IN THE 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, 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 in the Wisconsin Supreme Court

RESPONSE BRIEF OF INTERVENOR-PETITIONERS BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON & REBECCA ALWIN

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*Admitted *pro hac vice*
**Motion for admission *pro hac vice* pending

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INTRODUCTION

BLOC Petitioners have proposed state assembly and senate plans that adhere to the "least-change" approach and comply with the Voting Rights Act, while prioritizing constitutional redistricting criteria in remedying malapportionment across existing districts. No other proposal combines VRA compliance through seven districts in which Black voters can likely nominate and elect candidates of their choice with top-tier core retention scores, the consensus measure of a "least-change" approach. BLOC Petitioners' proposal therefore should be selected.

ARGUMENT

I. Only BLOC Petitioners' proposal complies with the VRA.

A. Other parties' proposed Milwaukee-area assembly districts would violate the VRA.

Other proposals would violate the VRA by either (1) packing and cracking Black voters into too few districts or (2)

configuring Black opportunity districts[1] that would jeopardize Black voters' opportunity to nominate their preferred candidate in Democratic primaries. Only BLOC Petitioners draw the appropriate number of assembly districts—seven—in a configuration that protects Black voters' VRA rights in *both* the Democratic primary and the general election.

B. The VRA requires seven Black opportunity assembly districts.

The VRA is violated by (1) "the dispersal of [minority voters] into districts in which they constitute an ineffective minority of voters"; or (2) "the concentration of [minority voters] into districts where they constitute an excessive majority." *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986). The three *Gingles* preconditions, together with the totality of

[1] "Opportunity district" references districts required under Section 2 of the VRA, 52 U.S.C. § 10301.

circumstances, dictate that seven Black opportunity districts be drawn. (BLOC Pet. Br. 18–26, 29–47)

1. Proposals with six Black opportunity districts crack and pack Black voters.

The Legislature and Senator Bewley propose assembly plans allegedly containing six Black opportunity districts:

District	2011 Wis. Act 43 BVAP	Legislature's Proposal BVAP	Sen. Bewley's Proposal BVAP
10	59.4%	47.2%	53.9%
11	65.5%	73.3%	63.3%
12	60.6%	57.0%	50.7%
16	55.6%	54.1%	54.6%
17	68.4%	61.8%	66.4%
18	60.7%	52.6%	50.5%

Like Act 43, these proposed districts have excessively high Black Voting Age Populations ("BVAP"), with the Legislature proposing to *increase* AD11's BVAP from an already-packed 65.5% to 73.3%. All three plans leave other Black voters "cracked" outside Black opportunity districts, primarily in the Village of Brown Deer. Currently, Brown

Deer's Black voters are cracked into AD24, which extends into Washington County and has a BVAP of 12.3%. (BLOC Resp.App. 31) Sen. Bewley's proposal also cracks these voters into a new AD24 with a BVAP of 16.5%. (BLOC Resp.App. 31)[2] The Legislature's plan (unnecessarily, *see infra* Part II. B) swaps substantial population between AD23 and AD24, thereby cracking Brown Deer's Black voters into its proposed AD23, which has a BVAP of 10.3%. (BLOC Resp.App. 31) Both districts are currently represented by white incumbents.

By packing Black voters in some districts and cracking them in others instead of creating a seventh Black opportunity district, the Legislature's and Sen. Bewley's proposals would violate the VRA.

[2] The Appendix to this Response Brief.

2. Six seats is below the proportionate share for Black voters.

The Legislature's expert, Dr. Alford, contends that a seventh Black opportunity district "moves beyond proportionality of representation" because six districts, not seven, is the proportional share for Black voters. (Alford Rpt. at 4, 11-12) That is incorrect.

Dr. Alford relies on data from the American Community Survey ("ACS"), which he contends shows a statewide Black CVAP of 6.0%. (Alford Rpt. at 12, ¶ 35) This Black CVAP estimate is wrong.

First, ACS overestimates Wisconsin's white CVAP and underestimates Black CVAP, as shown by comparing the 2020 Census actual VAP *count* to the most recent ACS CVAP *estimate* centered on 2017 (which Dr. Alford uses). The ACS estimates that there are over 7,000 more white adult *citizens* in

Wisconsin than *residents*—citizens and noncitizens combined. (BLOC Resp.App. 20) Mathematically, that is impossible.

Second, ACS underestimates the Black adult population. If the ACS estimated Black CVAP were correct, given the actual Black VAP Census count, it would yield a 10% noncitizenship rate for Black adults. (BLOC Resp.App. 21) That is wrong—ACS itself estimates only 2.2% of Black adults are noncitizens. Rather, ACS has underestimated the total Black adult population. (BLOC Resp.App. 21)

The ACS report then nonsensically concludes that the Black share of CVAP (6.1%) is *lower* than the Black share of VAP (6.4%). One would expect the reverse, given that disproportionately more Hispanic and Asian adults are noncitizens than Blacks. (BLOC Resp.App. 21) When noncitizen populations are removed from VAP to arrive at CVAP, the Black share of CVAP should *increase* over their

VAP share because of their higher citizenship rate relative to Hispanics and Asians. (BLOC Resp.App. 21)

Dr. Collingwood corrects for these known errors in the CVAP estimates by multiplying ACS's estimated citizenship rate for Black adults (97.8%) by the Census *count* of Black adults (296,313), and concludes that the Black statewide CVAP is 6.5%--a proportionate share between six and seven assembly districts. (*Id*.)

3. Proportionality is just one of many totality of circumstances factors.

Even if Dr. Alford's argument lacked these factual flaws, proportionality is just one of many "totality of circumstances" factors that must be considered in ascertaining Section 2 rights for minority voters.

In *LULAC v. Perry*, the Supreme Court emphasized that proportionality is "a relevant fact in the totality of circumstances" but "is *never* itself dispositive." 548 U.S. 399,

436 (2008) (internal quotation marks omitted) (emphasis in original). Although "proportionality has 'some relevance,'" "'placing undue emphasis upon proportionality risks defeating the goals underlying the Voting Rights Act.'" *Id.* (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1027-28 (1994) (Kennedy, J., concurring)).

The Court therefore disagreed that granting minorities a proportional number of seats would provide a State an automatic "safe harbor" against a Section 2 claim. Texas had contended that its congressional plan did not violate Section 2 because it provided Latino voters close to their proportional share of seats statewide. *LULAC*, 548 U.S. at 438. After examining the totality of the circumstances holistically, the Court concluded that vote dilution occurred "[e]ven assuming [the plan] provides something close to proportional representation for Latinos." *Id.* at 442.

