STATE OF WISCONSIN

IN SUPREME COURT

Case 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 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.

ORIGINAL ACTION

GOVERNOR TONY EVERS'S
REPLY BRIEF IN SUPPORT OF PROPOSED MAPS

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This Court's decision was unequivocal: "least changes" governs unless a deviation is legally "necessary." *Johnson v. Wisconsin Elections Commission*, 2021AP1450-OA, Nov. 30, 2021, Opinion ¶ 81 (Bradley, R., J.); *id.* ¶¶ 85, 87 (Hagedorn, J., concurring). And only if maps are "equally compelling" as to "current district boundaries," would other considerations matter. *Id.* ¶ 83 (Hagedorn, J., concurring).

Nothing in the response briefs changes that the Governor's maps outperform on "least changes," and no party cites support for the Governor's maps violating a legal requirement. That should end this case with the Court adopting the Governor's proposals.

I. The Governor's state maps indisputably outperform on "least changes" and comply with the law.

A. The Governor's maps significantly outperform on "least changes."

The Governor's proposals are the best under the Court's mandate to apply "least changes" to "current district boundaries" unless legally "necessary" to do otherwise. Op. ¶ 81 (Bradley, R., J.); *id.* ¶¶ 83, 85, 87 (Hagedorn, J., concurring).

As the Governor's expert explained, the Legislature's Assembly and Senate maps moved many more people: in total, 93,778 more people. (Clelland Resp. Rep. 10.) Although some parties use different methodologies, it is striking that no party disagrees with that basic pattern: the Governor's maps perform significantly better by moving many fewer people. In fact, the Johnson petitioners, who support the Legislature, found that in total the Legislature's maps move 108,469 more

people. (Johnson Resp. Br. 4, 8.) Along similar lines, the Hunter petitioners' analysis shows that the Governor's maps perform significantly better not only on population retention but also far outperform the Legislature on geographical retention—preserving 90.1% to the Legislature's 86.9%. (Hunter Resp. Br. 15–16.)

There is no tie on the "least changes" measure, as the Johnson petitioners baldly assert. (Johnson Resp. Br. 5.) Rather, it is undisputed that the Governor's maps perform significantly better. Again, it is not a close call—the expert analyses found that the Legislature's proposals move about 100,000 more people. (Clelland Resp. Rep. 10; Johnson Resp. Br., Gimpel Rep. 5–6; Citizen Mathematicians Resp. Br, Deford Rep. 16, 19.) This is the very measure that the Legislature and Johnson petitioners conceded was key. (Legislature Opening Br., Bryan Rep. ¶ 62; Johnson Opening Br. 4.) To quote the Legislature's expert: a "proposed plan with high core retention scores is indicative of a plan that makes minimum changes to Wisconsin's existing districts, as required by this Court." (Legislature Opening Br., Bryan Rep. ¶ 62.)

Faced with this reality, the Legislature attempts to change the rules. It now asserts that the Court should ignore the big picture and just look at movement in one place: Milwaukee. (Legislature Resp. Br. 10–12.) Why? Because the Legislature moved fewer people there but not across the entire state. That is not a legal principle, much less a neutral one. There is no escaping that (1) the Governor's maps perform better overall and (2) on a district-by-district basis, those maps also move fewer people in the majority of districts. (Clelland Resp. Rep. 10–11.)

Looking at various other regions shows how much the Legislature changed boundaries unnecessarily, unmoored from malapportionment. For example, tens of thousands of people are moved unnecessarily in the areas west of Milwaukee, north of Milwaukee, in the region around the cities of Hudson and River Falls, and in the Fox River Valley. (BLOC Resp. Br. 26–38.)

Under this Court's stated neutral criteria, it is undisputed that the Governor's maps are most consistent with the existing maps. That is dispositive.

