
No. 2021AP1450-OA

In the Supreme Court of Wisconsin

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS, *and* RONALD ZAHN,
PETITIONERS,

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

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, IN HER
OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS
COMMISSION, JULIE GLANCEY, IN HER OFFICIAL CAPACITY AS A MEMBER OF
THE WISCONSIN ELECTIONS COMMISSION, ANN JACOBS, IN HER OFFICIAL
CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION,
DEAN KNUDSON, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE
WISCONSIN ELECTIONS COMMISSION, ROBERT SPINDELL, JR., IN HIS
OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS
COMMISSION, *and* MARK THOMSEN, IN HIS OFFICIAL CAPACITY AS A
MEMBER OF THE WISCONSIN ELECTIONS COMMISSION,
RESPONDENTS,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, IN HIS
OFFICIAL CAPACITY, *and* JANET BEWLEY, SENATE DEMOCRATIC
MINORITY LEADER, ON BEHALF OF THE SENATE DEMOCRATIC CAUCUS,
INTERVENORS-RESPONDENTS.

**REPLY BRIEF OF THE CONGRESSMEN IN SUPPORT OF THEIR
PROPOSED REMEDIAL MAP**

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INTRODUCTION

When putting before this Court their Proposed Remedial Map, the Congressmen appreciated that there are multiple ways that a map-drawer could modify Wisconsin's current congressional districts to reach population equality, under the "least changes" approach articulated in *Johnson v. Wisconsin Elections Commission*, 2021 WI 87, ___ Wis. 2d ___, ___ N.W.2d ___. The Congressmen thus explained, in specific detail, each of the limited number of proposed changes that they propose to bring Wisconsin's Congressional districts in line with the constitutional one-person/one-vote rule. Br. Of The Congressmen Supporting Their Proposed Congressional District Map at 31–44, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 15, 2021) ("Congressmen Br."). The Congressmen grounded each of these explanations in Wisconsin's political geography, through the expert report from Mr. Tom Schreibel, who has deep experience with our State's political geography and redistricting history. Aff. of Tom Schreibel Ex. A at 5–7, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 15, 2021).

In their Response Briefs, the Governor, the Citizen Mathematicians And Scientists ("Citizen Mathematicians"), and the Hunter Petitioners did not even attempt to grapple with or rebut the Congressmen's detailed explanations of each of the Congressmen's proposed changes, other than offering an abbreviated critique of the proposed line between

Districts 3 and 7. And, notably, these parties also offered no argument or expert testimony to rebut any of Mr. Schreiber's Wisconsin-specific explanations for any of the limited changes in the Congressmen's proposed map, including as to the line between Districts 3 and 7.

Given these parties' decision not to grapple with the Congressmen's explanation of their proposed changes, as well as these parties' complete failure even to put forward *any* Wisconsin-grounded explanation for the changes in their own proposed maps, Resp. Br. Of Congressmen Regarding Proposed Congressional District Maps at 7–19, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 30, 2021) ("Congressmen Resp.Br."), the task for this Court is straightforward as it relates to the congressional districts. If this Court is convinced by the Congressmen's unrebutted, expert-based explanation of why their Proposed Remedial Map most sensibly achieves perfect population equality under the *Johnson* least-change mandate, this Court should adopt that map. If, however, this Court is convinced by the critique of the line between Districts 3 and 7 in the Congressmen's Proposed Remedial Map, or otherwise wants to adopt a map that moves fewer people, this Court should modify that line in Congressmen's Proposed Remedial Map in the manner that the Congressmen explained in their filings on December 30.

ARGUMENT

I. The Other Parties Raise No Credible Critiques Against The Congressmen's Proposed Remedial Map

The Congressmen put before this Court a proposed least-changes map that makes only targeted adjustments to Wisconsin's congressional districts, which is the same map that the Legislature recently adopted, *see* 2021 S.B. 622, and the Governor vetoed, Wis. Senate J. at 617, 105th Reg. Sess. (Nov. 18, 2021). The Congressmen explained in their Opening Brief and attached expert report why this map complies with all constitutional and statutory requirements and why it modifies Wisconsin's current congressional districts in a sensible, least-changes manner, consistent with Wisconsin's political geography. Congressmen Br.28–44.

