No. 2021AP1450-OA

IN THE 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 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.

RESPONSE BRIEF BY THE WISCONSIN LEGISLATURE

BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN
SBN 1054815
5325 Wall Street, Suite 2200
Madison, WI 53718
608.216.7995
kstjohn@bellgiftos.com

LAWFAIR LLC
ADAM K. MORTARA
SBN 1038391
125 South Wacker, Suite 300
Chicago, IL 60606
773.750.7154
mortara@lawfairllc.com

CONSOVOY MCCARTHY PLLC
JEFFREY M. HARRIS*
TAYLOR A.R. MEEHAN*
JAMES P. MCGLONE*
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
703.243.9423
jeff@consovoymccarthy.com

* *Admitted pro hac vice.*

Counsel for Intervenor-Respondent,
The Wisconsin Legislature

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

INTRODUCTION

This litigation and the ongoing work on Wisconsin's 2021 redistricting plans reveal that many have a basic misunderstanding of Wisconsin civics. The Wisconsin Constitution states in no uncertain terms: "At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." Wis. Const. art. IV, §3; *see also* U.S. Const. art. I, §4, cl. 1 ("Manner of holding Elections for … Representatives[] shall be prescribed in each State by the Legislature thereof"). There is a process for amending that provision of the Wisconsin Constitution. It is not in this Court.

Should the Court need to provide a remedy, it will be a modest remedy to a malapportionment problem. It is not the time or the place to decide whether computers or an unelected commission or some other expert should redistrict. The Wisconsin Constitution assigns that responsibility to the Legislature. Yet some wish this Court to step in and impose its (their) will as a super-legislature, doing super-legislature things such as drawing "fair" maps in accordance with their preferred vision of the good. As the Bard said, the wish is the father to the thought.[1] Activists, hungry for the Legislature's chair, invite this Court to oust it from its

[1] *See* Henry IV, Part 2, Act IV, Scene iii:

> PRINCE HENRY: I never thought to hear you speak again.
>
> KING: Thy wish was father, Harry, to that thought.
>
> I stay too long by thee; I weary thee.
>
> Dost thou so hunger for mine empty chair
>
> That thou wilt needs invest thee with my honors.

constitutional duty. But we are a country of laws, and no law supports the revolution they seek. Wishful thinking is not Wisconsin law.

ARGUMENT

I. Every party agrees a remedy must comply with state and federal law, while acknowledging there will be policy-laden decisions beyond those requirements.

1. The parties appear to uniformly agree on the *required* redistricting factors. Any remedy must comply with state and federal law. Districts must be equally apportioned. Districts must comply with the Voting Rights Act without running afoul of the Fourteenth Amendment. Districts must be contiguous.[2] A legislative redistricting plan must have three nested Assembly districts for every one Senate district. *See* Legislature's Br. 22-31.

2. The parties will inevitably part ways, however, about how to balance softer redistricting criteria, which are not absolutely required. For example, districts should generally honor county, municipal, or ward boundaries—but invariably a county or municipality will be too large or too small for a single district. Where and how should Milwaukee be split? Where and how should the small town of Ainsworth or the village of Arpin be combined with a nearby community of interest? Likewise, districts must be compact, but only "as practicable." Wis. Const. art. IV, §4. When is it practicable? When not? And while everyone agrees that

[2] As the Legislature explained in its initial brief, contiguity is not necessarily geographical contiguity. In Wisconsin, a municipality may have annexed "island" territory that should be included in a district for it to be "contiguous," even if not geographically contiguous. *See* Legislature's Br. 30; *see also* Citizen Mathematicians & Scientists Br. 13 (explaining the same).

communities of interest should generally be kept intact, when does keeping those communities together warrant sacrificing other redistricting criteria—say, slight deviations in population or compactness? Which incumbents should be paired, which ones not?

Asking a court to balance these competing redistricting criteria to remedy a malapportionment claim is akin to asking the court "whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment); *accord* Citizen Mathematicians & Scientists Br. 18 (noting unironically that the "hardest of all is assessing the tradeoffs between scoring well on one criterion or metric and on another, given that each is essential to ensuring fair and effective representation for all Wisconsinites").

3. There are two paths. The first and best is to adopt the Legislature's proposed redistricting plans (should they pass both chambers) as the presumptive remedy. That path recognizes the Legislature's principal role in redistricting. *See* Legislature's Br. 18-22. Alternatively, the Court could adjust existing laws (prescribing the existing districts) as necessary to adjust for shifting populations, but otherwise leave the existing laws in place. *See id.* at 32. That path, too, is necessarily deferential to the Legislature's principal role in redistricting, leaving in place the innumerable lawful policy choices embedded in any legislative redistricting plan. *See Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 529, 576 N.W.2d 245 (1998) ("It is for the legislature to make policy choices, ours to judge them based not on our preference but on legal principles and constitutional authority."); *White v. Weiser*, 412 U.S. 783, 795 (1973).

Whichever path the Court takes, either the Legislature's present redistricting 2021 plans or the State's past 2011

redistricting plans warrant deference. They already balance the above criteria. The newly introduced plans[3] are based on the existing plans. 2021 Senate Joint Res. 63. They modify those existing plans insofar as they perfectly reapportion the congressional districts (with 0% aggregate population deviation) and approach perfect reapportionment for the legislative districts (with a remarkable <1% aggregate population deviation).[4] Because they are based on the existing plans, they prioritize continuity of representation and temporally "disenfranchising" the fewest number of voters in the upcoming Senate elections for odd-numbered Senate Districts.[5] (The average Senate District in the newly proposed maps keeps 92.21% of the existing district—meaning only a small fraction of voters will miss out on their next Senate election.[6]) And they pair

---

[3] *See* 2021 Wis. Senate Bill 621; 2021 Wis. Assembly Bill 624; 2021 Wis. Senate Bill 622.

[4] *See* Memo. from LRB re Proposed Congressional Districts (Oct. 20, 2021), bit.ly/2ZDNkas. The largest proposed Assembly District is 0.39% above ideal population; the smallest is -0.37% below ideal population; the aggregate population deviation totals 0.76%. Similarly, the largest proposed Senate District is 0.29% above ideal population; the smallest is -0.28% below ideal population; the aggregate population deviation totals 0.57%. *See* Memo. from Legislative Reference Bureau (LRB) re Proposed Legislative Districts at 1-2 (Oct. 20, 2021), bit.ly/3CsWC7Q.

[5] Contrary to some parties' unsupported arguments, continuity of representation is a uniformly *welcome* feature of territorial redistricting. *See, e.g.*, *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *White*, 412 U.S. at 791-92; *Vieth v. Jubelirer*, 541 U.S. 267, 357-358 (2004) (Breyer, J., dissenting) (collecting sources); Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649, 671 (2002); Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131, 1136 (2005).

[6] LRB Memo. re Proposed Legislative Districts, *supra*, at 2.

only six existing legislators in three districts (all of whom are Republican Assembly members).[7] Most importantly, the Legislature's redistricting plans continue to reflect their countless "political and policy decisions," *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537 (2002), which cannot be set aside by a Court without some state or federal requirement for doing so. *See* Part II.B, *infra.*

4. One might wonder why the Governor's "People's Maps Commission" does not warrant the same deference. After all, this Court's precedent has labeled him an "indispensable" part of the legislative process. *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 557, 126 N.W.2d 551 (1964). For the reasons explained in the Legislature's opening brief, the Legislature has the power to reapportion. Legislature's Br. 18-22. At best, the Governor has the power to *approve* the Legislature's maps (even though that requirement appears nowhere in the Wisconsin Constitution). *Id.* at 20-21. But there can be no argument that the Governor has the power to oust the Legislature altogether, with his "People's Maps Commission," through litigation, or otherwise. Even if he could, his commission has started from scratch, without consideration of existing lines, thereby moving a mass of voters from their existing districts, among other flaws.[8] Whatever plans the commission proffers will go well beyond what is necessary to resolve the malapportionment claims here, and will thus exceed this Court's equitable power to offer those plans as a remedy. The Court, as *a court*, cannot fashion a remedy that entails such sweeping changes in no way tailored to the claims before it. *See* Part II.B, *infra.*

---

[7] LRB Memo. re Proposed Legislative Districts, *supra*, at 3.