Here, the existing assembly plan (and the Legislature's and Sen. Bewley's proposals) provide Black voters with less than their proportional share of seats.

But even if that were not so, the totality of circumstances overwhelmingly show that a six-seat configuration—which necessarily features packing and cracking of Black voters—constitutes unlawful vote dilution. Wisconsin places last (or close thereto) on many racial disparity metrics, including graduation rates, high school degrees, standardized testing, and college degrees. (BLOC App. 78) Redlining in Milwaukee caused the seventh-lowest nationwide rate of Black homeownership at 26.7%, roughly one-third of Milwaukee's white residents. (BLOC App. 73)[3] Wisconsin also scores last in the racial gaps in the employment-to-population ratio of prime-age workers and in

[3] The Appendix to BLOC Petitioners' Merits Brief.

the unemployment rate. (BLOC App. 80-81) Wisconsin's incarceration rate of Black residents is the highest in the nation. (BLOC App. 83-84) And the life expectancy of a Black person in Milwaukee is 71.7 years, compared to 82.1 years for a White person in Ozaukee County. (BLOC App. 83)

These extreme examples of effects of past discrimination faced by Black voters in Milwaukee combine to reduce their opportunity to participate in the franchise: "[I]n 2018, Wisconsin had third largest gap between Black and white turnout; in 2020 that gap was the second largest in the nation." (BLOC App. 62)

BLOC Petitioners' plan draws seven Black opportunity districts that satisfy the *Gingles* preconditions. The totality of circumstances evidence is overwhelming, and the Legislature's expert's opinion regarding proportionality is factually wrong—his proportionality argument favors finding vote dilution under six-district plans.

C. Only BLOC Petitioners' Black opportunity districts will reliably provide Black voters an equal opportunity to nominate their candidates of choice in Democratic primaries.

To satisfy the VRA, Black opportunity districts must "perform"—*i.e.* white bloc voting must not usually prevent the nomination or election of Black-preferred candidates—in both (1) the Democratic primary and (2) the general election. *See, e.g.*, *Gingles*, 478 U.S. at 56. While all parties' proposed Black opportunity districts would perform in general elections, only BLOC Petitioners' districts would reliably perform in Democratic primaries.

An "intensely local appraisal," *id* at 79, of Milwaukee electoral conditions reveals that the communities of Shorewood, Whitefish Bay, Fox Point, and Bayside have substantial numbers of white Democrats who exhibit strong racially polarized voting patterns and high turnout in Democratic primaries. (BLOC Resp.App. 15, 19) To satisfy

the VRA, these lakeshore communities must therefore be avoided in configuring Black opportunity districts. Nonetheless, all other parties include some of these communities in their proposed Black opportunity districts. For example, each includes all or part of Shorewood in their proposed AD10. The Citizen Data Scientists also include all of Whitefish Bay in AD10 and Fox Point, and Bayside in their proposed AD12, with a BVAP of just 36.3%. The Hunter Petitioners include Fox Point and Bayside in their proposed AD23, which has a BVAP of 45.2%.

Including these communities in proposed Black opportunity districts—particularly districts with sub-50% BVAP—prevents the districts from reliably performing for Black voters in Democratic primaries, as the 2018 Democratic gubernatorial primary demonstrates. That primary featured racially polarized voting with a clear Black candidate of choice—Mahlon Mitchell—along with nine white candidates,

including now-Governor Evers. Mitchell would carry all seven of BLOC Petitioners' proposed districts by a large margin—receiving a majority in six districts while attaining a near-majority (46.3%) in the seventh (AD10). (BLOC Resp.App. 8) And had it been just a two-person race, there would be sufficient white crossover voting in BLOC Petitioners' proposed AD10 for Mitchell to prevail. (BLOC Resp.App. 18-19)

The same cannot be said of the other parties' plans. For example, Mitchell would receive just 39.3%[4] in the Legislature's proposed AD10. (Alford Rpt. at 9) And he would receive the following vote shares in the other parties' versions of AD10: Governor: 41.2%; Sen. Bewley: 39.2%, Citizen Data Scientists: 34.5%; Hunter Petitioners: 44.7%.

[4] The Legislature's expert Dr. Alford miscalculated it has 42.2% by mistakenly excluding from his calculation two of the ten candidates. (BLOC Resp.App. 15)

While these vote shares would win Mitchell these districts with a plurality in the ten-candidate field, he likely would not prevail in a race featuring fewer white candidates to splinter the vote of white Democrats. (BLOC Resp.App. 19) Without a plurality vote share closer to 50% (like BLOC Petitioners' proposed AD10), there is insufficient white crossover voting for Mitchell to likely prevail in other parties' AD10 in a two-candidate election. (BLOC Resp.App. 19)

To be sure, the existing AD10 includes Shorewood, but its BVAP is 59.4%. (Alford Rpt. at 9) Maintaining its opportunity district status while rebalancing its undersized population requires excluding Shorewood. "Least-change" here must give way to the VRA, which requires that districts be configured to avoid vote dilution. Only BLOC Petitioners' proposal does so.[5]

[5] Removing Shorewood from AD10 requires certain Milwaukee County wards currently in AD19—in SD3—to be moved to AD10 and AD16. Shifting these voters from an odd-numbered senate district to an even-

II. BLOC Petitioners' proposal also faithfully applies the "least-change" approach.

BLOC Petitioners' proposal also merits selection because it stands alone in combining VRA compliance with strong fidelity to the "least-change" approach. Core retention provides the most logical and appropriate way to gauge whether a proposal adheres to a "least-change" approach, as it measures how many people are retained in their current districts. BLOC Petitioners' proposal scores among the highest on that measure.

Other flawed metrics for measuring "least-change" have been proposed, including delayed senate voting and incumbent pairing. Incumbent pairing is absent from the Court-ordered criteria and should be disregarded. And while courts

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numbered district results in some delayed voting, but that is the unavoidable result of ensuring VRA compliant districts. Moreover, it necessarily reduces the core retention figure of BLOC Petitioners' proposal, which nonetheless achieves the second highest core retention of any proposed plan. *See infra.*

have considered delayed senate voting, as a measure of "least-change" it is redundant and less accurate than core retention. Regardless, BLOC Petitioners' proposal performs well on these measures, too.

A. BLOC Petitioners' proposal scores among the best on core retention.

All parties generally agree that core retention scores can measure whether a proposal complies with the "least-change" approach. This makes sense, as the statistic measures the percentage of an old district's previous population that is kept together in a new district. (BLOC App. 127) From a population standpoint, a proposal with more core retention has "changed less" from the prior apportionment than one with less.

