



WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
330 E. Kilbourn Avenue, Suite 725, Milwaukee, WI 53202-3141
414-727-WILL (9455)
Fax 414-727-6385
www.will-law.org

December 30, 2021

Supreme Court of Wisconsin
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688
Clerk@wicourts.gov

RE: *Billie Johnson, et al. v. Wisconsin Elections Commission, et al.*
Appeal No. 2021AP001450-OA

To The Court:

In November this Court authorized the parties to file proposed state legislative and congressional district maps complying with the parameters it set forth in its November 30, 2021 decision. The parties thereafter cumulatively filed six sets of proposed state legislative district maps and four sets of proposed congressional maps.

As they noted in their previous brief, Petitioners Billie Johnson, Eric O'Keefe, Ed Perkins and Ronald Zahn (the "Petitioners") are not proposing maps of their own, but have instead retained an expert to evaluate and compare the maps proposed by other parties in this suit for compliance with this Court's November 30 ruling.

For the reasons stated below, this Court should adopt the Legislature's proposed state legislative maps and either the Legislature's or the Governor's proposed congressional map as the remedy in this case.

ARGUMENT

This Court has indicated it anticipates issuing a mandatory injunction designed to rectify the unconstitutional population imbalances between Wisconsin's state legislative and congressional districts produced by shifts in population since the 2010 census. *See*

Johnson v. Wisconsin Elections Comm’n, 2021 WI 87, ¶¶1-5, ___ Wis. 2d ___, ___ N.W.2d ___. In its November 30 decision, this Court provided three critical limitations on the scope and nature of this remedy. First, in evaluating modified maps, the Court will not consider the partisan makeup of districts. *See id.* at ¶8 (plurality opinion); *id.* at ¶82 n.4 (Hagedorn, J., concurring). Second, this Court will utilize a least-change approach in adopting any amendments to existing maps. *See id.* at ¶8 (plurality opinion); *id.* at ¶82 n.4 (Hagedorn, J., concurring). Finally, this Court will ensure that any remedy comports with applicable requirements of the United States Constitution; the Voting Rights Act; and Article IV, Sections 3, 4, and 5 of the Wisconsin Constitution. *See id.* at ¶8 (plurality opinion); *id.* at ¶82 n.4 (Hagedorn, J., concurring).

The Petitioners’ expert has provided scorecards grading the various proposed maps on metrics relating to the above limitations. (Those scorecards are contained in the expert report attached as an exhibit to this letter-brief.) No one map beat out its competitors on every relevant metric. Therefore, this Court must devise a system for comparing maps. The Petitioners propose the following.

First, the scorecards show that some of the maps do not adopt a least-changes approach. These maps should be immediately eliminated from consideration as noncompliant with this Court’s November 30 decision. These include, in particular, the proposed state legislative maps of the Hunter Intervenors and the Citizen Mathematicians and Scientists.

Of the maps that clear this first threshold, some clearly outperform the others with respect to population equality, which should be characterized as the preeminent measure given that the entire purpose of this case is to remedy “shifts in Wisconsin’s population around the state [which] have disturbed the constitutionally guaranteed equality of the people’s representation in the state legislature and in the United States House of Representatives.” *Id.* at ¶2. Given that the central goal is to draw maps with districts with equality of population, those maps that do better at accomplishing that goal should be preferred to those maps that do worse.

Finally, in those instances where more than one map follows a least-changes approach and where those maps perform equally well with respect to reapportioning population, performance with respect to other constitutionally-mandated requirements provides the tiebreaker.

Applying this approach, the Legislature's state legislative maps and the Legislature or Governor's congressional map emerge as the maps that best meet the requirements of this Court's order.

I. State Legislative Maps

The parties' proposed maps for the State Assembly and the State Senate can be scored separately, but they must be selected as a package. Because of Wisconsin's "nesting" principle (with three assembly districts making up one senate district), the Court could not accept one party's proposed assembly map and another party's proposed senate map. Thus, in deciding on proposed maps for the state legislative districts, the Court should evaluate the party's proposed assembly map and the proposed senate map as a package.