B. One-person-one-vote principles do not justify selecting the Legislature's state maps.

The Legislature and Johnson petitioners attempt to change the rules in another way. The Legislature now says the Court should instead use a different measure—lowest population deviation—as the decisive, neutral criteria. (Legislature Resp. Br. 9.) Unsurprisingly, the Legislature's map performs better on its newly proposed standard. This Court must reject that invitation, which changes the rules to suit the Legislature's facts. That is contrary to the Court's November 30th decision and would be anything but neutral.

In fact, the Legislature's new assertion has no legal basis. Courts apply a 2% de minimus rule for court-drawn map deviation. *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *2 (E.D. Wis. May 30, 2002). Restated, a plan "kept below 2%" is "constitutionally acceptable." *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 634 (E.D. Wis. 1982); *see also Essex v. Kobach*, 874 F. Supp. 2d 1069, 1082–83 (D. Kan. 2012) (collecting cases). No party cites authority to the contrary. Going further below 2% is not "necessary" to comply with federal law. The Governor's maps

comply with what is required, (Clelland Initial Rep. 7), and do not make unnecessary changes to go beyond what is required.

Similarly, the Legislature points to no support for its lower deviation having legal significance, or that deviation needs to be further justified where, as here, the Governor's proposal already is under 2%. (Legislature Resp. Br. 9.) The precedent says just the opposite. (Governor Resp. Br. 13–14.)[1] Further, even if justification were needed, it is supplied by "least changes," which this Court mandated must be followed unless otherwise legally "necessary." Op. ¶ 81 (Bradley, R., J.), ¶¶ 85, 87 (Hagedorn, J., concurring). The Governor's maps best conform to that mandate—they do what is legally necessary.

The Court must reject the Legislature's invitation to change the rules to suit its facts. Rather, it remains the case that the Governor's maps best satisfy the rules laid out in this Court's decision, and otherwise comply with the law.

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[1] This Court has ruled that Wisconsin's parallel provision is "consistent with" the federal one. Op. ¶ 33. Likewise, no party cites support for needing less than 2% deviation under Wisconsin law, which does not require perfect exactness. *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 726 (1892). Previous Wisconsin maps demonstrate this. *E.g.*, *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *7 (E.D. Wis. May 30, 2002) (maximum population deviation of 1.48%); *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 637 (E.D. Wis. 1982) (no district varied from "ideal norm by more than 0.87%," meaning the range of deviation likely was about double that figure).

C. The Governor's state proposals comply with the Voting Rights Act.

The Legislature has no true answer to the facts that the Governor both (1) better complied with "least changes" overall and (2) complies with the Voting Rights Act by creating seven majority-minority districts. The Legislature ignores the case law that forbids unnecessarily "packing" minority voters covered by the Act (which the Legislature does not dispute applies here). *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994). Rather, the Legislature engages in that packing. The Governor does not, and thus avoids creating "a small number of districts to minimize [minority voters'] influence in the districts next door." *Id.* (*See* Governor Resp. Br. 15–17.)

The Legislature asserts that the Governor's seven majority-minority districts should have higher concentrations of Black voters. However, as it stands, the seven districts are all over 50%, which complies with the Act. (Clelland Initial Rep. 11.) In fact, just a few weeks ago, the Legislature argued in its opening brief that inflating districts was to be *avoided*. To quote the Legislature: "there is no requirement that a district exceed 50% BVAP to comply with the Voting Rights Act; indeed, unnecessarily inflating a district to exceed 50% BVAP can itself violate the Fourteenth Amendment. *Cooper*, 137 S. Ct. at 1472." (Legislature Opening Br. 35 n.24.) The Legislature's new position that the Governor's districts should be even higher should be rejected as contrary to that concession and the law. (*E.g.*, Legislature Resp. Br. 31.)

As outlined in the submissions, Milwaukee's population covered by the Act indeed lends itself to drawing seven majority-minority districts. (Governor Resp. Br. 16–19; *see also* BLOC Resp. Br., App. 21 (calculating population vis-à-vis number of districts).) It thus "should" be done. *League of*

United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399, 495 (2006) (Roberts, C.J., concurring).