The parties' proposals fall into two camps: (1) those with higher core retention, between roughly 80% and 85% for assembly districts and around 90% for senate districts; and (2) those with scores that fall well below that mark.

BLOC Petitioners' proposal falls into the high-score category (at 84.2% for assembly, 89.6% for senate), along with those from Sen. Bewley (83.8% for assembly, 90.5% for senate), the Legislature (84.2% for assembly, 92.2% for senate), and the Governor (85.79% for assembly, 92.17% for senate). By contrast, the proposals from Hunter Petitioners (73.2% for assembly, 80.4% for senate) and the Citizen Data Scientists (61% for assembly, 74.3% for senate) score far lower. (BLOC Resp.App. 32-36)

BLOC Petitioners' high core retention is remarkable, considering that their proposal not only achieves VRA compliance by drawing a seventh Black opportunity district in a configuration that will actually perform for Black voters (which lowered core retention by shifting Shorewood out of AD10), contrary to the other proposals, but *ties* the Legislature's core retention score and trails the Governor's by

a mere 1.5% (and their senate proposal's score tracks these other proposals, too).

Setting aside the districts affected by VRA compliance provides an even better view of BLOC Petitioners' high core retention, increasing their core retention score to 87.95% (for assembly districts), *the highest of all proposed plans*. (BLOC Resp.App. 32-36) Where federal law did not mandate changes to ensure minority electoral opportunities, BLOC Petitioners retained an exceedingly high population of existing districts.

B. Even with high core retention scores, the Legislature's proposal still violates the "least-change" approach.

The Court should also examine how the Legislature's proposal deviates from "least-change" by shifting population for reasons untethered to the VRA and "one person, one vote" compliance. *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶¶ 39–63, __ Wis. 2d __, __ N.W.2d 2d __. Where a change

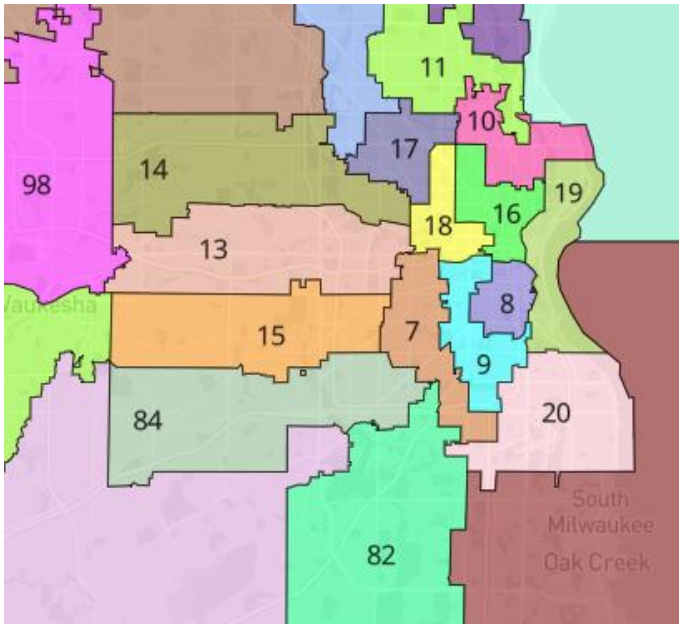
cannot be traced to these legal requirements, it is inappropriate under a "least-change" approach.

The Legislature passed an apportionment plan that it said reflected the current Legislature's "policy choices," and argued that the Court must select it despite its veto by the Governor. (Legislature's 4-Issue Br. at 19-20) The Legislature noted that "[a]lternatively, the Court could begin with the *existing* . . . districts" and "invite the parties to propose" least-change plans. *Id.* at 32. The Court adopted the latter approach, but the Legislature did not change course and propose such a plan; rather, it submitted its original plan.

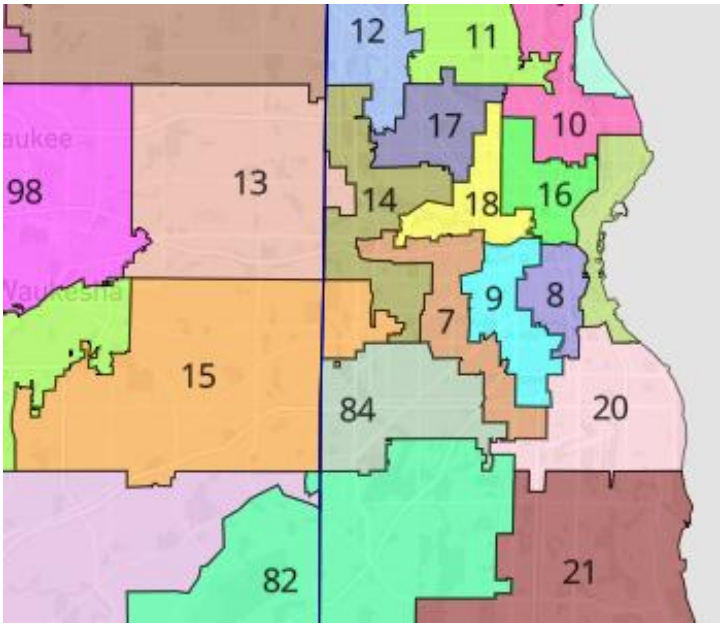
The Legislature's departure from a least-change approach is evident. In multiple areas identified below, it is difficult to discern any reason for changes connected with either VRA compliance or remedying malapportionment.

