Supreme Court of Wisconsin
NO. 2021AP001450 - OA

SUPREME COURT OF WISCONSIN

Appeal No. 2021AP001450 - 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 GALLONA, LAUREN STEPHENSON, REBECCA ALWIN, CONGRESSMAN GLENN GROTHMAN, CONGRESSMAN MIKE GALLAGHER, CONGRESSMAN BRYAN STEIL, CONGRESSMAN TOM TIFFANY, CONGRESSMAN SCOTT FITZGERALD, LISA HUNTER, JACOB SABEL, 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, ANN JACOBS, in her official capacity as a member of the Wisconsin Elections Commission, DEAN KNUDSON in his official capacity as a member of the Wisconsin Elections Commission, ROBERT SPINDELL, JR. in his official capacity as a member of the Wisconsin Elections Commission, and MARK THOMSEN in his official capacity as a member of the Wisconsin Elections Commission,

Respondents,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, in his official capacity, and JANET BEWLEY SENATE DEMOCRATIC MINORITY LEADER, on behalf of the SENATE DEMOCRATIC CAUCUS,

Intervenors-Respondents.

NON-PARTY BRIEF IN SUPPORT OF NO PARTY OF WILLIAM WHITFORD, HANS BREITENMOSER, MARY LYNNE DONOHUE, WENDY SUE JOHNSON, AND DEBORAH PATEL

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INTRODUCTION

In 2011, as legislators carved up Wisconsin for partisan gain, a senior aide boasted: "The maps we pass will determine who's here 10 years from now." *Whitford v. Gill*, 218 F. Supp. 3d 837, 853 (W.D. Wis. 2016), *vacated and remanded on other grounds*, 138 S. Ct. 1916 (2018). He was right. Ten years later, Republicans remain in control of the legislature, despite losing the statewide vote multiple times. Now, unsatisfied with just ten years of extreme gerrymandering and faced with a gubernatorial veto, those politicians, along with their allies, invite this Court to do their dirty work: to entrench them for *another* decade.[1] The Court should decline that invitation. It's bad enough that the legislature insulated itself from voters for the past ten years. It would be even worse if the Court were to perpetuate the gerrymander for the next decade.

The Court will be on solid footing in rejecting Petitioners' request. Neither Wisconsin law nor its past practice justifies taking a least-change approach to redistricting. In fact, they preclude it where, as here, the

[1] Petitioners ask for "least changes," *see* Omnibus Am. Pet. ¶118, while the legislature has used the term "core preservation," *see* S.J. Res. 63, 105th Gen. Assemb., Reg. Sess. (Wis. 2021). These approaches are related but distinct. *See infra* Part I.B. Here, however, there is no doubt that the legislature's push for core preservation is a fig leaf for a rote least-change approach to preserve the gerrymander. *See infra* note 2; *infra* Part I.C.

existing maps subvert constitutional criteria for partisan advantage. Wisconsin is hardly alone in spurning a least-change criterion. Only three states have redistricting laws that consider old districts, and *none* applies a least-change principle. Similarly situated courts have almost universally declined to use a least-change approach, often warning of its dangers. If this Court were to accede to Petitioners' request, it would stand nearly alone in applying least change to maps that politicians had created in the prior round of redistricting. There's no valid reason for the Court to do that.

STATEMENT OF INTEREST

Amici are Wisconsin voters who were among the plaintiffs in *Whitford v. Gill*, the case challenging the legislature's extreme 2011 partisan gerrymander. 218 F. Supp. 3d 837. A federal court found that the 2011 gerrymander imposed substantial harms on Amici. While the U.S. Supreme Court vacated that opinion on jurisdictional grounds, it didn't question those factual findings. For the past decade, Wisconsin's district maps have diluted Amici's votes. Their interest is in ensuring that this Court doesn't renew that harm for the next decade under a least-change

approach that has no basis in Wisconsin law or practice and little support elsewhere.

BACKGROUND

In 2011, the Wisconsin legislature enacted an egregious partisan gerrymander, ensuring "Republican control of the Assembly under any likely future electoral scenario for the remainder of the decade." *Id.* at 896. A federal court found that partisan gain was the driving force of the line-drawing process. *Id.* at 864. The scheme worked. The map entrenched the Republican Party regardless of voter preference. When Democrats won about 52% of the statewide vote in 2012, for example, they won thirty-nine Assembly seats; two years later, when Republicans won a roughly equivalent vote share, they won sixty-three seats. *Id.* at 901. The current maps remain among the most gerrymandered in modern history. *See Wisconsin 2012-2020 Redistricting Plan*, PlanScore, https://planscore.campaignlegal.org/wisconsin/#!2020-plan-statehouse-eg (Assembly map is "more skewed than 94%" of enacted plans since 1972).