A. Assembly Maps

As noted, there are six state assembly maps before this Court, proposed by: (1) the Wisconsin Legislature, (2) Governor Tony Evers, (3) Senator Janet Bewley (4) the BLOC Intervenor-Petitioners, (5) the Hunter Intervenor-Petitioners, and (6) the Citizen Mathematician and Scientists.

Least-changes. The Petitioners' expert has graded these maps with respect to the number of people moved from their current district to a new district and "core retention" (the percentage of people in an existing district that remain in that district). The lower the number of people

who are moved and the higher percentage of people who stay, the less change made to the current maps.¹

As seen in the following chart, the first four of the six assembly maps score similarly on these metrics:

	People Moved	Core Retention
Legislature	936,312	84.1%
Governor	821,531	86.1%
Senator Bewley	953,317	83.4%
BLOC	930,131	84.2%

The Governor's proposed assembly map moves the fewest people. But as seen in the related chart further below, when the senate maps are considered, the Legislature's proposed map moves the fewest people. And the two maps must be viewed as a package.

The Petitioners believe that all four of the above maps are consistent with a least-changes approach.

The remaining two maps, however, score substantially below these four:

	People Moved	Core Retention
Hunter	1,464,240	75.2%
Citizens	1,707,985	71.0%

In the Petitioners' view, these maps are disqualified for failing to follow a least-changes approach that the other parties' maps demonstrate is possible. The Legislature, Governor, Senator Bewley, and BLOC Intervenors have shown that there is simply no need to move

¹ The Petitioners note that the Citizen Mathematicians and Scientists use a method of measuring the amount of land that moved or stayed in a district but that has no logic behind it. You could move a border 10 miles in northern Wisconsin and not move many people, while moving a border 10 miles in southeastern Wisconsin would move tens of thousands of people. The measurement must be of people and not distance.

one-and-a-half million Wisconsinites to rebalance Wisconsin's legislative districts.

As between the four maps that follow a least-change approach, it is difficult to distinguish as a legal matter between these maps on this metric alone given that relatively small variations in core retention may be explained by a need to comply with other legal requirements, particularly population equality.

Population Deviation. As discussed above, population equality is the preeminent measure since the central goal of redistricting is to equalize district populations. As can be seen from the chart below, of the four least-changes maps, the Legislature's clearly outperforms the others.

	Range of Deviation (People)	Range of Deviation (Percentage)
Legislature	452	0.76%
Governor	1,121	1.88%
Senator Bewley	1,652	2.77%
BLOC	784	1.32%

The ideal Assembly population is 59,533 individuals. Senator Bewley's map has the largest deviation range from the ideal (i.e., 1,652 individuals, or 2.77%). This means that the most populated district proposed by Senator Bewley has 1,652 people more than the least populated district proposed by Senator Bewley. The reported percentage simply reports that 1,652 people equals 2.77% of the ideal population of 59,533.

The point here is that the "ideal" would be to have each assembly district contain exactly 59,533 people and if that could be done there would be zero deviation. But given the number of districts involved and the constraints of having to move census blocks instead of individual people and to not split municipalities, it is impossible to achieve the ideal.

As can be seen from the above chart, the Legislature's proposed assembly map comes closest to the ideal with the maximum deviation range being just 452 people which equals 0.76%

The Governor's map has a maximum deviation range of 1,121 individuals, or 1.88%. The BLOC Intervenors' map has a maximum deviation range of 784 individuals, or 1.32%. Senator Bewley's map, again, performs the worst with a deviation range of 1,652 individuals which equals 2.77%.

The fact that the Legislature's proposed assembly map performs substantially better with respect to population equality causes the Petitioners to prefer the Legislature's map especially because, as discussed below, the Legislature's proposed senate map performs better than the proposed senate maps of the other parties.

Other metrics. Article IV, § 4 of the Wisconsin Constitution contains a preference against splitting county and municipal boundaries. Per the chart below, the Legislature's proposed assembly map splits fewer counties and municipalities than the proposals from the Governor, the BLOC Intervenors, and Senator Bewley. That again causes the Petitioners to prefer the Legislature's proposal.

	County Splits	Municipal Splits	Total
Legislature	54	71	125
Governor	53	151	204
Senator Bewley	55	98	153
BLOC	54	120	174

Article IV, §§ 4 and 5 of the Wisconsin Constitution contain requirements on compactness and contiguity for state legislative districts. The Petitioners do not see any issues on the maps in question with respect to compactness which would cause the Petitioners to prefer one over another.