- ***<u>West of Milwaukee: AD13, AD14, AD15, AD84</u>***

Existing map



Legislature's proposal

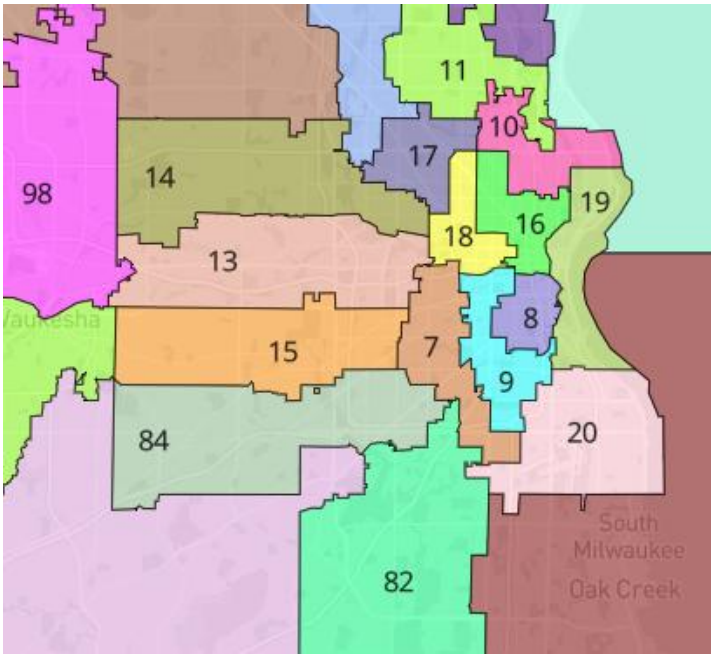


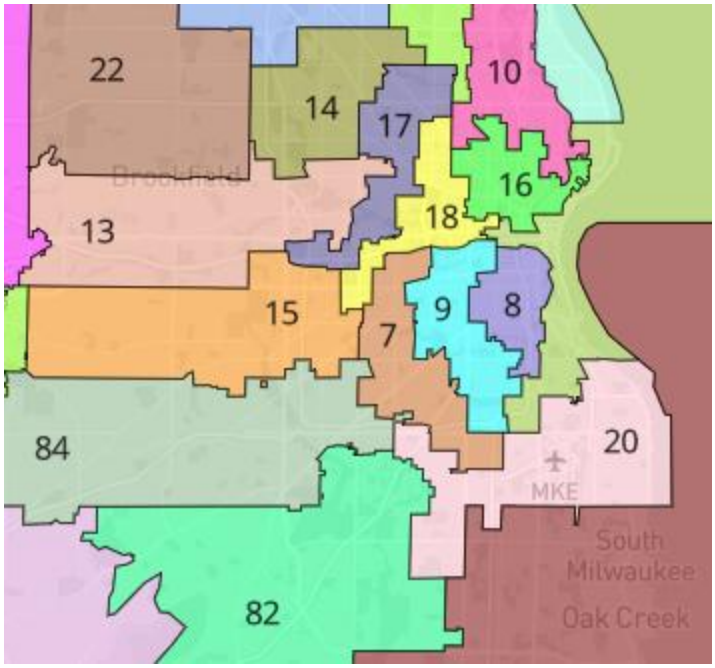
The Legislature's proposal significantly changes AD13, AD14, AD15, and AD84. Rather than four stacked, rectangular districts, the districts now neighbor each other in a 2x2 grid. And AD14 assumes a serpentine shape, while AD84 retracts into Milwaukee County. In doing so, the Legislature violates one of its own purported goals: it pairs the incumbents of AD15 and AD84.

These population trades do not appear necessary to address malapportionment, nor do they create VRA opportunity districts. While the Legislature suggests that these changes allowed it to "eliminate … pre-existing municipal splits" in the cities of Brookfield and New Berlin (Leg. Br. at 23–24, n.15), those mergers do not flow from a need to rebalance population. Absent such a need, such shifts are forbidden by the "least-change" approach.

Compare the Legislature's approach to BLOC Petitioners':

Existing map **BLOC Petitioners' proposal**

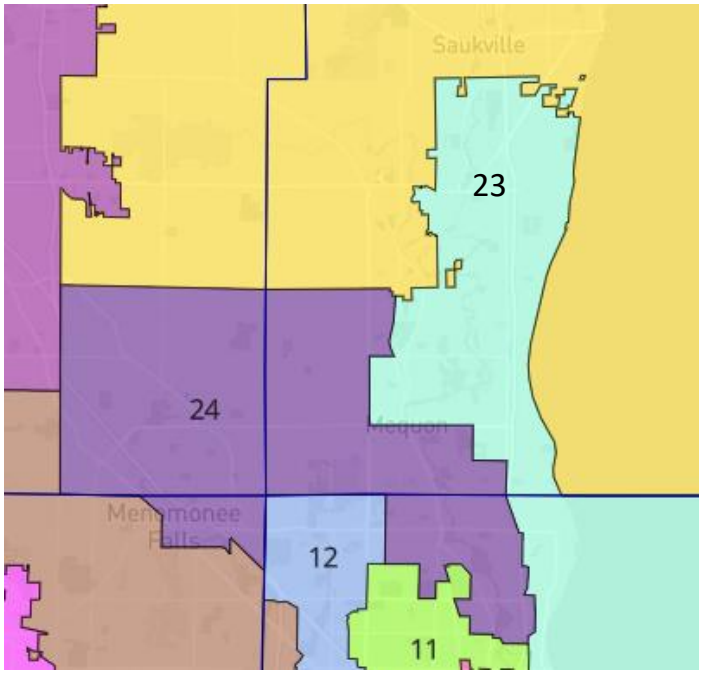




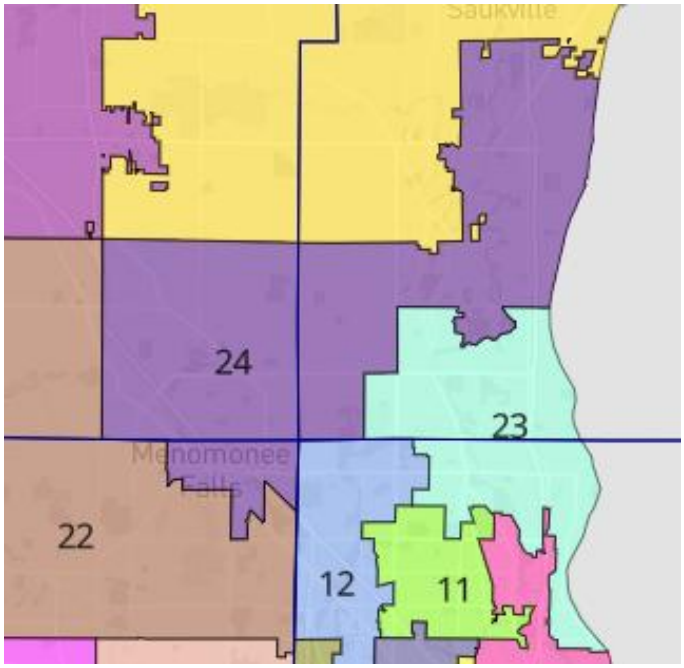
Unlike the Legislature's proposal, BLOC Petitioners retain the basic "stacked" structure of AD13, AD14, AD15, and AD84. To be sure, AD14 contracts inward, but thereby creates a necessary Black VRA opportunity district. Because legal requirements drive this change, it adheres to a proper "least-change" approach.

