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March 9, 2022

Via Email & Hand Delivery

Sheila T. Reiff
Clerk of the Wisconsin Supreme Court and Court of Appeals
Wisconsin Supreme Court and Court of Appeals
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Re: *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA, Opposition to Pending Motion

Dear Ms. Reiff:

Per this Court's March 7, 2022 request for responsive letter briefs, the Hunter Intervenors submit the following response to the Wisconsin Legislature's Motion for a Stay Pending Appeal.

The Legislature seeks a stay of this Court's March 3, 2022 order adopting remedial assembly and senate districting maps while it seeks federal court review of its claim that this Court is guilty of racial gerrymandering. The Legislature's claims are without merit and it has failed to make the requisite showing entitling it to the extraordinary relief of a stay pending appeal. Even the Legislature itself appears to doubt the strength of its own legal theory: it advised the U.S. Supreme Court that this Court is "likely" to deny the Legislature's motion for stay.[1] That assessment properly reflects the weakness of the Legislature's request: not only has it failed to make a strong showing that it is likely to succeed on the merits of the appeal; it will not suffer irreparable injury absent a stay; a stay

[1] *See* Letter from Taylor A.R. Meehan, Counsel of Record, to Hon. Scott S. Harris, Clerk, at 1 (Mar. 7, 2022), available at **********.supremecourt.gov/DocketPDF/21/21A471/217859/20220307135813545_Wisconsin%20Legislature%20v.%20WEC%20Supplemental%20Letter%20and%20Order.pdf.

would substantially harm other parties; and a stay will harm the public interest. *See State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225, 229 (1995).

The Hunter Intervenors join the arguments filed today by the BLOC Intervenors and write separately to emphasize the following points: *First*, the Legislature lacks standing to pursue the claims that it raises in federal court. *Second*, this Court could not have committed a racial gerrymander because racial considerations did not predominate in the Court's selection of remedial legislative maps. *Third*, the Legislature seeks relief that is contrary to established law and has no likelihood of being granted. The Legislature's motion should be denied.

I. The Legislature does not have standing to pursue its federal court action.

The Legislature's federal court action fails at the threshold: neither the Legislature nor the Johnson Petitioners who join the U.S. Supreme Court application have standing to challenge the districts alleged to be gerrymandered in violation of the Fourteenth Amendment. Federal courts require those who seek appellate review to meet Article III's standing requirements, "just as it must be met by persons appearing in courts of first instance." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 64 (1997); *see also Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). Individuals have standing to challenge districts alleged to reflect a racial gerrymander only if they "reside[] in a racially gerrymandered district." *United States v. Hays*, 515 U.S. 737, 745 (1995). Voters who "do not live in the district that is the primary focus of their racial gerrymandering claim," have no standing to pursue such a claim. *Id.* at 739.

The Legislature fails this simple test. While the U.S. Supreme Court has indicated that it might be possible, under particular circumstances not present here, for a state legislature to *defend* legislatively enacted districting plans against claims that the district reflects a racial gerrymander, *see Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951-56 (2019), that Court has never indicated that a legislative body could *challenge* an adopted districting plan as a racial gerrymander. Such a rule would be incoherent, for equal protection injuries are individual, personal ones, and only plaintiffs who have "personally been subjected to a racial classification" have standing to sue. *Hays*, 515 U.S. at 745.

The addition of the four individual Johnson Petitioners to the Legislature's appeal does not change the analysis. The federal court applicants challenge two senate districts and seven assembly districts in and around Milwaukee as alleged racial gerrymanders. None of the Johnson Petitioners reside in any of these districts; instead, they claim to live in Madison, Spring Green, Grand Chute, and Wrightstown, respectively. *See* Pet. to the Sup. Ct. to Take Jurisdiction of an Original Action ¶¶ 14-17, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA, (Aug. 23, 2021). Thus, they, too, lack the requisite injury-in-fact to maintain an appeal on these grounds.

Because none of the federal court applicants have standing to pursue their claims, they cannot make a "strong showing" that their appeal is likely to succeed. *Gudenschwager*, 191 Wis. 2d at 440, 529 N.W.2d at 229. For the same reason, they cannot show that they will be irreparably harmed absent a stay. The Legislature's injury is merely disappointment that this Court did not adopt maps to the Legislature's liking.

II. Racial considerations did not predominate in this Court's choice of remedial maps.

The Legislature's appeal is also unlikely to succeed for a second, independent reason: even if the Legislature could clear the significant jurisdictional hurdle discussed above, this Court did not enact a racial gerrymander. To succeed on its claim, the Legislature bears the burden of showing "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 266-67 (2015). As this requirement suggests, racial gerrymandering claims challenge a *legislature*'s intent. The Legislature conspicuously fails to identify any case in any jurisdiction where a court-drawn map was found to suffer from illicit intent. There is no reason to expect this case will supply the first example in American history.

Moreover, the Legislature barely musters any argument that racial considerations predominated in this Court's map selection process. That omission is no accident: this Court made clear throughout the course of litigation that it would adopt maps that most closely satisfy its "least change" mandate. In its November 30 Order prescribing the relevant criteria that the Court would consider and prioritize during the map-selection process, the Court announced, "We adopt the least-change approach to remedying any constitutional or statutory infirmities in the existing maps[.]" Nov. 30 Order, ¶ 81 (plurality op.); *see also id.* ¶ 85 (Hagedorn, J., concurring) ("A least-change approach is the most consistent, neutral, and appropriate use of our limited judicial power to remedy the constitutional violations in this case."). This least change approach does not reflect any illicit racial motive. In fact, it is *the very approach urged by the Legislature* at the outset of litigation. *See* Br. by the Wis. Legislature at 32 (Oct. 25, 2021) (arguing the "least changes" approach "would comport with the Court's limited role in redistricting, respect the traditional redistricting principle of core retention, and mitigate temporal vote dilution").