[8] "The People's Maps Commission Criteria for Drawing Districts," The People's Maps Commission (2021), bit.ly/3ms8dyu.

II. In the event the Legislature does not reapportion, the Court will be ordering a judicial remedy, not acting as a super-legislature.

A. This malapportionment suit is not a forum for relitigating the existing maps.

The parties who oppose a least-changes remedy rest their opposition on the idea that the existing maps are unconstitutional or illegal. They are wrong, and their arguments are no basis for rejecting a least-changes approach.

That's because the existing maps survived six years of litigation and two mammoth cases. In *Baldus*, a federal court rejected every challenge to the existing districts, save for one minor modification to Assembly Districts 8 and 9 that the Voting Rights Act required. *See generally Baldus v. Members of the Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012). Then in *Gill*, the U.S. Supreme Court altogether vacated a district court decision setting out its vision of the good in a "case" that the Supreme Court deemed not to be a "case" about alleged partisan gerrymandering. In no uncertain terms, the Supreme Court rejected that suit as one "about group political interests, not individual legal rights" and admonished that the Court was "not responsible for vindicated generalized partisan preferences." *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018). Later the Supreme Court confirmed that what the district court did in *Gill* was "not law" at all. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) ("our duty is to say 'this is not law'"). It was policymaking, and suspect policymaking at that. *See id.* at 2499 (rejecting that courts can make a "political judgment about how much representation particular parties *deserve*").

Arguments about why this Court should not begin with the existing maps as a baseline are mostly based on "findings" from

that vacated district court decision in *Gill*. Findings made by a court lacking jurisdiction are no findings at all. *See, e.g.*, *Montana v. United States*, 440 U.S. 147, 153 (1979) (an element of the doctrines of collateral estoppel and res judicata is that first court possesses "competent jurisdiction"); *see also Rucho*, 139 S. Ct. at 2508. With the greatest of respect, to ask this Court to defer to jurisdiction-less proceedings is to thumb one's nose at the Supreme Court and the foundation of American legal tradition. This Court should no sooner adopt or defer to such jurisdiction-less findings as it would adopt and defer to the findings of the Rotary Club on the subject. Contrary to the district court's egregiously wrong musings in *Gill*, considerations of partisanship are not only "permissible" but expected when both the federal Constitution and the Wisconsin Constitution leave redistricting in the hands of the Legislature. *Id.* at 2497, 2503; *Jensen*, 2002 WI 13, ¶10; *see* Part III.A, *infra*.

The Court here finds itself in no different position than the many cases cited in the Legislature's opening brief (at 32-36). Courts must begin somewhere in a malapportionment suit. At the very least, a court should begin with existing law, thereby limiting its role to addressing shifting populations. Just as in these many other suits, for purposes of this litigation, the existing law (Acts 43 and 44) are presumed constitutional and otherwise lawful, except for the alleged malapportionment. The *only* claim in the voluminous omnibus petition as to the existing districts is that they are malapportioned.

B. Beginning with the Legislature's map is the only way to avoid policy-laden judgments with no legal answer.

The parties who criticize a "least-change" approach believe that it arbitrarily privileges some traditional redistricting criteria over others. *See, e.g.*, BLOC Br. 22 *et seq.*, Bewley Br. 14 *et seq.*,

Evers Br. 8-10, Hunter Br. 13, Whitford Br. 4 *et seq*. They characterize (in order to criticize) the least-change approach as a criterion for drawing electoral maps, much as a legislature would. *See, e.g.*, BLOC Br. 23 (least-change approach would "elevate a prioritize a single criterion" over others which the Wisconsin Constitution demands). This argument misunderstands the work of this Court. It ignores both *why* a least-change approach is valuable here as a tool of judicial restraint, and *how* it naturally pre-incorporates all traditional redistricting criteria (part II.C, *infra*).

If this Court takes a least-change approach, it avoids acting as "a super-legislature" balancing competing factors and political theories. *Flynn*, 216 Wis. 2d at 529 ("Our form of government provides for one legislature, not two."). "The question" here "is not what policy" the Court "prefer[s], but whether the legislature's choice is consistent with constitutional restraints." *Id.* The least-change approach is how this Court respects limits on the judicial power. In fact, it is just descriptive of how courts in equity act all the time when facing an alleged constitutional violation—a court redresses the alleged legal injury and nothing more. Applied to redistricting disputes, a court can remedy malapportionment, racial gerrymandering, or a VRA violation, but must stop short of substituting its political judgments for the Legislature's. *See, e.g.*, *White*, 412 U.S. at 796 (legislative policy "should not be unnecessarily put aside in the course of fashioning relief appropriate to remedy what were held to be impermissible population variations between congressional districts").

It is no surprise, then, that myriad other courts have endorsed a "least-change" approach to avoid exceeding their proper role. *See* Legislature's Br. 32-41. And they have been upbraided when they go further. In *North Carolina v. Covington*, for example, the U.S. Supreme Court held that a district court's remedy for a

racial gerrymandering claim swept too broadly. 138 S. Ct. 2548, 2554-55 (2018). The Supreme Court observed that "the District Court proceeded from a mistaken view of its adjudicative role and its relationship to the North Carolina General Assembly" in redrawing the House districts. *Id.* at 2554. The lower court had struck down these district maps merely because "the General Assembly's action was not required by federal law." *Id.* (quotation marks omitted). That was overstepping: "[A] legislature's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of federal law." *Id.* (quotation marks omitted). Otherwise, "[a] district court is not free to disregard the political program of a state legislature." *Id.* at 2554-55 (alteration and quotation marks omitted). The court should have confined itself to "ensur[ing] that the racial gerrymanders at issue in this case were remedied," *id.* at 2555, and gone no further.

The recent Wisconsin redistricting dispute in *Baldus* is another example of a court's limited remedial role. There, plaintiffs challenged Wisconsin's 2011 redistricting plans. Plaintiffs pressed a host of theories for declaratory and injunctive relief that would have invalidated the new districts in upcoming elections. *Baldus*, 849 F. Supp. 2d at 847-48. The only meritorious claim was the allegation that two Assembly districts violated the VRA. *Id.* at 859. In the court's own words, that conclusion was "not intended to affect any other district drawn by Act 43." *Id.* And the court explained that it would "avoid disrupting other lines" and that "redrawing of the lines for [the offending districts] must occur within the combined outer boundaries of those two districts." *Id.* at 860. In other words, the existence of a VRA violation was not an open-door for redrawing all Wisconsin Assembly districts. The remedy

appropriately deferred to the Legislature and redressed the violations of law and nothing further.

The same is true here. The Court must redress any victorious malapportionment claim without upsetting the valid policy judgments of the Legislature. The existence of a constitutional defect in the existing maps empowers the Court to correct the defect. It does not allow the Court to draw new maps from scratch. At the very least, the existing maps should be the "starting point" and give this Court the "important guidance" for its remedy, which cannot "displac[e] legitimate state policy judgments with the court's own preferences." *Perry v. Perez*, 565 U.S. 388, 394 (2012).

