

Election Law Clinic at Harvard Law School Files Friend of the Court Brief on Behalf of Five Former *Whitford* Plaintiffs Urging Court Not to Bake in Last Decade’s Partisan Gerrymander for Another Ten Years

October 25, 2021

Case: *Johnson v. Wisconsin Elections Commission*

WISCONSIN – Today, the Election Law Clinic at Harvard Law School (ELC), representing five former plaintiffs from *Gill v. Whitford*, filed a friend of the court brief urging the Wisconsin Supreme Court not to bake in the extremely gerrymandered maps that have distorted Wisconsin’s democratic governance for the last decade. Specifically, the brief seeks to ensure that the Wisconsin Supreme Court rejects a “least-change” approach—keeping old districts intact to the extent possible—should the Court intervene and draw new district maps.

On August 22, the Wisconsin Institute for Law & Liberty (WILL) filed a petition in the Wisconsin Supreme Court asking the Court to intervene in the redistricting process should the state government fail to enact new maps in time for the 2022 election (*Johnson v. Wisconsin Elections Commission*). WILL asks the Court to use a least-change approach to draw new maps. Such an approach would prioritize keeping the districts as gerrymandered as they were for the last decade, at the expense of all legally required redistricting criteria. A claim had previously been filed by individual Democratic voters in the federal district court for the Western District of Wisconsin (*Hunter v. Bostelmann*), asking that court to draw congressional, and state legislative districts for the state. It is not yet clear whether the state or federal court will ultimately draw the maps.

As the ELC brief illustrates, neither Wisconsin law nor its past practice justify taking a least-change approach to redrawing the State’s maps. It was not the practice of the legislature when it needlessly moved millions of voters from one district to another like pawns in a game. And it should not be sanctioned by law where, as here, the existing map is a proven extreme partisan gerrymander.

Over the five elections between 2012 and 2020, Democrats received an average of 49.2% of the statewide vote and yet received an average of only 37 of the Assembly’s 99 seats. Conversely, during that same time period, Republican candidates received an average of 50.8% of the vote and yet a whopping 63 of the 99 seats in the Assembly.

“Ten years of one-party advantage in a purple state was bad enough,” said **Bill Whitford, amicus in the brief and former *Whitford* plaintiff.**



“We must not let the partisan mapmakers of 2011 determine who constitutes the Wisconsin Assembly in 2030.”

“The Wisconsin Constitution declares that governments ‘deriv[e] their just powers from the consent of the governed.’ There is no such consent when the maps are rigged against Wisconsin voters,” said **Wendy Sue Johnson, amicus in the brief and former Whitford plaintiff**. “A representative government allows voters to choose their representatives in each election. When politicians preserve their partisan gerrymander and choose their voters, they are governing without our consent.

“The least-change approach proposed here is at odds with Wisconsin’s Constitution, and its mandated redistricting criteria,” said **Mary Brown, a student in the Election Law Clinic** who worked on the brief. “The Court should not favor an approach with no basis in Wisconsin law over redistricting criteria that Wisconsin’s Constitution explicitly mandates.”

“If the Wisconsin Supreme Court were to use a least-change approach, as the Wisconsin Legislature would have it do, the Court would be doing more than merely *blessing* a gerrymandered map — they would be *drawing* the gerrymander themselves,” said **Meredith Manda, another student in the Election Law Clinic** who worked on the brief. “The Court would be just as culpable as the 2011 map architects if they go with a least-change approach. Put simply, they would become ‘gerrymanderers in robes.’”

“There is no constitutional or statutory basis for a least-change approach,” said **Jakob Feltham, attorney at Hawks Quindel and local counsel for amici**. “If the Court takes the bait, they are effectively collaborating with the Assembly to rig the maps against Wisconsin voters. Wisconsinites’ faith in government and trust in the independence of the judiciary would only further erode if the Court bakes in this gerrymander.”