- ***North of Milwaukee: AD23, AD24***

Existing map



Legislature's proposal



The Legislature's proposal merely swaps population between AD23 and AD24. The prior version of these districts need not have shifted for malapportionment reasons, and the Legislature failed to draw an additional Black VRA district that

would have necessitated these changes, yet the Legislature changed them significantly.[6]

- ***City of Hudson and River Falls: AD30***

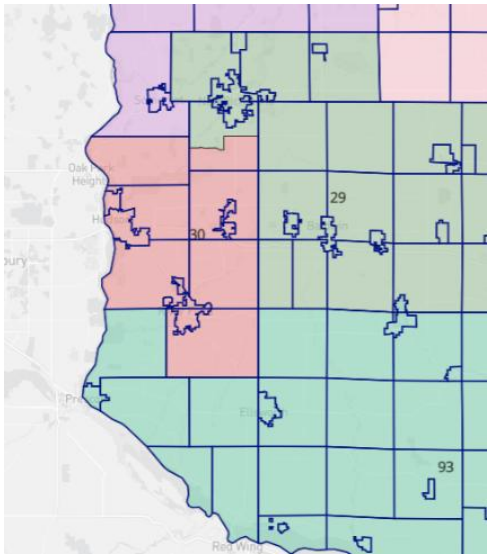
AD30 is currently overpopulated by 3,202 people. Two of its three neighbors are also overpopulated, AD29 (+2,213) and AD93 (+1,134), while its other neighbor, AD28, is close to ideal.

A reasonable "least-change" approach would subtract population from AD30, not add it. Its core retention should thus be close to 100%. And its overpopulated neighbors should have scores near 100%, less the new population gained from AD30, as shown by BLOC Petitioners' scores: AD30 (99.05%), AD28 (98.7%), AD29 (93.84%), and AD93 (94.58%). (BLOC App. 128-29)

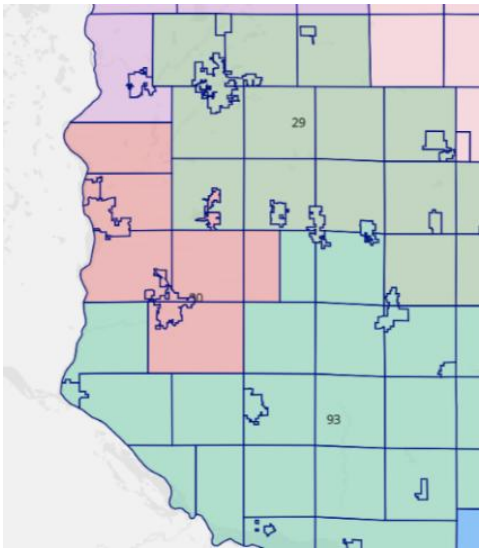
[6] More specifically, AD23 took River Hills, Brown Deer, and southern Mequon from AD24, while AD24 took northeastern Mequon, Grafton village, and Grafton town from AD23.

Not so for the Legislature's plan. All four districts have *below average* core retention: AD30 (80.54%), AD28 (75.48%), AD29 (71.95%), and AD93 (72.45%). The maps below reveal the Legislature's substantial changes:

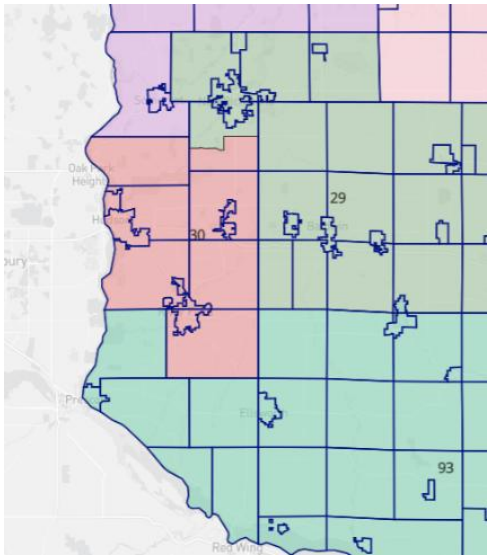
Current Plan



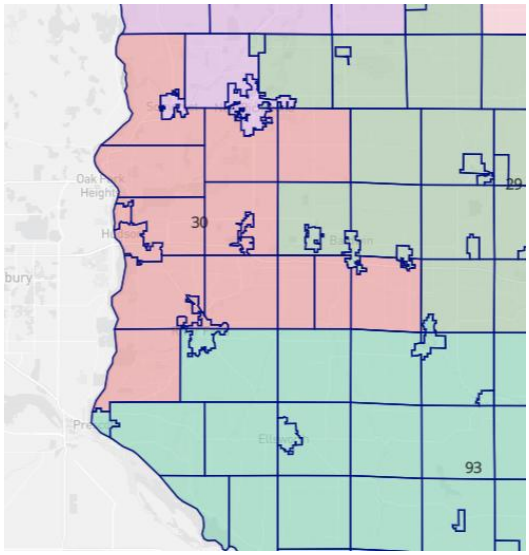
BLOC's Plan



Current Plan



Legislature's Plan



While AD30 needed to lose just 3,202 people, the Legislature shifts 14,761 people from AD30 to AD93. And it adds to AD30 4,291 people from AD28, 5,121 from AD29, and 2,177 from AD93. (Leg. App. 12, 18) The Legislature needlessly moves the City of New Richmond (over 10,000 people) from AD29 to AD28 and splits the city of River Falls (over 16,000 people) between two assembly and two senate districts. There is no plausible population-shifting justification for these substantial changes. AD30 borders the state line, and the surrounding districts had minimal population deviations.

These changes also create an incumbent pairing between AD30 Rep. Shannon Zimmerman, who claims a residence address in River Hills, and AD93 Rep. Warren Petryk, who lives near Eau Claire. The Legislature also moved the Town of Clifton from AD93 to AD30, despite AD30 needing to *lose* population. This is notable because Rep. Zimmerman was reported to have claimed a Town of Clifton

home *outside* AD30 as his primary residence for tax purposes, but his River Hills home *inside* AD30 as his voting address.[7] He faced a WEC complaint for failing to reside in AD30, which was dismissed on a 4-2 vote.[8] Now, the Legislature has moved Rep. Zimmerman's Clifton home *into* AD30 and his River Hills home *out* of AD30. Whatever is afoot here, it is not "least-change."