C. A "least-change" approach respects other traditional redistricting criteria.

The criticism that a least-change approach privileges "core retention" over other traditional redistricting criteria reveals a misunderstanding of the Court's role here. That criticism is based on the mistaken view that this Court is stepping into the shoes of the Legislature and will act as a Legislature in resolving this dispute. For example, the Citizen Mathematicians & Scientists Intervenor-Petitioners ask rhetorically (at 28), "does prioritizing Petitioners' 'least change' approach mean that there will be less respect for the integrity of counties, municipalities, or wards? Does it mean the districts will be less compact? Does it mean there will be insufficient opportunity for minority voters?" Similarly, the BLOC Intervenor-Petitioners (at 27-29) contend that following a least-change approach would lead the Court to ignore the redistricting requirements identified in Article IV of the Wisconsin Constitution. And Senator Bewley argues (at 16-18) that the Court will necessarily be "called upon to apply its own values" and that it "smacks of hypocrisy" to order minimal changes now after the Legislature made more than minimal changes last cycle. *See also*

Hunter Br. 16 (describing least-changes arguments as "frankly disingenuous"). Likewise, the Whitford amici (at 11-12) point to other States where "core retention" is just one factor among many in the redistricting process as a reason why the Court ought not prioritize that criterion here. And others point to States where "core retention" is not recognized at all. *See, e.g.*, BLOC Br. 20-21.

Contrary to these critiques, a "least-change" approach is descriptive of *a court's* equitable remedy. The Court is not "drawing" a map. Its remedy will redress legal defects in the existing maps. But it will otherwise leave in place the balance *already struck* by Wisconsin's duly elected representatives with respect to its electoral districts. The Legislature's maps, existing or forthcoming, already calibrate all the traditional redistricting criteria as a matter of state policy. *Cf. White*, 412 U.S. at 796 (admonishing that the court's "preferences do not override whatever state goals were embodied in" a plan). A least-change approach respects those innumerable policy choices already embedded in the plans. It would be quite unnatural for the Court to reweigh those policy choices except as required to remedy the malapportionment claim. *See Jensen*, 2002 WI 13, ¶10 ("The framers in their wisdom entrusted this decennial exercise to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other.").

Article IV directs the Legislature to redistrict, not the courts, or computers, or commissions. Contrary to the BLOC Intervenor-Petitioners' arguments (at 31), this Court will not be replacing the Legislature to "district anew."[9] Similarly, the Citizen

[9] Relatedly, both the BLOC Intervenor-Petitioners and the Whitford amici contend that Article IV's phrase "district *anew*" requires

Mathematicians & Scientists assert (at 19) that the Court ought to adopt "computational redistricting" so that "no fair-minded Wisconsinite can claim that the Court's maps are not constitutional, neutral, and fair." To the contrary, if the Court adopts "computational redistricting," drawing maps from scratch without any deference to the Legislature's constitutionally assigned role, then every fair-minded Wisconsinite with a copy of the Wisconsin Constitution could say that the Court's maps are a violation of the separation of powers. This Court is not replacing the Legislature—with the help of computers or not. It is remedying a constitutional claim by issuing an order to adjust Wisconsin law pursuant to its judicial power.[10]

---

redistricting—whether by a Legislature or by courts—to discount core retention and preexisting maps. BLOC Br. 31; *see also* Whitford Br. 5. This puts far more weight on "anew" than it can bear. A logical corollary of this view is that if redistricting maps were enacted that largely preserved the prior cycle's maps, this would violate the supposed "district anew" clause of the Wisconsin Constitution. The clause "district anew" confirms that the Legislature must adjust for shifting populations. It does not, *sub silentio*, reject core retention as a traditional redistricting criterion, contrary to well-established political theory that continuity of representation benefits voters and their representatives. *See* n.5, *supra.*

[10] Now would be an appropriate time for the Court to correct misstated dicta in *Jensen* that "[c]ourts called upon to perform redistricting are, of course, *judicially legislating*, that is, *writing* the law rather than *interpreting* it, which is not their usual—and usually not their proper—role." 2002 WI 13, ¶10. The Court's role here, as in every other case, is to correct a constitutional violation, not to "perform redistricting" or "write the law." Its remedial authority is to issue injunctive relief. That relief should be limited "to the problem" and "may not be broader than equitably necessary." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006); *State v. Seigel*, 163 Wis. 2d 871, 890, 472 N.W.2d 584 (Ct. App. 1991).

For all of the foregoing reasons, the Court must start somewhere to order a remedy. And the only conceivable place to start is with the policy choices already made by the Legislature and to adjust those policy choices only as necessary to comply with state and federal law.

III. Partisanship considerations must be rejected.

Petitioners' and Intervenor-Petitioners' claims are malapportionment claims with respect to the existing districts. *See* Omnibus Pet. ¶¶1-7 (Oct. 21, 2021). They do not challenge the existing districts as an unconstitutional partisan gerrymander. Nor could they. *See* Part III.A, *infra.* But Intervenor-Petitioners, the Governor, and the Senate Minority Leader urge this Court to make this a case about partisanship anyway.

For the reasons that follow, even the most well-intentioned quest for partisan "balance" or "fairness" will transform this Court's role from a judicial one to a political one. There is no basis for a Court to reject or prefer proposed remedies based on their partisan make-up. The Court would not be "cementing … a partisan gerrymander" (BLOC Br. 56) should it decide to adopt the Legislature's map or a least-changes map. The Court would be refusing (rightly) to enter the "political thicket" of redistricting, except as necessary to remedy the malapportionment claims. *Gaffney v. Cummings*, 412 U.S. 735, 750 (1973); *see Covington*, 138 S. Ct. at 2554; *White*, 412 U.S. at 796.

A. Neither federal nor state law requires a remedy to pass a partisan "fairness" test.

The parties cannot back-door a partisan gerrymandering claim into this malapportionment suit by asserting (as they do) that the remedy must survive a partisan "fairness" or "balance"

test.[11] The remedy must comply with a list of state and federal law requirements. "Fair" and "balanced" maps are not on that list. *See Rucho*, 139 S. Ct. at 2503; *Vieth*, 541 U.S. at 286 (plurality opinion).

1. There are various federal and state guardrails in redistricting. *See* Legislature Br. 22-31. Drawing districts on the basis of race, for example, has no place in redistricting absent a compelling state interest. *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). But achieving partisan "balance," "equilibrium," "symmetry," "proportionality," or whatever else some deem "fair" is not one of them. *See Rucho*, 139 S. Ct. at 2502 ("Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.").

It is not only "permissible" for legislatures to act with partisan intent in redistricting; it is also expected. *Id.* at 2497, 2503. The use of partisan considerations in districting is a "lawful and common practice" by legislatures from time immemorial. *Vieth*, 541 U.S. at 286 (plurality opinion). By giving legislatures primary responsibility for redistricting, the Framers necessarily anticipated that redistricting would be "root-and-branch a matter of

[11] *See, e.g.*, BLOC Br. 18-19 ("This Court is obligated to ensure that it does not—intentionally or unwittingly—impose a plan with unfair partisan advantage. The Court can do so only by analyzing the plans' partisan implications in light of the established voting preferences of Wisconsin voters."); Hunter Br. 8 ("If a court does not intend to enact a partisan gerrymander, then it must consciously take steps to prevent that result from occurring."); Citizen Mathematicians & Scientists Br. 31 ("expressly checking for partisan consequences in a remedial redistricting map is necessary").

politics." *Id.* at 285; *see Rucho*, 139 S. Ct. at 2497 (collecting cases for the proposition that "a jurisdiction may engage in constitutional political gerrymandering"); *Jensen*, 2002 WI 13, ¶10. "It would be idle … to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it," for "political considerations are inseparable from districting and apportionment." *Gaffney*, 412 U.S. at 752-53; *see Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in judgment) (the "opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States").