Wisconsinites have noticed, and they don't like it. Across the political spectrum, Wisconsin voters oppose gerrymandering—including 84% of Republicans, 88% of independents, and 91% of Democrats.

Wisconsin Polling: Voters See Gerrymandering as a Major Problem, Want Reform, RepresentUS (Aug. 24, 2021), https://represent.us/wp-content/uploads/2021/08/WI-Rep-US-Polling-Memo-Draft.pdf. Fifty-five Wisconsin counties, containing 83% of the State's population, have passed resolutions urging nonpartisan redistricting. *Toolkit to Ban Gerrymandering in Wisconsin*, Wis. Democracy Campaign (Oct. 24, 2021), https://www.wisdc.org/reforms/118-redistricting/6392-toolkit-for-banning-gerrymandering-in-wisconsin#intro.

ARGUMENT

I. Neither Wisconsin Law nor Past Practice Supports a Least-Change Approach.

A. Wisconsin law provides no basis for a least-change approach.

Wisconsin law provides no basis for this Court to apply a least-change approach when redrawing the State's maps. The Wisconsin Constitution lists several traditional redistricting criteria: contiguity, compactness, and respect for county and municipal boundaries. Wis. Const. art. IV, § 4. Least change is nowhere to be found. If the Court were to take a least-change approach here, it would therefore rely on a criterion that's absent from Wisconsin law. *Contra, e.g.*, *SEIU, Loc. 1 v. Vos*, 2020

WI 67, ¶28, 393 Wis. 2d 38, 946 N.W.2d 35 ("The text of the constitution reflects the policy choices of the people, and therefore constitutional interpretation . . . focuses primarily on the language of the constitution.").

What's worse, the Court would undermine the requirements that *do* appear in Wisconsin law. The 2011 gerrymander splits more counties and contains less-compact districts, on average, than any previous Wisconsin map. *See* Joint Statement of Stipulated Facts ¶¶207–21, *Whitford v. Gill*, 3:15-cv-00421 (W.D. Wis. May 9, 2016), ECF No. 125. Minimizing revisions to the current maps would replicate those constitutional deficiencies to pursue an extraconstitutional least-change principle. Instead, the Court should hew closely to explicit legal criteria. *See Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶12, 249 Wis. 2d 706, 714, 639 N.W.2d 537 (court should choose map that is "most consistent with judicial neutrality" (marks omitted)); *AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 633 (E.D. Wis. 1982) ("[A] court-ordered legislative plan is held to a higher standard . . . than a legislative plan enacted by a state.").

If anything, the Wisconsin Constitution counsels *against* a least-change approach, requiring districts to be drawn "*anew*." Wis. Const. art. IV, § 3 (emphasis added); *see also Anew*, Webster's Dictionary (1st ed.

1828) ("Over again; another time; in a new form"). Districts crafted to resemble their predecessors are the opposite of districts that take a "new form" for "another time." *See also State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("[Constitutional] language is read where possible to give reasonable effect to every word, in order to avoid surplusage.")

A least-change approach is especially dubious here because the existing map is an extreme partisan gerrymander. It remains an open question whether Wisconsin's Constitution permits the legislature to redistrict for partisan gain. *See Johnson v. Wis. Elections Comm'n*, Order No. 2021AP1450-OA, at 15, Sept. 22, 2021 (Dallet, J., dissenting). Although the U.S. Supreme Court has deemed such claims unreviewable in federal courts, it has acknowledged that extreme partisan gerrymanders violate both the Constitution and basic democratic values. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) ("[G]errymandering is incompatible with democratic principles." (marks omitted)); *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) ("[A]n *excessive* injection of politics is *un*lawful."). Whatever the Constitution may tolerate from the political branches, it demands more of the judiciary. As this Court has recognized,

"Judges should not select a plan that seeks partisan advantage . . . even if they would not be entitled to invalidate an enacted plan that did so." *Jensen*, 2002 WI 13, ¶12 (marks omitted). If the Court uses a least-change approach here, it will violate that tenet, imposing its own gerrymander.