- ***Fox River Valley area: AD55, AD56, AD88***

The Legislature's reconfiguration of AD55 and AD56 also is inexplicable. AD55 must ***lose*** 2,459 people, while AD56 must ***lose*** 5,011. AD55 is bounded by Lake Winnebago, AD56, and AD57, a district that must ***gain*** 1,596 people. Under

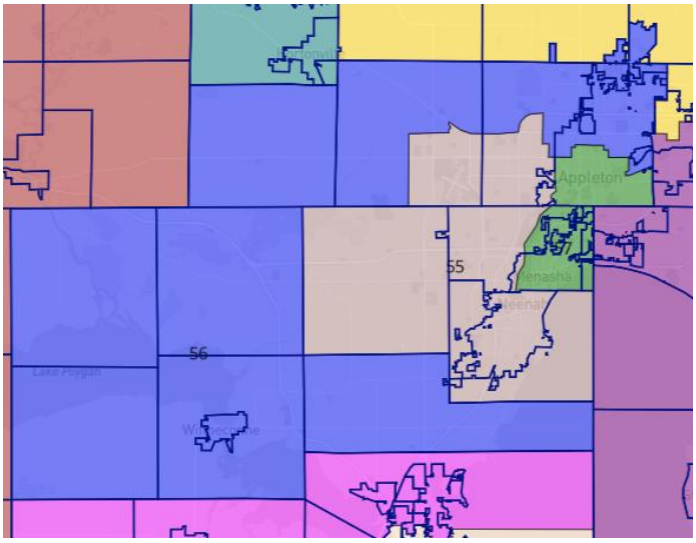
[7] Rob Mentzer, *Documents Suggest Assembly Lawmaker Lives Outside District in Violation of State Law*, WPR (Jan. 28, 2021), https://www.wpr.org/documents-suggest-assembly-lawmaker-lives-outside-district-violation-state-law.

[8] Daniel Bice, *Elections commission rejects complaints accusing state lawmaker of living outside his district*, Milwaukee Journal Sentinel (Feb. 5, 2021), https://www.jsonline.com/story/news/politics/2021/02/05/commission-rejects-claim-rep-shannon-zimmerman-lives-outside-district/4406915001/.

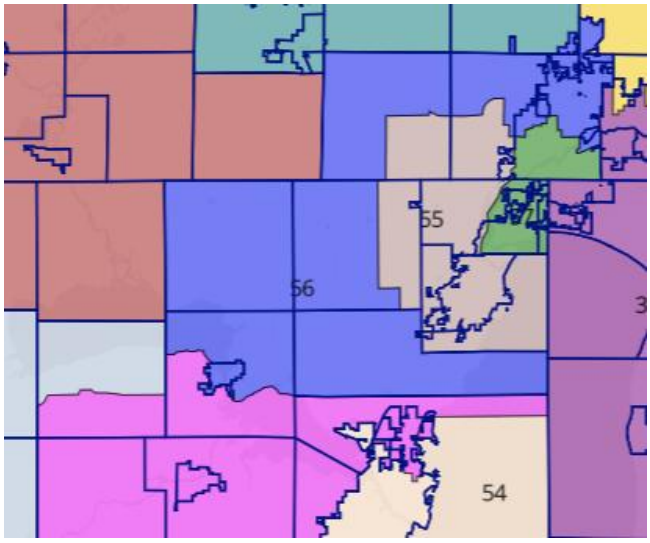
a "least-change" approach, AD55 would retain nearly 100% of its core, shedding population to AD56 or AD57. In BLOC Petitioners' plan, AD55 retains 99.97% of its core, AD56 retains 95.66% (gaining some from AD55), and AD57 retains 96.78% (gaining some from AD56). (BLOC App. 128-29)

As shown below, the Legislature did not follow a "least-change" approach:

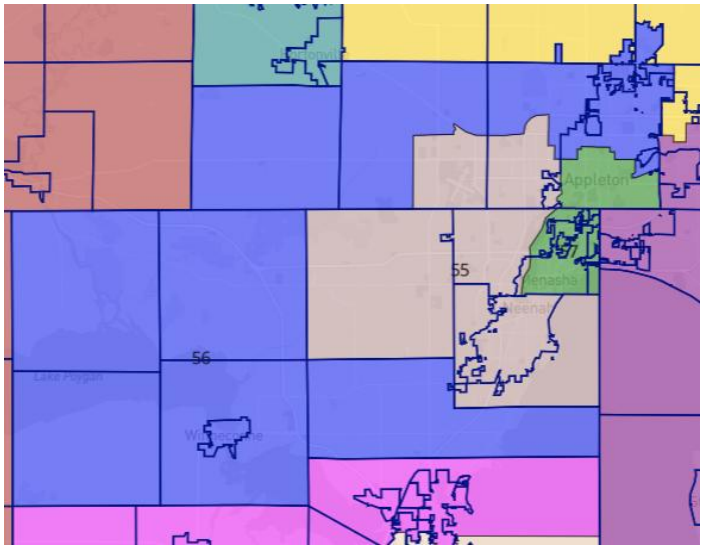
Current Plan



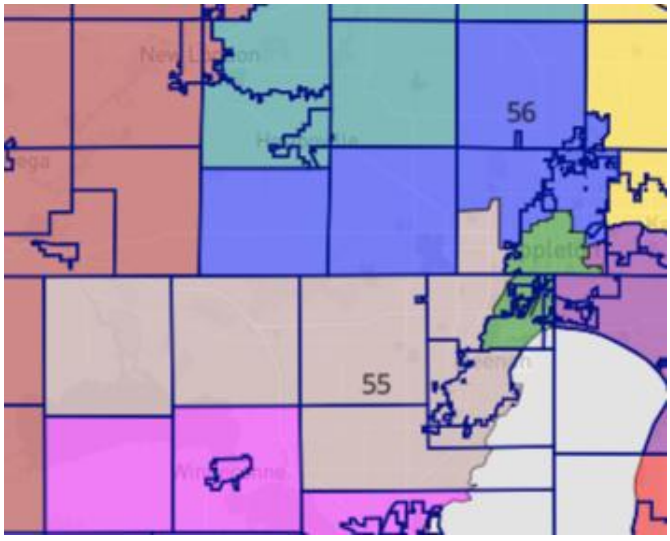
BLOC's Plan



Current Plan



Legislature's Plan



The Legislature *adds* 4,781 people from AD56 to AD55 (the reverse direction needed to balance population). (Leg. App. 14) AD55 then shifts 6,224 different people back to AD56, and AD56 shifts 2,774 people to AD57, which in turn shifts 3,179 to AD3. *Id*. These needless shifts result in core retention of 88.3% for AD55 and 77.1% for AD56, 11.67% and 18.55% below BLOC's plan respectively. (*Id*.; BLOC App. 128)