2. Applied here, no state or federal law requires this Court to neuter any past or present redistricting plans as part of remedying the pending malapportionment claims. Just the opposite—the Supreme Court has repeatedly recognized that any attempt to achieve "balance" in a redistricting plan is itself a political act. *See, e.g.*, *Rucho*, 139 S. Ct. at 2503 ("Judges must forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent (whoever that may turn out to be). Judges not only have to pick the winner—they have to beat the point spread."). It would be an "impossible task" for courts to "extirpate[e] politics from what are the essentially political processes of the sovereign States." *Gaffney*, 412 U.S. at 754. The Governor and Intervenor-Petitioners turn these Supreme Court decisions upside down, as though precedent endorses partisan "balancing" here. For example, they quote *Rucho*'s statement that "gerrymandering 'is incompatible with democratic principles.'" *Rucho*, 139 S. Ct. at 2506 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015)). But they neglect the part of *Rucho* that holds a federal court is unfit to determine what

constitutes "excessive partisanship" and that such debates about "democratic principles" must thus be left to the political branches. It is "not law." *Id.* at 2508. The very same justiciability concerns control here. *See State v. Chvala*, 2004 WI App. 53, ¶50, 271 Wis. 2d 115, 678 N.W.2d 880 (applying *Baker v. Carr*, 369 U.S. 186 (1962)), *aff'd*, 2005 WI 30, ¶50, 279 Wis. 2d 216, 693 N.W.2d 747; *Vincent v. Voight*, 2000 WI 93, ¶¶193-98, 236 Wis. 2d 588, 614 N.W.2d 388 (Sykes, J., concurring in part, dissenting in part); *see, e.g.*, *Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶¶31, 39, 382 Wis. 2d 1, 913 N.W.2d 131 ("legislative determination … does not give rise to justiciable issues of fact or law").

Despite some parties' insistence that any "neutral" remedy must reflect the partisan breakdown of voters statewide, there is "no authority" for a rule-of-thumb that the majority of voters statewide should be able to elect a majority of the State's congressional and legislative delegations. *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring in judgment); *id.* at 288 (plurality opinion) ("the Constitution contains no such principle" of "proportional representation"). U.S. Supreme Court precedents "clearly foreclose any claim that the [U.S.] Constitution requires proportional representation." *Bandemer*, 478 U.S. at 130 (plurality opinion). Nowhere does the Constitution "sa[y] that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers," either in the state legislatures or in Congress. *Vieth*, 541 U.S. at 288 (plurality opinion). Likewise, nowhere does the Constitution say that courts may "make their own political judgment about how much representation particular parties *deserve*—based on the votes of their supporters [statewide]—and to rearrange the challenged districts to achieve that end." *Rucho*, 139 S. Ct. at 2499.

3. Nor is there any independent basis in state law that requires this Court to search for partisan "balance" in a remedy—an unachievable Platonic ideal (Part III.B & C, *infra*). The BLOC Intervenor-Petitioners argue (at 47-48 & n.12) that this Court does not face the same difficulties in refereeing partisanship as the Supreme Court did in *Rucho*. Wrong. In *Rucho*, the Supreme Court explained that "[f]ederal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." 139 S. Ct. at 2507. This Court faces the same limitations. Just as the U.S. Constitution "provides no basis whatever to guide the exercise of judicial discretion" in evaluating partisanship, the Wisconsin Constitution as it stands now does not either. *See id.* at 2506 ("There is no way to tell whether the prohibited deviation from that map should kick in at 25 percent or 75 percent or some other point. The only provision in the Constitution that specifically addresses the matter assigns it to the political branches."); *see also, e.g.*, *Voters with Facts*, 2018 WI 63, ¶39; *Vincent*, 2000 WI 93, ¶¶193-98 (Sykes, J., concurring in part, dissenting in part). At this time, Wisconsin is not one of those States with "[p]rovisions in state statutes [or] state constitutions [that] can provide standards and guidance for state courts to apply." *Rucho*, 139 S. Ct. at 2507. The parties cannot leapfrog the political process and achieve that end by using this litigation—which does not even allege partisan gerrymandering—to replace the Legislature with the heretofore unknown Wisconsin Supreme Court Independent Redistricting Commission.

For their part, the BLOC Intervenor-Petitioners suggest (at 49) that article I, section 22 of the Wisconsin Constitution requires partisan "balancing." They believe that provision "require[s] this Court not to ignore how the redistricting plans it considers and

adopts will affect the ability of Wisconsinites to translate their votes into electoral outcomes" and "compels this Court to analyze that question in light of justice, moderation, temperance, and respect for democratic principles." BLOC Br. 49. Wrong again. Section 22's inapplicability to this case speaks for itself. Section 22 states, "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." It says nothing about redistricting. It prescribes no test for "fair" redistricting. It has never been applied in a redistricting case. And for the Court to consider partisan "balance" here is precisely the opposite of judicial "moderation." The Court's judicial role is to prescribe a remedy—not a legislative reassessment of partisan "balance" or which incumbents to protect or which communities of interest to group in which districts. Redistricting authority rests primarily with the Legislature, Wis. Const. art. IV, §3, and its policy choices are to remain intact unless in violation of federal or state law. *See White*, 412 U.S. at 796; *see also Rucho*, 139 S. Ct. at 2507 ("[f]ederal judges have no license to reallocate political power").

Finally, the BLOC Intervenor-Petitioners also suggest (at 51) that this Court has already deemed partisanship impermissible in the *Cunningham* cases. *See State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35 (1892); *State ex rel Att'y Gen. v. Cunningham*, 81 Wis. 440, 484, 51 N.W. 724 (1892). Still wrong. In the *Cunningham* cases, districts were severely malapportioned, designed to preserve the power of the majority party. *See Zimmerman*, 22 Wis. 2d at 566-67. This Court held that districts must be equally apportioned, even if that meant that the Legislature could not obtain its desired political ends. *See Lamb*, 53 N.W. at 59; *see also Cunningham*, 51 N.W. at 729-30. Here too, neither the Legislature nor this Court can put partisan considerations above the

constitutional requirement that there be an equal number of inhabitants in districts. Everyone agrees on that score. And it is laughable to suggest otherwise.

B. Applying traditional redistricting criteria can never be politically neutral because Wisconsin Democrats have geographically concentrated themselves.

For the foregoing reasons, neither state nor federal law requires this Court to somehow scrub any legislative map for partisan advantage. For good reason—doing so would require this Court to prioritize partisanship over traditional redistricting criteria, likely creating new maps with sprawling and "balanced" districts that look little like the existing ones and disenfranchise hundreds of thousands of State Senate voters next year.

1. Single-member districts are inherently "unfair." It is well-accepted (except by the Governor, Senator Bewley, and Petitioner-Intervenors apparently) that when a legislature applies traditional redistricting criteria, the resulting districts are often not politically competitive. *See Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring in judgment). As Justice Breyer noted in his dissenting opinion in *Vieth*, Democrats tend to live closely together in urban areas, while Republicans tend to disperse into suburban and rural areas. 541 U.S. at 359-60; *see* Gardner, *What Is "Fair" Partisan Representation, and How Can It Be Constitutionalized?*, 90 Marq. L. Rev. 555, 565-66, 569 (2007). Because districts are contiguous and as compact as practicable, a legislature will not place Madison Democrats in a district with Republicans in the far reaches of Wisconsin's Northwoods. Nor would such a pairing respect communities of interest, continuity with previous districts, or any number of other traditional redistricting criteria.

Consider the hypothetical state below, where there are four districts comprising 20 voters from the X and O parties.[12] On a statewide basis, the X party's share of the vote is 50% and the O party's share of the vote is 50%. But in a system of winner-take-all, single-member districts—such as those in Wisconsin and across the country—the composition of legislative districts will rarely match these statewide numbers. In the hypothetical state below, the X party takes three of the four legislative districts, and the O party takes only one:

Hypothetical State W

District 1 X X X X O	*District 2* X X X O O
District 3 X X X O O	*District 4* O O O O O

Some will inevitably argue that State W's districting plan was the result of partisan gerrymandering. But it just as likely results from where voters naturally reside, or where natural boundaries lie. Or perhaps it is a mix of multiple factors.

