Supreme Court of Wisconsin

No. 2021AP1450-OA

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

Petitioners,

BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, REBECCA ALWIN, CONGRESSMAN GLENN GROTHMAN, CONGRESSMAN 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, DON MILLIS IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, ANN JACOBS IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, CARRIE RIEPL IN HER 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 DIANNE HESSELBEIN, SENATE DEMOCRATIC MINORITY LEADER, ON BEHALF OF THE SENATE DEMOCRATIC CAUCUS,

Intervenors-Respondents.

MEMORANDUM IN SUPPORT OF INTERVENORS-PETITIONERS LISA HUNTER, JACOB ZABEL, AND JOHN PERSA'S MOTION FOR RELIEF FROM JUDGMENT

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INTRODUCTION

Just over three weeks ago, this Court overruled "any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach." *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶ 63, 998 N.W.2d 370.[1] As the Court explained, the "least change" approach to redistricting was never sound in principle and has proven "unworkable in practice." *Id.* ¶¶ 60–63. The Court thus struck the "least change" principle in its entirety out of Wisconsin law.

The *Clarke* decision renders the current congressional map, selected in *Johnson II*, lawless in the most literal sense: With the "least change" approach that justified the map's adoption overruled, the map now lacks any basis in Wisconsin redistricting law or precedent. To the contrary, the *Johnson II* map runs roughshod over this Court's recognized redistricting criteria in quixotic service to a now-discredited standard. In the process, the map perpetuates the partisan unfairness that has radically skewed Wisconsin's districting maps since 2011. And its continued

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[1] *Johnson I* is the November 30, 2021, order in this action announcing the Court's criteria for map selection, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469; *Johnson II* is the March 1, 2022, order applying those criteria to adopt congressional and legislative maps, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402; and *Johnson III*, is the April 15, 2022, order adopting different legislative maps on remand from the U.S. Supreme Court, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559.

imposition on Wisconsin voters undermines the separation of powers because the Court has a duty to independently adjudicate the merits of a judicially adopted map.

The *Johnson II* map, all told, is an equitable impasse remedy the Court is enforcing on a continuing basis with no equitable justification. Thus, absent a course correction, an avowedly lawless map will remain in effect until *at least 2031* and will govern *four* rounds of congressional elections. That would subject the Hunter Intervenors-Petitioners—and all other Wisconsin voters—to a full decade of elections under a congressional map that lacks any basis in state law.[2]

Such a result cannot stand. And it need not, for the Wisconsin statutes provide an able mechanism for relief from the *Johnson II* judgment. *See* Wis. Stat. § 806.07(1)(g), (h). Where a judgment's prospective application "is no longer equitable," *id.* § (g), or where "other reasons" justify relief, *id.* § (h), this Court may grant a party relief from judgment. Those standards are satisfied here.

The Court should grant relief from judgment and resume the remedial process that *Johnson I* derailed by soliciting from the

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[2] In this brief and the accompanying motion, "Hunter Intervenors-Petitioners" refers to Lisa Hunter, Jacob Zabel, and John Persa. Jennifer Oh, Geraldine Schertz, and Kathleen Qualheim are no longer seeking relief in this action.

parties new congressional map proposals that comply with Wisconsin law *as clarified by Clarke*. Specifically, because a remedial map operates by judicial power alone, *Clarke* makes clear that the Court cannot "ignore partisan impact." 2023 WI 79, ¶ 70. *Johnson I*'s least-change approach, and *Johnson II*'s selection of a congressional remedy constrained by that approach, flout that fundamental commitment. In that sense, those decisions comprised a serious deviation from this Court's otherwise-longstanding commitment to partisan neutrality and the proper judicial role.

Fortunately, there is still time to undo the damage by granting relief from judgment, inviting the parties to make new submissions, and selecting a map that fully complies with current Wisconsin law. Granting such relief will fulfill this Court's constitutional duty to independently adjudicate the validity of Wisconsin's congressional maps; failing to act will double down on a now-discredited legal principle and subject Wisconsin voters to a full decade under congressional maps that lack any basis in Wisconsin law. Justice and equity require relief.

BACKGROUND

Johnson I initiated a remarkable and unprecedented deviation from Wisconsin's traditional redistricting principles. There, a fractured majority of the Court announced a novel standard that would govern the remedy in this case: so-called

"least change." *Johnson I*, 2021 WI 87, ¶¶ 64–79 (lead opinion); *id.* ¶¶ 82–87 (Hagedorn, J., concurring). The lead opinion purported to justify this standard on separation-of-powers grounds, calling it "a neutral standard," *id.* ¶ 76, and "far from a novel idea," *id.* ¶ 73. The concurrence similarly declared "least change" an "impartial exercise of [the Court's] limited judicial power." *Id.* ¶ 86 (Hagedorn, J., concurring). In context, however, "least change" was anything but impartial: "by ratifying outdated partisan political choices"—the brutally skewed maps imposed on Wisconsin by a Republican trifecta in 2011—least change injected "the court directly into politics." *Id.* ¶ 89 (Dallet, J., dissenting). The assertion that such an approach was precedented rang just as hollow. In truth, "the least-change approach has no 'general acceptance among reasonable jurists' when the court's starting point is a legislatively drawn map" like the 2011 congressional plan. *Id.* ¶ 90 (Dallet, J., dissenting).

The Court's brief experiment with "least change" went poorly. The fractured majority in *Johnson I* "never fully enumerated [the applicable] metrics or explained their relative importance, let alone defined a least-change approach in a coherent way." *Clarke*, 2023 WI 79, ¶ 61; *see also Johnson I*, 2021 WI 87, ¶¶ 64–79 (lead opinion); *id.* ¶¶ 82–87 (Hagedorn, J., concurring). Subsequently, in *Johnson II*, it turned out that no four-justice coalition agreed both with the "least change" approach

and about what it entailed. Justice Hagedorn's opinion for the Court treated "least change" as equivalent to core retention, and on that basis ordered adoption of the current congressional map. 2022 WI 14, ¶¶ 1–25 (lead opinion). The *Johnson I* dissenters concurred in the judgment but continued to object to any least-change requirement. *Id.* ¶ 54 (Walsh Bradley, J., concurring in the judgment) (describing the analysis as "[c]ircumscribed by [the *Johnson I*] decision and the parties' reliance upon it when crafting their submissions").

The rest of the original *Johnson I* majority dissented. One dissenter blasted core retention as coming "out of thin air," *id.* ¶ 135 (Zeigler, C.J., dissenting), while another called it a means to a "judicially-partisan outcome" based on "subjective policy preferences," *id.* ¶ 211 (Grassl Bradley, J., dissenting). One dissenter even questioned whether the Court's mandate was proper given the Justices' votes: "Despite six justices agreeing core retention should not be the sole governing criterion in this case, a majority nevertheless selects the Governor's maps ostensibly on this basis . . . . [P]roperly applied, [*Johnson I*] stands in opposition to the majority's decision." *Id.* ¶ 209 n.1 (Grassl Bradley, J., dissenting).

The Court's remedial determination as to the best congressional map in *Johnson II* turned entirely on *Johnson I*'s instruction that "least change"—in some form—would be the

criterion for selecting a remedial map. As Justice Hagedorn's opinion for the Court in *Johnson II* put it: "Our selection of remedial maps in this case is driven *solely* by the relevant legal requirements and the least change directive the majority adopted in the November 30 order—*not a balancing of traditional redistricting criteria*." *Id.* ¶ 11 n.7 (emphasis added).

Clarke properly ended this Court's "least change" misadventure by overruling *Johnson I*'s mandate of that standard. 2023 WI 79, ¶¶ 60–63. As the Court explained, "least change" suffers from both principled and practical defects. *Id.* On a principled level, *Johnson I*'s single-minded focus on "least change" allowed "a judicially-created metric, not derived from the constitutional text, to supersede the constitution." *Id.* ¶ 62. And, practically, "[b]ecause no majority of the court agreed on what least change actually meant, the concept amounted to little more than an unclear assortment of possible redistricting metrics." *Id.* ¶ 61. The least-change principle thus had to be overruled both because it was "based on fundamentals that never garnered consensus," and because it was "in tension with established districting requirements." *Id.* ¶ 63.

The Court denied a motion to reconsider its merits decision in *Clarke* just five days ago, on January 11. Order re: Motion for Reconsideration, *Clarke v. Wis. Elections Comm'n*, No. 2023AP1399-OA (Jan. 11, 2024).

ARGUMENT

I. The Court should grant relief from *Johnson II*'s judgment adopting the current congressional plan.

The Court should grant the motion for relief from judgment. Wisconsin law authorizes such relief "[o]n motion and upon such terms as are just" for "the following reasons" (among others): (i) "[i]t is no longer equitable that the judgment should have prospective application," Wis. Stat. § 806.07(1)(g); or (ii) "[a]ny other reasons justifying relief from the operation of the judgment," Wis. Stat. § 806.07(1)(h).[3] The relief-from-judgment statute must be "construed liberally because of its remedial nature." *Connor v. Connor*, 2001 WI 49, ¶ 28, 243 Wis. 2d 279, 627 N.W.2d 182. A motion under the provisions invoked here is timely so long as it is made "within a reasonable time." Wis. Stat. § 806.07(2).

Because continued enforcement of the *Johnson II* congressional remedy would be profoundly inequitable and unjust, Hunter Intervenors-Petitioners are entitled to relief from judgment under Wis. Stat. § 806.07(1)(g) and (h). Subsection (g)'s chief function is to allow relief from a continuing judgment, most often a permanent injunction, where a "change in conditions" means "it would be inequitable for the original judgment to be

[3] Wis. Stat. § 806.07(1)(f) authorizes relief from judgment where "[a] prior judgment upon which the judgment is based has been reversed or otherwise vacated."

enforced prospectively." *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 543–44, 363 N.W.2d 419 (1985) (analogizing subsection (g) to Federal Rule 60(b)(5)). Among other circumstances, such inequity exists where continued enforcement "would be detrimental to the public interest." *Wis. Dep't of Corrections v. Kliesmet*, 211 Wis. 2d 254, 261, 564 N.W.2d 742 (1997) (quoting *Rufo v. Inmates of the Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992)).

Subsection (h), in turn, "is written in broad terms and obviously extends the grounds for relief beyond those provided for in the preceding subsections: under subsection (h) the ground for granting relief is 'justice[.]'" *M.L.B.*, 122 Wis. 2d at 544–45, 363 N.W.2d 419. Subsection (h) accordingly "must be liberally construed to allow relief from judgments whenever such action is appropriate to accomplish justice." *Conrad v. Conrad*, 92 Wis. 2d 407, 418, 284 N.W.2d 674 (1979) (internal quotation marks omitted) (analogizing subsection (h) to Federal Rule 60(b)(6)). This Court has called subsection (h) a grant of "broad discretionary authority" that "invokes the pure equity power of the court." *Mullen v. Coolong*, 153 Wis. 2d 401, 407, 451 N.W.2d 412 (1990).[4]

[4] When a movant seeks relief under subsection (h) that would be available under Wis. Stat. § 806.07(1)(a), (b), or (c), but is time-barred by subsection (2), the Court has typically required a showing of "extraordinary circumstances." *M.L.B.*, 122 Wis. 2d at 549–50, 363 N.W.2d 419. Several recent cases suggest this showing is a prerequisite to *any* motion under subsection (h), not

Relief from the congressional map is appropriate under either or both provisions for four related reasons. *First*, *Clarke* renders this Court's remedial *Johnson II* order a continuing redistricting remedy with no continuing basis in Wisconsin redistricting principles. The public interest favors conducting future elections under a lawful map, and equity and justice require affording Hunter Intervenors-Petitioners the full and fair

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just those seeking time-barred relief that would have been available under subsections (a), (b), or (c) if the movant had not delayed. *See, e.g.*, *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶ 34, 326 Wis. 2d 640, 785 N.W.2d 493. Yet where relief would not have been available under those subsections regardless of timing, this Court has affirmed a grant of relief under subsection (h) *without* finding "extraordinary circumstances." *See Mullen*, 153 Wis. 2d at 408–11, 451 N.W.2d 412. The Court has never resolved this tension in its precedents.

