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,
Intervenor-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,
Intervenor-Respondents.

HUNTER INTERVENOR-PETITIONERS' RESPONSE IN OPPOSITION TO CONGRESSMEN'S MOTION

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Per this Court's January 4, 2022 request for responsive briefs, Intervenor-Petitioners Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, and Kathleen Qualheim (the "Hunter Intervenors") submit the following response to the Motion of Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald to submit an alternative congressional plan for consideration to this Court.

INTRODUCTION

As this Court well knows, it has taken on the complex task of remedying Wisconsin's malapportioned congressional, state assembly, and state senate districts in an extremely compressed timeline. To accomplish this herculean task, the Court developed precise procedures in its November 17, 2021 Scheduling Order:

- On November 30, the Court provided the parties with the relevant criteria for selecting a remedy.
- On December 15, the parties could file one proposed remedial map for each of the state assembly, state senate, and congressional maps.
- On December 30, the parties could file briefs responding to the other parties' proposals.
- On January 4, the parties could file short replies.

See Johnson v. Wis. Elections Comm'n, No. 2021AP1450-OA, Order at 1-2 (Wis. Nov. 17, 2021) (the "Scheduling Order").

The Congressmen have failed to adhere to the Court's orders. First, the congressional map the Congressmen proposed on December 15 (the "Original Map") ignored the Court's "least-change" mandate, going

far "further than necessary to remedy [the existing map's] legal deficiencies." *See Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA, Order at 1-2 (Wis. Nov. 30, 2021) (the "Criteria Order"). Now, in a tacit admission of their Original Map's inadequacies, the Congressmen propose an "alternative (as opposed to a replacement) map." *See* Motion at 7. The Congressmen's attempt to submit a new map at this late stage of the proceeding violates the Scheduling Order and does so with maximum prejudice to the other parties and the judicial process. The Congressmen's motion must be denied.

ARGUMENT

I. The Congressmen's proposed maps and deviation from the remedial process disregard this Court's orders.

The Congressmen's Original Map was drafted and passed by the Legislature before the Court issued its Criteria Order. Among other things, that map made substantial changes to Wisconsin's existing Third and Seventh Congressional Districts. For example, the Third District only deviates from ideal population by 3,131 people. Nevertheless, the map proposed by the Congressmen and the Legislature moves 238,929 people in and out of the Third District—more than 75 times the number needed to equalize population. *See* Hunter Reply Br. at 11.

In its Criteria Order, however, the Court stated clearly that proposed remedial plans should follow the least-change framework. Despite that guidance, the Congressmen did nothing in the intervening weeks to alter their Original Map to comply with the Court's least-change requirement. Instead, the Congressmen waited until *after* the deadline for proposed plans to prepare a new map that purports to follow a least-change

approach. The Congressmen provide no explanation for why they ignored the Court's Criteria Order in the first instance.

After all parties submitted their proposed map, the Congressmen, having inevitably realized that many other parties did in fact comply with the least-change mandate, still sat on their hands. They waited more than two weeks to submit their new map. And, in doing so, they ignored that the Scheduling Order does not contemplate the parties filing new maps but, instead, only allows a party to seek to make "a correction or modification," by filing "a motion seeking the court's leave to amend the proposed map." Scheduling Order at 2. The terms "correction" and "modification" convey the limited nature of any additional submissions that are allowed—relatively minor technical corrections or modifications to maps *that were previously filed*. No reasonable reading of this language supports the conclusion that the parties are permitted to submit entirely new maps and to request that the court consider multiple maps. If that is what the Court had intended, it surely would have said so.

While the Congressmen feign confusion over "whether the submission of an alternative (as opposed to a replacement) map […] requires them to submit a motion," it is clear from the plain language of the Court's Scheduling Order that alternative maps are not permitted. Mot. at 7. The Scheduling Order was explicit: "each party (including all intervenors) may file *a proposed map* (for state assembly, state senate, and congress)." Scheduling Order at 2 (emphasis added). The Congressman's Alternative Map, however, was not an amendment to their Original Map, but a wholesale second proposal for consideration. The Congressmen are plain on this point: They repeatedly maintain that

the Court should consider the Original Map as it was first proposed, in addition to the new proposal. Mot. at 4, 7.

