) (stating that "the fact that such gerrymandering is 'incompatible with democratic principles,' . . . does not mean that the solution lies with the federal judiciary" (citation omitted)). While the U.S. Supreme Court has ruled that such claims are nonjusticiable in federal court, that is not the question here. This Court is developing the maps in the first instance. Because it is a Court, it must not adopt partisanship or any other antidemocratic baseline for its maps.

In sum, there is nothing judicially "restrained" about adopting politically-biased old maps as the presumptive maps merely because they are the old maps. Rather, a so-called "politically mindless approach may produce . . . the most grossly gerrymandered results." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Here, that is not just a possibility but a certainty, and so the Court must not do so.

B. The Legislature's presumption elevates one nonbinding concept over all others, and it ignores the basic democratic principles underlying redistricting.

The Legislature's proposal is not only forbidden under the rule that courts may not adopt politically-biased maps, but it is also analytically unsound. Judicial redistricting can be challenging. It is inherently a balancing act, with the Court acting on behalf of the State in a matter of the highest importance. It is precisely the time when the Court must studiously balance the law in light of the facts. That process cannot be short-circuited with an invented presumption.

There is nothing magical about the words "least-change" or "core retention." Far from being binding (much less dominant) considerations, the Legislature largely ignored them the last time it redistricted, moving five to seven times

more people than a "least-change" approach would have warranted. *Baldus*, 849 F. Supp. 2d at 849. But now that the Governor's office is held by a member of the other party, the Legislature says the only possible remedy, if this Court does not merely adopt its proposed plan, is to make the least changes to a prior map. This rule would entrench the unrestrained moving of people from the prior map, directly contrary to contemporary practice. That cannot be the rule, and it is not.

Rather, a host of laws and principles apply to redistricting, as discussed in the opening brief. (*See also* BLOC Opening Br. 3–22.) "Core retention" is only one concept among many. It cannot be used to trump all else, including the Wisconsin Constitution's requirements and the political constraints on judicial redistricting.

This notion of blindly adopting "core retention" also lays waste to what animates redistricting in the first place: the "achieving of fair and effective representation for all citizens is . . . the basic aim of legislative apportionment." *Gaffney*, 412 U.S. at 748. While the federal courts will not step in to stop the political branches from redistricting with political motives, the courts as map-designers are much different. Again, courts must not ignore when a party's proposed map-drawing principles are highly partisan.

It is no answer that reapportionment may affect voting for the senate via a two-year delay for some voters. (Leg. Opening Br. 36–37.) That is unavoidable and common. *See*, *e.g.*, *Prosser*, 793 F. Supp. at 864. It does not trump other redistricting considerations. To the contrary, the effect of the temporary "disenfranchisement" poses no legal problem so long as it does not target a particular group. *Baldus*, 849 F. Supp. 2d at 852. The cases the Legislature relies on do not claim this is any sort of constitutional command.

And the Legislature's proposed factor of "continuity of representation" is a red herring. The "continuity" it proposes is using a highly-partisan, unresponsive gerrymander as the starting point. That is not the kind of continuity that judge-developed maps may countenance. In fact, since the last maps were adopted, the people have spoken in a statewide election to elect Governor Evers.[2] There is no ongoing democratic blessing of the old map. Much to the contrary. Entrenching a party in power, regardless of the will of the people, may promote "continuity" but no one would mistake it for democracy.

III. Response to question three: contrary to the Legislature's pronouncement, courts of course may consider what is balanced and fair.

As discussed, it not only is permissible to consider partisan makeup for judicial redistricting, but it is an established practice. Ignoring that, the Legislature makes the alarming proposal that "'fairness' is a partisan choice." (Leg. Opening Br. 16, 41–43.) That will come as a surprise to courts and voters everywhere.

Courts, of course, apply fairness principles all the time. *E.g.*, *State v. Jenkins*, 2007 WI 96, ¶ 37, 303 Wis. 2d 157, 736 N.W.2d 24 (applying a "fair and just reason standard" to plea withdrawal); *State v. Miller*, 2004 WI App 117, ¶ 19, 274 Wis. 2d 471, 486, 683 N.W.2d 485 (discussing the test for

[2] The Johnson petitioners suggest that adopting the old map as a default would encourage the Legislature and Governor to compromise (Johnson Opening Br. 23), but it would instead have the opposite effect. If existing maps are automatically adopted as the baseline, then the Legislature will have zero motivation to compromise because it will keep the core partisan map it wants by default.

issue preclusion, which includes "various factors to decide if the application of the doctrine is fundamentally fair").

That remains true in the context of redistricting. It is *more* important here; this Court's task affects the entire voting public's core democratic act. It goes "to the heart of our system of representative democracy." *Jensen*, 249 Wis. 2d 706, ¶ 4. "[F]air and effective representation" *is* its reason. *Gaffney*, 412 U.S. at 748 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565–56 (1964)). The Legislature's bald assertions that it is not possible to consider partisan game-playing when drawing or selecting maps is directly belied by the many courts that have done just that. *See*, *e.g.*, *supra* Part II.A.; (BLOC Opening Br. 50–52; Hunter Opening Br. 9–10; Citizen Mathematicians Opening Br. 32–33.)

The Legislature's attempt to disavow fairness should give pause. There is no basis for this Court closing its eyes to partisanship when redistricting—the principles of judicial mapmaking require it.

IV. Response to question four regarding proposed proceedings.

As stated in the opening brief, absent the very unlikely event of a political solution, this case will require a trial for expert testimony, proposed maps, and argument. In turn, this Court will develop Wisconsin's new maps.

The Legislature's proposal that this Court should pre-decide that its preferred maps are the presumptive maps must be rejected. It follows that its schedule based on that presumption should not be followed. Rather, like any other court handling a redistricting matter, this Court should impartially consider the evidence, laws, and factors during and after the evidentiary phase.

This Court has accepted jurisdiction over this highly-important fact-intensive inquiry and it is imperative that the Court itself—and not some designee—view and consider that evidence. The most efficient way to do so is to have the parties first submit their affirmative evidence, such as their plans and any supporting expert reports, in writing and then to conduct a court trial for cross-examination and argument.

Dated this 1st day of November 2021.

Respectfully submitted,

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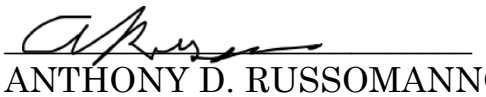
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3688 words.

Dated this 1st day of November 2021.



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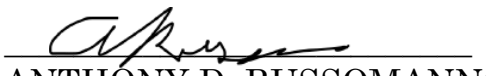
CERTIFICATE FILING OF SERVICE

I hereby certify that the *Response Brief of Intervenor-Respondent Governor Tony Evers* was email filed in pdf form to clerk@wicourts.gov, on or before 12:00 p.m. on November 1, 2021.

I further certify the original and 10 copies of this brief, with the notation that "This document was previously filed via email," were hand-delivered for filing to the Wisconsin Supreme Court Clerk's Office, 110 East Main Street, Madison, WI 53701, no later than 12:00 p.m. on November 2, 2021.

I further certify that on this day, I caused service of a copy of this brief to be sent via electronic mail to counsel for all parties who have consented to service by email. I caused service of copies to be sent by U.S. mail and electronic mail to all counsel of record who have not consented to service by email.

Dated this 1st day of November 2021.



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