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March 14, 2022

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 by Congressmen

Dear Ms. Reiff:

Per this Court's March 11, 2022 request for responsive letter briefs, the Hunter Intervenor-Petitioners submit the following response to the Congressmen's Motion for a Stay Pending Appeal and Order Permitting Parties to Submit New Maps.

The Court should deny the Congressmen's motion for stay pending appeal at the U.S. Supreme Court. The equities strongly disfavor a stay in this case, and that alone provides reason to deny the Congressmen's motion. But even if that were not so, the Congressmen have not—and cannot—establish any likelihood of success on the claims raised in their motion. The Congressmen lack standing to claim on appeal that the court-adopted congressional map violates one-person-one-vote. Because not one of the Congressmen claims to live in the single district (CD 3) which has one additional person, none of them can claim to suffer a personal injury-in-fact from this deviation—even if one were to presume (in the absence of any authority) that anyone can be injured by such a *de minimis* deviation at all. And just this past week, the U.S. Supreme Court considered an application to enjoin the congressional map adopted by the Pennsylvania Supreme Court after an impasse between the political branches, similar to the one here. That application, just like the Congressmen's motion, argued that the Pennsylvania Supreme Court violated Article I, Section 2 by adopting a map with a plus-or-minus one person deviation. The U.S. Supreme Court denied that application without dissent last week, and there is no reason to think the outcome here will be any different.

The Congressmen's due process claim is similarly flawed. At the outset, the Congressmen have no basis to feign surprise at the standard the Court used to select a map, months after the Congressmen affirmatively encouraged the Court to adopt a "least-change" standard that would, in their words, "*maximize core retention*." *See* Congressmen's Resp. Br. Addressing Court's Four Questions at 5, *Johnson* (Oct. 25, 2021) (emphasis added). On the merits, the Congressmen do not

have a legally protected interest in the contours of their district, which precludes their due process claim from the start. Even if they did, it is not a violation of due process for the Court not to announce, in advance, every factor that would prove relevant in its decision-making. This Court announced its Order Setting Criteria to be helpful to the parties; that order was not meant to serve as a weapon post-litigation.

Finally, the Court should not entertain the Congressmen's request to restart this litigation from scratch and permit all parties to submit brand new congressional proposals for the Court's consideration. For one, the Wisconsin Elections Commission has already told this Court that "to timely and effectively administer the fall 2022 general election, a new redistricting plan must be in place no later than March 1, 2022." Letter Br. on Behalf of the Wis. Elections Comm'n, *Johnson* (Oct. 6, 2021). We are nearly two weeks past that date. Nor is there any compelling reason to give the Congressmen a "do-over." The Congressmen had no more and no less information than all the other parties had at the start of this case; that they now regret their map submission is not a reason to throw Wisconsin's elections into disarray.

For all the reasons that follow, the Hunter Intervenors respectfully request this Court deny the Congressmen's motion.

I. The Court should deny a stay pending appeal.

The Congressmen have failed to make the requisite showing entitling them to the extraordinary relief of a stay pending appeal. *See State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225, 229 (1995); *see also Waity v. LeMahieu*, 2022 WI 6, ¶ 49, 400 Wis. 2d 356, 969 N.W.2d 263 (2022). The merits and the equities—together and separately—compel a denial of their stay request.

A. The Congressmen have not made a strong showing that they are likely to succeed on the merits of the appeal.

Neither the Congressmen's malapportionment claim nor their due process claim is likely to succeed on appeal. For this reason alone, the Court should deny their request for a stay.

i. The Article I, Section 2 claim is not likely to succeed on appeal.

The Congressmen's federal malapportionment challenge is not likely to succeed for the simple reason that the Congressmen do not have standing to pursue it. Federal courts require individuals seeking appellate review to meet Article III standing requirements, "just as [they] 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). And in malapportionment cases, the "harm arises from the particular composition of the voter's own

district." *Gill v. Whitford*, 138 S. Ct. 1916, 1921 (2018). The rights that are protected under the Equal Protection Clause in malapportionment cases are "individual and personal in nature," and thus only those "individual voters living in disfavored" districts—also known as overpopulated districts—can demonstrate an injury-in-fact. *Reynolds v. Sims*, 377 U.S. 533, 561, 563 (1964); *see also Baker v. Carr*, 369 U.S. 186, 206 (1962) (explaining that those who have standing to sue are those who have an interest "in maintaining the effectiveness of their votes") (citing *Coleman v. Miller*, 307 U.S. 433, 439 (1939)).