The Court should not require a showing of "extraordinary circumstances" to grant relief from judgment under subsection (h) here. Movants do not seek time-barred relief that would have been available under subsections (a), (b), or (c), so the original justification for requiring a heightened and extratextual showing of "extraordinary circumstances" does not apply. *See M.L.B.*, 122 Wis. 2d at 549–50, 363 N.W.2d 419.

In any case, the circumstances here *are* extraordinary. As set out below, Wisconsin has congressional maps that lack all basis in current state law, impose gross partisan unfairness, and undermine the separation of powers—yet are to be applied to *four more congressional elections* by virtue of this Court's *Johnson II* mandate.

opportunity to propose a remedy they were denied in *Johnson II*. *Second*, the *Johnson II* map, adopted under the least-change principle, suffers from serious partisan unfairness. It thus effectively enlists this Court's authority to further partisan ends in direct contravention of *Clarke*. *See Johnson I*, 2021 WI 87, ¶ 39. *Third*, the least-change approach that led the Court to adopt the *Johnson II* map contravenes separation-of-powers principles by abdicating this Court's duty of independent judgment. The resulting remedy's continued enforcement for the rest of the decade will inflict that harm on Wisconsin's constitutional order on an ongoing basis. *Fourth*, the motion is timely because it comes at "a reasonable time"—just weeks after the merits decision in *Clarke* and just days after reconsideration of that decision was denied.

A. The *Johnson II* map is a prospective remedy with no basis in current law.

The only justification in Wisconsin law for the *Johnson II* remedial order was *Johnson I*'s imposition of the "least change" approach to redistricting. *See supra* Background. That novel principle lacked any basis in this Court's precedents, the Wisconsin Constitution, or past Wisconsin redistricting practice. *Clarke*, 2023 WI 79, ¶ 62; *Johnson I*, 2021 WI 87, ¶¶ 89–90 (Dallet,

J., dissenting). With *Johnson I* overruled, "least change" now has no basis in Wisconsin law at all. *Clarke*, 2023 WI 79, ¶¶ 60–63.

Yet the congressional map adopted under the "least change" approach is now in effect and will remain in effect for the remainder of the decade absent this Court's action. With *Johnson I* nullified, that map amounts to little more than an exercise of "raw judicial power," *Clarke*, 2023 WI 79, ¶ 125 (Ziegler, C.J., dissenting)—it governs the state's congressional boundaries not because Wisconsin's Constitution and laws require it, but because four Justices once voted for it "[c]ircumscribed by [the *Johnson I*] decision and the parties' reliance upon it when crafting their submissions," *Johnson II*, 2022 WI 14, ¶ 54 (Walsh Bradley, J., concurring). Relief is appropriate on this basis alone: Imposing an arbitrary and unjustified map on Wisconsin's next *four* congressional elections is profoundly "inequitable," *M.L.B.*, 122 Wis. 2d at 544–45, 363 N.W.2d 419, and "would be detrimental to the public interest," *Kliesmet*, 211 Wis. 2d at 261, 564 N.W.2d 742. Equity, justice, and the public interest favor elections conducted using congressional boundaries that comply with state law.

Further, only relief from judgment will afford the Hunter Intervenors-Petitioners just and equitable treatment. *Clarke* overruled more than just "*the law* applied by the court in making its [*Johnson II*] adjudication." *Schauer v. DeNeveau Homeowners Ass'n, Inc.*, 194 Wis. 2d 62, 75, 533 N.W.2d 470 (1995) (emphasis

added). *Johnson I* was not, with respect to *Johnson II*, merely an unrelated precedent that provided a rule of law. To the contrary, the *Johnson I* mandate was the entire basis for the *Johnson II* judgment. That mandate dictated both the form of the remedial maps proposed by the parties—which were the only final remedies available to the Court—and the Court's selection from among those proposed remedies. *See Johnson II*, 2022 WI 14, ¶ 54 (Walsh Bradley, J., concurring in the judgment).[5]

After *Clarke,* it is thus clear that Hunter Intervenors-Petitioners were deprived of a fair opportunity to propose a

[5] For this reason, *Clarke*'s repudiation of *Johnson I* may permit relief from judgment not only under subsections (g) and (h) but also under subsection (f). That provision applies where "[a] prior judgment upon which the judgment is based has been *reversed or otherwise vacated*." Wis. Stat. § 806.07(1)(f) (emphasis added). Here, in the terms of this Court's subsection (f) case law, a "prior judgment"—*Johnson I*—has "actually served as the basis for a subsequent judgment, order, or stipulation"—*Johnson II*. *Schauer*, 194 Wis. 2d at 75, 533 N.W.2d 470. And, arguably, the prior judgment has now been "reversed or otherwise vacated"—namely, by *Clarke*.

Hunter Intervenors-Petitioners recognize that *Clarke* expressed the Court's intent to "overrule"—rather than to "reverse" or "otherwise vacate"—"any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach," *Clarke*, 2023 WI 79, ¶ 63. Accordingly, Hunter Intervenors-Petitioners presently move under subsections (g) and (h). If the Court determines *Clarke* "reverse[d] or otherwise vacate[d]" the *Johnson I* judgment, Hunter Intervenors-

congressional map that complies with state law *properly understood*. Having won relief on their malapportionment claim, Hunter Intervenors-Petitioners were never given a chance to propose a remedy informed by recognized redistricting principles. And they suffered that result even though their *Johnson I* brief pressed the very arguments about the proper remedial framework that *Clarke* subsequently vindicated. *See Hunter Intervenor-Petitioners' Brief Addressing Court's October 14 Order* at 3–18; *Clarke*, 2023 WI 79, ¶¶ 60–63. Although it is now too late for the Court to grant Hunter Intervenors-Petitioners the remedial opportunity they were denied with regard to the 2022 election, that opportunity need not be denied for future elections.

This Court's decision in *Mullen* supports relief from judgment in such circumstances. *See* 153 Wis. 2d at 408, 451 N.W.2d 412. In *Mullen*, this Court reversed the Court of Appeals' decision reversing a grant of relief from judgment under Wis. Stat. § 806.07(1)(h). *Id.* at 403. Mullen, a personal-injury plaintiff, had pressed a novel legal theory on appeal but lost at the Court of Appeals. *Id.* at 403–04. This Court then denied her petition for review. *Id.* Unbeknownst to Mullen, the Court had granted

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Petitioners request that the Court construe the motion as also requesting relief under subsection (f). *See State v. Holmes*, 106 Wis. 2d 31, 39–40, 315 N.W.2d 703, 707 (1982) (recognizing Wisconsin appellate courts' authority to address issues *sua sponte* in interest of justice).

another petition pressing the same theory earlier that year. *Id.* After Mullen settled her claim for a pittance, the Court adopted her theory in the other case and "specifically overruled" the Court of Appeals decision against Mullen. *Id.* at 404–05. In those circumstances, this Court held relief from judgment proper because it had "reached the precise result Mullen advocated in her petition for review." *Id.* at 408.

Analogous circumstances warrant relief from judgment here. In *Johnson I*, Hunter Intervenors-Petitioners pressed the "precise" objections to "least change" that the Court vindicated in *Clarke*. And *Clarke* "specifically overruled" *Johnson I*. The only material difference from *Mullen* is that here, Hunter Intervenors-Petitioners seek only *prospective* relief from the judgment—which makes the "balance between the competing values of finality and fairness," *Mullen*, 153 Wis. 2d at 407, 451 N.W.2d 412, tilt even more clearly in favor of relief.

B. The *Johnson II* map subjects Wisconsin voters to intolerable partisan unfairness.

In *Clarke,* this Court confirmed that it must not "ignore partisan impact in adopting remedial maps." 2023 WI 79, ¶ 70. Consistent with that principle, relief from judgment should be granted here because the *Johnson II* congressional map emerged from ignoring precisely that and, as a result, has a profoundly unfair partisan impact. As an analysis of a variety of common statistical metrics confirms, the current map is "extremely

favorable to the Republican Party"—more skewed than any Wisconsin congressional map in at least half a century, and more skewed than the vast majority of congressional plans from comparable states over the past three redistricting cycles. Expert Aff. of Dr. Jonathan Rodden ("Rodden Aff.") ¶ 44, Ex. A. And just as this Court may not, consistent with its proper role, adopt an unfair partisan map as a remedy in the first instance, *Clarke*, 2023 WI 79, ¶ 70, it may not enforce such a map as a remedy on an ongoing, prospective basis. Whether choosing the map in advance of the first election after a decennial census or continuing to enforce it for the remaining elections under that census, the Court's authority is brought to bear in service of one party's partisan advantage in an election. *Clarke* properly rejects such usurpation of the proper judicial role.

Wisconsin's 2011 congressional map had a marked partisan skew. Though Democrats won a majority of the statewide vote share in 2012, 2018, and 2020, and just below a majority in 2014 and 2016, the results were functionally predetermined: The Republican trifecta enacted a map that ensured Republican candidates always won five seats and Democrats just three. Rodden Aff. ¶ 14. Although the partisan skew of the 2011 map is plain to see, relief here does not require the Court to decide whether that map—or partisan gerrymandering by the Legislature more generally—violates the Wisconsin Constitution.

Nor does the Court need to conduct "extensive fact-finding," *Clarke*, 2023 WI 70 ¶ 7, into legislative intent to decide whether the lingering taint of the 2011 map renders the current map unlawful, *see, e.g., Whitford v. Gill*, 218 F. Supp. 3d 837, 846–53 (W.D. Wis. 2016) (three-judge panel), *vacated*, 138 S. Ct. 1916 (2018). Whatever prerogative legislators may or may not have to aggrandize their own power, "courts can, and should, hold themselves to a different standard than the legislature regarding the partisanship of remedial maps." *Clarke*, 2023 WI 79, ¶ 71. "As a politically neutral and independent institution," this Court must "take care to avoid selecting"—or enforcing—"remedial maps designed to advantage one political party over another." *Id.* And "it is not possible to remain neutral and independent by failing to consider partisan impact entirely." *Id.*

Yet *Johnson I* embraced precisely the "politically mindless approach" that *Clarke* warns against. *Id.* (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)). Faced with the duty of adopting maps for Wisconsin elections after a political impasse in *Johnson I*, a bare majority of the Court expressly refused to consider partisan fairness. *Johnson I*, 2021 WI 87, ¶ 39. That in itself was improper; as *Clarke* explained, courts cannot "ignore partisan impact in adopting remedial maps." 2023 WI 79, ¶ 70. Worse yet, the *Johnson I* majority then guaranteed that the remedial map would richly and unjustly reward a particular

partisan faction by transforming the map-selection process into a contest over who could submit a configuration that most closely resembled the skewed 2011 congressional map. *Johnson I*, 2021 WI 87, ¶ 72. The majority set the Court on that path notwithstanding the parties' abundant warnings that the 2011 map was incurably skewed and its use as benchmark would perpetuate gross partisan unfairness. *See, e.g.*, *Hunter Intervenor-Petitioners' Brief Addressing Court's October 14 Order* at 3–18.

The resulting congressional map selected in *Johnson II* has partisan effects that are even more severe than its 2011 progenitor. Dr. Jonathan Rodden, a professor of political science at Stanford University, calculated that the share of congressional seats won by Republican candidates relative to the share of the statewide vote won by Republican candidates is more distorted in Wisconsin under the 2022 map (where Republicans won 75% of the state's congressional seats despite winning only 50% of the statewide vote) than it has been in virtually any other state in modern history. Rodden Aff. ¶ 20. Dr. Rodden also computed other metrics—including the efficiency gap, partisan bias, and mean-median difference—commonly used by political scientists to evaluate a districting map's partisan fairness and again found that the *Johnson II* map is an extreme outlier favoring Republicans. Rodden Aff. ¶¶ 26–38.