Only the Governor, the Citizen Mathematicians, and the Hunter Petitioners criticize the Congressmen's Proposed Remedial Map, and their critiques are limited and unconvincing. As a threshold matter, these parties either concede, *see* Gov. Tony Evers's Resp. Br. On Proposed Maps at 22–26, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 30, 2021) ("Gov.Resp.Br."); Hunter Int.-Pet'rs Resp. Br. In Support Of Proposed Maps at 9–10, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 30, 2021) ("Hunter Resp.Br."), or admit by silence, *see Parsons v. Assoc. Banc-Corp*, 2017 WI 37, ¶ 39 n.8, 374 Wis. 2d 513, 893 N.W.2d 212; *see generally* Citizen Math. Resp.Br.1–20, that the Congressmen's proposal complies with

all constitutional and statutory requirements. These parties also fail completely to grapple with *any* of the Congressmen’s specific, Wisconsin-grounded proposed changes, thereby forfeiting any response to these explanations. *See Parsons*, 2017 WI 37, ¶ 39 n.8; *see generally* Gov.Resp.Br.6–26; Hunter Resp.Br.9–22; Citizen Math. Resp.Br.1–20. The few critiques that these parties offer cannot withstand scrutiny.

The Governor. The Governor rests his critique largely upon the fact that his proposal moves roughly 1% fewer people overall than does the Congressmen’s proposal. Gov.Resp.Br.22–23.¹ As the Congressmen read *Johnson*, including Justice Hagedorn’s concurrence, if a proposed map: (1) moves a limited number of persons to achieve population equality, as *only* the Congressmen’s Proposed Remedial Map (and its modified version, *see infra* Part II) and the Governor’s proposed map do, *see* Letter Resp. Br. of the Johnson Petitioners at 10–11, *Johnson v. Wis. Elections Comm’n*, No.2021AP1450-OA (Wis. Dec. 30, 2021); and (2) “compl[ies] with all relevant legal requirements,” as the Congressmen’s Proposed Remedial Map (and its modified version, *see infra* Part II) does, Congressmen Br.28–32, and the Governor’s

¹ The Governor also makes a brief reference to the line between Districts 3 and 7 in the Congressmen’s proposed map, Gov.Resp.Br.25, which point the Hunter Petitioners develop more specifically and which the Congressmen address below, *see infra* pp.10–11.

proposed map would, with just a minor adjustment,² then this Court will decide as between any such maps based upon the parties' explanation of "how their maps are the most consistent with existing boundaries," including "other, traditional redistricting criteria" that "may prove helpful." *Johnson*, 2021 WI 87, ¶ 87 (Hagedorn, J., concurring); *accord id.* ¶¶ 72, 75 (majority op.). Given that the Governor has not attempted to offer *any* explanation for the many bizarre changes in his proposed map, while the Congressmen offered a detailed, unrebutted, Wisconsin-grounded explanation for each of the changes in their proposal, Congressmen Br.31–44, and explained in detail why the Governor's proposed changes do not make sense, Congressmen Resp.Br.8–12, the Congressmen's proposal is far preferable under *Johnson*.

Having said that, if this Court wants to adopt the map that both complies with all legal requirements and moves fewer people, then the modified version of the Congressmen's Proposed Remedial Map is clearly preferable to the Governor's proposal, given that the modified version of the

² The Citizen Mathematicians correctly point out that the Governor's and the Hunter Petitioners' proposed congressional maps fail to achieve perfect population equality because they do not reduce the difference between the most and least populous districts to a single person, Resp. Br. Of Citizen Mathematicians at 6, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 30, 2021) ("Citizen Math. Resp.Br."), which violates the one-person/one-vote requirement applicable to congressional redistricting, *see Johnson*, 2021 WI 87, ¶ 25.

Congressmen's proposal moves almost 2% fewer people than the Governor's proposed map. *See infra* Part II.

The Citizen Mathematicians. The Citizens Mathematicians devote only a single, conclusory paragraph to criticizing Congressmen's Proposed Remedial Map. Citizen Math. Resp.Br.15. That paragraph merely echoes some of the meritless arguments that the Governor and the Hunter Petitioners make, *id.*, while not even attempting to address the Congressmen's detailed, expert-grounded explanation for their proposed changes, Congressmen Br.31–44.

The Hunter Petitioners. The Hunter Petitioners, in turn, offer three critiques of the Congressmen's Proposed Remedial Map, but each critique lacks merit.