The Congressmen do not meet this standard. Under this Court's adopted congressional plan, only Congressional District 3 is "overpopulated," and even then the overpopulation amounts to just a single voter. See Exhibit 1 (Dr. Ansolabehere Declaration). The remaining congressional districts either reach exact population equality or are "underpopulated" by one voter. None of the Congressmen alleges to live in Congressional District 3. *See* Proposed Pet. for Original Action of Proposed Intervenor Pet'rs' Congressmen at ¶¶ 9-13, *Johnson* (Oct. 6, 2021).[1]

For that simple reason, none of the Congressmen have standing to appeal an alleged malapportionment injury. Even if the Congressmen sincerely believe that the new congressional plan is malapportioned, the desire "to have the Government act in accordance with law" does not confer standing. *Allen v. Wright*, 468 U.S. 737, 754 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126–27 (2014); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) ("[U]nder Article III, *an injury in law is not an injury in fact*. Only those plaintiffs who have been concretely harmed by a defendant's . . . violation may sue . . . over that violation in federal court.") (emphasis added). Because none of the Congressmen have standing to pursue this appeal, they cannot make a "strong showing" that their appeal is likely to succeed. *Gudenschwager*, 191 Wis. 2d at 440. For the same reason, they cannot show that they will be irreparably harmed absent a stay.

Even if the U.S. Supreme Court had jurisdiction to hear the Congressmen's malapportionment claim, it fares no better on the merits. Just this past week, the U.S. Supreme Court declined to accept a nearly identical challenge to Pennsylvania's congressional map, which was adopted by the Pennsylvania Supreme Court after the state reached impasse. The applicants there challenged Pennsylvania's new congressional plan as unconstitutionally malapportioned after the state supreme court selected a plan with a plus-or-minus one person deviation, even though the court had been presented with several plans with exact population equality. *See* Emergency Appl. to Justice Alito for Writ of Jurisdiction, *Toth v. Chapman*, No. 21A457 (Feb. 28, 2022). That application alleged that Pennsylvania's congressional plan was "constitutionally intolerable" and "flout[ed]" the Court's one-person one-vote jurisprudence. *Id.* at 22-23. Last week,

[1] The Congressmen currently represent and reside in Congressional Districts 6, 8, 1, 7, and 5 (Reps. Grothman, Gallagher, Steil, Tiffany, and Fitzgerald, respectively).

the U.S. Supreme Court denied the application without dissent. *See* Order List, No. 21A457, 595 U.S. __ (Mar 7, 2022). There is no reason to believe that this case will turn out any differently.

The U.S. Supreme Court's denial of that application was hardly surprising. No court has ever held that a plus-or-minus-one-person deviation—like that in the Wisconsin congressional plan—violates the equal population requirement. In fact, courts have held that population deviations of plus or minus one person from the ideal population *have* satisfied the population equality standard. *See Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 664 (D.S.C. 2002) ("In keeping with our overriding concern, the court plan complies with the 'as nearly as practicable' population equality requirement of Article 1, § 2 of the Constitution . . . with a deviation of plus or minus one person.") (citing *Karcher v. Daggett*, 462 U.S. 725, 730 (1983)); *see also Essex v. Kobach*, 874 F. Supp. 2d 1069, 1088 (D. Kan. 2012) ("The Court's plan results in two districts with populations of 713,278 and two with populations of 713,281. Such a distribution provides equality among Kansas voters as nearly as practicable, and therefore satisfies Article I, Section 2 of the U.S. Constitution."). Likewise, since 2000, at least six states—Oregon, Georgia, South Carolina, Kentucky, Colorado, and Maryland—have adopted congressional plans with an absolute two-person deviation without constitutional consequence. *See* Hunter-Intervenors' Mot. on Suppl. Authorities at 3-4, *Johnson* (Jan. 25, 2022). Wisconsin itself had a five-person deviation in its congressional plan after the 2000 redistricting cycle, also without constitutional consequence. *Id.* at 3.