Clarke declares the Court's firm commitment not to be dragooned into the service of partisan mapmaking even when it comes garbed in putatively neutral standards. *Clarke*, 2023 WI 79, ¶ 70; *see* also Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. Rev. 985, 1003–12, 1056 (2022) (explaining how least change and related concepts are "so laden with political considerations" that they "cannot properly drive judicial mapmaking" (internal quotation marks omitted)). "Unlike the legislative and executive branches, which are political by nature, this court must remain politically neutral." *Clarke*, 2023 WI 79, ¶ 70. To ensure that neutrality, "judges should not select a plan that seeks partisan advantage[.]'" *Id.* (quoting *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 12, 249 Wis. 2d 706, 639 N.W.2d 537).

These principles dictate granting relief from judgment here. Just as the Court lacks "free license to enact maps that privilege one political party over another," *id.,* it lacks license to enforce such maps as continuing and prospective impasse remedies. A map adopted to remedy an impasse draws its legal force directly from the authority of the Court that orders its use, not from statute. *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 559–64, 126 N.W.2d 551 (establishing this Court's authority to adopt impasse maps). And an impasse map is a form of permanent injunction, so is necessarily within the adopting court's "continuing jurisdiction." *Whitford v. Gill*, No. 15-cv-421-bbc, 2017 WL 2623104, at *1 (W.D.

Wis. Feb. 22, 2017) (three-judge panel) (explaining that a court's ongoing authority over an impasse map is inherent). Accordingly, each future election held under the *Johnson II* map will violate the Court's commitment not to exercise its jurisdiction "to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda." *Clarke*, 2023 WI 79, ¶ 70 (quoting *Jensen*, 2002 WI 13, ¶ 12).

It follows that relief from judgment is warranted. Put simply, "[i]t is no longer equitable that the [*Johnson II*] judgment should have prospective application." Wis. Stat. § 806.07(1)(g). Rather, the "public interest," *Kliesmet*, 211 Wis. 2d at 261, 564 N.W.2d 742, will be best served by the Court reclaiming its proper role as neutral arbiter and concluding the remedial process under neutral, traditional redistricting criteria.

C. The *Johnson II* map's continued enforcement undermines the separation of powers.

As discussed, Wisconsin's congressional map resulted from a flawed "least-change" approach that this Court has since overruled. *Clarke*, 2023 WI 79, ¶ 63. In addition to perpetuating and exacerbating the partisan skew of the 2011 map, this approach, "based on fundamentals that never garnered consensus" and "in tension with established districting requirements," *id.*, undermined Wisconsin's separation of powers. Accordingly, leaving the map in place for the balance of the decade will inflict an ongoing harm on Wisconsin's constitutional order.

Wisconsin's Constitution "created three branches of government, each with distinct functions and powers, and the separation of powers doctrine is implicit in this tripartite division." *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 11, 376 Wis. 2d 147, 897 N.W.2d 384 (citations omitted). The "judicial power" was exclusively vested in this Court, "and that judicial power confers on [this Court] an *exclusive* responsibility to exercise *independent* judgment in cases over which [it] preside[s]." *Id.* ¶ 46 (emphasis added). The separation of powers doctrine "prevents [this Court] from abdicating [its] core power." *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 48, 382 Wis. 2d 496, 914 N.W.2d 21.

This Court's duty to exercise independent judgment is especially important in redistricting cases, which require this Court to resolve disputes between the Legislative and Executive branches. To strike the careful balance required in such cases, the Court "must consider numerous constitutional requirements when adopting remedial maps" and "cannot allow a judicially-created metric, not derived from the constitutional text, to supersede the constitution." *Clarke*, 2023 WI 79 ¶ 62. But when faced with an impasse between the political branches after the 2020 census, this Court declined to exercise its independent judgment and failed to "balance . . . requirements and considerations essential to the mapmaking process." *Id.* Instead, this Court "declared that the overarching approach to adopting remedial maps was for them to

'reflect the least change necessary' from the previous maps." *Id.* ¶ 62 (quoting *Johnson I*, 2021 WI 87, ¶ 72).

This Court was explicit that the purpose of the least-change framework was to "minimize judicial policymaking," *Johnson II*, 2022 WI 14, ¶ 11, and defer to the "policy choices of the legislature" as constituted a decade earlier, *Johnson I*, 2021 WI 87, ¶ 81. But the Court's effort to "remov[e] [itself] from the political fray," *id.* ¶ 77, ignored three key principles regarding the judiciary's duty in resolving questions about redistricting maps.

First, "it is not possible to remain neutral and independent by failing to consider partisan impact entirely." *Clarke*, 2023 WL 79, ¶ 71. To the contrary, to maintain judicial independence, this Court has an affirmative duty to "take care to avoid selecting remedial maps designed to advantage one political party over another." *Id.* That is because a "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results." *Id.* (internal quotation omitted). State high courts across the country have properly recognized that the separation of powers requires the judiciary's scrupulous observance of its duty of independence in this context. *See, e.g.*, *Maestas v. Hall*, 2012-NMSC-006, ¶¶ 28–29, 274 P.3d 66, 76 (determining that to preserve "judicial independence" and "avoid the appearance of partisan politics," a court "should not select a plan that seeks partisan advantage").

Second, courts "called upon to perform redistricting are, of course, judicially legislating." *Jensen*, 2002 WI 13, ¶¶ 9–11. Indeed, federal courts defer to state courts on redistricting matters precisely *because* it is a "highly political task." *Growe v. Emison*, 507 U.S. 25, 33 (1993); *see also id.* ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965)). State courts are thus empowered to independently craft redistricting plans when legislatures "refuse[] to reapportion themselves" because "citizens have a right to have their legislature properly apportioned and their congressional districts properly drawn and the responsibility for seeing that this right is enforced rests with the states, not the federal courts." *Alexander v. Taylor*, 2002 OK 59, ¶¶ 14, 16, 51 P.3d 1204, 1209, as corrected (June 27, 2002).

Deferring to a decade-old map—enacted by a decade-old legislative body and signed by a governor whom Wisconsin voters deposed at the polls years before the current redistricting cycle began—does not properly discharge this responsibility. Contrary to the Court's least-change approach, the Court's constitutional duty to exercise its independent judgment is neither qualified nor quieted by the politicized nature of the task before it.

Third, to maintain its independence, the judiciary's role in redistricting cannot be circumscribed by deference to any one political branch. When a state court is "thrust into the position of choosing a redistricting plan due to the political stalemate between the Legislature and the Governor," it must "endeavor[] to adopt a plan" that is "superior or comparable to all of the plans submitted" based "[f]irst and foremost" on "the traditional core criteria" that guide the state's redistricting decisions. *Carter v. Chapman*, 270 A.3d 444, 451, 461-62 (Pa. 2022), cert. denied sub nom. *Costello v. Carter*, 143 S. Ct. 102 (2022); *see also Hippert v. Ritchie*, 813 N.W.2d 391, 395 (Minn. 2012) (adopting a remedial plan by utilizing "redistricting principles that advance the interests of the collective public good and preserve the public's confidence and perception of fairness in the redistricting process").

There are no shortcuts to this endeavor. State courts cannot fulfill their redistricting duties and maintain their independence by deferring to prior plans. *See, e.g.*, *Carter*, 270 A.3d at 464 (recognizing the court's duty to ensure that the remedial map "satisfie[d] the requisite traditional core criteria while balancing the subordinate historical considerations" and was "reflective of and responsive to the partisan preferences of the Commonwealth's voters."); *Wattson v. Simon*, 970 N.W.2d 42, 45–46 (Minn. 2022) (balancing seven core principles to guide its task of drawing new legislative districts).

This Court has a constitutional duty, when called upon to break an impasse, to independently analyze the merits of proposed redistricting plans by applying a wide range of redistricting criteria, including partisan outcomes. This Court's failure to discharge that duty with respect to Wisconsin's congressional maps was an affront to the separation of powers. Each election conducted under the *Johnson II* map will compound that affront. Justice and equity accordingly dictate granting relief from the judgment requiring that map's continued application.

D. The motion for relief from judgment is timely.

Section 806.07(2) dictates that a motion for relief from judgment under subsections (g) or (h) is timely so long as it is made "within a reasonable time." Determining what counts as "a reasonable time" entails "a case-by-case analysis of all relevant facts." *State ex rel. Cynthia M.S. v. Michael F.C.*, 181 Wis. 2d 618, 627, 511 N.W.2d 868 (1994). That "analysis should be guided" by Wis. Stat. § 806.07's purpose, namely, "to do substantial justice when the circumstances so warrant." *Id.* Notably, while motions under subsections (a) or (c) must be brought "not more than one year after the judgment was entered or the order or stipulation was made," Wis. Stat. § 806.07(2), that constraint does not apply to motions under subsections (g) or (h). This Court in *Cynthia M.S.*, a subsection (h) case, held a motion for relief timely though it was

made *eleven years* after the order in question issued. 181 Wis. 2d at 622, 511 N.W.2d 868.

The "reasonable time" standard is easily satisfied here because the Court decided *Clarke*—the appropriate measuring stick—just over three weeks ago, and denied reconsideration of that decision just last week. Specifically, *Clarke* overruled *Johnson I*'s mandate of the "least change" approach, reaffirmed *Jensen*, and corrected *Johnson I*'s deviation from the Court's previous commitment to partisan neutrality in service of the separation of powers. The motion is thus plainly timely in light of "all relevant factors." *Cynthia M.S.*, 181 Wis. 2d at 627, 511 N.W.2d 868. Moreover, granting relief will do "substantial justice" by ensuring that Wisconsin voters are not subjected to a baseless and inequitable congressional map for the next four elections. *See id.*

***

At this juncture, the *Johnson II* congressional map is the vestigial artifact of a remedial process that took a wrong turn. It is lawless in justification, partisan in effect, and backwards under Wisconsin's constitutional order. Its continued application will harm Wisconsin voters in every election it governs without any basis in law or logic. In such circumstances, subsections (g) and (h) of Wis. Stat. § 806.07(1) each give this Court substantial discretion to correct the map—an ongoing, equitable impasse remedy under the Court's supervision—in service of equity, justice, and the

public interest. The Court should exercise that discretion here and grant the motion.

II. The Court should resume the congressional remedial process and select the plan that best satisfies redistricting criteria grounded in Wisconsin law.

With *Johnson I* properly repudiated, this Court should resume the congressional remedial process at the point at which it was derailed. Specifically, the Court should solicit the parties to prepare proposed maps that remedy the pre-*Johnson* map's malapportionment. The Court should then select a remedial map that complies with Wisconsin law as clarified by *Clarke*.

Unlike in *Clarke*, the Court need not give the political branches the opportunity to enact a new congressional map in the first instance. *See Clarke*, 2023 WI 79, ¶ 4. *Clarke* presented a contiguity claim not presented or litigated in *Johnson*. This motion, by contrast, tests the continuing viability of the *Johnson* remedy adopted by this Court. Because that remedy was an impasse remedy, the political branches are not entitled to a first-instance opportunity to enact a valid map—they already had their shot and failed. The Court then took up the pen, whereupon *Johnson I*'s imposition of an unlawful "least change" methodology improperly "[c]ircumscribed" the parties' remedial proposals. *Johnson II*, 2022 WI 14, ¶ 54 (Walsh Bradley, J., concurring in the judgment). To correct that misstep, all that is required is to give the parties to the impasse litigation another opportunity to

propose maps drafted in accordance with the proper, lawful criteria, and to select a map consistent with those criteria.[6]

In evaluating the parties' proposals and selecting a map to govern Wisconsin's congressional elections for the balance of the decade, the Court should follow the law *as clarified by Clarke*. Under binding federal precedent, congressional districts must have equal population, *Wesberry v. Sanders*, 376 U.S. 1 (1964); may not be drawn predominantly on the basis of race, *Miller v. Johnson*, 515 U.S. 900 (1995); and must provide members of any protected class an equal opportunity to elect candidates of choice, *Allen v. Milligan*, 599 U.S. 1 (2023). Under state law, the Court should fully and properly perform its neutral role by considering whether the proposed maps have an unfair partisan impact. *Clarke*, 2023 WI 79, ¶ 70. And the Court should give due weight to

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[6] If, however, the Court disagrees, Hunter Intervenors-Petitioners request that the Court order the same parallel remedial process as in *Clarke*, *see* 2023 WI 79, ¶ 76, to ensure a valid map is in place for the 2024 election cycle, *see* Response of Wisconsin Elections Commission to Court Order of October 6, 2023, at 3, *Clarke v. Wis. Elections Comm'n*, No. 2023AP1399-OA (Oct. 16, 2023) (Wisconsin Elections Commission indicating in *Clarke* that maps "need to be in place by March 15, 2024, to permit the prerequisite steps to be completed before the petition circulation process begins"); *see also* Response Brief of Atkinson Intervenors at 51 n.29, *Clarke v. Wis. Elections Comm'n*, No. 2023AP1399-OA (Oct. 30, 2023) (noting that courts in Wisconsin adopted legislative districts in mid-April in both 2012 and 2022).