And there can be no doubt that, in this context, least change isn't a neutral principle but a wolf in sheep's clothing. The legislature has introduced minimal-change maps. *See* Memorandum, LRB-5017/1 and LRB-5071/1 State Legislative Data (Oct. 20, 2021) ("New Maps Memorandum"), https://drawyourdistrict.legis.wisconsin.gov/download/Sen_LeMahieu_and_Speaker_Vos_LRB_5017_and_5071.pdf. They are extreme gerrymanders—as biased as the 2011 maps whose rampant cracking and packing they faithfully replicate. *See SB621 Assembly*, PlanScore, https://planscore.campaignlegal.org/plan.html?20211020T222331.511387585Z (draft Assembly map would "favor[] Republicans in 99% of predicted scenarios"). These drafts show that, if the Court applies least change here, it too will be gerrymandering.

B. A least-change approach is inconsistent with Wisconsin's prior practice.

Wisconsin's prior practice doesn't support a least-change approach either. When courts drew maps following the 1980 and 1990 censuses, they declined to consider previous district cores. *See Prosser v. Elections Bd.*, 793 F. Supp. 859 at 863–65 (W.D. Wis. 1992); *AFL-CIO*, 543 F. Supp. at 634–36. Likewise, when the legislature drew maps last cycle, it "disregard[ed] . . . core district populations," transferring "striking[ly]" more people than necessary between districts. *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 849–51 (E.D. Wis. 2012). It's only now, when the prior maps are to its liking, that the legislature suddenly stresses minimal change.

Moreover, contrary to Petitioners' suggestion, *see* Omnibus Am. Pet ¶118, the court in *Baumgart v. Wendelberger* didn't take a least-change approach, instead merely considering core preservation as one of several factors, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002). But Petitioners seek *least* change, which prioritizes core preservation over all other criteria, including those written into Wisconsin law. Petitioners would be dissatisfied if the Court considered existing district boundaries as one of a range of relevant factors. Instead, Petitioners want the Court to

start with the current gerrymanders and then tinker around their edges to meet one-person, one-vote requirements, thereby ignoring all neutral, constitutionally enumerated criteria. That is an extraordinary request.[2]

In any event, *Baumgart* doesn't support the use of least change or core preservation here. The *Baumgart* court worked from a previous *court-drawn* map that emphasized neutral, traditional criteria. Under those circumstances, considering core preservation as one of several factors might be appropriate because the baseline map prioritized legitimate criteria. Here, by contrast, this Court would start with an extreme gerrymander. Preserving *its* district cores would perpetuate partisan bias to the detriment of neutral, traditional criteria.

The *Baumgart* court as well as others that have drawn Wisconsin maps have emphasized how improper it would be for a court to use least change or core preservation in these circumstances. They have been unequivocal in explaining that courts may not design maps that would

[2] The legislature's introduced maps should leave no doubt how extreme Petitioners' request is. In *Baumgart*, after weighing core preservation as one of several factors, the court-drawn plan had an "average level of core retention [of] 76.7%." 2002 WL 34127471, at *7. Here, after sacrificing all other criteria to maintain the gerrymander, the legislative maps have an "average core retention rate for assembly districts [of] 84.16 percent and [an] average core retention rate for senate districts [of] 92.21 percent." New Maps Memorandum.

create partisan advantage. *See Jensen*, 2002 WI 13, ¶12; *Baumgart*, 2002 WL 34127471, at *3; *Prosser*, 793 F. Supp. at 867. If this Court were to keep intact old district cores, it would do just that: divide the State to one party's advantage while undermining Wisconsin law's prescribed criteria.

C. A nonbinding legislative resolution changes nothing.

Finally, the legislature's joint resolution about redistricting—passed during the pendency of this litigation—provides no basis for the Court to use a least-change or core-preserving approach. That resolution expresses the legislature's opinion that "[r]etain[ing] as much as possible the core of existing districts" should be prioritized. S.J. Res. 63, 105th Gen. Assemb., Reg. Sess. (Wis. 2021). However, Wisconsin's redistricting process requires the State's legislative *and* executive branches to agree on maps. *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 559 (1964). If the legislature wanted a least-change criterion with the force of law, it should have enacted a statute. Absent presentment, the resolution merely reflects a single branch's view, devoid of legal force.