Moreover, the Scheduling Order also requires an explanation of the reasons for an amendment to the map, yet the Congressmen never provide one. The Congressmen are simply concerned that a unique feature of their map (one that substantially changes the existing map) will be disfavored by the Court, so they would like to propose another version of their map to omit that feature. If the Congressmen are granted leave to submit an entirely new map after reviewing all other proposed maps, then basic litigation parity requires permitting every other party to submit a new map after reviewing the Congressmen's latest submission. And then every party would need time to review and respond to every other submission, and more time to reply to the responses. But as everyone well knows, there is no time for any of that. The Court required every party to submit their best proposal by December 15 because this case must advance expeditiously to avoid disturbing election deadlines or inviting federal court intervention. The Congressmen's last-minute gambit violates the entire framework for this litigation.[1]

II. The Congressmen's approach to the remedial process maximally prejudices the other parties and the Court's own decision-making.

The Congressmen's submission of an Alternative Map two weeks after parties' proposals were due—and after parties had already written and filed response briefs to the universe of proposals—severely

[1] Notably, the Congressmen's intervention in this case was premised on their promise not to "unduly delay or prejudice the adjudication of the rights of the original parties." Cong. Mot. to Intervene at 18 (quoting Wis. Stat. § (Rule) 803.09(2)).

prejudices the other parties to this proceeding, both in terms of their inability to respond to the Congressmen's Alternative Map and the imbalance of letting only one party propose multiple, alternative remedies. Equally important, the Congressmen's approach also undermines this Court's selection of a map: The Court must not consider a remedial plan that has not been subjected to adversarial briefing and expert analysis.

Contrary to the Congressmen's representations that their alternative map was disclosed "consistent with the parties' Proposed Joint Discovery Plan," Mot. at 8, the Congressmen violated that agreement. In the Joint Discovery Plan, the parties agreed to "exchange proposed maps with the expert disclosures on December 15, 2021." *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA, Joint Proposed Discovery Plan at 5 (Dec. 3, 2021). To further emphasize the importance of timely disclosure, the parties agreed that all non-public expert materials would be disclosed within one day—providing the parties with as much time to review competing proposals prior to the December 30 deadline for response briefs as possible.

The Congressmen did not even express an intent to propose their Alternative Map until the evening prior to the December 30 deadline for response briefs. In notifying the other parties, the Congressmen did not disclose what had changed in their modified version or why they were submitting a modified map. Indeed, the actual disclosure did not occur until the Congressmen filed these materials with the Court on December 30, at the exact same time all other parties' response briefs were due.

Such untimely disclosure made it impossible for any of the parties to address this proposed map in their response or reply brief.[2]

The Congressmen have not and could not provide an explanation for their dilatory disclosure. Moreover, they have not ever explained *why* the submission of their alternative map is necessary or justified—their Motion merely notes that their Original Map was the only proposal which eliminated "District 3's long, narrow appendage."[3] Mot. at 4. The differential treatment of District 3's appendage is clear from the face of the parties' proposals, and this difference would have been apparent to the Congressmen on December 15, 2021. Nevertheless, the Congressmen made no effort to respect the court-ordered schedule, took no steps to notify other parties of their plans to "amend" or submit a modified map until the eleventh hour, and eviscerated the judicial vetting process for proposed plans.

CONCLUSION

For the reasons stated above, the Court should deny the Congressmen's motion to submit an alternative proposed map. The Court should evaluate only the maps that were proposed by the parties on December 15, 2021, in accordance with the Court's Scheduling Order.

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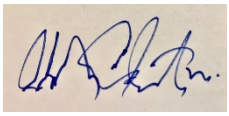
[2] The parties' reply briefs were due one and a half business days after the Congressmen's disclosure. That timeline did not permit the type of expert analysis and briefing required to respond adequately to the Congressmen's untimely submission. By contrast, the parties had eleven business days to evaluate the proposals submitted on December 15.

[3] The Congressmen do not claim that their alternative proposal was due to a technical error, but rather that their map made a unique and unsupported substantive choice—which further underscore the gamesmanship behind this new proposed submission. The Court's Scheduling Order did not contemplate each party substantively altering their own maps based on a review of other parties' proposals—such gamesmanship by the Congressmen should not be rewarded.

Dated this 5th day of January, 2022.

Respectfully Submitted,



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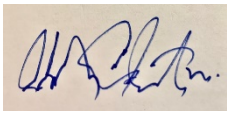
FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and the length requirements of the Court's January 4 Order for a response brief produced with a proportional serif font. The length of this brief is 1,597 words.

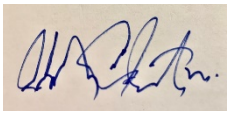
Dated: January 5, 2022



Charles G. Curtis, Jr.

CERTIFICATE OF SERVICE

I certify that on this 5th day of January, 2022, I caused a copy of this brief to be served upon counsel for each of the parties via e-mail.



Dated: January 5, 2022

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