Likewise, near Green Bay, AD88 is overpopulated by 3,361 people and its neighbor AD2 is overpopulated by 3,031 people. In BLOC Petitioners' plan, AD88 rightly has a core retention of 100%—*i.e.*, it only loses population. (BLOC App. 128-29) In the Legislature's plan, however, AD88 and AD2 unnecessarily *swap* population, with AD2 gaining 10,744 people from AD88 and AD88 gaining 9,738 people from AD2. The Legislature's AD88 thus retains only 75.4% of its core. (Leg. App. at 17)

The Legislature rightly notes that "population growth in the Fox Valley area required changes," suggesting that it used those changes as an opportunity to eliminate existing municipal splits in De Pere, Little Chute, Ledgeview, Calumet and Greenville. (Leg. Br. at 21 n.12) But these municipal reunions did not flow from a need to remedy malapportionment. The Legislature merely swapped population between AD2 and AD88 to make the De Pere and Ledgeview changes and between AD55 and AD56 to make the Greenville change. And it added population to AD5—one of the most overpopulated districts in the State (+7,895)—to reunite Little Chute.

These shifts, unconnected with remedying malapportionment, violate the "least-change" approach. The Legislature lauds its plan as having 52 municipal splits, down from 78 in the existing plan. (Bryan Rpt. at 19) But that decrease itself indicates a departure from "least-change." And

because, as shown, many of these reunions are untethered to legal requirements, they "tread further than necessary to remedy the[] current legal deficiencies" and therefore "would intrude upon the constitutional prerogatives of the political branches and unsettle the constitutional allocation of power." *Johnson*, 2021 WI 87, ¶64.

By contrast, BLOC Petitioners properly only reunited municipalities where malapportionment or the VRA required changes and made eliminating a municipal split possible (*e.g.*, Sheboygan and Beloit).

C. Other factors should not be considered in the "least-change" analysis, if at all.

The Court's "least-change" analysis should end after examining core retention and changes unexplained by legal requirements. It should not go on to consider incumbency pairing and delayed senate voting. And while delayed senate voting could be considered separately from "least-change,"

protecting incumbents should not because it is not a traditional districting criterion and necessarily requires the Court to balance the same partisan considerations it has forsaken.

1. Delayed senate voting is not relevant to a "least-change" analysis.

Other parties suggest that the Court should measure "least-change" by examining how many voters will experience delayed senate voting. (Leg. Br. at 25–28; Bewley Br. at 7) Admittedly, this figure represents a "traditional and neutral redistricting criterion that may assist" the Court when choosing among proposals that otherwise satisfy "all relevant legal requirements" and represent a "least-change" approach. *Johnson*, 2021 WI 87, ¶ 83 & n.9 (Hagedorn, J., concurring).

But delayed senate voting does not represent a meaningful measure of "least-change," and the Court has wisely not recognized it as such. The measure is arbitrary: two proposals with identical core retention can yield different

levels of delayed senate voting simply due to geographic chance. If one proposal happens to move more voters than another from an odd-numbered senate district into an adjacent even-numbered one, it will have a higher level of delayed senate voting, even though both proposals move the same number of total voters. Except for the geographic vagaries of neighboring odd and even senate districts, there is little reason to distinguish the two from a "least-change" perspective—both displace the same number of voters from their original senate district.

Regardless, BLOC Petitioners' level of delayed senate voting—179,629 voters—is still on the lower end of the parties' proposals (and far less than the roughly 300,000 delayed voters created by 2011 Wisconsin Act 43). While slightly higher than the Legislature's (138,732 voters) and Sen. Bewley's (135,560 voters), those parties' failure to comply with the VRA explains this difference. Creating seven Black

opportunity assembly districts required BLOC Petitioners to move more voters from odd-numbered senate districts to even-numbered ones than in those proposals, both of which have fewer such districts. And BLOC Petitioners' figure is substantially lower than Citizen Data Scientist's (422,492 voters) and Hunter Petitioner's (240,723 voters).

That leaves only the Governor's proposal, which also has seven Black opportunity districts while delaying a senate vote for about 40,000 fewer voters than BLOC Petitioners'. This difference can be largely explained by how the two proposals treat the Village of Shorewood. BLOC Petitioners' proposal moves Shorewood out of AD10, which required moving voters from odd-numbered SD7 (which contains AD19) to even-numbered SD4 (which contains AD10 and AD16). This shift delays senate voting for the affected population. The Governor's proposal avoids this shift—and the

resulting delayed senate voting—by keeping Shorewood in AD10.[9]

As explained above, *supra* at I. C., the VRA justifies BLOC Petitioners' decision. Compliance with federal law must take precedence over a minor increase in delayed senate voting. *See, e.g., Prosser v. Elections Bd.*, 793 F. Supp. 859, 866 (W.D. Wis. 1992).

2. The number of paired incumbents should not be considered.

Nowhere does *Johnson* indicate that a "least-change" approach should avoid district adjustments that pair incumbents. Contrary to some parties' suggestions (*see* Bewley Br. at 8; Gov. Br. at 18-19; Leg. Br. at 28-30), incumbent pairings should not be considered because this criterion requires the Court to balance partisan considerations,

[9] This choice also largely explains why the Governor's senate core retention score is around 2.5% higher than BLOC Petitioners'.

contrary to this Court's clear directive. *See, e.g.*, *Johnson*, 2021 WI 87, ¶ 39.

Rather than neutrally reallocating population to comply with VRA and "one person, one vote" requirements, choosing among plans that pair different sets of incumbents requires the Court to engage in partisan choices, embroiling it in political considerations. As one observer put it, "[i]t might be all well and good for a legislature to protect its own, but why should a court be in the business of placing a thumb on the scale in favor of incumbent reelection?" *See* Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131, 1162 (2005).

Indeed, even the Legislature's cited authority recognizes the inherently political nature of protecting incumbents. In *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 647 (D.S.C. 2002), (Leg. Br. at 28), the court contrasted incumbent pairing with "other *nonpolitical*

considerations such as such as communities of interest and compactness." (emphasis added). *McConnell*'s observation was correct—incumbent protection is "an inherently more political" factor than communities of interest and compactness. *Johnson v. Miller*, 922 F. Supp. 1556, 1565 (S.D. Ga. 1995), *aff'd Abrams v. Johnson*, 521 U.S. 74 (1997).

And another case the Legislature cites, *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688 (D. Ariz. 1992), (Leg. Br. at 28), opines only that incumbents should not be paired "unnecessar[ily] or invidious[ly]." But when such pairings result from district changes "required by the Constitution or the Voting Rights Act," they are appropriate. *Id*.