Notably, the Johnson petitioners, who support the Legislature, take the position that there should be six majority-minority Black districts. (Johnson Resp. Br. 8.) However, the Legislature's proposal contains only five. (Legislature Resp. Br. 23.) The Legislature's own chart demonstrates how problematic its districts are. Its proposed Assembly District 10 *eliminates* a majority-minority Black district from Act 43, changing the BVAP from 61.8% to 45.8%, and then unnecessarily packs an already-strong 61.9% District 11 into a very large 71.5% BVAP. (Legislature Resp. Br. 23 & Table 5.) That reduction in total majority-minority districts, while further packing a remaining one, is a red flag under the Act.

Lastly, it bears mentioning that the BLOC petitioners criticize one district in the Governor's map as insufficiently supportive of a Black vote. What it critiques is the Governor's adherence to "least changes": BLOC believes that existing District 10 should be changed to exclude Shorewood, whereas the Governor's District 10 continues to include it. (BLOC Resp. Br. 23.) The Voting Rights Act, however, does not *require* that change. Rather, BLOC points to one gubernatorial primary where a Black candidate, Mahlon Mitchell, would have received 41.2% of the vote under the Governor's proposed District 10, but would have received 46.3% under BLOC's proposal (but won a plurality of votes in both). (BLOC Resp. Br. 19, Resp. App. 8–10.) BLOC does not demonstrate that this difference matters—under both plans, Mitchell prevails over all other candidates and would also have received less than 50% of the vote under BLOC's plan—and does not support that Michell's performance is typical of a Black legislative candidate in the district. Mitchell received

only 16.4% of the statewide vote in that primary.[2] That his 16% statewide vote would increase to 41% in the Governor's district is actually impressive—it suggests that a local Assembly candidate supported by Black voters could garner majority support. None of this demonstrates that the Governor's map would not comply with the Act.

D. Other considerations do not change that the Governor's plans should be selected.

1. The Governor's Assembly plan is better on the only compactness measure that matters.

Wisconsin law has only one compactness requirement—for the Assembly—and the Legislature does not dispute that the Governor's Assembly map outperforms on it. By multiple measures (Polsby-Popper, Reock, cut edges), it not only complies with compactness, but does so better than the Legislature's map. (Clelland Resp. Rep. 18; *see also* Hunter Resp. Br. 18 (same).) Thus, even if there were a reason to reach criteria other than "least changes," this constitutional requirement would favor the Governor's proposal.

2. The splits topic points to no legal problem with the Governor's maps, but rather is consistent with "least changes."

As discussed in the Governor's filings, his proposed Assembly map has fewer splits than the existing map. (Clelland Resp. Rep. 17.) Having *fewer* splits cannot pose a

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[2] *Wisconsin Elections Commission Elections Results Report*, Wis. Elections Comm'n, https://elections.wi.gov/sites/elections.wi.gov/files/Percentage%20Results%20%288.14.18%29.pdf (last visited Jan. 4, 2022).

legal problem—no one claims that the existing maps' splits were illegal. To the contrary, the Legislature has maintained that the current maps are lawful but for malapportionment, and it repeats in its response brief that the prior plans were "lawful." (Legislature Resp. Br. 19 n. 10.) That should end the conversation on splits. Only if it were legally required to reduce splits further would it matter under this Court's "least changes" mandate. It is not required.

In fact, the "least changes" mandate itself produces, or retains, many splits. To put it in terms of towns in the Assembly map—which are the only type of municipality covered by the constitution, *see* Wis. Const. art. IV, § 4—dozens of the towns split in the Governor's map were also split in the 2011 map.[3] Thus, many splits are a *symptom* of "least changes," not a departure from it.

In contrast, the Legislature's discussion incorrectly asserts that municipal splits in the Governor's map are a sign that "least changes" was not followed. (Legislature Resp. Br. 15–17.) But the opposite is true—the number of splits track, and somewhat reduce, the existing number of splits. (Clelland Resp. Rep. 17, Table 8.)