First, the Hunter Petitioners criticize the Congressmen's Proposed Remedial Map for moving more landmass than other proposed maps, seeking without citation to redefine "least change" as placing equal weight on the movement of persons and of land. Hunter Resp.Br.10. But this Court is adopting a remedial map since Wisconsin's congressional districts are no longer equally populous, because, under the one-person/one-vote principle, "[l]egislators represent people, not trees or acres." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). The Hunter Petitioners do not cite any case, or any other authority, even suggesting that the number of "trees or acres" moved, *id.*, has any relevance to the remedial, least-changes inquiry, let alone equal relevance to the number of people moved, *see Johnson*, 2021

WI 87, ¶¶ 64, 81; *id.* ¶ 82 (Hagedorn, J., concurring). The least-change approach, of course, means “retaining *previous occupants* in new legislative districts,” *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *1, *3 (E.D. Wis. May 30, 2002) (per curiam) (emphasis added), which also “minimizes voter confusion,” *Hippert v. Ritchie*, 813 N.W.2d 374, 381 (Minn. 2012); trees and acres experience no judicially-cognizable confusion from being moved to new districts. The Governor appears to agree that the least-changes focus should be on the number of people moved. Gov.Resp.Br.7–8.

And while the movement of “trees or acres,” *Reynolds*, 377 U.S. at 562, has no legal relevance, the Congressmen note, for completeness, that the modified version of their proposed map would retain 96.7% of the current congressional districts’ landmass, *Aff. of Kevin M. LeRoy, Ex. A*, at 2.

Second, the Hunter Petitioners criticize the Congressmen’s Proposed Remedial Map for its number of county, municipal, and precinct splits. Hunter Resp.Br.10–11. As a threshold matter, to the extent that this Court considers this factor, county splits are the most important Wisconsin units to look to, including because of their longstanding role of governing in this State. *See State ex rel. Att’y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1892); *Jackson Cty. v. Dep’t of Nat. Res.*, 2006 WI 96, ¶ 31, 293 Wis. 2d 497, 717 N.W.2d 713. Further, the Congressmen, unlike the other parties, offered Wisconsin-specific

explanations for their proposed lines, so this Court can evaluate for itself whether any particular line and attendant split makes sense under *Johnson's* least-change approach, in light of Wisconsin's political geography. These points aside, the Congressmen's Proposed Remedial Map fares comparably to the other parties' submissions with respect to political-subdivision splits, especially when taking into proper account the number of people each map moves.

With regard to the total number of county splits, the Congressmen's Proposed Remedial Map splits 10 counties, the Hunter Petitioners' proposed map splits 11, and the Governor's proposed map splits 12. Second Aff. of Tom Schreibel Ex. A ("Schreibel Resp. Expert Rep.") at Ex. 2 at 1, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 30, 2021). Although the Citizen Mathematician's proposed map splits only 7 counties, Schreibel Resp. Expert Rep. Ex. 2 at 1, it moves significantly more people than any other proposed map, while also imposing numerous changes without offering any explanation, making the Congressmen's Proposed Remedial Map far preferable, Congressmen Resp.Br.16–20. Similarly, while the modified version of the Congressmen's Proposed Remedial Map splits 14 counties, Schreibel Resp. Expert Rep.22, that map moves significantly fewer people than do the other proposed maps, Congressmen Resp.Br.22–23.

As to the total number of municipal splits, the Hunter Petitioners' expert offers figures at odds with those presented

by other experts and nonpartisan sources, which all appear to conflict with each other, making this an unhelpful metric, as the Congressmen and their expert previously explained. Congressmen Resp.Br.20 n.2; Schreibel Resp. Expert Rep.23 n.*. While the Hunter Petitioners' expert claims that the Congressmen's proposed map splits 36 municipalities and the Governor's proposal splits 27 municipalities, Supp'l Rep. of Dr. Stephen Ansolabehere In Supp. Of Hunter Int.-Pet'rs at 12 & App'x I at Table 1, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 30, 2021) ("Ansolabehere Supp'l Expert Rep."); Hunter Resp.Br.11, the nonpartisan Legislative Reference Bureau concluded that the Congressmen's proposal splits only 16 municipalities, while the Governor's splits 25. Schreibel Resp. Expert Rep. Ex. 2 at 1.³ The Governor's expert, in turn, estimates that his proposal splits 47 municipalities, Resp. Rep. of Jeanne Clelland In Support Of Gov. Evers's Proposed District Plans at 16–17, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 30, 2021), close to the number that the Hunter Petitioners' expert estimates for the Congressmen's Proposed Remedial Map, Ansolabehere Supp'l Expert Rep.12 & App'x I at Table 1; Hunter Resp.Br.11. Given these considerations, the number of municipal splits

³ The Legislative Reference Bureau concluded that the modified version of the Congressmen's Proposed Remedial Map splits 22 municipalities. *See* Schreibel Resp. Expert Rep. Ex. 2 at 1.

cannot possibly justify adopting a map that moves additional people (as does every proposed map other than the Congressmen's and the Governor's), or one that makes numerous changes without the submitting party offering any explanation for those changes (as does every proposed map other than the Congressmen's).