Tellingly, the legislature ranks its newfound favorite criterion *above* Wisconsin's constitutionally enumerated requirements of contiguity,

compactness, and respect for county and municipal boundaries.[3] And this interest in core preservation isn't just extraconstitutional. It's also at odds with the legislature's 2011 priorities. *See supra* Part I.B. The Court should see the effort for what it is—a last-ditch attempt to cling to a gerrymander—and reject it.

II. States and Courts Nationwide Disfavor Least Change and Core Preservation.

A. Most states do not consider core preservation and none embraces least change.

Like the Wisconsin Constitution, most states' redistricting criteria exclude any form of core preservation. Only three states have constitutional or statutory provisions that mention core preservation at all. *No* state embraces a least-change approach by giving that criterion primacy over the neutral, traditional criteria reflected in Wisconsin law. *See* N.Y. Const. art. 3, § 4(c)(5) (2021) (mapmakers may "*consider* the maintenance of cores of existing districts" (emphasis added)); N.M. Stat. Ann. § 1-3A-7 (A)(10) (2021) (as *tenth* criterion, "to the extent feasible, the committee *may* seek to preserve the core of existing districts" (emphasis added)); Utah

[3] The guidelines equate core preservation and respecting communities of interest. Courts have rejected similar efforts to "imply that communities of interest should be legally defined by the existing . . . districts." *Hall v. Moreno*, 270 P.3d 961, 972 (Colo. 2012).

Code Ann. § 20A-20-302(5)(c) (2021) (listing core preservation as one of several factors to be considered "to the extent practicable").

Moreover, each of these states adopted its core-preservation provision when establishing an independent redistricting commission. *See* S.B. 304, 2021 Leg., Reg. Sess. (N.M. 2021); H.R. Con. Res. A02086, 200th Gen. Assemb., Reg. Sess. (N.Y. 2013); S.B. 200, 2020 Leg., Gen. Sess. (Utah 2020). Core preservation may well be appropriate where the previous maps were designed by nonpartisan actors seeking only to comply with neutral, traditional criteria. *See supra* Part I.B (discussing *Baumgart*). As it stands, though, no state's law contemplates what the legislature seeks here: to enact a gerrymander in one cycle and then use core preservation to extend the gerrymander in perpetuity. That approach would make Wisconsin an outlier on the national stage.

B. Courts rarely use a least-change approach and warn against core preservation in circumstances like these.

It's not just state law across the country that disfavors core preservation—so does judicial practice. When faced with gridlock from the political branches, courts routinely decline to consider prior district boundaries, instead focusing on neutral, traditional criteria like those enshrined in the Wisconsin Constitution. *See, e.g.*, *Guy v. Miller*, No. 11-

OC-00042-1B (Nev. Dist. Ct., Carson City Oct. 27, 2011); *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002); *Zachman v. Kiffmeyer*, C0-01-160 (Minn. Spec. Redistricting Panel Mar. 19, 2002).

Judicial aversion to core preservation should come as no surprise. As this Court has observed, when courts remedy flaws in enacted plans, minimal tinkering might be appropriate because enacted plans "have the virtue of political legitimacy." *Jensen*, 2002 WI 13, ¶12 (marks omitted). But where, as here, gridlock means courts lack "the benefit of a recently enacted plan to assist [them]," *Perry v. Perez*, 565 U.S. 388, 396 (2012), they "owe[] no comparable deference to the outdated policy judgments of a now unconstitutional plan," *Favors v. Cuomo*, 2012 WL 928223, at *6 (E.D.N.Y. Mar. 19, 2012). Instead, their endeavor demands "judicial neutrality" because courts lack the legitimacy and capacity to make the political judgments embedded in core preservation. *Jensen*, 2002 WI 13, ¶12 (marks omitted).

In these circumstances, even when courts *do* consider core preservation, they caution against giving the criterion much weight. *See, e.g.*, *Favors*, 2012 WL 928223, at *6 (core preservation "risk[s] drawing the court into political disputes"); *Hall*, 270 P.3d at 972 (core preservation

"is nothing more than one of the many factors to be considered" and should not "subsume" other criteria); *In re Legislative Districting of the State*, 805 A.2d 292, 328 (Md. 2002) ("[T]o use an existing plan as a constraint" is "to dictate a continuation of the deficiencies in the old plan."). In fact, even when a Colorado statute formerly mentioned core preservation, its supreme court emphasized the criterion's limitations, lest neutral factors be eclipsed by "a mechanistic attempt" to retain old districts and courts "be forever beholden to the districts created decades earlier." *Hall*, 270 P.3d at 972, 976.