Wisconsin's traditional redistricting criteria, such as contiguity, compactness, and preservation of communities of interest. Although those considerations are not mandatory in congressional redistricting, their application is appropriate in light of longstanding practice. *See id.*, ¶ 68 (applying nonmandatory but traditional redistricting criteria in the legislative context).

CONCLUSION

Hunter Intervenors-Petitioners respectfully request that the Court grant the motion for relief from judgment.

Dated: January 16, 2024

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***Pro hac vice application forthcoming*

CERTIFICATE AS TO FORM AND WORD COUNT

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. Excluding the caption, table of contents, table of authorities, signatures, and these certifications, the length of this brief is 6,389 words as calculated by Microsoft Word.

Dated: January 16, 2024 By: *Electronically signed by Diane M. Welsh*

CERTIFICATE OF SERVICE

I certify that on this 16th day of January, 2024, I caused a copy of this brief to be served upon counsel for each of the parties via email.

Dated: January 16, 2024 By: *Electronically signed by Diane M. Welsh*

EXHIBIT A

IN THE SUPREME COURT OF WISCONSIN

BILLIE JOHNSON, ET AL., ***Petitioners,*** **v.** **WISCONSIN ELECTIONS COMMISSION, ET AL.,** ***Respondents.***	**No. 2021AP1450-OA**

EXPERT AFFIDAVIT OF DR. JONATHAN RODDEN

I, Jonathan Rodden, having been duly sworn and cautioned according to law, hereby state that I am over the age of eighteen years and am competent to testify to the facts set forth below based on my personal knowledge and having personally examined all records referenced in this affidavit, and further state as follows:

I. INTRODUCTION AND SUMMARY

1. For the purpose of this affidavit, I have been asked to calculate commonly used indicators of partisan fairness for the Wisconsin congressional redistricting plan adopted on March 3, 2022 (the "2022 Plan"), and to place those indicators in historical and comparative perspective. I take two approaches to this task. First, I take an *ex post* approach, examining the results of the 2022 congressional election. Second, I take an *ex ante* approach, examining presidential election results that were available prior to the selection of the adopted plan.

2. Wisconsin is a very competitive state where Democratic candidates have had a slight advantage in statewide elections in recent years, but the adopted redistricting plan created only two Democratic districts out of eight in the 2022 congressional election. Whether one examines the efficiency gap, partisan bias, or the difference in partisanship between the mean and median district, the 2022 Plan clearly creates a substantial advantage for the Republican Party. Especially with respect to the efficiency gap and the mean-median difference, the inequity of the 2022 Plan is quite extreme relative to congressional maps adopted by other states over the last 50 years.

3. On each of these indicators of partisan fairness, going back to 1972, pro-Republican advantage—or significant advantage for any party—was not present prior to the 2012 round of redistricting, after which it suddenly emerged. This advantage was then reinforced in the 2022 court-adopted congressional plan, which sought the "least change" from the 2012 map.

4. Even without the benefit of hindsight after the 2022 election, this pro-Republican advantage could have been ascertained via district-level data on the 2020 presidential election.

II. QUALIFICATIONS AND EXPERIENCE

5. I am currently a tenured Professor of Political Science at Stanford University and the founder and director of the Stanford Spatial Social Science Lab—a center for research and teaching with a focus on the analysis of geo-spatial data in the social sciences. I am engaged in a variety of research projects involving large, fine-grained geo-spatial data sets including ballots and election results at the level of polling places, individual records of registered voters, census data, and survey responses. I am also a senior fellow at the Stanford Institute for Economic Policy Research and the Hoover Institution. Prior to my employment at Stanford, I was the Ford Professor of Political Science at the Massachusetts Institute of Technology. I received my Ph.D. from Yale University and my B.A. from the University of Michigan, Ann Arbor, both in political science. A copy of my current C.V. is included as Exhibit A.

6. In my current academic work, I conduct research on the relationship between the patterns of political representation, geographic location of demographic and partisan groups, and the drawing of electoral districts. I have published papers using statistical methods to assess political geography, balloting, and representation in a variety of academic journals including *Statistics and Public Policy, Proceedings of the National Academy of Science*, *American Economic Review Papers and Proceedings*, the *Journal of Economic Perspectives*, the *Virginia Law Review*, the *American Journal of Political Science*, the *British Journal of Political Science*, the *Annual Review of Political Science*, and the *Journal of Politics.* One of these papers was selected by the American Political Science Association as the winner of the Michael Wallerstein Award for the best paper on political economy published in the last year, and another received an award from the American Political Science Association section on social networks. In 2021, I received a John Simon Guggenheim Memorial Foundation Fellowship, and received the Martha Derthick Award of the American Political Science Association for "the best book published at least ten years ago that has made a lasting contribution to the study of federalism and intergovernmental relations."

7. I have recently written a series of papers, along with my co-authors, using automated redistricting algorithms to assess partisan gerrymandering. This work has been published in the *Quarterly Journal of Political Science*, *Election Law Journal*, and *Political Analysis*, and it has been featured in more popular publications like the *Wall Street Journal*, the *New York Times*, and *Boston Review*. I have recently completed a book, published by *Basic Books* in June of 2019, on the relationship between political districts, the residential geography of social groups, and their political representation in the United States and other countries that use winner-take-all electoral districts. The book was reviewed in *The New York Times*, *The New York Review of Books*, *Wall Street Journal*, *The Economist*, and *The Atlantic*, among others.

8. I have expertise in the use of large data sets and geographic information systems (GIS), and I conduct research and teaching in the area of applied statistics related to elections. I frequently work with geo-coded voter files and other large administrative data sets, including in recent papers published in the *Annals of Internal Medicine* and *The New England Journal of Medicine.* I have developed a national data set of geo-coded precinct-level election results that has been used extensively in policy-oriented research related to redistricting and representation.

9. I have been accepted and testified as an expert witness in several election law and redistricting cases: *Romo v. Detzner,* No. 2012-CA-000412 (Fla. Cir. Ct. 2012); *Mo. State*

Conference of the NAACP v. *Ferguson-Florissant Sch. Dist.,* No. 4:2014-CV-02077 (E.D. Mo. 2014); *Lee v. Va. State Bd. of Elections,* No. 3:15-CV-00357 (E.D. Va. 2015); *Democratic Nat'l Committee et al. v. Hobbs et al.*, No. 16-1065-PHX-DLR (D. Ariz. 2016); *Bethune-Hill v. Virginia State Board of Elections*, No. 3:14-cv-00852-REP-AWA-BMK (E.D. Va. 2014); and *Jacobson et al. v. Lee*, No. 4:18-cv-00262 (N.D. Fla. 2018), *Rivera v. Schwab*, No. 2022-cv-89 (Kan. Dist. Ct. 2022), *Carter v. Chapman*, No. 464 MD 2021, 465 MD 2021 (Pa. Commw. Ct. 2021); *Bennet v. Ohio Redistricting Comm'n*, No. 2021-1198 (Ohio 2021); *Adams v. DeWine*, No. 2021-1428 (Ohio 2021); *Neiman v. LaRose*, No. 2022-0298 (Ohio 2022). Much of the testimony in these cases had to do with geography, electoral districts, voting, ballots, and election administration. My compensation in this case is not dependent upon my conclusions in any way.

III. DATA SOURCES

10. I have collected data from the Wisconsin Elections Commission for statewide elections from 2012 to 2022. I have also collected Wisconsin ward-level election results and geo-spatial boundaries from the Wisconsin Legislative Technology Services Bureau.[1]

11. For purposes of generating historical and cross-state comparisons, I have also obtained historical congressional, Senate, and presidential election results from the MIT Election Data and Science Lab,[2] and results of presidential elections, aggregated to the level of congressional districts, from several sources: the replication materials from Gary Jacobson, 2015, "It's Nothing Personal: The Decline of the Incumbency Advantage in US House Elections," *Journal of Politics* 77(3); the Almanac of American Politics; spreadsheets assembled by Kenneth Black and collaborators and published by *The Daily Kos*;[3] and data compiled by Chris Tausanovitch and Chris Warshaw, "Subnational Ideology and Presidential Vote Estimates."[4] Information about partisan control of the redistricting process in various states was obtained from data collected by Justin Levitt and Doug Spencer and archived at redistricting.lls.edu.

IV. *EX POST* PARTISAN FAIRNESS OF THE 2022 PLAN

12. I have been asked to determine whether the 2022 Plan favors one of the two major political parties in Wisconsin and, if so, to what extent. I begin by characterizing statewide partisanship in Wisconsin, and then comparing it to the partisan outcome of the 2022 congressional election.

13. Table 1 displays votes for candidates of the two major parties in all partisan statewide elections from 2012 to 2022. Democratic candidates received consistent but slim statewide majorities throughout this period, winning 12 of 19 statewide races, and 50.65 percent

[1] Available at https://gis-ltsb.hub.arcgis.com/.
[2] Available at https://electionlab.mit.edu/data.
[3] Available at https://docs.google.com/spreadsheets/d/1YZRfFiCDBEYB7M18fDGLH8IrmyMQGdQKqpOu9lLvmdo/edit#gid=1926565681.
[4] Available at https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/BQKU4M.

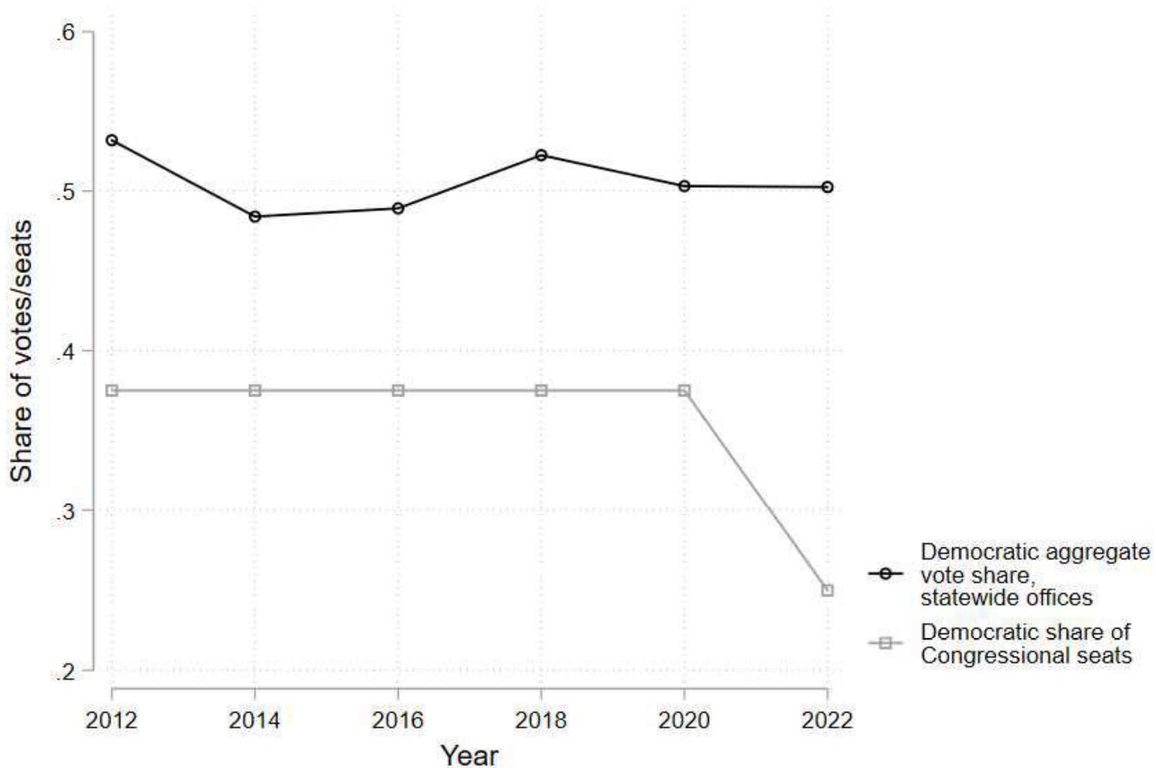
of the votes cast. The Democratic presidential candidate was also victorious in 2020, and Democratic candidates won three of five statewide races in 2022.