[12] Discussed in Part III.D, measuring partisanship in Wisconsin is far less straightforward. Wisconsin does not have party registration, whereby voters identify themselves on party lines. It has open primaries. *Democratic Party v. Wisconsin*, 450 U.S. 107, 110-11 (1981). And more than one third of Wisconsin voters identify as independents. *See, e.g.*, "Marquette Law School Poll, August 3-8, 2021, Toplines," Marquette, bit.ly/3jUfg15 (reporting 37% of those polled think of themselves as independents).

Achieving "balance" in State W's redistricting plan requires sacrificing traditional redistricting criteria. One cannot send some of District 1's X voters to District 4 if the counties or municipalities in those districts do not border each other. Doing so would create "islands" of voters in each district, joined only by their predicted votes in future elections. Similarly, imagine that District 4 is an urban, progressive municipality. The only way to make districts more politically competitive is to slice District 4, pulling its voters into the surrounding rural districts. That sacrifices traditional redistricting criteria—splitting a municipality and likely making districts less compact, even though District 4 embodies a community of interest with shared priorities different than those faced by the surrounding rural districts. No federal or state constitutional principle requires sacrificing these redistricting criteria for the sake of political heterogeneity.

As these examples show, the application of traditional redistricting criteria can produce politically lopsided districts. There is a "'natural' packing effect" in states where political groups tend to cluster, even where the legislature's objectives are only "compactness and respect for the lines of political subdivisions." *Vieth*, 541 U.S. at 289-90 (plurality opinion). It is a political directive to tell a legislature (or a court) that it must abandon or reprioritize these traditional redistricting criteria to avoid partisan asymmetries—and to some extent an impossible one. Which districts are the result of naturally occurring political advantages because of where voters live? Which are the result of "tinkering for partisan advantage" (Evers Br. 14)? Which are some of both? These are unanswerable questions.

2. Adjusting redistricting plans to correct naturally occurring "unfairness" is also "unfair." Some parties surmise that Wisconsin's maps will not be "fair" until they match

Wisconsin's statewide partisan makeup. *See, e.g.*, Evers Br. 12. For example, if the Democratic Governor received 50 percent of the statewide vote, then the Legislature should be 50 percent Democrats. There is no legal authority for that position. Part III.A, *supra.* And it ignores the phenomena illustrated above—representatives from single-member, winner-take-all districts will not reflect the statewide proportion of the vote because individual voters do not live in perfect political homogeneity.

If this Court were to attempt to divine what is "fair," despite the naturally occurring advantages for some groups of voters, the Court itself would be making a political decision to favor one party over another. The best example of this is the Governor's own commission. Its marching orders include achieving "proportional outcomes," meaning legislative representation "roughly equal to [a party's] statewide share of support."[13] In reality, that means conferring an unnatural advantage for Wisconsin Democrats. The Court need not take the Legislature's word for that; the Governor's own experts conceded it.

The Governor's commission held a number of public hearings involving their own experts early on in their quest for "fair" maps. Their own experts candidly acknowledged that there will be a baseline advantage in Congress and the Legislature for Republican voters because of where Wisconsinites live. According to one of the commission's own experts, the median 2012 Assembly map in Wisconsin favored Republicans in an estimated 55 out of 44 districts, even assuming voters were split roughly 50-50 statewide.[14] In his

---

[13] "The People's Maps Commission Criteria for Drawing Districts" at 3, The People's Maps Commission (2021), bit.ly/3ms8dyu.

[14] The People's Maps Commission Online Public Hearing for the 3rd Congressional District, 26:00-27:35, The People's Maps Commission

words, even though "one notion of 'fair'" might be a 50-50 map, "[y]ou shouldn't expect the proportion of the popular vote necessarily to match the share of seats" in Wisconsin's Assembly.[15] Another one of the commission's experts observed, "Proportionality just doesn't come for free."[16] Meaning, if single-member districts are to reflect a State's partisan makeup statewide, then one must sacrifice traditional redistricting criteria such as compactness or keeping communities of interest intact. The commission's expert acknowledged that "Wisconsin follows the trend of close to 50-50 voting" statewide, but "sure enough, the … status quo is a 5-3 congressional delegation" in Wisconsin—not a 4-4 congressional delegation.[17] The presentation described Wisconsin's existing 5-3 congressional map as "pretty unremarkable."[18] Simply put, Wisconsin voters have gerrymandered themselves. This Court cannot now be expected to upset principles of separation of powers and judicial modesty so that these voters can avoid the attendant consequences of where they happen to live.

(Nov. 19, 2021), https://www.youtube.com/watch?v=BlC5ILnfEGo. In fact, Democrats won *more than* 50% of the vote in statewide elections in 2012. *See* 2012 Fall General Election Results, Wisconsin Elections Commission, bit.ly/3vYM128; *Whitford v. Gill*, 218 F. Supp. 3d 837, 946 & n.9 (W.D. Wis. 2016) (Griesbach, J., dissenting) (noting "Republicans won something on the order of 48.6% of the statewide vote in 2012"). Such analyses, moreover, are mere predictions of future elections based on past voting behavior. In real life, a vote for one candidate cannot necessarily predict votes for other candidates in the *same* election, let alone future elections. *See* Part III.D, *infra.*

[15] The People's Maps Commission Online Public Hearing for the 3rd Congressional District, *supra*, 26:30-26:50.

[16] *Id.* at 36:03-36:07.

[17] *Id.* at 45:55-46:15.

[18] *Id.*

C. Any pursuit of "fairness" entails political and policy-laden decisions about theories of representation.

In light of the above difficulties, no party offers a way in which this Court could measure "fairness" or "balance." But the *Hunter* Intervenor-Petitioners offer a telling analogy:

> Just as measuring brainwaves, pulse, and breathing activity are each distinct methods to determine whether or not a person is alive, for example, common statistical tools such as the efficiency gap, mean-median difference, and partisan bias all quantify related elements that help determine whether a plan is fair—or not.

Hunter Br. 12. Just as the members of this Court are not brainwave-measuring neurologists, they are also not political philosophers. It is not this Court's role to develop political theories to ensure that those living in city mansions on Lakes Mendota and Michigan get both the great views and districts drawn to ensure an outsized influence on the Legislature too.

1. Requiring politically competitive districts, just like requiring a proportionate number of "safe" districts, is a political choice. For all the reasons discussed in *Rucho*, divining what is "fair" in redistricting is a question for political theorists or the political branches, not for courts. 139 S. Ct. at 2499-2502 ("Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal.").

But here, the Governor, Senator Bewley, and Intervenor-Petitioners insist that this Court can adjust its remedy so that districts are "fair," as if that were any different than a partisan

gerrymandering claim. Searching (in vain) for a "fair" remedy is no different than searching (in vain) for a "fair" test for partisan gerrymandering claims. The parties do not even try. Indeed, the very same players who sponsored *Gill*'s doomed "gerrymandering" litigation are here again as counsel and *amici* putting forth the same theories, saying the same things for the same reasons, all of which were wisely rejected in *Rucho*. *See, e.g.*, BLOC Br. 18-19; Whitford Br. 15. Wisconsin has seen this movie before. In the end the Supreme Court said courts are in no position to do these things. *Rucho*, 139 S. Ct. at 2500. The Court was right.

Any (elusive) "fair" remedy would require this Court to reject or reorder lawful political and policy choices made by the Legislature (Parts III.A & B, *supra*) and then make its own political and policy choices about what is normatively "better" for representation in the Legislature. Is a voter better off in a politically homogenous district with mostly likeminded people? Or in a politically heterogeneous district where elections swing back and forth between parties? Represented by a long-time, seasoned representative in a "safe" district? Or a first-time representative who can't be sure they'll be re-elected next year in a "swing" district? There is no single answer to these questions.