	Polsby-Popper	Schwartzberg
Legislature	0.24	0.48
Governor	0.25	0.48
Senator Bewley	0.25	0.49
BLOC	0.23	0.46

Similarly, none of the maps appear to offend requirements relating to contiguity.

Other parties have discussed the issues of incumbent pairing and “delayed voting” or “disenfranchisement” (referring to the fact that when voters are moved from an odd numbered district to an even numbered district they will have to wait two extra years before voting for their state senator). The Petitioners’ position is that because these criteria are not constitutional factors they are of secondary importance as compared to those already discussed and do not change the result in this case.

Voting Rights Act. One significant difference between the Legislature’s proposed assembly map and the other three competitive maps is that these other maps would create one additional minority-majority African-American assembly district. The Petitioners have no current position on whether the Voting Rights Act requires an additional minority-majority district because all of the evidence needed to determine that answer is not available to the Petitioners and the Petitioners have not engaged an expert specifically to review that issue. The Petitioners expect that the other parties will make additional evidence available upon which such a decision can be made.

However, the Petitioners will observe that to the extent the VRA does not *require* the creation of additional districts, whether to create such districts is a policy decision that should be left to the political branches under this Court’s least-changes approach. *See, e.g., Johnson*, 2021 WI 87, ¶64 (“The existing maps were adopted by the legislature, signed by the governor, and survived judicial review by the federal courts. Treading further than necessary to remedy their current legal deficiencies, as many parties urge us to do, would intrude upon the

constitutional prerogatives of the political branches and unsettle the constitutional allocation of power.” (citations omitted)).²

Given that the existing maps contain 6 minority-majority African-American assembly districts, the Petitioners would not disturb that policy choice absent proof that a 7th such district is required by law.

B. State Senate Maps

The Petitioners believe that the Legislature’s senate proposal best meets the requirements imposed by this Court.

Least-changes. As shown in the following chart, the same four parties discussed above score relatively close on least-change metrics:

	People Moved	Core Retention
Legislature	451,825	92.0%
Governor	458,137	92.0%
Senator Bewley	559,521	90.5%
BLOC	598,620	89.2%

The Legislature moves the fewest number of people and is in a virtual tie with the Governor’s proposal on core retention. The Legislature’s proposal moves far fewer people than the Bewley or BLOC Intervenor’s proposals.

The Hunter Intervenor and the Citizen Mathematicians, once again, move far more people; 1,085,713 and 1,380,148 respectively.

	People Moved	Core Retention
Hunter	1,085,713	80.9%
Citizens	1,380,148	73.9%

Both maps should be rejected on this basis.

² The Petitioners have not included a Voting Rights Act measure in their final scorecards.

Population Deviation. Turning to population deviation, the Legislature once again vastly outperforms the Governor, Senator Bewley, and the BLOC Intervenors.

	Range of Deviation (People)	Range of Deviation (Percentage)
Legislature	1,026	0.57%
Governor	2,138	1.20%
Senator Bewley	3,426	1.92%
BLOC	1,689	0.95%

Other Metrics. The Legislature's proposed senate map also is preferable with respect to minimizing municipal splits:

	County Splits	Municipal Splits	Total
Legislature	43	51	94
Governor	45	98	143
Senator Bewley	48	71	119
BLOC	43	80	123

Again, as with the proposed assembly maps, the Petitioners do not see any issues with respect to compactness or contiguity with any of the four maps.

	Polsby-Popper	Schwartzberg
Legislature	0.22	0.46
Governor	0.21	0.46
Senator Bewley	0.20	0.44
BLOC	0.19	0.42

Based upon the above the Petitioners request that this Court select the proposed state legislative maps submitted by the Legislature.

II. Congressional Maps

Because only eight districts need be drawn, drawing legally-compliant Congressional maps is more straightforward than drawing state legislative maps. But that also makes distinguishing amongst competing maps more difficult. Above, the Petitioners identified those maps that qualify as following a least-changes approach and then examined which of those scored best with respect to population deviation.

Here, the maps submitted by the Legislature/Congressmen and the Governor score relatively close with respect to least-changes, while the maps submitted by the Citizen Mathematicians and the Hunter Intervenors move noticeably more people.