Table 1: Results of Partisan Statewide Wisconsin Elections, 2012 to 2022

	Democratic Votes	Republican Votes	Democratic Share of Two-Party Vote
2012 President	1,620,985	1,407,966	53.52%
2012 U.S. Senate	1,544,274	1,377,253	52.86%
2014 Governor	1,122,913	1,259,706	47.13%
2014 Attorney General	1,066,866	1,211,388	46.83%
2014 Secretary of State	1,161,113	1,074,835	51.93%
2014 Treasurer	1,026,548	1,120,140	47.82%
2016 President	1,382,536	1,405,284	49.59%
2016 U.S. Senator	1,380,335	1,479,471	48.27%
2018 Governor	1,324,307	1,295,080	50.56%
2018 Attorney General	1,305,902	1,288,712	50.33%
2018 Secretary of State	1,380,752	1,235,034	52.79%
2018 Treasurer	1,324,110	1,216,811	52.11%
2018 U.S. Senator	1,472,914	1,184,885	55.42%
2020 President	1,630,673	1,610,065	50.32%
2022 Governor	1,358,774	1,268,535	51.72%
2022 Attorney General	1,333,369	1,298,369	50.66%
2022 Secretary of State	1,268,748	1,261,306	50.15%
2022 Treasurer	1,254,949	1,293,553	49.24%
2022 U.S. Senator	1,310,467	1,337,185	49.50%
Total votes cast, 2012-2020	18,744,228	18,166,630	50.78%
Total votes cast, 2012-2022	25,270,535	24,625,578	50.65%
Total votes cast, 2022	6,526,307	6,458,948	50.26%

14. Despite receiving over 50 percent of the vote in statewide elections in 2022, Democratic candidates were victorious in only two of the eight congressional districts in 2022 (25 percent). This disjuncture between votes and seats can be visualized in Figure 1, which plots the Democratic vote share in statewide races (from Table 1) in black, and the Democratic seat share in the congressional delegation in gray. In each election held under the redistricting plan in place from 2012 to 2020, Democratic candidates had received three of eight seats (37.5 percent), despite winning just above 50 percent of the votes in statewide elections in 2012, 2018, and 2020, and just below 50 percent in 2014 and 2016.

Figure 1: Statewide Vote Shares and Congressional Seat Shares, 2012-2022



15. Although discrepancies between votes and seats often emerge in democracies like the United States with single-member, winner-take-all districts, it is quite unusual for a party with the support of slightly less than half the population to win 75 percent of the seats. In order to place this result in recent comparative perspective within the United States, it is useful to focus on a set of states that are comparable to Wisconsin in that they have seen relatively competitive statewide races in recent decades and are large enough to have more than four congressional districts.[5] To measure statewide partisanship in a way that facilitates cross-state comparison, I have assembled data on presidential and U.S. Senate elections. For each redistricting cycle, I calculate the average Republican share of the two-party vote in Senate and presidential elections.[6] Next, for each redistricting cycle, I calculate the share of all congressional seats won by Republican candidates.

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[5] Throughout this report, I focus on states with more than four congressional districts. Many of the indicators of partisan fairness explored in this report are less meaningful in states with very few districts. In a state like New Hampshire with two congressional districts, a single district changing hands, for instance, can be associated with a party going from 50 percent of the seats to 100 percent. None of the inferences in this report change if slightly smaller (3- or 4-seat states) are included.

[6] In a few states, I also have access to data on statewide executive offices, *e.g.*, Governor, Attorney General, Railroad Commissioner, Treasurer, and the like. However, the mix of elected offices

16. In Figure 2, the data markers indicate the state and the year that the relevant redistricting plan went into effect. The vertical axis is the average Republican seat share for the entire period the redistricting plan was in effect. For most observations, it was an entire decade, but the graph also includes some instances of mid-decade redistricting. States with districts drawn by legislatures under unified Republican control are indicated in red. States with districts drawn by independent commissions, courts, or divided legislatures are indicated in black. And states where districts were drawn under unified Democratic control are indicated in blue. The dotted line indicates proportionality—where, for instance, 50 percent of the vote translates into 50 percent of the seats, 52 percent of the vote translates into 52 percent of the seats, and so on. In Figure 2, in order to focus on states most similar to Wisconsin and facilitate legibility including labels, I zoom in on a group of the most evenly divided states, where statewide partisanship is between 44 and 56 percent. In Figure 3, I include all states with more than four Congressional districts.

17. In both figures, the data for Wisconsin in the 2002, 2012, and 2022 cycle are presented in bold. Since the plans in 2002 and 2022 were drawn by a bipartisan legislature and under supervision of courts, respectively, they are presented in black, whereas the 2012 plan, passed under unified Republican control, is presented in red.

18. For the most part, districts drawn by courts, divided legislatures, and independent commissions come closer to proportionality than those drawn by states under unified control from one political party. This can be seen most clearly *within* states where the districts were redrawn during a redistricting cycle due to litigation—including North Carolina, Virginia, Pennsylvania, and Florida. In these states, Republican-drawn maps led to Republican seat shares far beyond the party's statewide support, and plans drawn or supervised by courts came much closer to proportionality.

19. As can be seen in Figures 2 and 3, throughout the range of statewide vote shares—from Democratic-leaning states like Pennsylvania to Republican-leaning states like Indiana—Republican candidates have been able to win surprisingly large seat shares in the states where districts were drawn by unified Republican political actors.

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varies from one state to another, and comparable data are unavailable in some states. I elect to use statewide races for *national* elections only (president and U.S. Senate) in order to facilitate cross-state comparison.

Figure 2: Vote Shares in Statewide Senate and Presidential Elections and Seat Shares in Congressional Elections, Evenly Divided States with More than Four Districts, 2002, 2012, 2022 Redistricting Cycles

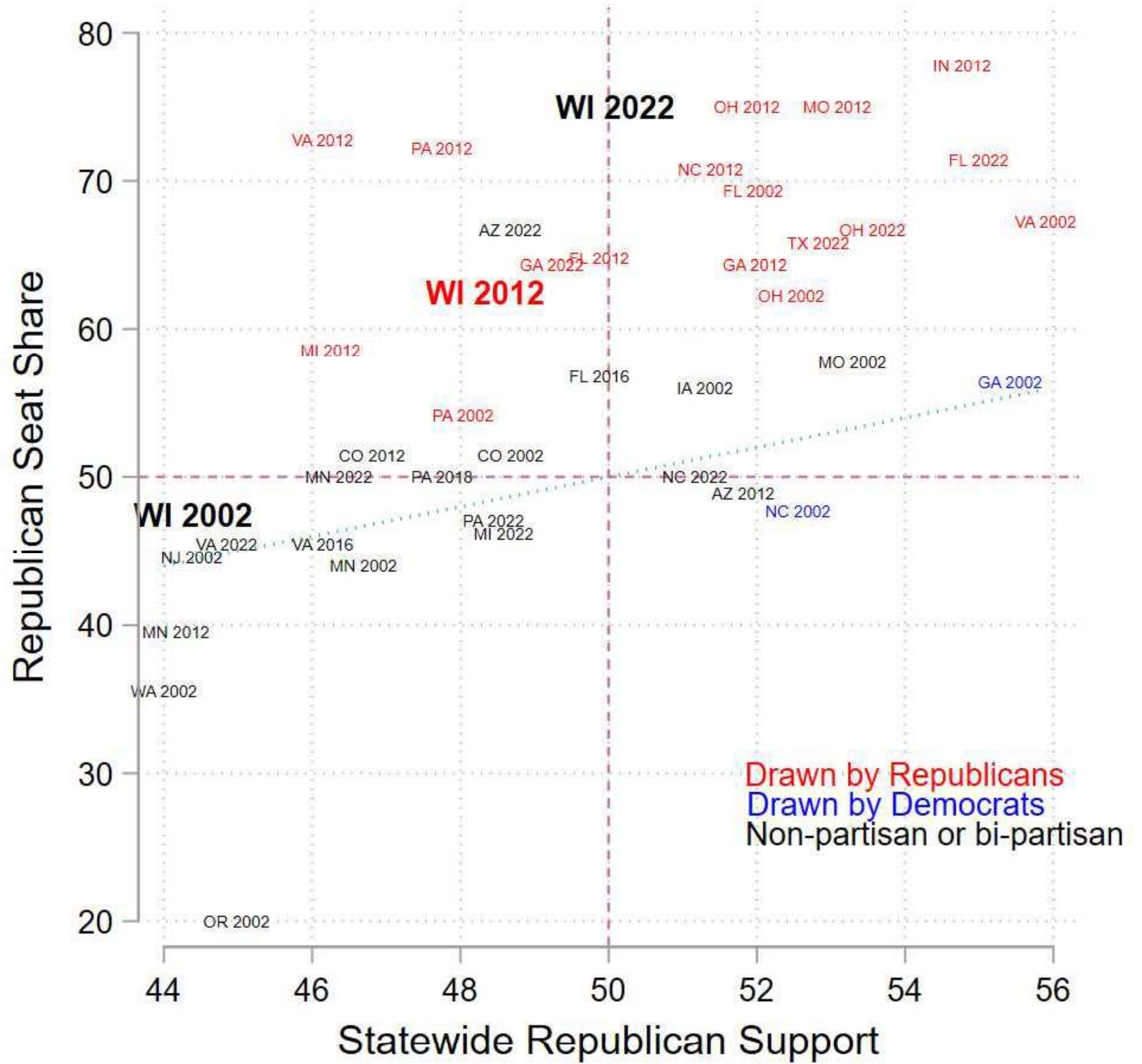
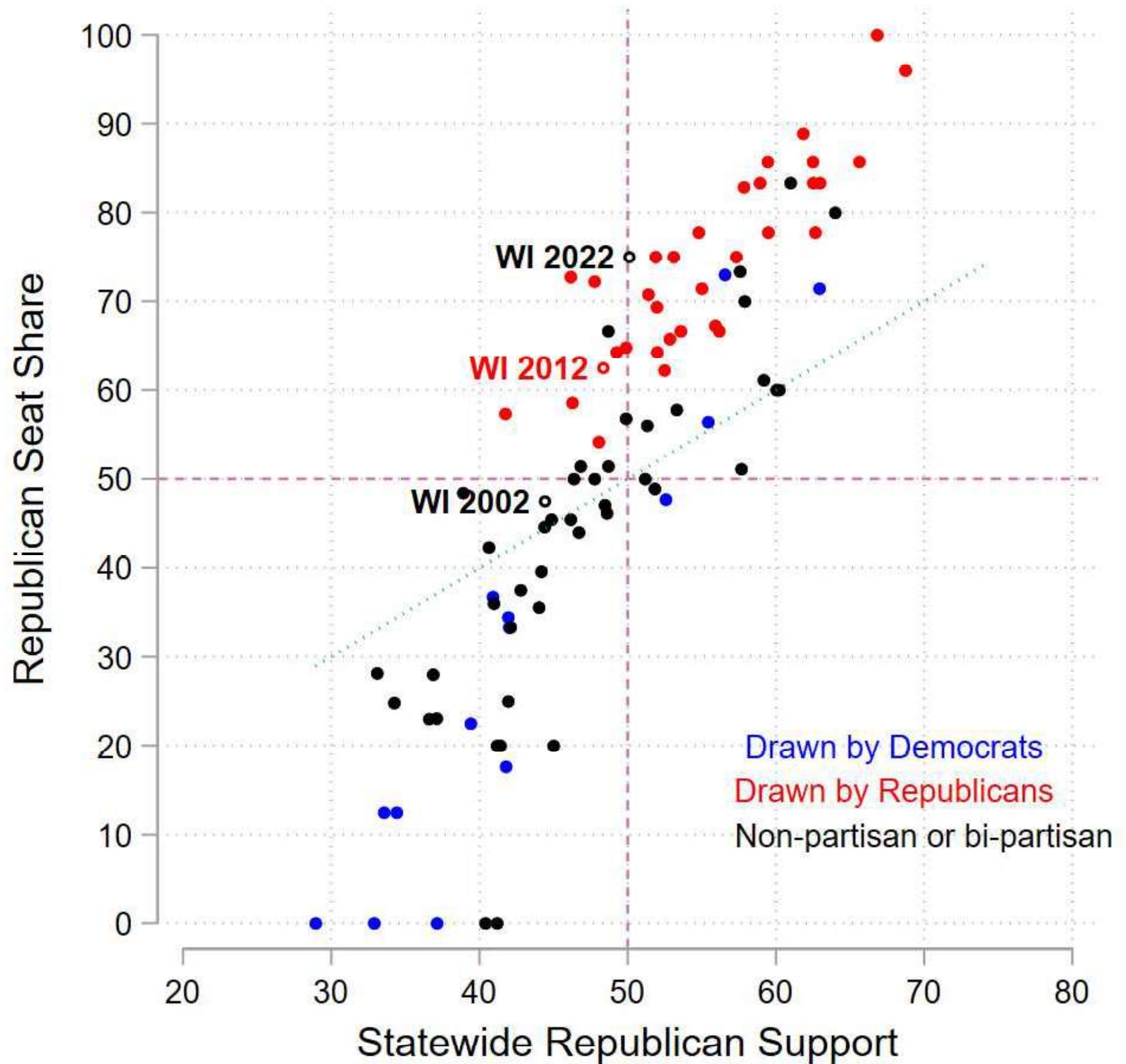