In fact, the table the Legislature uses in its brief is fatally flawed. (Legislature Resp. Br. 15, Table 4.) That table uses figures from different reports that use *different* counting methods—for example, it says that Act 43 had 78 municipal splits to the Governor's 174. But the "174" comes from the Governor's report, which used a different counting method.

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[3] For example, those towns include Beloit, Burlington, Calumet, Dunkirk, East Troy, Grant, Harmony, Koshkonog, Madison, Meeme, Mukwonago, Somers, Trenton, Brookfield, Cottage Grove, Genesee, Grand Chute, Hartford, Hull, Ledgeview, Lisbon, Stettin, Union, Verona.

Using a uniform counting method (comparing apples-to-apples) reveals that Act 43 had 188 municipal splits, compared to 174 in the Governor's plan. (Clelland Initial Rep. 17.) That is, the Governor's number is consistent with, and somewhat reduces, the splits in the existing map, which is entirely consistent with "least changes." For example, while adhering to "least changes," the Governor has nonetheless reduced the number of town splits by about 10%.[4] (Clelland Resp. Rep. 17.)

Apart from this, the Johnson petitioners also discuss Senate splits, but there is no legal requirement related to the Senate. (Johnson Resp. Br. 9.) In any event, as with the Assembly splits, the Governor's proposal has fewer splits than the existing maps. (Clelland Resp. Rep. 17.) Improving on that map can pose no legal problem.

Lastly, without any explanation or legal citation, the Citizen Mathematicians assert that the Governor's maps split too many wards. (Citizens Resp. Br. 19.) They misunderstand how current Wisconsin law works: wards are *based on* the new maps. Wis. Stat. § 5.15(4)(a). This assertion points to no legal issue.

3. Incumbent pairings do not help the Legislature's cause.

The Legislature identified the same number of incumbent pairings in the Governor's maps as in its own proposals. (Legislature Resp. Br. 5–6.) Yet, oddly, the Legislature attacks the Governor's maps on this identical measure. Its attack is based on politics—the Legislature

[4] Further, the Governor anticipates that some of the remaining town splits may be further reduced via non-substantive corrections that he anticipates submitting in the coming days.

apparently dislikes that the maps pair particular legislators. (Legislature Resp. Br. 13–14.) That is irrelevant under this Court's order, which soundly rejected any consideration of partisanship (which the Legislature advocated for).[5] *See* Op. ¶¶ 39–52. The Legislature cannot reinsert political considerations when it finds it convenient. Rather, viewed objectively, the maps perform equally well on incumbent pairings.

II. There is no dispute that the Governor's congressional map best satisfies this Court's "least changes" mandate.

It also is undisputed that the Governor's congressional map outperforms on the key "least changes" mandate. The Johnson petitioners' expert, in addition to the Governor's expert, identified that roughly 60,000 more people are moved in the Congressmen's proposal than the Governor's. (Johnson Rep. Br. 10; Clelland Initial Rep. 8.) That difference (roughly 18% more people moved) cannot be ignored under this Court's mandate. Those findings also are supported by other parties—for example, the Hunter petitioners found that the Governor's congressional map outperformed not only on population retention and but considerably outperformed the Congressmen on geographical retention—98.5% to 90.6%. (Hunter Resp. Br. 10, Table 1.)

And as the Johnson petitioners state, there is no other legal reason to differentiate between these maps because the Governor's proposal violates no legal principle, but rather

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[5] The Legislature contends that Senate District 8 is "comically redrawn," (Legislature Resp. Br. 13–14), but the existing district already spans from Lake Michigan through Waukesha County, and the pairing is created by merely extending the district slightly southward from its existing border.

complies with one-person-one-vote. (Johnson Resp. Br. 10.) It follows that the Court should select the Governor's map under the criteria it imposed—to neutrally select the "least changes" map where a map outperformed the others and otherwise complied with necessary legal requirements. Op. ¶¶ 77, 81; *id.* ¶¶ 85, 87 (Hagedorn, J., concurring).