For example, the homogeneity of territorial districts can have democratic benefits. In *Vieth*, Justice Breyer acknowledged that territorial redistricting enables more citizens to elect legislators with their same views and maintains stability in the legislature. 541 U.S. at 360 (Breyer, J., dissenting) ("The use of purely political boundary-drawing factors, even where harmful to the members of one party, will often nonetheless find justification in other desirable democratic ends, such as maintaining relatively stable legislatures in which a minority party retains significant representation."). Homogeneity can better ensure that both

political and racial minorities are reliably represented (as compared to swing districts, at-large elections, or multimember districts). *See Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (recognizing "that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial minorities" (quotation marks and alterations omitted)). These benefits are consistent with the long-held notion that legislators represent the distinct interests of a particular place, often politically homogenous, not merely statewide or nationwide party platforms. See Gardner, *supra*, 90 Marq. L. Rev. at 577-79.

Compare these democratic benefits to the parties' preferred alternative—having this Court redraw Wisconsin's electoral districts to create "fair" or competitive districts. Those districts might maximize competition in district-level elections and increase the odds that the Legislature (unnaturally) reflects the statewide proportion of voters. But they also maximize unhappy voters. It "promises to make the greatest number of voters *unhappy* with the outcome of the election…. In a highly competitive district, nearly half the voters will have voted for the loser." Persily, *supra*, 116 Harv. L. Rev. at 668 (emphasis added); *see also Bandemer*, 478 U.S. at 130 (plurality opinion) ("If all or most of the districts are competitive … even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature."). At the very least, whether the quixotic search for political competitiveness ought to replace traditional redistricting criteria is a political choice, not a judicial one.

Any quest for partisan "balance" will be at odds with the State's required system of territorial redistricting.[19] Illustrated

[19] It also "antithetical to our system of representative democracy" to presume that voters who supported losing candidates are deprived of

above, partisan political affiliation is not uniformly distributed "save in a mythical State with voters of every political identity distributed in an absolutely gray uniformity." *Vieth*, 541 U.S. at 343 (Souter, J., dissenting). Likeminded people live with likeminded people. Communities develop shared interests and political preferences. Reshuffling those voters into different districts for "fairness" or "balance" replaces the application of traditional redistricting criteria with assumptions about *how* representation is best achieved. It is far beyond this Court's remedial role in this malapportionment suit to rebalance these distinctly political judgments. *See Holder v. Hall*, 512 U.S. 874, 901 (1994) (Thomas, J., concurring in judgment) ("The matters the Court has set out to resolve in vote dilution cases are questions of political philosophy, not questions of law.").

2. Statistical tools are not politically neutral. The Governor and Intervenor-Petitioners will argue that "balance" is easy to come by with math and sufficient computing power. *See, e.g.*, Hunter Br. 12. Wisely, the U.S. Supreme Court has rejected these "common statistical tools" that the parties seek to revive. As the Supreme Court explained in *Gill*, the so-called "efficiency gap," intended to measure alleged gerrymandering, is nothing but an *ex post* measure of election outcomes. The calculations are merely an "average measure" of the effect of redistricting "on the fortunes of

---

representation in the state legislature. *Shaw v. Reno*, 509 U.S. 630, 648 (1993). While a losing candidate's supporters might be "without representation" by their candidate of choice, *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971), courts "cannot presume … that the candidate elected will entirely ignore the interests of those voters," *Bandemer*, 478 U.S. at 132 (plurality opinion). Instead, those voters are "deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district." *Id.*

political parties." *See Gill*, 138 S. Ct. at 1933.[20] And it is not a very good measure at that—the efficiency gap is highly variable, punishing states like Wisconsin where elections are won by narrow margins.[21] Others have similar failings. *See League of United Latin Amer. Citizens v. Perry (LULAC)*, 548 U.S. 399, 420 (2006) (opinion of Kennedy, J.) (rejecting "symmetry" as a reliable measure because "[t]he existence or degree of asymmetry may in large part depend on conjecture about where possible vote-switchers will reside"); Gardner, *supra*, 90 Marq. L. Rev. at 566 (describing attempts to construct "a definition of partisan fairness that takes into account both the commitment to partisan proportionality … and the commitment to territorial election districts" as "generally unsatisfying"). None equips a court to answer the elusive question of how much partisanship is "too much" in a redistricting plan. *See*

---

[20] The "efficiency gap" measures "wasted" votes—defined as the number of votes cast for a losing candidate in a district. The creators of the efficiency gap have argued that a district with a certain percentage of "wasted" votes in past elections is presumptively invalid. Stephanopoulos & McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 886-890 (2015). Their one-size-fits-all benchmarks might work in one-person-one-vote cases. But what might be "fair" in a Democratic stronghold like Vermont might not be in a swing state like Wisconsin, where elections are won by close margins resulting in more "wasted" votes. No more effort need be wasted by discussing academic theories such as these. They are not the law in Wisconsin.

[21] Take, for example, a four-district state in which each election is won by five votes. If Democrats win two districts and Republicans win two districts, the efficiency gap is 0. But if Democrats win three districts and Republicans win only one district, the efficiency gap is roughly 25%. *See also* Gardner, *supra*, 90 Marq. L. Rev. at 572 ("a districting plan in which every district is evenly balanced by party and thus genuinely competitive runs the risk of producing a normatively undesirable result: massive swings in the partisan composition of the legislature in response to small fluctuations in public opinion").

Gill, 138 S. Ct. at 1926-29 (cataloguing failed gerrymandering claims); *Hall*, 512 U.S. at 899 n.6 (Thomas, J., concurring in judgment) (criticizing "desire, when confronted with an abstract question of political theory concerning the measure of effective participation in government, to seize upon an objective standard for deciding cases, however much it may oversimplify the issues").

The last round of Wisconsin redistricting litigation provides a helpful illustration of how seemingly neutral statistical tools can in fact lead the Court to partisan outcomes. In *Gill*, after the Supreme Court vacated the initial decision, the plaintiffs tried again to prove that Wisconsin's existing districts were unfair. They used the aforementioned "efficiency gap" as a measure of fairness.[22] And they hired an expert who chose one computer-drawn map ("Plan 43995") out of thousands of computer-drawn maps. His chosen map—picked because it was the most "fair"—revealed itself to be a complete outlier, favoring Democrats more than thousands of other computer-drawn maps that he did not pick:[23]

[22] *See* Stephanopoulos & McGhee, *supra*, 82 U. Chi. L. Rev. at 853.

[23] *See* Expert Report of Dr. James Gimpel at 43-45 & Fig. 6, *Whitford v. Gill*, No. 3:15-cv-00421-jdp (W.D. Wis. Feb. 4, 2019), ECF No. 249.

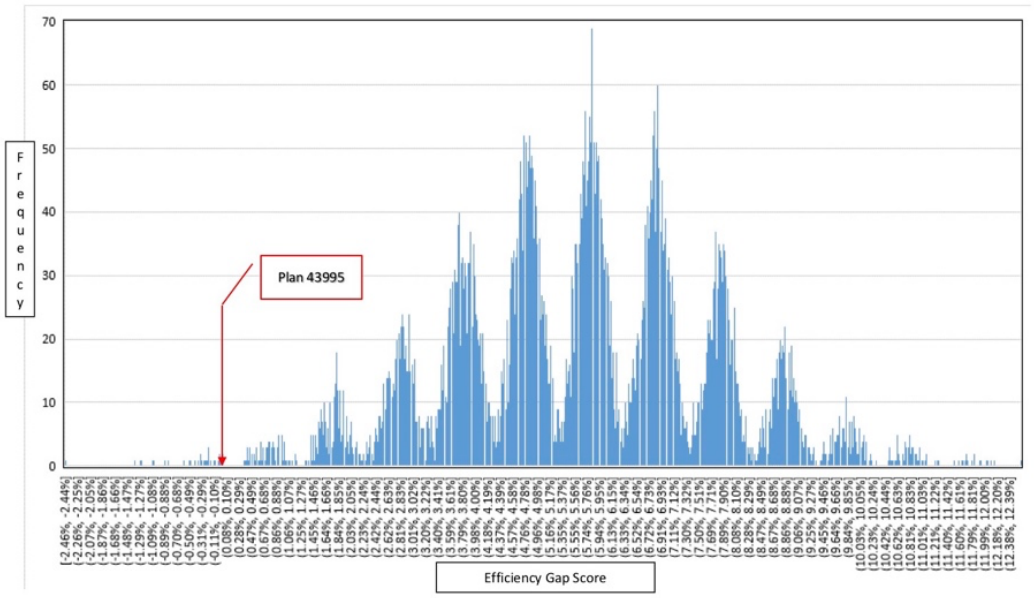

Figure 6. Graphed Distribution of the Efficiency Gap Scores of Simulated Legislative Redistricting Plans Produced by Plaintiffs

Source: Chen backup: WI_split_v6_july25.xlsx

The example is helpful because it shows that what is "fair" in the eyes of one expert could be standard deviations away from what is "fair" in the eyes of another. These are political questions for political actors and political thinkers. There is no Platonic ideal of "fairness" that can be applied by a court.