Figure 3: Vote Shares in Statewide Senate and Presidential Elections and Seat Shares in Congressional Elections, All States with More than Four Districts, 2002, 2012, 2022 Redistricting Cycles



20. The Wisconsin plan of 2002 was similar to many other court-ordered or bipartisan plans in other states in recent decades in that the Republican seat share hewed rather closely to the Republican vote share over the course of the decade. Figures 2 and 3 make it clear that the 2012 plan, however, was a substantial departure. Wisconsin's 2012 plan joined the small handful of congressional plans, including the invalidated 2012 plan in Pennsylvania, in which Republicans received large majorities in the state's congressional delegation while receiving less than half of statewide support. This disjuncture between statewide support and seats controlled grew larger with the implementation of the "least change" Wisconsin congressional map ordered by the Court in 2022.

21. Figures 2 and 3 make it clear that the extent to which the Wisconsin 2022 map favors one political party is extremely unusual for a court-ordered map.

22. The impact of a redistricting plan on the relative advantage or disadvantage it provides to the parties can also be assessed through other techniques. For example, Nicholas Stephanopoulos and Eric McGhee have popularized use of the "efficiency gap," which measures the difference in "wasted" votes between the two parties.[7] For Stephanopoulos and McGhee, "wasted votes" are all the votes received by a party in districts that it loses, combined with all the surplus votes beyond the winning threshold in districts it wins. They calculate the total wasted votes for each party in each district, tally them over all districts, and divide by the total number of votes cast. To see how this works, consider the examples in Table 2.

Table 2: Efficiency Gap Calculations in Hypothetical Examples

	Example 1: Symmetric Distribution				Example 2: Asymmetric Distribution			
District	Dem	Rep	Dem Wasted Votes	Rep Wasted Votes	Dem	Rep	Dem Wasted Votes	Rep Wasted Votes
1	2	8	2	2	3	7	3	1
2	3	7	3	1	4	6	4	0
3	3	7	3	1	4	6	4	0
4	4	6	4	0	4	6	4	0
5	4	6	4	0	4	6	4	0
6	5	5	0	0	4	6	4	0
7	5	5	0	0	4	6	4	0
8	5	5	0	0	4	6	4	0
9	5	5	0	0	4	6	4	0
10	5	5	0	0	5	5	0	0
11	6	4	0	4	5	5	0	0
12	6	4	0	4	5	5	0	0
13	7	3	1	3	7	3	1	0
14	7	3	1	3	9	1	3	1
15	8	2	2	2	9	1	3	1
Total	75	75	20	20	75	75	42	3

23. Table 2 includes columns to capture wasted votes for the Republicans and Democrats in a hypothetical state with ten voters in each of 15 districts. In the first example, voters are distributed across the districts symmetrically with regard to party affiliation: each party has one district with eight voters, two districts seven voters, two districts with six voters, and five

[7] See Nicholas Stephanopoulos and Eric McGhee. 2015. "Partisan Gerrymandering and the Efficiency Gap." *University of Chicago Law Review* 82,831.

districts with five voters. In the second example, Democratic voters are packed into a few districts that they win overwhelmingly, while Republicans are spread over many more districts that they win with small majorities.

24. The efficiency gap calculates the relative share of each party's wasted votes in these two scenarios. In the first example, the Republicans win the first district in a landslide, 8-2. They waste two votes (since they only needed six votes to win), and the Democrats waste two votes in their losing effort. At the bottom of the table, I sum the wasted votes for each party. The Democrats and Republicans each waste the same number of votes, 20. Thus, the efficiency gap is zero.

25. Next, consider the second example. The Republicans have a very efficient distribution of support such that they received six votes in several districts, while the Democrats wasted votes in a handful of districts that they won by large majorities. In this example, the Republicans waste only three votes while the Democrats waste 42. Thus, there is an efficiency gap of 39, which amounts to 26 percent of all votes cast.

26. Let us now apply this approach to the 2022 Congressional Plan in Wisconsin. Before doing so, we must deal with the fact that two of the districts, 6 and 8, were uncontested, and as a result, a simple calculation of wasted and surplus votes makes little sense. A common solution is to *impute*, using the available data, what the election results would have been if they had been contested. I have collected district-level data on the results of all congressional elections in Wisconsin since 1972, as well as data on whether an incumbent was running, and from which party, and crucially, the results of the most recent presidential election, aggregated to the level of congressional districts. Using data from all the *contested* elections, I estimate a regression model in which the dependent variable is the Democratic share of the two-party vote for congressional candidates, and the independent variables are incumbency (0 if no incumbent is running, 1 if a Democratic incumbent is running, and -1 if a Republican incumbent is running), the Democratic share of the two-party presidential vote in the district, and the Democratic share of the two-party congressional vote in the previous contested election.[8] The model includes fixed effects for years, which captures the effect of year-to-year fluctuations in overall party support. I then take the predictions from this model for the two uncontested districts in Wisconsin in 2022 and treat these as the most likely election results under a hypothetical scenario in which both districts were contested. The estimate for District 6 is a two-party Democratic vote share of 38 percent, and for District 8 it is around 36 percent.

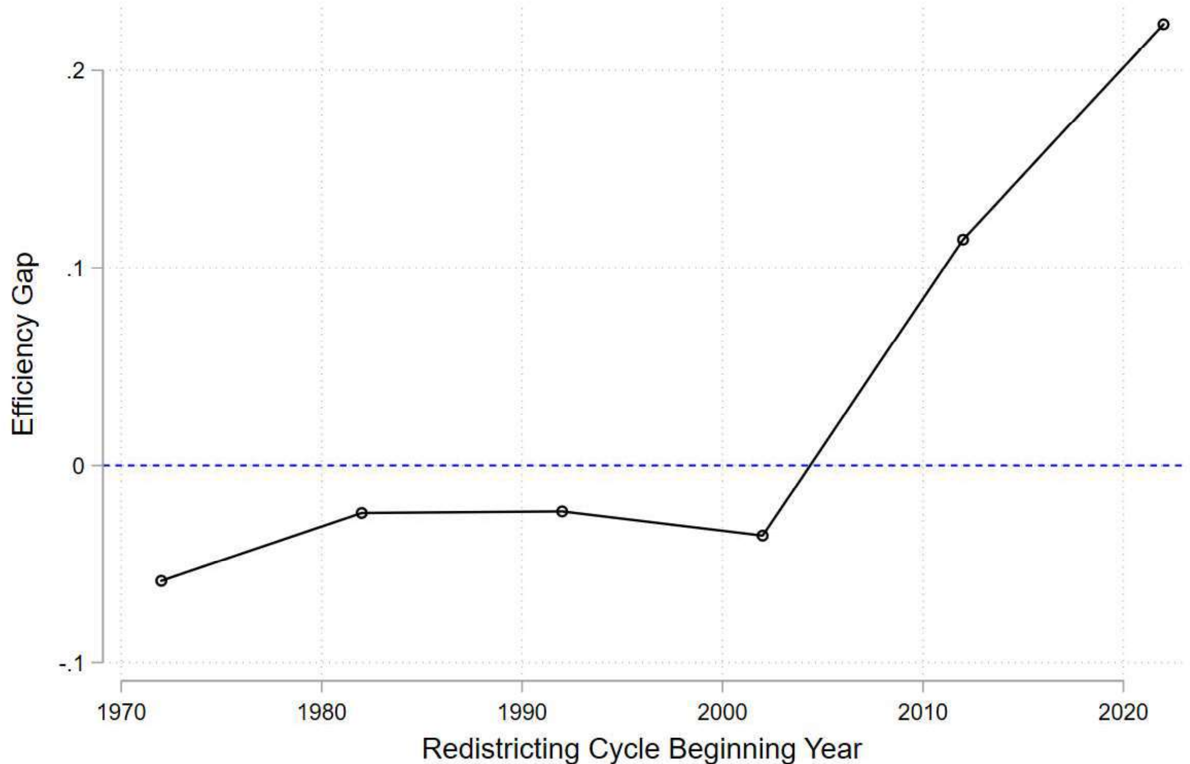
27. The efficiency gap associated with the 2022 Plan is quite large—22.3 percent—indicating that Republicans' votes are distributed across districts with far greater efficiency than those of Democrats.

28. Figure 4 plots the average efficiency gap for each Wisconsin redistricting plan from 1972 to the present. Positive numbers indicate an advantage for Republicans, and negative numbers indicate an advantage for Democrats. Figure 4 indicates that support for Democrats was

[8] Note that the 2022 districts have only been used for a single election, so there is no strictly comparable "lagged" contested result to include. However, since a "least change" map was enacted, it is sensible to include the 2020 results as predictors in this model in order to get the most accurate possible estimate for 2022 in the uncontested seats.

very slightly more efficient than that of Republicans on average for the entire period from 1972 until the very consequential redistricting of 2012, when a large pro-Republican efficiency gap suddenly emerged, and then subsequently grew with the 2022 “least change” plan.