Finally, as to precinct splits, the Hunter Petitioners do not explain why those should be given any particular weight. *See generally* Hunter Resp.Br.6–12. The Hunter Petitioners do not cite any case or authority that gives any weight to the number of precincts that a map split in drawing congressional districts, nor do they even attempt to explain why they believes this to be a “traditional redistricting criteria” that “may prove helpful,” *Johnson*, 2021 WI 87, ¶ 87 (Hagedorn, J., concurring), let alone so helpful and important as to justify adopting a map that moves more people or one that makes numerous unexplained and inexplicable changes.

Third, the Hunter Petitioners—having offered no explanation whatsoever for the many unnecessary and bizarre changes in their own map, which almost moves more people than does the Congressmen's proposal—remarkably attack the Congressmen's proposed changes to the line between Districts 3 and 7 on the basis that the Congressmen's proposal moves more people in this particular part of the State. Hunter Resp.Br. 11–12. Yet, as the Congressmen explained, this proposal is sensible and consistent with *Johnson's* “least-change” approach. After the 2020 Census,

District 2 was significantly overpopulated; thus, the Proposed Remedial Map logically moves a large portion of that overpopulation to the neighboring District 3. Congressmen Br.36–39. Then, to account for the overpopulation of District 3 resulting from that necessary adjustment, the Congressmen’s Proposed Remedial Map contracts District 3’s northernmost and easternmost extremities, including its long, narrow appendage into central Wisconsin. Congressmen Br.37–39. That latter adjustment eliminates four county splits by shifting Stevens Point—near the tip of District 3’s long, narrow appendage—to District 7. Congressmen Br.38–39. That shift makes sense given Wisconsin’s political geography because Stevens Point has far more in common with Wausau in District 7 than with Eau Claire or La Crosse in District 3. Congressmen Br.38–39. Given that none of the other parties have pointed out any fault whatsoever in those Wisconsin-grounded, expert-based explanations, these parties have forfeited any arguments to the contrary. *Parsons*, 2017 WI 37, ¶ 39 n.8.

* * *

The Congressmen thus respectfully submit that their Proposed Remedial Map—which is the only map with changes grounded in Wisconsin’s existing political geography, while also moving only a small number of people to new districts—best complies with this Court’s governing least-change standards in *Johnson*. 2021 WI 87, ¶¶ 64, 81; *id.* ¶¶ 82–83, 87 (Hagedorn, J., concurring). Nevertheless, if this Court is

convinced by the critique of the Congressmen's proposed line between Districts 3 and 7, or otherwise wants to adopt a map that moves fewer people, then this Court should adopt the modified version of the Congressmen's proposal.

II. If This Court Is Convinced By The Critique Of The Line Between Districts 3 And 7 In The Congressmen's Proposed Remedial Map, Or Otherwise Wants To Adopt A Map That Moves A Smaller Number Of People, This Court Should Simply Adopt The Modified Version Of The Congressmen's Proposed Remedial Map

If this Court agrees that the critique of the line between Districts 3 and 7 in the Congressmen's Proposed Remedial Map—notwithstanding the Congressmen's *unrebutted*, Wisconsin-grounded explanation for that line, *supra* pp.1–4—or otherwise wants to move fewer people, the Congressmen respectfully submit that the only viable alternative is to modify the Congressmen's Proposed Remedial Map in the manner that they explained in their Response Brief and accompanying Motion. *See* Congressmen Resp.Br.20–23; Mot. Of Congressmen To Submit Their Modified Version Of Their Proposed Remedial Congressional Map, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 30, 2021). This modified Proposed Remedial Map would move only 226,723 people, or 3.84% of the population, fewer than the changes of the other proposed maps. Schreiber Resp. Expert Rep.19; Congressmen Resp.Br.22–23. It would also make only those changes to the existing map that, as the Congressmen and their unrebutted expert report have

explained, make sense given Wisconsin's political geography (except for adopting a similar line between Districts 3 and 7 to that which the Governor, the Hunter Petitioners, and the Citizen Mathematicians propose). Congressmen Resp.Br.20–23; Schreiber Resp. Expert Rep.19–23. This modified map also complies with all constitutional and statutory requirements, for the same reasons as does the Congressmen's Proposed Remedial Map. Congressmen Resp.Br.22–23.

CONCLUSION

This Court should adopt the Congressmen's Proposed Remedial Map.

Dated: January 4, 2022.

Respectfully submitted,



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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, as well as to this Court's November 17, 2021 Order. The length of this Brief is 2,764 words.

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**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, excluding the appendix, if any, 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 opposing parties.

Dated: January 4, 2022.



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