Having received party map submissions drawn pursuant to its least change policy, the Court honored its prior commitment and "beg[a]n [its] analysis by probing which maps make the least change from the current district boundaries." Mar. 3 Order, ¶ 12. This race-neutral test identified a clear winner: the Court concluded that "the Governor's legislative maps produce the least change from current law." *Id.* ¶ 33. The Court then reviewed those maps and concluded they "comply with all relevant legal requirements." *Id.* ¶ 51. This

second step required race consciousness to ensure the maps did not violate the Voting Rights Act, but "[t]hat sort of race-consciousness does not lead inevitably to impermissible race discrimination." *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

The Court's explanation of its process was clear and consistent. The "selection of remedial maps in this case [wa]s driven solely by the relevant legal requirements and the least change directive the majority adopted in the November 30 order." Mar. 3 Order, ¶ 11, n.7. There is simply no plausible argument that this Court "subordinated traditional race-neutral districting principles . . . to racial considerations." *Bush v. Vera*, 517 U.S. 952, 958 (1996). Race was never the "predominant, overriding factor" motivating the Court's adoption of the Governor's map. *Miller v. Johnson*, 515 U.S. 900, 920 (1995).

The Legislature confuses the issue by attacking the Governor's supposed motivations. But the Legislature also cannot show that the Governor acted with impermissible racial intent, and, besides, the Governor did not adopt a map—this Court did. This Court's March 7 Order recognized that parties' map submissions inevitably were the product of any number of motives, but the Court was clear: "rather than weigh motives and pick and choose which changes we approve of and which we don't, we look to which maps actually produce the least change." Mar. 7 Order, ¶ 18. Full stop. There is no authority that would allow the federal court to find that the Legislature is likely to succeed on a racial gerrymandering claim based on its allegations about the Governor's motivation. In fact, quite to the contrary, the U.S. Supreme Court has held that the body that adopts a districting plan does not adopt the intent of a prior map-drawer, even where that intent had been found to be discriminatory by a prior court. *See Abbott v. Perez*, 138 S. Ct. 2305, 2313 (2018). Here, the Governor's intent has never been found unlawful. And *Abbott* makes clear that this Court is not responsible for the motives privately harbored by any party's map-drawers.

This is particularly so here, where the map in question was adopted by a Court that declared, from the outset, that it was not examining motives and would choose the map that most hewed to Wisconsin's prior maps. The Court conspicuously did *not* require parties to submit maps that maximize majority-minority districts in Milwaukee. Nor did it invite party submissions, and then cull proposals that failed to include a sufficient number of majority-minority districts. It did not impose *any* race-based goals or requirements at all. Because this Court did not adopt districting maps with unconstitutional racial intent, the Legislature cannot make a strong showing that it is likely to succeed on its racial gerrymandering claim.[2]

[2] To be sure, the Legislature would fail on the merits even if it could show that this Court was predominantly motivated by racial considerations. Such a showing would shift the burden to the state to "demonstrate that its districting [plan] is narrowly tailored to achieve a compelling state interest." *Miller*, 515 U.S. at 920. For the reasons explained in the BLOC Intervenors' letter brief

III. The Legislature is not entitled to an injunction replacing the Court's map with its own submission.

The Legislature's proposed remedy is unserious, contrary to law, and sure to be denied. The Legislature requests the U.S. Supreme Court to enter "an injunction pending appeal that instructs Wisconsin election officials to prepare for the forthcoming primaries using" the proposed maps submitted by the Legislature in this case. Appl. at 37.[3] These unenacted maps failed the political process and failed the judicial process. At most they are entitled to a participation ribbon, certainly not the force of law. Inconsistently, the Legislature also asked this Court to "instruct the parties that Act 43 [the 2011 redistricting enactment] remains in effect while the appeal of the constitutionality of the Governor's districts is pending." Mot. at 13 n.7. But the districts drawn a decade ago are now unconstitutionally malapportioned, which was the entire reason for this litigation in the first place. The Legislature can provide no reason why maps that are incontrovertibly unconstitutional—as the maps prescribed by Act 43 surely are—would be a permissible substitute.

Assuming—as the Legislature itself asserts—that there is insufficient time for a full remedial process, elections should proceed on the maps ordered by this Court. In the unlikely event that these maps are later found to require amendment, this Court may be tasked with remedying "district-specific claims." *Ala. Leg. Black Caucus*, 575 U.S. at 268. Thus. rather than adopting wholesale some alternative map, this Court may later resolve the Legislature's claims by adjusting the boundaries of some subset of challenged Milwaukee districts. Because the Legislature has no cognizable interest in the shape of those particular districts, this brings the problems with the Legislature's theory full circle: the Legislature is pursuing claims that are sure to be rejected. The Motion for Stay Pending Appeal should be denied.

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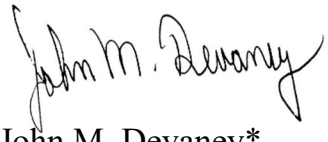
today, this burden would be satisfied by the Court's compelling interest in abiding by the Voting Rights Act.

[3] Emergency Application for Stay and Injunctive Relief (Mar. 7, 2022), **********.supremecourt.gov/DocketPDF/21/21A471/217802/20220307100303897_Wisconsin%20Legislature%20v.%20Bostelmann%20Application.pdf.

Respectfully,



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