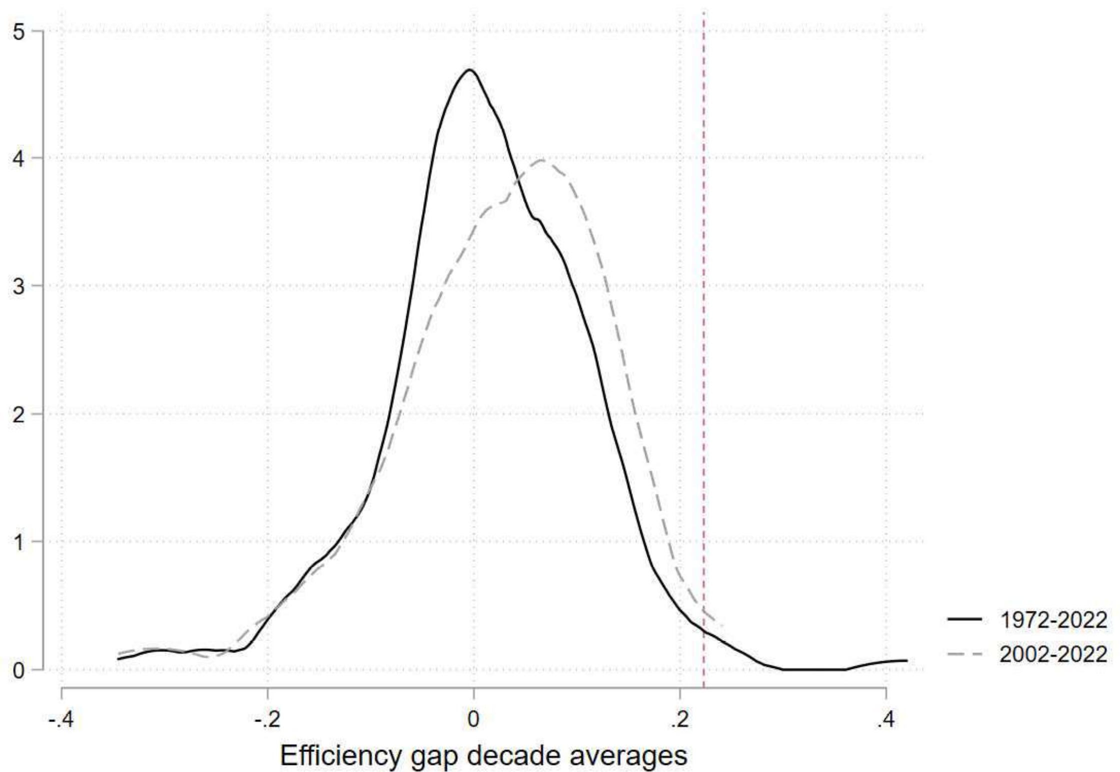
Figure 4: Average Efficiency Gap, Wisconsin Congressional Plans, 1972-2022



29. To put this in perspective, it is useful to engage in some simple cross-state comparisons. I have collected district-level data on congressional election outcomes from 1972 to 2022. In order to impute the results of a handful of uncontested seats, I have also collected data on incumbency and district-level presidential results for all states with more than four congressional districts.[9] I calculate the average efficiency gap for each decade in each state. Figure 5 provides a kernel density (smoothed histogram) that represents the distribution of those state-decade averages. The solid black line includes all plans for all decades, whereas the dashed gray line covers only the last three cycles (2002, 2012, and 2022). The dashed red vertical marker on the right represents the efficiency gap of the Wisconsin 2022 plan, indicating that it is a rather extreme outlier whether the comparison set is relatively recent plans or all plans since the 1970s.

[9] I impute uncontested seats using a model that includes incumbency, the district-level presidential result, and the mean of all *contested* races that take place in the district during the redistricting cycle. The model includes fixed effects for state and year.

Figure 5: Average Efficiency Gap, Congressional Redistricting Plans, 1972-2022



30. In addition to the efficiency gap, another approach to measuring partisan asymmetry is to calculate so-called partisan bias.[10] In majoritarian election systems, it is common for a majority party to win more than a proportional share of seats (that is, a party that wins 55 percent of the statewide vote may receive 60 percent of the statewide seats). This is commonly known as the "winner's bonus." The presence of an observed winner's bonus does not inherently render a map unfair if the bonus is *symmetrical*—this is, if one party wins 60 percent of the seats when it garners 55 percent of the vote, then the opposing party should *also* win 60 percent of the seats when *it* garners 55 percent of the vote.

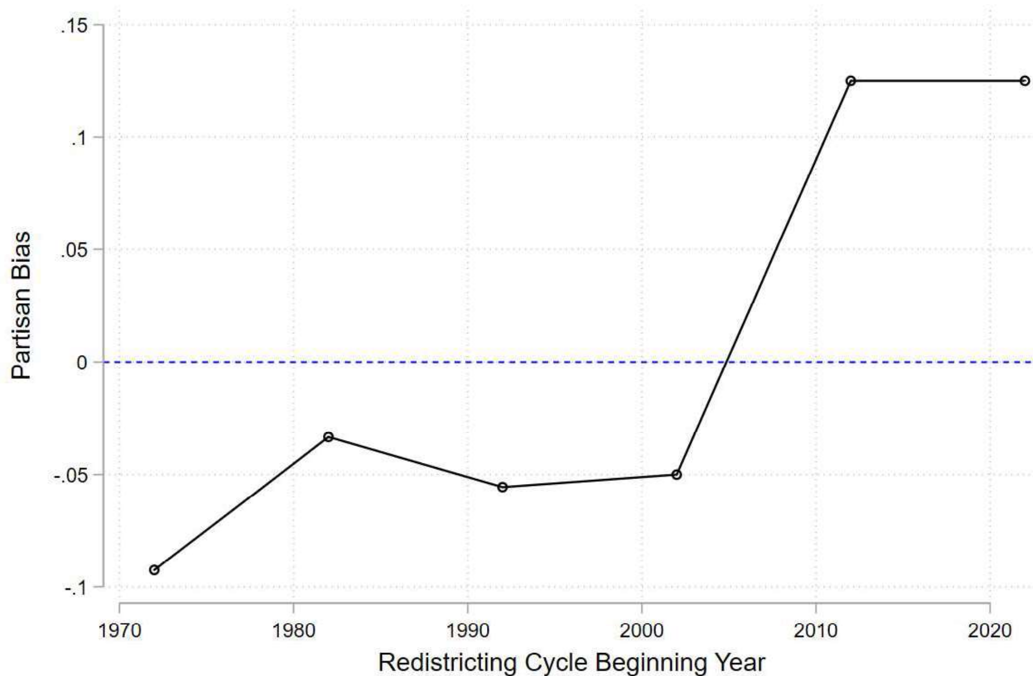
31. From the observed distribution of district-level election results, one can simulate the relationship between votes and seats under hypothetical vote shares other than the one observed. Above all, it is useful to examine the hypothetical of a tied election: With 50 percent of

[10] See Edward Tufte. 1973. "The Relationship Between Seats and Votes in Two-Party Systems," *American Political Science Review* 67: pages 540-554; Bernard Grofman. 1983. "Measures of Bias and Proportionality in Seats-Votes Relationships," *Political Methodology* 9: pages 295-327; Gary King and R. Browning .1987. "Democratic Representation and Partisan Bias in Congressional Elections," *American Political Science Review* 81: pages 1251-1273; Andrew Gelman and Gary King. 1994. "A Unified Method of Evaluation Electoral Systems and Redistricting Plans," *American Journal of Political Science* 38, pages 514-544; and Simon Jackman. 1994. "Measuring Electoral Bias: Australia 1949-1993," *British Journal of Political Science* 24: pages 319-357.

the vote, can each party expect 50 percent of the seats? Or can one party expect a larger seat share due to its superior efficiency of support across districts? The difference between 50 percent and the expected seat share in a hypothetical tied election is known as "partisan bias."

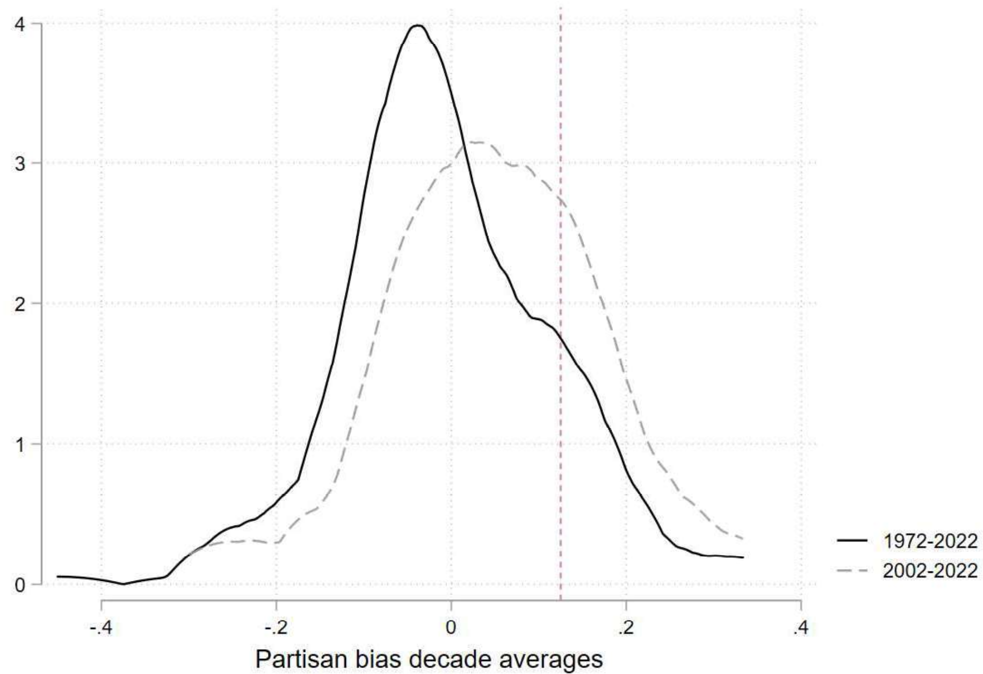
32. I calculate the partisan bias for the Wisconsin 2022 redistricting plan at 12.5 percent in favor of Republicans. Again, it is useful to examine decade averages in Wisconsin since the 1970s, which are displayed in Figure 6. Once again, positive numbers indicate pro-Republican bias, and negative numbers indicate pro-Democratic bias. As with the efficiency gap, there was a small pro-Democratic bias on average from the 1970s until the 2012 round of redistricting, when a large pro-Republican bias emerged and then stayed in place with the 2022 round of redistricting.

Figure 6: Average Partisan Bias, Wisconsin Congressional Plans, 1972-2022



33. Again, we can contrast the partisan bias associated with the Wisconsin 2022 districts with all plans in states with more than four districts since 1972, as well as more recent plans only. Figure 7 shows that the pro-Republican partisan bias associated with the most recent Wisconsin plan is also relatively high compared with both comparison sets.