But even if there were a colorable question as to the constitutionality of the congressional plan's population deviation, the U.S. Supreme Court has upheld congressional plans with significantly greater deviations where, as here, they are justified by a legitimate state interest. As the U.S. Supreme Court has explained, "we are willing to defer to state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts." *Karcher*, 462 U.S. at 740. "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, *preserving the cores of prior districts*, and avoiding contests between incumbent Representatives. As long as the criteria are nondiscriminatory, . . . these are all legitimate objectives that on a proper showing could justify minor population deviations." *Id.* (emphasis added).

This Court's adoption of the current congressional plan is easily justified by the Court's desire to select a plan that made the least changes to the districts in which Wisconsinites currently reside. This is exactly the kind of tradeoff the U.S. Supreme Court has approved as sufficient justification for minor population deviations—including deviations significantly greater than plus or minus one person. *See Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 763-65 (2012) (concluding a 4,871 population deviation in West Virginia's congressional plan was justified by the state's interest in avoiding contests between incumbents, not splitting political subdivisions, and limiting population shifts between the new and old congressional districts); *Abrams v.*

Johnson, 521 U.S. 74, 99–100 (1997) (finding the plan adopted by a federal court with an overall population deviation of 0.35%, the equivalent of several thousand people, to be a "slight deviation[]"justified by state's interest in reducing political subdivision splits, maintaining the core of its districts, and preserving communities of interest).

While the Congressmen argue this Court's congressional plan is unconstitutional because it is possible to draw a plan that maximizes core retention even more *and* achieves perfect population equality (even though no such plan was presented to this Court), that is not the standard this Court, or any court, is held to in making a good-faith effort to achieve population equality. The U.S. Supreme Court has never demanded that courts remedying impasse disputes exhaust every possible permutation of maps before one can be constitutionally compliant. Nor was this Court required to select the Congressmen's map—a map that moved an additional 60,041 Wisconsin citizens outside their current congressional district, *see* Mar. 3 Order ¶ 15—simply to equalize the entire state's congressional plan by one person.

Finally, even if the U.S. Supreme Court ultimately concluded that the congressional plan's population deviation were "unacceptable," the proper remedy would be to "require some very minor changes in the court's plan—a few precinct shifts—to even out districts with the greatest deviations." *Abrams*, 521 U.S. at 100. It would not require the selection of a new wholesale plan, as the Congressmen suggest. Mot. at 2-3.

ii. The due process claim is not likely to succeed on appeal.

The Congressmen's due process claim relies on a distortion of both the facts and the law.

The fact that this Court relied significantly on a core retention metric in choosing a congressional plan should not have come as a surprise to the Congressmen. On November 30, this Court issued an order setting out the criterion it would use to select a remedial map—"a 'least-change' approach." Nov. 30 Order, ¶ 5. This was hard to miss, with the Court going so far as to label a section of its November 30 Order, "**We Will Utilize a 'Least-Change' Approach**." Nov. 30 Order, ¶ 63. That unambiguous statement from the Court caused the Hunter Intervenor-Petitioners to functionally withdraw their map before oral argument to support another proposal with a higher core retention score upon learning that their original proposal ranked in the bottom of maps on that metric. *See* Hunter Intervenor-Pet'rs' Resp. Br. in Supp. of Proposed Maps at 15-16, 21, *Johnson* (Dec. 30, 2021) (noting "the Governor's legislative maps do the best overall at population retention" and that "the Governor's proposed legislative maps best comply with the least-change requirement"). They would not have made this concession if there were any ambiguity about the Court's chosen approach.