D. Achieving "balance" requires this Court to make political assumptions about Wisconsinites.

The idea that this Court can divine what is "fair" rests on another equally pernicious fiction. It assumes that certain voters vote only for Democrats and others vote only for Republicans, in all elections—past, present, and future—and no matter the candidate. It depends on a completely "hypothetical state of affairs." *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.). Measuring partisanship is not so simple. Over time, voters' political preferences change. It is "assuredly not true" that the only factor determining voting behavior is party affiliation or past votes. *Vieth*, 541 U.S. at

288 (plurality opinion). A voters' political affiliation "is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line." *Id.* at 287; *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring in judgment) ("voters can—and often do—move from one party to the other"). In reality, there are "separate elections between separate candidates in separate districts, and that is all there is." *Vieth*, 541 U.S. at 289 (quotation marks omitted). "These facts make it impossible to assess the effects of partisan gerrymandering," *id.* at 287, let alone to articulate a standard for crafting a "fair" remedy.

A quest for a "fair" or "balanced" remedy ignores all of this. It is especially out of step in Wisconsin, a quintessential "purple state," where primaries are open, voters do not register for particular parties, and voters "regularly elect comparable numbers of Democrats and Republicans." *Baldus*, 849 F. Supp. 2d at 843; *see Democratic Party*, 450 U.S. at 110-11. Wisconsin election results reveal an electorate with a sizeable faction of independent voters who choose candidates based on their records and positions, not just their political parties.

Examples abound showing that the same voter will vote for different parties in the same election and will change political allegiances over time. A Republican presidential nominee might win at the top of the ticket, while the same group of voters elects a Democrat for their State Assembly seat, or vice versa. For instance, a Democrat represents Senate District 31 even though voters in that district supported President Donald Trump (R) in 2016 and 2020.[24] Similarly, voters in Congressional District 3 re-elected

[24] *See* 2014 Fall General Election Results, Wisconsin Elections Commission (WEC), bit.ly/2ZDRnEp (reporting 52.3% of Senate District

U.S. Representative Ron Kind (D) in 2020, while the same set of voters would have also re-elected President Trump.[25] Likewise, nearly one out of every five Assembly districts simultaneously voted for a Republican Assembly candidate and U.S. Senator Tammy Baldwin (D) in Wisconsin's 2018 general election.[26]

Similarly, one party might hold a seat for some years and then lose as voters change even though district lines remain the same. For example, in Assembly District 92—long considered a "safe" Democratic district—a Democratic candidate won the seat uncontested in 2012, won again in 2014, but was then unseated by a Republican challenger in 2016.[27] In Assembly District 75, the incumbent Republican was unseated by a Democratic challenger in

---

31 voters voted for Senator Kathleen Vinehout (D)); 2016 Fall General Election Results, WEC, bit.ly/2Y1DXRA (reporting 52% of Senate District 31 voters voted for President Trump (R)); 2018 Fall General Election Results, WEC, bit.ly/2ZFky9n (reporting 51.7% of Senate District 31 voters voted for Senator Jeff Smith (D)); 2020 Fall General Election Results, WEC, bit.ly/3pZc6NH (reporting 51.7% of Senate District 31 voters voted for President Trump (R)).

[25] 2020 Fall General Election Results, WEC, bit.ly/3pZc6NH (reporting 52.4% of Congressional District 3 voters voted for President Trump (R), while 51.3% of the same voters voted for Representative Kind (D)).

[26] 2018 Fall General Election Results, WEC, bit.ly/2ZFky9n (reporting majority of voters in Wisconsin's Districts 1, 4, 13, 15, 21, 23, 24, 29, 30, 42, 49, 50, 51, 55, 68, 85, 88, 92, and 96 voted both for a Republican State Assembly candidate and Senator Baldwin (D)).

[27] *See* 2012 Fall General Election Results, WEC, bit.ly/3vYM128; 2014 Fall General Election Results, WEC, bit.ly/2ZDRnEp (reporting 56.6% of Assembly District 92 voters voted for Representative Chris Danou (D)); 2016 Fall General Election Results, WEC, bit.ly/2Y1DXRA (reporting only 47.9% of Assembly District 92 voters voted for Representative Chris Danou (D)).

2012, who himself was unseated two years later by another Republican.[28] Likewise, in Assembly District 70, a Democrat won in 2012, but was then defeated in 2014 by a Republican, who won again with a sizable majority in 2016 against a new opponent.[29]

None of these results can be explained by partisan gerrymandering. To the contrary, they reflect the same political factors that always decide elections: candidates and the issues they run on matter. *See Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring) ("one implication of the districting system is that voters cast votes for candidates in their districts, not for a statewide slate of legislative candidates put forward by the parties"); *Vieth*, 541 U.S. at 287 (plurality opinion) ("We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold."). There is no statewide election for "Legislature" as there is for Governor, or U.S. Senate, or President. Wisconsin voters respond to what is happening in their districts. They do not blindly support one party from top to bottom on a ballot. By reducing all elections to an "R" or "D," as the parties invite this Court to do, the Court will underestimate the

---

[28] *See* 2012 Fall General Election Results, WEC, bit.ly/3vYM128 (reporting Republican incumbent defeated after earning only 48.85% of votes); 2014 Fall General Election Results, WEC, bit.ly/2ZDRnEp (reporting Democratic incumbent defeated after earning only 45.1% of votes).

[29] *See* 2012 Fall General Election Results, WEC, bit.ly/3vYM128 (reporting 50.19% of Assembly District 70 voters voted for Representative Amy Sue Vruwink (D)); 2014 Fall General Election Results, WEC, bit.ly/2ZDRnEp (reporting Democratic incumbent defeated after earning only 47.14% of votes); 2016 Fall General Election Results, WEC, bit.ly/2Y1DXRA (reporting Republican incumbent re-elected after earning 62.26% of votes).

discernment of Wisconsin voters and oversimplify the nuances of Wisconsin politics.

Each election cycle, "the candidates change, their strengths and weaknesses change, their campaigns change, their ability to raise money changes, the issues change—everything changes." *Vieth*, 541 U.S. at 289 (plurality opinion). Unlike the racial gerrymandering context, where the racial classifications at issue are "immutable" characteristics, *see id.* at 287, courts cannot simply assume that past votes dictate future votes. But that is exactly what partisan "fairness" methodologies will invite this Court to do—assume that how a voter voted for a U.S. Senate candidate years ago is how she will vote for a State Assembly candidate next year. (When in reality, recent election results show that those voters do not even vote for the same party for those two offices in the *same* election, *supra*.)