	People Moved	Core Retention
Legislature	384,272	93.5%
Governor	324,858	94.5%
Citizens	502,470	91.5%
Hunter	408,875	93.0%

On that basis the Petitioners would prefer either the Legislature's or the Governor's proposed congressional map and would reject the remaining proposals.

With respect to population equality, both the Legislature and the Governor achieve perfect population equality. The Legislature's proposal has a slight edge with respect to splits and compactness.

	County Splits	Municipal Splits	Total
Legislature	10	31	41
Governor	13	42	55
Citizens	7	49	56
Hunter	12	30	42

	Polsby-Popper	Schwartzberg
Legislature	0.28	0.52
Governor	0.25	0.49
Citizens	0.31	0.54
Hunter	0.28	0.53

The Petitioners assume that the Legislature/Congressmen, on the one hand, and the Governor, on the other hand, will explain in their respective response briefs why their proposal is preferable to the other. The Petitioners have no ability to prejudge those arguments but simply say that at this point the Court could readily accept either proposal.

Sincerely,

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
Attorneys for Petitioners



Richard M. Esenberg (WI Bar No. 1005622)
Anthony LoCoco (WI Bar No. 1101773)
Lucas Vebber (WI Bar No. 1067543)
Wisconsin Institute for Law & Liberty, Inc.
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
Phone: (414) 727-9455
Facsimile: (414) 727-6385

CERTIFICATION

I hereby certify that this letter-brief conforms to the rules contained in s. 809.19 (8) (b)-(c) for a brief produced with a proportional serif font. The length of this letter-brief is 2,354 words.

Dated this 30th day of December, 2021.

Signed,



Anthony LoCoco (WI Bar No. 1101773)
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
Phone: (414) 727-9455
Fax: (414) 727-6385
alococo@will-law.org

Attorney for Petitioners

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this letter-brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12).

I further certify that:

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

Dated this 30th day of December, 2021.

Signed,



Anthony LoCoco (WI Bar No. 1101773)
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
Phone: (414) 727-9455
Fax: (414) 727-6385
alococo@will-law.org

Attorney for Petitioners

Response Expert Report of

James G. Gimpel, Ph.D.

Executive Summary of Opinions

1. I have reviewed all maps proposed in this case and evaluated them with respect to a minimum or least changes approach, compliance with the other applicable constitutional and statutory redistricting requirements identified by this Court, and compliance with the Court's decision that the partisan makeup of districts does not implicate any justiciable or cognizable right, preparing "score cards" for each of the proposed maps submitted by the parties.
2. In my opinion, the Legislature's proposed Senate and Assembly maps and the Legislature and Governor's proposed Congressional maps best balance compliance with a minimum changes approach and the other constitutional and statutory criteria identified by this Court in its November 30, 2021 Decision.

Statement of Opinions

The opinions that I hold and the facts and data I have considered are set forth below. I hold all of the opinions set forth herein to a reasonable degree of certainty within my field. I considered all of the facts set forth in the Amended Petition filed herein and the Joint Stipulation of Facts submitted herein. I also reviewed and considered the proposed maps and underlying data submitted by the Legislature, the Governor, the Congressmen, Senator Bewley, the Citizen Mathematicians and Scientists, the BLOC Intervenors, and the Hunter Intervenors. In assessing the data, I used the LTSB matching of census blocks. Finally, I have read the Wisconsin Supreme Court's Order of November 17, 2021 and its Decision of November 30, 2021 and done my best



to address the issues in a manner consistent with that Order and that Decision, as discussed in my previous report.