The Congressmen knew this too. While the Congressmen now suggest that the Court's prioritization of core retention was "newly announced," Mot. at 2, the Congressmen expressly

urged the Court to adopt a "'least-change' approach," arguing in prior briefing that such an approach "would both minimize voter confusion and *maximize core retention*." Congressmen's Resp. Br. Addressing Ct's Four Questions at 5, *Johnson* (Oct. 25, 2021) (emphasis added); *see also* Congressmen's Opening Br. Addressing Ct's Four Questions at 22, *Johnson* (Oct. 14, 2021) ("The 'least-change' approach would . . . maximize 'core retention,' . . . by limiting the number of people placed in different congressional districts. That reduces voter confusion by decreasing the number of people forced to vote in elections for unfamiliar congressional candidates, after a switch to a new district. And it furthers core retention by preserving the 'relations' between representatives and their 'constituents' in the existing districts, promoting 'continuity' and 'stability.'").

While the Congressmen may purport to disagree with the Court's conclusion that "core retention . . . is the best metric of least change," Mar. 3 Order ¶ 7, they cannot be surprised that such a metric would feature heavily in this Court's decision. Nor was this Court the first to equate "least-change" with core retention of the district's population. *See, e.g.*, *Below v. Gardner*, 963 A.2d 785, 795 (N.H. 2002) (New Hampshire Supreme Court remedying impasse and explaining "the court's plan imposes the least change for New Hampshire citizens in that it changes the senate districts for only 18.82% of the State's population"); Order at 27, *In Re Petition Of Reapportionment Commission Ex. Rel.* Case No. SC 20661 (Conn. Sup. Ct., Jan. 18, 2022) (special master remedying Connecticut's impasse aimed to "move[] the fewest people possible" to comply with the Connecticut Supreme Court's "least change directive").[2] To the extent the Congressmen merely disagree with this Court's legal interpretation of "least change," no federal court has authority to overturn this Court's determination on the meaning of state law. *See Barger v. Indiana*, 991 F.2d 394, 396 (7th Cir. 1993) ("State courts are the final arbiters of state law.").

Despite the Congressmen's apparent frustration that they misjudged this Court's November 30 Order setting criteria for selecting a map, their due process rights have not been violated in this litigation. Far from it. It is a basic tenet that "the requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). Of relevance here, courts have held elected officials and candidates have "no legally cognizable interest in the composition of the district" they hope to represent, *Corman v. Torres*, 287 F. Supp. 3d 558, 567 (M.D. Pa. 2018), and a legislator "suffers no cognizable injury, in a due process sense or otherwise, when the boundaries of his district are adjusted by reapportionment," or holds any legal interest "in representing any particular constituency." *City of Phila. v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980). For that reason alone, the Congressmen's due process claim must fail.

[2] Available at: https://jud.ct.gov/supremecourt/Reapportionment/2021/Docs/FinalOrder.pdf.

Nor is it a due process violation every time a court fails to spell out in advance every single factor that may be considered in the court's decision-making process. The Congressmen's cited due process precedent does not suggest otherwise. *See* Mot. ¶ 8. The decision in *Saunders v. Shaw*, 244 U.S. 317 (1917), for example, stands only for the proposition that after a litigant has been *barred* from offering evidence at the trial court, and that evidence becomes relevant due to an intervening decision by the U.S. Supreme Court, then the litigant should be permitted to offer such evidence. Similarly, *Reich v. Collins*, 513 U.S. 106 (1994), stands only for the proposition that it would violate due process to withhold taxes from a citizen after such taxes had been found unconstitutional. And so on. Simply put, there is no support for the proposition that a court violates the federal constitution when it disagrees with a litigant's preferred application of a legal standard.

B. The Congressmen have not shown irreparable harm.

While the Congressmen must establish that they will suffer irreparable harm absent a stay, *see Waity*, 2022 WI 6, ¶ 49, they have not done so here. At the outset, two of the Congressmen's alleged irreparable harms rest on their mistaken view of the merits of their claims. The Congressmen first allege that, without a stay, they will be required "to run and vote in unconstitutionally malapportioned districts." Mot. ¶ 9. But as described above, because none of the Congressmen are voters in the one congressional district that has one additional person, they suffer no injury from that population deviation. If anything, they benefit from it. The Congressmen also allege "irreparable harm from the loss of their due-process rights to a fair judicial process," *id.*, but that, too, depends on the merits of their due process claim, which fails for the reasons described above.

