No. 2021AP1450-OA

In the Supreme Court of Wisconsin

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.

RESPONSE OF CONGRESSMEN GLENN GROTHMAN, MIKE GALLAGHER, BRYAN STEIL, TOM TIFFANY, AND SCOTT FITZGERALD TO THE HUNTER PETITIONERS' MOTION FOR LEAVE TO PROVIDE AUTHORITIES IN RESPONSE TO ORAL ARGUMENT QUESTION

Intervenors-Petitioners Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald (hereinafter "the Congressmen"), respond to the Hunter Petitioners' Motion For Leave To Provide Authorities In Response To Oral Argument Question, filed with this Court yesterday, January 25, 2022. The Congressmen wish to bring three points to this Court's attention:

First, the Hunter Petitioners' Motion appears to be procedurally improper, as it asks this Court to consider previously existing authorities after oral argument. *See* Wis. Stat. § (Rule) 809.19(10) (authorizing supplemental submission only of "pertinent authorities decided after briefing"). The Hunter Petitioners' request is no different than the Attorney General's failed strategy in *Service Employees International Union (SEIU), Local 1 v. Vos* ("*SEIU*"), 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, where he similarly moved to file a supplemental, post-oral-argument brief to raise prior authorities to this Court, in response to oral-argument questions. *See* AG's Mot. For To File A Supp. Br.,

SEIU, Nos. 2019AP614-LV, 2019AP622 (Wis. Nov. 1, 2019). This Court denied the Attorney General's motion. *See* Order, *SEIU*, Nos. 2019AP614-LV, 2019AP622 (Wis. Dec. 10, 2019).

Second, the Hunter Petitioners' Motion does not properly and accurately describe the examples that the Motion cites.

As counsel for the Congressmen explained during oral argument, *see, e.g.*, Oral Argument Recording at 3:51:22–3:52:26, *Johnson*, No. 2021AP1450-OA (Wis. Jan. 19, 2022),[*] the U.S. Supreme Court has most recently held that "States must draw congressional districts with populations *as close to perfect equality as possible*," *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016) (emphasis added). As articulated by *Evenwel*, this rule admits of no exceptions. Before *Evenwel*, the Court held that "*there are no* de minimis *population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification*." *Karcher v. Daggett*, 462 U.S. 725, 734 (1983)

[*] Available at https://wiseye.org/2022/01/19/wisconsin-supreme-court-oral-arguments-johnson-v-wisconsin-elections-commission/ (last visited Jan. 25, 2022).

(emphasis added). Accordingly, even under the pre-*Evenwel* rule, a congressional map could not deviate from perfect population equality if that deviation could "*practicably be avoided*," unless the party can offer some "*justification*" for the departure. *Id.* (emphases added). Here, the Hunter Petitioners (just like the Governor) submitted a proposed remedial map that departs from perfect population equality, *yet they expressly concede that they could have "practically . . . avoided" such deviation and offered absolutely no "justification" for that deviation*. *Karcher*, 462 U.S. at 734 (emphases added); *see* Mot. 5; *infra* pp. 6–7; *see also* Oral Argument Recording, *supra*, at 2:13:00–2:15:34 (Governor's counsel explaining that, "[i]f the Court thinks that's a problem, then "that could be fixed overnight"). Simply put, because the Hunter Petitioners' proposed map departs from perfect population equality without justification, it is plainly unconstitutional even under the pre-*Evenwel* rule. *Karcher*, 462 U.S. at 734.

The Hunter Petitioners' Motion lists a couple of previous, pre-*Evenwel* congressional maps and related authorities in an

attempt to support their claim that their proposed map's deviation from perfect population is constitutional, but none of them are helpful to their meritless position. *See* Mot. 3–4. None of these authorities ever adjudicated whether the small deviations from perfect population equality at issue were justified under the pre-*Evenwel*, *Karcher* rule. *See generally* Mot. 3–4. Had there been adversarial litigation over these deviations as to any of those maps, the maps' proponents would have needed to articulate some justification for the deviations from perfect population equality for the maps to survive *Karcher* scrutiny.

Tellingly, the *only* case to have adjudicated the *Karcher* justification issue that the Hunter Petitioners' motion refers to is *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672 (M.D. Penn. 2002), which invalidated the proposed map at issue for a failure to justify adequately a minor deviation from absolute equality. *Id.* at 676–79. As the *Vieth* court explained, "[i]t has been suggested that the deviation from absolute numerical equality present in [the map] is too trivial or minute to rise to a constitutionally significant level.

While it is true that the deviation contained in [the map] is small, *Karcher* specifically holds that 'there are no *de minimis* variations which could practically be avoided, but nonetheless meet the standard of Art. I, § 2 without justification.'" *Id.* at 676 (quoting *Karcher*, 462 U.S. at 734). Again, the Hunter Petitioners (like the Governor) offered no "justification[s]" in this case, *Karcher*, 462 U.S. at 734, and actually admitted that they have no justification.

Third, if this Court is inclined to grant the Hunter Petitioners' request to submit a "modification to their proposed congressional map" that attempts to correct their map's unconstitutionality, in response to oral-argument questions, Mot. 5, then—in all fairness—all parties *absolutely* must have the opportunity to modify their maps in response to questions at oral argument. All such amendments would be equally "[ ]substantive," Mot. 5, as each would change the proposed lines.

That said, while the Congressmen would not oppose *all* parties being given an opportunity to amend their maps in light of oral argument, this appears unnecessary. After all, this Court

already has the option of choosing between all of the *constitutional* maps that the parties have submitted or, if this Court determines that all of those maps are inadequate in terms of this Court's least-changes methodology, following Wisconsin redistricting precedent by "combin[ing] the best features of the two best plans." *Prosser v. Elections Bd.*, 793 F. Supp. 859, 865 (W.D. Wis. 1992).

Dated: January 26, 2022.

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