Figure 7: Average Partisan Bias, Congressional Redistricting Plans, 1972-2022

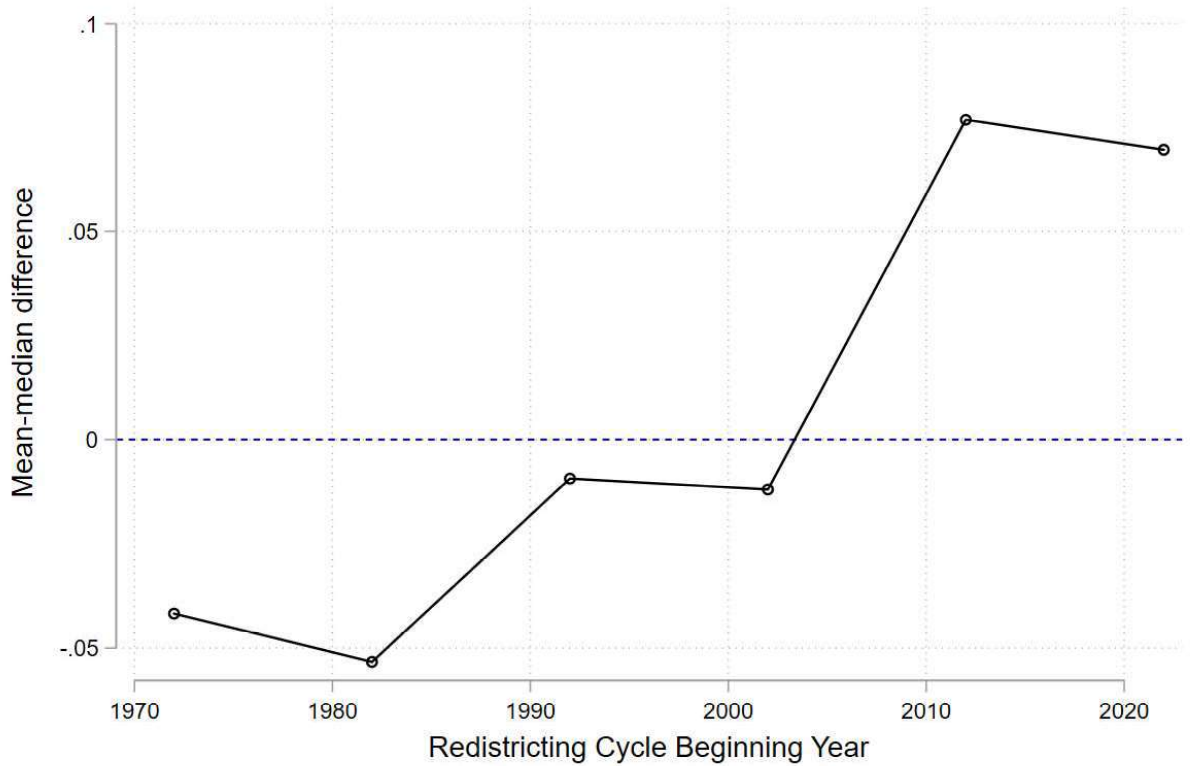


34. Another simple approach to assessing partisan fairness is to simply calculate the mean Democratic (or Republican) share of the two-party vote across all districts and contrast it with the median. When a party has a relatively inefficient distribution of support across districts in a competitive state, it will often find that its vote share is substantially higher in the average (mean) district than in the median district, due to the fact that its support is inefficiently "packed" in the districts where it wins majorities. Accordingly, we can calculate the difference in vote shares between the mean and median district. In the hypothetical example in Table 2 above, in the symmetric case on the left, the median and mean are both 50 percent, and the mean-median difference is 0. In the asymmetric case on the right, the mean Democratic vote share is 50 percent, but in the median district, it is only 40 percent, so that the mean-median difference is 10 percent.

35. For the 2022 plan in Wisconsin, this difference was around 7 percent.

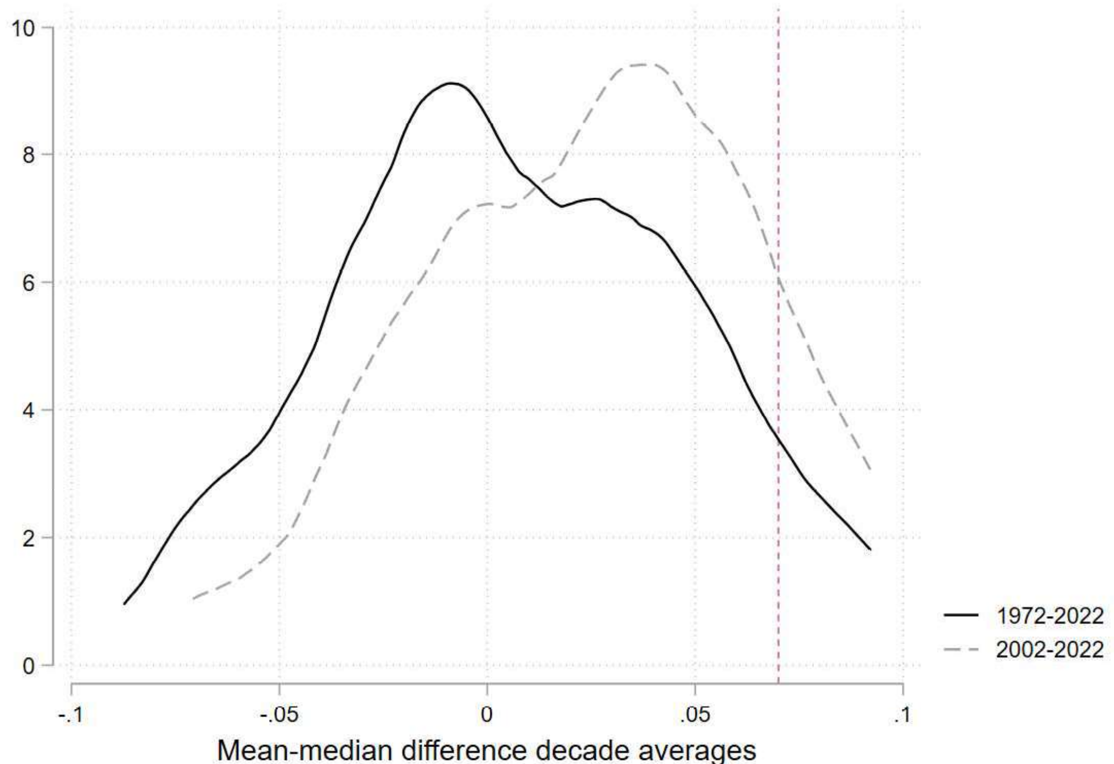
36. Figure 8 displays the evolution of this indicator over time, again with positive numbers indicating pro-Republican advantage, and negative numbers indicating pro-Democratic advantage. Again, a large pro-Republican advantage emerged with the 2012 round of redistricting and then stabilized in the 2022 round.

Figure 8: Average Mean-Median Difference, Wisconsin Congressional Plans, 1972-2022



37. Figure 9 places Wisconsin's 2022 plan in comparative perspective. Whether the comparison set is the entire period since 1972 or the period since 2002, on this metric, Wisconsin's skew is extreme relative to other states.

Figure 9: Average Mean-Median Difference, Congressional Redistricting Plans, 1972-2022



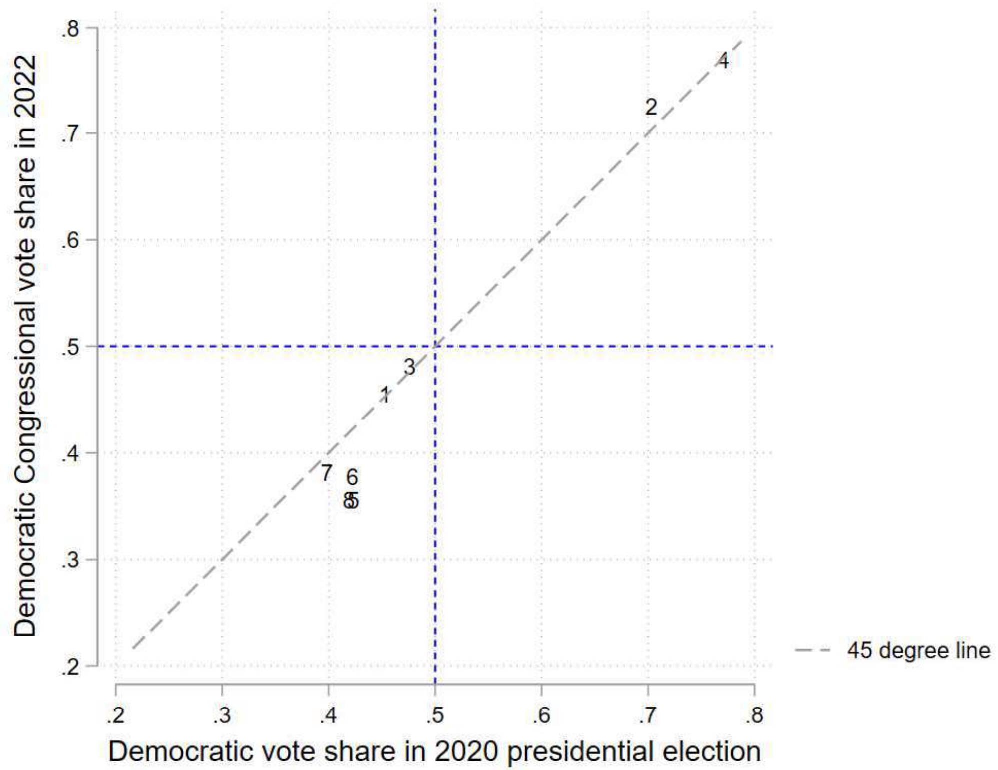
38. In sum, whether we pursue 1) a simple comparison of the anticipated seat share with the statewide vote share, 2) a measure of the efficiency of support across districts, 3) partisan bias, or 4) the mean-median difference, it is clear that Wisconsin's 2022 congressional redistricting plan provides a very substantial benefit to the Republican Party

V. *EX ANTE* PARTISAN FAIRNESS OF THE 2022 PLAN

39. The following analysis examines what could have been anticipated about the partisan fairness of the court-adopted congressional plan *before* it was implemented.

40. A common practice when making educated guesses about the partisan impact of a proposed redistricting plan in a way that facilitates over-time and cross-state comparisons is to aggregate precinct-level results of the most recent presidential election to the level of the proposed districts and use either these raw results—or predictions from statistical models driven by these results—to calculate measures of partisan fairness. In this case, the correlation between the district-level presidential election results of 2020 and the congressional results of 2022 was extremely high. Figure 10 plots the Democratic share of the two-party vote in the 2022 congressional election (using imputed values for districts 6 and 8) on the horizontal axis, and the 2020 presidential vote on the horizontal axis.

Figure 10: Correlation Between 2022 Congressional and 2020 Presidential Elections, Wisconsin Enacted Congressional Districts



41. In Figure 10, we see that most of the districts are very close to the 45-degree line, indicating that the distribution of support for the candidates of the two parties across districts was virtually identical in the congressional and presidential election. Accordingly, if one had used presidential votes to predict congressional elections, or simply used the raw presidential data to calculate partisan fairness metrics, one would have obtained partisan fairness indicators very similar to those presented above.

42. I have calculated the same partisan fairness metrics using raw 2020 presidential election results at the level of congressional districts, and they are presented in the second column of Table 3.

43. The efficiency gap is even larger using presidential data (26.7 percent rather than 22.3 percent). The measure of electoral bias jumps from 12.5 percent to 25 percent using the presidential data.[11] The mean-median difference is quite similar whether one uses congressional or presidential data (7 percent compared to 6 percent).

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[11] This is because, when using congressional election results with imputed values for the uncontested districts, the total number of statewide votes for Republican candidates is slightly

Table 3: Partisan Fairness Metrics Using Alternative Data Sources

	2022 Congressional Election Results	2020 Presidential Data
Efficiency Gap	0.223	0.267
Partisan Bias	0.125	0.25
Mean-median difference	0.07	0.06

VI. CONCLUSIONS

44. In conclusion, by generating only two extremely Democratic seats out of eight in a very hotly contested state with a slim Democratic majority, Wisconsin's 2022 court-adopted congressional plan is extremely favorable to the Republican Party. This can be appreciated using several partisan fairness metrics, whether one uses *ex post* data on the outcome of the 2022 congressional election, or *ex ante* data from presidential election results that were available prior to the plan's enactment. This extreme advantage for Republicans did not exist prior to the 2012 round of redistricting. It emerged thereafter, and was bolstered with the enactment of the 2022 "least change" plan.

larger than for Democratic candidates, so that in the generation of a hypothetical tied election, one swings just enough votes towards the Democrats in District 3 to classify it as a Democratic victory—giving the Democrats three of eight seats in this hypothetical tied election. This does not happen when using presidential data, where the Democrats had a slim statewide majority, and the generation of a hypothetical tied election involves shifting a handful of votes toward the Republicans. In this case, with 50 percent of the statewide votes, there would be only two Democratic districts (25 percent).

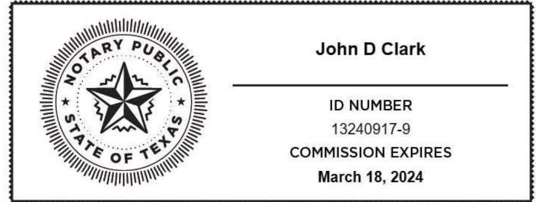
Jonathan Rodden

In the state of Texas, county of Tarrant appeared, Jonathan Rodden:

Sworn to before me this 16th day of January 2024.

Notary Public, State of Texas

Notary Public



Notarized online using audio-video communication

My commission expires ______________________________