That was exactly BLOC Petitioners' approach. Some incumbency pairing where legislators live near their districts' borders or where required population changes moved those borders was unavoidable when complying with the VRA and

rebalancing population. BLOC Petitioners' proposal includes only two senate districts and three assembly districts with incumbent pairings (excluding pairings where an incumbent is not running for re-election). Those figures lie within one or two pairings of every other party who submitted that data. Even if considered, this criterion further supports choosing BLOC Petitioners' proposal or, at minimum, does not alone justify rejecting it.

Moreover, the Legislature fails to report the number of incumbents its plan draws out of their districts without pairing them, despite highlighting this phenomenon in its brief as being equally problematic for maintaining the "constituent-incumbent relationship." (Leg. Br. at 28) Its proposal moves Rep. Vruwink from AD43 to AD33, resulting in a reconfigured AD33 that retains only 30.6% of Rep. Vruwink's constituency. (Leg. App. 13) Likewise, the Legislature's plan moves Rep. Horlacher from AD33 to AD83, which retains only 39.3% of

his constituency. (Leg. App at 12) The Legislature's plan thus creates *five* legislative districts, not three, that affect the "constituent-incumbent relationship," the same number as in BLOC Petitioners' proposals.

III. Other legal and traditional criteria justify selecting BLOC Petitioners' proposal.

BLOC Petitioners' proposal also falls well within accepted levels of population deviation and compactness, and its districts are contiguous. It also performs well at preserving communities of interest while not departing needlessly from the current map to do so.

A. Remaining federal and state law requirements do not justify selecting any proposal instead of BLOC Petitioners'.

Remaining federal and state law requirements do not meaningfully distinguish the parties' proposals:

- All parties' proposals fall below the constitutional *de minimis* 2% population deviation target. *See, e.g., Baumgart v.*

Wendelberger, No. 01-C-0121, 2002 WL 34127471, at *2 (E.D. Wis. May 30, 2002).

- All proposals fare similarly on the compactness criterion, as measured by Reock scores.[10] BLOC Petitioners' assembly proposal (0.38) is only marginally less compact than the Governor's (0.397) the Legislature's (0.39), Sen. Bewley's (0.405), the Citizen Data Scientists' (0.406), and Hunter Petitioners' (0.44). (BLOC Resp.App. 32-36) The senate proposals also minimally differ on this score. Courts have approved compactness scores lower than these.
- BLOC Petitioners' proposed districts are contiguous, as are those proposed by other

[10] This measures the relationship between a district's area and the smallest circle that would capture the entire district. The higher the score on a scale of zero to one, the more "compact" the district.

parties. (BLOC App. 136, Mayer Rpt. at 22; Citizen Br. at 28; Leg. Br. at 31; Gov. Br. at 17; Bewley Br. at 10)[11]

B. BLOC Petitioners' proposal best serves the traditional redistricting criterion of preserving communities of interest.

BLOC Petitioners' proposal preserves communities of interest by closely tracking the current plan's number of county and municipal splits and, when presented with an opportunity created by necessary population shifts, by reuniting two prominent municipalities that are currently split—Beloit and Sheboygan. Should other proposals survive to this stage of the analysis, BLOC Petitioners' proposal presents the "best alternative" given its performance on this measure. *Johnson*, 2021 WI 87, ¶ 83 (Hagedorn, J., concurring).

[11] BLOC Petitioners have discovered a few minor technical errors in their proposal. These errors are immaterial, but BLOC will correct them for its January 4 submission.

Communities of interest are often described as groups of people with "actual shared interests," *Miller v. Johnson*, 515 U.S. 900, 916 (1995), or with common "cultural, economic, political, and social ties." *Diaz v. Silver*, 978 F. Supp. 96, 123 (E.D.N.Y. 1997). *aff'd*, 522 U.S. 801 (1997). The state constitutional requirement that assembly districts be "bounded by county, precinct, town or ward lines," Wis. Const. art. IV, §4, reflects the view that political subdivisions represent communities of interest. Accordingly, one objective way to measure a map's preservation of communities of interest is to quantify its municipal and county splits.

BLOC Petitioners' assembly proposal splits 77 municipalities and 53 counties, while its senate proposal splits 53 municipalities and 42 counties. (BLOC Resp.App. 25-28) These rates compare favorably to all other proposals (BLOC Resp.App. 32-36), and they are close to the 78 assembly and 48 senate municipal splits in the current plan, which further

shows BLOC Petitioners' adherence to a "least-change" approach. The Legislature, by contrast, has 52 assembly municipal splits and 31 in the senate. (Bryan Rpt. at 19) As discussed above in Section II. B., this departure from the existing plan for reasons other than complying with the VRA or equalizing population indicates that the Legislature has departed from the "least-change" approach, improperly changing policy reflected in the existing plan.

In addition to this statewide measure, BLOC Petitioners' proposal also reunites the important communities of interest represented by the cities of Beloit and Sheboygan. Recall how Milwaukee-area population decline required the region's districts to expand outward to acquire more people, and VRA-required changes required movement northward. When that ripple effect reached Beloit and Sheboygan, two cities that had been split between AD31 and AD45 and

between AD26 and AD27, respectively, BLOC Petitioners reunited these important communities of interest.

These two reunions can be contrasted with, for instance, the Legislature's approach. Although its brief also acknowledges the need to adjust population throughout the region surrounding Milwaukee, it fails to reunite Beloit and Sheboygan and instead leaves these communities of interest cleaved in two. So, should the Court's analysis consider communities of interest, the comparable level of county and municipal splits to the existing plan and the reunion of Beloit and Sheboygan merits selecting BLOC Petitioners' proposal.

CONCLUSION

BLOC Petitioners' proposed apportionment plan should be selected because it uniquely combines VRA compliance and fidelity to a "least-change" approach.

Dated: December 30, 2021.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 5,495 words.

Signed:

By Electronically signed by Douglas M. Poland
Douglas M. Poland

CERTIFICATION OF MAILING AND SERVICE

I certify that a paper original and 10 paper copies of the foregoing Response Brief of Intervenor-Petitioners, Black Leaders Organizing for Communities, Voces de la Frontera, the League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson, and Rebecca Alwin and Appendix were hand-delivered to the Clerk of the Supreme Court on December 30, 2021.

I further certify that on December 30, 2021, I sent true and correct email copies of the foregoing Response Brief of Intervenor-Petitioners, Black Leaders Organizing for Communities, Voces de la Frontera, the League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson, and Rebecca Alwin and Appendix, to all counsel of record.

By Electronically signed by Douglas M. Poland
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