While the Congressmen also allege an irreparable harm in "expending substantial, unrecoverable resources campaigning in communities that they have not previously represented," *id.*, *every map* presented to the Court, including the Congressmen's proposed map, made changes to districts that would require the Congressmen to develop relationships with new constituents. Moreover, because this Court maximized core retention, the vast majority of the Congressmen's districts have not changed. Moreover, any such harm is self-imposed; if the Congressmen feel strongly that they will succeed on appeal, they can choose to focus their current campaign efforts on areas of the map that will remain in their district under any map this Court would adopt. Finally, revisiting the state's congressional map, as the Congressmen suggest, would only further delay the Congressmen's knowledge of which voters are in their district and their ability to manage a campaign.

C. The equities weigh against a stay pending appeal.

The Congressmen's motion does not meaningfully grapple with the potential harm to other parties and the public at large should this Court issue a stay. *See id.* ¶ 10 (arguing it would be

"trivially easy" to submit a new round of maps). But a stay pending appeal *would* substantially harm other parties and the public in at least two significant ways.

First, because a stay would have the effect of pausing this Court's order until the appeal is resolved, *see* Wis. Stat. § 808.07(2), a stay would have the effect of putting back in place Wisconsin's prior congressional map, which all parties have already agreed is severely malapportioned on a magnitude of tens of thousands of people. Such a result would violate the constitutional rights that this Court set out to remedy months ago.[3] It would also be an absurd outcome to require *tens of thousands* of Wisconsin's voters to remain in malapportioned districts while the Congressmen pursue a claim of malapportionment *for a single person*. Finally, should this Court stay its order, it risks the chance that this process is restarted before the three-judge federal court that has already been convened to remedy malapportionment. *See Hunter, et al. v. Bostelmann, et al.*, No. 3:21-cv-512, ECF No. 103 (W.D. Wis. Oct. 6, 2021) (three-judge court) (asking parties to provide regular updates on the status of the Wisconsin Supreme Court's redistricting efforts and explaining that it "will stand by to draw the maps—should it become necessary"). That court remains convened today, ready if necessary to draw constitutional maps for Wisconsin.

Second, a stay pending appeal would freeze the efforts of the Wisconsin Election Commission and the counties to prepare for rapidly approaching elections. The Wisconsin Elections Commission has already told this Court that "to timely and effectively administer the fall 2022 general election, a new redistricting plan must be in place no later than March 1, 2022." Letter Br. on Behalf of the Wis. Elections Comm'n, *Johnson* (Oct. 6, 2021). We are nearly two weeks beyond that date.

II. The Court should not consider additional congressional map proposals.

Finally, this Court should not entertain the Congressmen's request to permit all parties to submit brand new congressional proposals to the Court for the Court to select a new map. As noted above, the Wisconsin Elections Commission needed a final map nearly two weeks ago. Any additional delay would crunch the state's election administration efforts even further. Nor is there any compelling reason to give the Congressmen a "do-over." The Congressmen had no more and no less information than all the other parties had at the start of this case; that they now regret their map submission is not a reason to throw Wisconsin's elections into disarray.[4]

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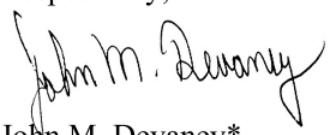
[3] It would also dilute the voting power of Rep. Gallagher and his constituents, who reside in the Eight Congressional District.

[4] The Congressmen suggest that the new remedial process they propose would be a simple mechanical exercise. However, if every party simply ran an algorithm to minimize population changes, there would almost certainly be a several-way tie for maximum core retention among

Respectfully,



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several maps. To pick a new winner, the Court would need to re-engage with traditional redistricting criteria and select which map best met the remaining criteria. It is not plausible that this could be done in a week, much less 24 hours.