This judicial skepticism may explain why, in the rare instances where courts apply a least-change approach, they're usually dealing with neutral prior maps. Last cycle, only three courts in states without core-preservation criteria took a least-change approach to the previous decade's maps. *Each* of those courts applied the principle to a court- or commission-drawn map, creating little risk of perpetuating partisan bias. *See Smith v. Hosemann,* 852 F. Supp. 2d 757 (S.D. Miss. 2011) (applying least change to court-drawn map); *Hippert v. Ritchie,* 813 N.W.2d 374; 813 N.W.2d 391 (Minn. 2012) (same); Order Directing Special Master, *In re Reapportionment Comm'n*, No. SC-18907 (Conn. Jan. 3, 2012),

https://jud.ct.gov/external/news/SC18907_010312.pdf (applying least change to commission-drawn map).

That context is entirely different from Petitioners' request that this Court apply least change to a gerrymander. In fact, the U.S. Supreme Court rebuked a court for doing just that in *LULAC v. Perry*, 548 U.S. 399 (2006). Texas's 1991 congressional map was an aggressive Democratic gerrymander. After the political branches deadlocked in 2001, a court left "the map free of further change except to conform it to one-person, one-vote." *Id.* at 412 (opinion of Kennedy, J.) (marks omitted). This was a mistake, according to the Court. "[T]he practical effect . . . was to leave the 1991 Democratic Party gerrymander largely in place as a 'legal' plan." *Id.*

This Court should avoid repeating the error of producing "a court-drawn map that perpetuate[s] much of [the previous] gerrymander." *Id.* Were the Court to follow Petitioners' approach, it would join the court chastised by the Supreme Court as one of the only courts in recent history to apply a least-change principle to a map drawn by politicians. If this Court gives *any* significant weight to the existing gerrymandered lines, it would be an outlier making a partisan choice without the institutional prerogative to do so. Courts up and down the federal and state judiciaries

have explained why this path is dangerous and distasteful. The Court should heed those alarms.

CONCLUSION

If this Court chooses to draw Wisconsin's maps, it should reject a least-change or core-preserving approach. Otherwise, it will defy Wisconsin law and practice, buck national trends, and create a rare and illegitimate court-drawn gerrymander.

Respectfully Submitted,

/s/ Ruth M. Greenwood
Ruth M. Greenwood*
Mary F. Brown†
Mark R. Haidar†
Meredith A. Manda†
Sarah A. Sadlier†
Corey M. Stewart†
THE ELECTION LAW CLINIC
Harvard Law School
5112 Wasserstein Hall
6 Everett St.
Cambridge, MA 02138
rgreenwood@law.harvard.edu
mbrown.jd22@hlsclinics.org
mhaidar.jd22@hlsclinics.org
mmanda.jd22@hlsclinics.org
ssadlier.jd22@hlsclinics.org
cstewart.jd23@hlsclinics.org

/s/ Jakob Feltham.
Jakob Feltham
State Bar No. 1097614
HAWKS QUINDEL, S.C.
409 E. Main St.
Madison, WI 53703
Tel: (608) 257-0040
jfeltham@hq-law.com

*Motion for *Pro Hac Vice* Admission forthcoming
† Law Student - Law School Certification forthcoming

CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of the Brief is 2,996 words.

Dated: October 25, 2021

/s/ Jakob Feltham

Jakob Feltham
State Bar No. 1097614
HAWKS QUINDEL, S.C.
409 E. Main St.
Madison, WI 53703
Tel: (608) 257-0040
jfeltham@hq-law.com

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) AND OF SERVICE

I hereby certify that:

I have submitted an electronic copy of this Brief which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the Brief filed as of this date.

A copy of this certificate has been served with the paper copies of this Brief filed with the Court and served on all parties.

Dated: October 25, 2021

/s/ Jakob Feltham

Jakob Feltham
State Bar No. 1097614
HAWKS QUINDEL, S.C.
409 E. Main St.
Madison, WI 53703
Tel: (608) 257-0040
jfeltham@hq-law.com