Summary of Measures

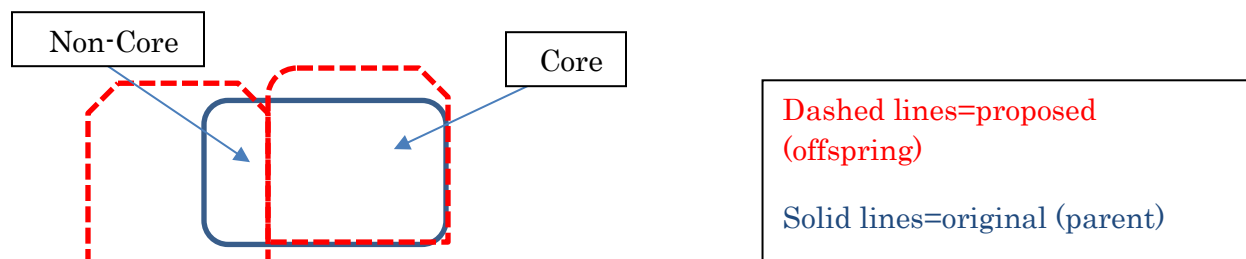
Deviation: Defined by the range by which individual districts lie above or below the ideal population for perfect equality across districts. For instance, if the most underpopulated district is -1,180 under the ideal population, and the most overpopulated district is +1,000 over the ideal population, total deviation=2,180.

% Deviation: The deviation divided by the ideal population. If total deviation=2,180, and the ideal population=59,333, then % Deviation=2,180/59,333, or .036, 3.6%.

Core Retention: To derive this estimate, the parent (original) districts are used as the base layer for comparison and the offspring (proposed) districts are placed on top. The 2020 Census population residing within the largest intersecting parcel between the two is counted as the core (see diagram below). The populations of the cores are summed across districts and become the figure for core retention for the entire plan. High core retention indicates a proposed district that largely preserves or shares the population of the original district.

Population Non-Core, Population “Moved”: This measure estimates the size of the original (parent) district’s population not included in the core parcel (see diagram) and reflects the inverse of core retention. Note that these

populations are not literally “relocated” only that they have been assigned to a new district. Small parts of the original district may be placed in other new districts but those intersecting parcels are not large enough to be considered the shared or continuous core between parent and offspring districts.



Compactness: There are numerous gauges of compactness. Two reported here are the Polsby-Popper measure and the Schwartzberg measure.

Polsby-Popper Compactness: Defined as the ratio of the area of the district to the area of a circle whose circumference is equal to the perimeter of the district. Higher scores (closer to 1) indicate more compact districts.

Schwartzberg Compactness: Defined as the ratio of the perimeter of the district to the circumference of a circle whose area is equal to the area of the district. Higher scores (closer to 1) indicate more compact districts.

Majority-Minority Districts: defined as the count of districts in the plan with a voting age black population exceeding the 50% threshold according to 2020 Census block data.¹

¹ I have not provided measures relating to compliance with the Voting Rights Act given that the parties have not yet fully discussed that issue.

City, Town and Village (CTV) Splits: defined as the number of cities, towns and villages in Wisconsin as of 2021 that are divided by at least one plan boundary. This measure involves using the Cities, Towns and Villages layer from the state of Wisconsin (currently reporting 1,912 such entities). The boundaries of each plan are overlaid on the base CTV layer. If a locale is divided at least once by a plan boundary, this is counted as a split City, Village or Town. (Note that some locales may be split more than once, but additional divisions are not counted in this measure.) Generally, plans with fewer split localities are considered to be superior to those that increase the divisions within localities. CTV Layer available here: <https://data-ltsb.opendata.arcgis.com/search?q=wise-decade>

County Splits: defined as the number of counties in Wisconsin as of 2021 that are divided by at least one plan boundary. This measure involves using the County layer from the U.S. Census, current reporting 72 such entities. The boundaries of each plan are overlaid on the base county layer. If a county is split at least once by a plan boundary, this is counted as a split county. (Note that some counties may be split more than once, but additional divisions are not counted in this measure.) Generally, plans with fewer split counties are considered to be superior to those that increase the divisions within counties.

Scorecards

As discussed in my previous report, I have prepared “score cards” evaluating the parties’ proposed maps for compliance with this Court’s November 30 decision. Those score cards are below. In my opinion, in applying the scorecard, the goal should be to select a map that best reflects the redistricting principles and priorities identified by the Court in its November 30, 2021 Decision; i.e., a map that complies with the minimum changes approach and meets the other constitutional and statutory redistricting criteria identified by the Court without regard to partisan composition.