It bears mentioning that the Citizen Mathematicians criticize the Governor's and Hunter petitioners' maps because they contain districts that are both one person above and one person below the ideal. (Citizens Resp. Br. 15.) They baldly assert that this tiny difference is unconstitutional, but they point to no support whatsoever for that bold assertion. It should therefore be disregarded. As the Hunter petitioners point out, it is the convention to deviate up and down one person from the ideal. (Hunter Resp. Br. 9 n.3.) And, tellingly, no other party, including the Congressmen, suggests that this poses a legal issue or cites a case saying so.

In the face of the Governor's superior performance, the Congressmen forward various non-legal reasons to favor their map. For example, they say that they attempted to unite what they view as Wisconsin's "political geography" and to do what they say "make[s] sense." (Congressmen Resp. Br. 4, 7.) This type of argument is precisely the type of policy-based post-hoc invitation that this Court vowed to decline by applying "least changes." *See* Op. ¶ 77. The Congressmen's policy reasons for their map allegedly being desirable do not come into play. It would abandon the neutral application of the Court's decision.

Rather, there are significant portions of the Congressmen's proposal that bear no relationship to "least changes"—moving hundreds of thousands of people where malapportionment was a few thousand. (*See* Hunter Resp. Br. 11–12.) So while the Congressmen criticize changes that the Governor's map made (Congressmen Resp. Br. 2, 8–12), both

maps make changes, and the Congressmen's make significantly more. Those greater changes are the product of no legal "necessity." Op. ¶ 81 (Bradley, R., J.); *id.* ¶ 85 (Hagedorn, J., concurring). That is decisive.

In an alternative argument, the Congressmen assert that a newly-submitted, substantially-different map should be considered as an alternative to its existing proposal. (Congressmen Resp. Br. 20–23.) This Court's November 17th order made no allowance for sponsoring multiple maps, much less one submitted after opening and response briefing was complete, and that changes the districts for over 150,000 people. (Clelland Resp. Rep. 10; Congressmen Resp. Br. 22.) Like all the parties, the Congressmen were on notice that this Court was applying a "least changes" mandate, and all of the parties made their choices about what to propose. The Congressmen proposed a map that, for example, significantly changed Congressional Districts 3 and 7—it was no inadvertent error for the Congressmen to support Senate Bill 622, which was introduced nearly two months before the deadline for proposing maps to the Court. The Congressmen's belated motion to add another map proposal is opposed by the Governor and multiple other parties and has not been granted by the Court. Accordingly, this brief does not address it.

* * * *

As mandated by the Court's decision, the Governor has delivered maps that create the "least changes" from the current maps, while complying with all legal requirements and also often improving on the current maps. An objective application of that criteria means that the Governor's maps should be selected.

CONCLUSION

The Court should adopt the Governor's proposed maps under the criteria stated in the November 30th order.

Dated this 4th day of January 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3223 words.

Dated this 4th day of January 2022.

ANTHONY D. RUSSOMANNO
Assistant Attorney General

CERTIFICATE FILING OF SERVICE

I hereby certify that *Governor Tony Evers's Reply Brief in Support of Proposed Maps* was email filed in pdf form to clerk@wicourts.gov, on or before 12:00 p.m. on January 4, 2022.

I further certify the original and 10 copies of this brief, with the notation that "This document was previously filed via email," were hand-delivered for filing to the Wisconsin Supreme Court Clerk's Office, 110 East Main Street, Madison, WI 53701, no later than 12:00 p.m. on January 5, 2022.

I further certify that on this day, I caused service of a copy of this brief to be sent via electronic mail to counsel for all parties who have consented to service by email. I caused service of copies to be sent by U.S. mail and electronic mail to all counsel of record who have not consented to service by email.

Dated this 4th day of January 2022.

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