The epilogue to the Supreme Court's decision in *Vieth* further proves the point. The *Vieth* plaintiffs alleged that Pennsylvania's congressional plan was "rigged to guarantee that thirteen of Pennsylvania's nineteen congressional representatives will be Republicans." *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 546 (M.D. Pa. 2002). But in elections held just two years after the Supreme Court found those claims nonjusticiable, a majority of Pennsylvania's congressional seats were won by *Democrats*, including many of the supposedly "guaranteed" Republican seats. *See Whitford*, 218 F. Supp. 3d at 937 (Griesbach, J., dissenting).

That lesson applies with extra force in Wisconsin, where winning elections frequently requires support from independent voters or members of other parties, and where yesterday's votes do not guarantee tomorrow's victories. The 2016 presidential election is illustrative. In 2008, President Obama carried 59 of Wisconsin's

72 counties.[30] In 2016, President Trump carried 60 of Wisconsin's 72 counties—capturing 47 counties that President Obama had won.[31] Thus, in the span of eight years—less than the lifespan of a decennial districting map—nearly two-thirds of Wisconsin counties flipped their party preference as measured by their presidential candidate of choice. As that reflects, party affiliation is simply not set in stone, and seats held by one party can (and do) change hands when effective candidates run effective campaigns.

* * *

All of the above complexities come to a head when a court attempts the impossible: measuring alleged partisan influence of a redistricting plan to decide whether it is "too" partisan. There is no way for this Court to enter that thicket—predicting how districts will perform and adjusting them accordingly as part of its remedy—without the Court itself becoming a political actor. Voters are not easily categorized. They are not born Republicans or Democrats. They vote for candidates, not parties. How ought the Court categorize the Tammy Baldwin supporter who has voted for years to re-elect her Republican Assembly representative? Even if voters were easily categorized, the application of traditional redistricting criteria will invariably offer some partisan advantage to one of the parties. How much is too much? These are questions a court cannot answer. And they certainly should not frame the Court's remedy here. Any proposed remedy should be considered without respect to its perceived partisan advantage or disadvantage.

---

[30] "Fall Election for President County Returns," Wisconsin State Elections Board (2008), bit.ly/3bpJ9lm.

[31] "County by County Report President of the United States Recount," WEC (2016), bit.ly/3GB57Ad.

IV. Form of proceedings

The Legislature agrees with most parties' proposals that the likely submissions in this case would be remedial submissions supported by short briefing and expert witnesses. The Legislature maintains that its proposed form and timing of the proceedings is the best way forward. *See* Legislature's Br. 43-46.

At this early stage, the Legislature cannot guarantee one way or another whether there will be fact disputes. But in light of the parties' arguments thus far, and if the Court invites all parties to submit proposed remedies, the Legislature anticipates that there will be some disputes between experts regarding proposed remedies that will have to be refereed. The Legislature has no objection to the Governor's suggestion (at 16) that this Court conduct any such hearing regarding disputed facts, in lieu of appointing a special master.

The Legislature disagrees with the BLOC Intervenor-Petitioners' suggestion that the schedule must allow for additional fact discovery. The Legislature cannot understand why that would be necessary in this case—which largely entails what the Court's *remedy* ought to be for the malapportionment claims in the event of a redistricting impasse. It is becoming clear that the BLOC Intervenor-Petitioners wish to relitigate the redistricting battles their comrades lost in the last decade. To what relevant end, they cannot say. For the foregoing reasons, the existing maps are a lawful baseline by which to remedy the malapportionment claims.

Relatedly, to the extent the BLOC Intervenor-Petitioners mean to suggest that there will be fact discovery of individual legislators, that suggestion should be swiftly rejected. Even assuming (dubitante) that legislative intent could have any relevance to this malapportionment dispute, individual legislators cannot "testify

as to what the intent of the legislature was in the passage of a particular statute." *State v. Consol. Freightways Corp.*, 72 Wis. 2d 727, 738, 242 N.W.2d 192 (1976); *see Cartwright v. Sharpe*, 40 Wis. 2d 494, 508-09, 162 N.W.2d 5 (1968). More fundamentally, legislators enjoy absolute immunity for their legislative acts and cannot be called as a witness to testify. *See* Wis. Const. art. IV, §§15, 16; *State v. Beno*, 116 Wis. 2d 122, 142, 341 N.W.2d 668 (1984); *see also Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998); *Gravel v. United States*, 408 U.S. 606, 616-17 (1972) ("[T]he day-to-day work of ... aides is so critical to the Members' performance that they must be treated as the latter's alter egos"). As this Court explained in *Beno*, the legislative privilege enshrined in Wisconsin's constitution "reinforces the separation of powers doctrine, protecting the independent functioning of the legislative branch by preventing interference, intrusion, or intimidation by the other branches. The framers' judgment was that the courts are not the proper place to hold legislators accountable as elected representatives for 'words spoken in debate.'" 116 Wis. 2d at 141-42. There is thus no constitutional basis for any fact discovery of legislators beyond what is in the legislative record.

CONCLUSION

The judicial power resides in this Court. It is not delegable to political science departments or their computers. That judicial power, moreover, is not the same political power held by the coordinate political branches of Wisconsin's Government. The Court's remedy should be of a judicial nature, not redrawing maps from scratch. To strike that balance here, deference is due to the Legislature—the branch to whom the framers of Wisconsin's first constitution gave the power to reapportion more than 150 years ago. Whatever injunctive relief that this Court may offer for the

malapportionment claims must "be tailored to the necessities of th[is] particular case." *Bubolz v. Dane Cty.*, 159 Wis. 2d 284, 296, 464 N.W.2d 67 (Ct. App. 1990). Once the Court has done what is "equitably necessary," *Seigel*, 163 Wis. 2d at 890, its role has ended and the Legislature's must be preserved.

Dated this 1st day of November, 2021.

Respectfully submitted,

Electronically Signed By
Kevin M. St. John

CONSOVOY MCCARTHY PLLC
Jeffrey M. Harris*
Taylor A.R. Meehan**
James P. McGlone***
1600 Wilson Boulevard, Ste. 700
Arlington, Virginia 22209
703.243.9423
jeff@consovoymccarthy.com
taylor@consovoymccarthy.com
jim@consovoymccarthy.com

BELL GIFTOS ST. JOHN LLC
Kevin M. St. John, SBN 1054815
5325 Wall Street, Ste. 2200
Madison, Wisconsin 53718
608.216.7990
kstjohn@bellgiftos.com

LAWFAIR LLC
Adam K. Mortara, SBN 1038391
125 South Wacker, Ste. 300
Chicago, Illinois 60606
773.750.7154
mortara@lawfairllc.com

** Admitted pro hac vice*
*** Admitted pro hac vice; licensed to practice in Ill. & D.C.*
**** Admitted pro hac vice; licensed to practice in Mass.*

Attorneys for Intervenor-Respondent, The Wisconsin Legislature

CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c) for a brief. This brief uses a proportionally spaced serif font, with margins and line spacing greater than or equal to that specified by rule. Excluding the caption, table of contents, table of authorities, signatures, and these certifications, the length of this brief is 10,674 words as calculated by Microsoft Word.

Dated this 1st day of November, 2021.

Respectfully submitted,

Electronically Signed by
Kevin M. St. John

BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Suite 2200
Madison, Wisconsin 53718
608.216.7990
kstjohn@bellgiftos.com

Attorney for the
Wisconsin Legislature

CERTIFICATION OF FILING AND SERVICE

I certify that I caused the foregoing brief to be filed with the Court as attachments to an email to clerk@wicourts.gov, sent on or before 12:00 noon and dated this day. I further certify that I will cause a paper original and 10 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 on Tuesday, November 2, 2021.

I further certify that on this day, I caused service copies of these documents to be sent by email to all counsel of record, all of whom have consented to service by email.

Dated this 1st day of November, 2021.

Respectfully submitted,

Electronically Signed by
Kevin M. St. John

BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Suite 2200
Madison, Wisconsin 53718
608.216.7990
kstjohn@bellgiftos.com

Attorney for the
Wisconsin Legislature