Name of Plan: SB621/622				
People Moved Across Districts				
Senate		451,825		
Assembly		936,312		
Congressional		384,272		
Core Retention (in % retained)				
Senate		92.0		
Assembly		84.1		
Congressional		93.5		
Population Deviation				
	Deviation	% Deviation	Ideal Pop	
Senate	1,026	0.57%	178,598	
Assembly	452	0.76%	59,533	
Congressional	1	0.00%	736,715	
Compactness				
	Polsby-Popper	Schwartzberg		
Senate	0.22	0.46		
Assembly	0.24	0.48		
Congressional	0.28	0.52		
Split Geography				
	CTVs	Counties	Total	
Senate	51	43	94	
Assembly	71	54	125	
Congressional	31	10	41	

Name of Plan: Evers				
People Moved Across Districts				
Senate		458,137		
Assembly		821,531		
Congressional		324,858		
Core Retention (in % retained)				
Senate		92.0		
Assembly		86.1		
Congressional		94.5		
Population Deviation				
	Deviation	% Deviation	Ideal Pop	
Senate	2,138	1.20%	178,598	
Assembly	1,121	1.88%	59,533	
Congressional	2	0.00%	736,715	
Compactness				
	Polsby-Popper	Schwartzberg		
Senate	0.21	0.46		
Assembly	0.25	0.48		
Congressional	0.25	0.49		
Split Geography				
	CTVs	Counties	Total	
Senate	98	45	143	
Assembly	151	53	204	
Congressional	42	13	55	

Name of Plan: CMS	
People Moved Across Districts	
Senate	1,380,148
Assembly	1,707,985
Congressional	502,470
Core Retention (in % retained)	
Senate	73.9
Assembly	71.0
Congressional	91.5
Population Deviation	

	Deviation	% Deviation	Ideal Pop
Senate	895	0.50%	178,598
Assembly	438	0.74%	59,533
Congressional	1	0.00%	736,715
	Compactness		
	Polsby-		
	Popper	Schwartzberg	
Senate	0.26	0.50	
Assembly	0.28	0.52	
Congressional	0.31	0.54	
	Split Geography		
	CTVs	Counties	Total
Senate	54	35	89
Assembly	95	43	138
Congressional	49	7	56

Name of Plan: Bewley			
People Moved Across Districts			
Senate	559,521		
Assembly	953,317		
Core Retention (in % retained)			
Senate	90.5		
Assembly	83.4		
	Population Deviation		
	Deviation	% Deviation	Ideal Pop
Senate	3,426	1.92%	178,598
Assembly	1,652	2.77%	59,533
	Compactness		
	Polsby-		
	Popper	Schwartzberg	
Senate	0.20	0.44	
Assembly	0.25	0.49	
	Split Geography		
	CTVs	Counties	Total
Senate	71	48	119

Assembly	98	55	153
----------	----	----	-----

Name of Plan: Bloc			
People Moved Across Districts			
Senate	598,620		
Assembly	930,131		
Core Retention (in % retained)			
Senate	89.2		
Assembly	84.2		
Population Deviation			
	Deviation	% Deviation	Ideal Pop
Senate	1,689	0.95%	178,598
Assembly	784	1.32%	59,533
Compactness			
	Polsby-Popper	Schwartzberg	
Senate	0.19	0.42	
Assembly	0.23	0.46	
Split Geography			
	CTVs	Counties	Total
Senate	80	43	123
Assembly	120	54	174

Name of Plan: Hunter	
People Moved Across Districts	
Senate	1,085,713
Assembly	1,464,240
Congressional	408,875
Core Retention (in % retained)	
Senate	80.9
Assembly	75.2
Congressional	93.0

	Population Deviation		Ideal Pop
	Deviation	% Deviation	
Senate	1,698	0.95%	178,598
Assembly	1,083	1.82%	59,533
Congressional	1	0.00%	736,715
	Compactness		
	Polsby-Popper	Schwartzberg	
Senate	0.27	0.51	
Assembly	0.34	0.57	
Congressional	0.28	0.53	
	Split Geography		Total
	CTVs	Counties	
Senate	101	43	144
Assembly	155	51	206
Congressional	30	12	42

In my opinion, the Legislature's proposed Senate and Assembly maps and the Legislature and Governor's proposed Congressional maps best balance compliance with a minimum changes approach and the other constitutional and statutory criteria identified by this Court in its November 30, 2021 Decision.

/s/ Electronically signed by James G. Gimpel