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.

OPPOSITION BY THE WISCONSIN LEGISLATURE TO MOTION TO SUPPLEMENT THE RECORD BY THE GOVERNOR

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The Wisconsin Legislature

Last week, the United States Supreme Court rejected the Governor's race-based redistricting plan for failing to satisfy strict constitutional scrutiny. *See Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. ___ (2022) (per curiam). The next day, the Governor filed an unsolicited letter brief asking this Court to permit him to put in more evidence. Then yesterday evening—without any order from this Court permitting the Governor to put in more evidence—the Governor filed yet another unsolicited motion to supplement the record and attached an unsolicited expert report. The Governor misunderstands much. He should receive no special litigating privileges in this Court. And the expert opinion he would lob in does nothing to address the evidentiary gaps the United States Supreme Court has identified. It is a report about the *Gingles* factors. But in *Johnson v. DeGrandy*, the Court assumed all the *Gingles* factors had been met and still rejected the Governor's admitted "maximization" goal. 512 U.S. 997, 1007-09, 1016-17 (1994) (rejecting that maximization of majority-minority districts was required even assuming all *Gingles* factors were met and even with evidence of historical discrimination). The Governor has had at least a half a dozen chances to explain how what he is doing is different from the error in *DeGrandy*. Each time he ignores it. The Supreme Court of the United States did not ignore *DeGrandy* in its summary reversal. *See Wis. Legislature*, 595 U.S. at ___ (slip op. at 4) (citing *DeGrandy* for criticism that Governor's plan

"apparently embrac[es] just the sort of uncritical majority-minority district maximization that we have expressly rejected").

The Legislature again opposes the Governor's request for a do-over. Nothing stopped the Governor from submitting that expert report months ago, as this Court ordered and as other parties did. Moreover, it would be futile to expend additional time and expense engaging with the Governor's eleventh-hour expert on the *Gingles* factors when the Governor has not provided any factual explanation of his maximization plan other than seven districts should be drawn because they can be drawn. His plan thus remains irreconcilable with binding Supreme Court precedent; any additional evidence would merely cement that fact.

I. The Court should reject the Governor's motion to supplement the record as procedurally improper.

As the Legislature explained in its March 24 response letter brief, the Governor should not be permitted to reopen the record in these proceedings and submit new evidence that should have been submitted months ago. The Governor failed to carry his burden of proof that his redistricting plan complies with federal law. *See Wis. Legislature*, 595 U.S. at __ (slip op. at 4-5) (stating the Governor "provided almost no other evidence or analysis supporting his claim that the VRA required the seven majority-black districts that he drew"). And because the Governor failed to prove that his districts complied with federal law, his districts did not satisfy the

legal framework announced by this Court last fall. *See Johnson v. Wis. Elections Comm'n* ("*Johnson I*"), 2021 WI 87, ¶¶8, 38, 72, 399 Wis.2d 623, 967 N.W.2d 469; *Johnson v. Wis. Elections Comm'n* ("*Johnson II*"), 2022 WI 14, ¶12, __ N.W.2d ___. The Court should thus end these proceedings by selecting the Legislature's assembly and senate districts, which do comply with that framework. They have both the fewest changes *and* abide by state and federal law.[1]

The Governor's request for special dispensation should fare no better than that of the other parties who have tried to evade the Court's scheduling order with out-of-time submissions. There is no basis to reverse course now. *See* Legislature's Resp. Letter Br. at

[1] Senator Bewley suggested in her letter brief that her districts could be chosen as an alternative, describing her proposal as "easily the top performing map, among all submissions not tainted by fatal VRA issues." Bewley Resp. Letter Br. at 3 (Mar. 25, 2022). Senator Bewley omits that this Court already scored the Legislature's plan as the second-best least-changes plan, not Senator Bewley's. *Johnson II*, 2022 WI 14, ¶¶27-31; Wis. Legislature Resp. Br. 5-6 (Dec. 30, 2022) (showing Senator Bewley's plan has significantly lower core retention, more incumbent pairings, more splits, and significantly greater population deviations). Senator Bewley also omits that she abandoned her plan at argument. And Senator Bewley omits that her plan has never been described as race-neutral, that her plan pairs minority incumbents in existing VRA districts, that her plan makes similarly dramatic and constitutionally suspect changes to the Milwaukee districts as the Governor and BLOC plans, and that she too never introduced any evidence that her plan complied with federal law in that regard. *See* Wis. Legislature Resp. Br. 13, 27-28 (Dec. 30, 2022).

2-3 (Mar. 24, 2022). Contrary to the Governor's suggestion, the United States Supreme Court never said that the Governor was entitled to submit new evidence. Instead, the Supreme Court stated that this Court could "choose from among the other submissions." *Wis. Legislature*, 595 U.S. at ___ (slip op. at 7). The Supreme Court warned that *if* this Court were to instead entertain the Governor's districts again, *then* it must "take additional evidence." *Id.* And even then, "[a]ny new analysis" of such evidence "must comply with [the Court's] equal protection jurisprudence." *Id*. The Governor's statement that it is "necessary" to allow him to submit new evidence (Mot. 1) is nowhere to be found in last week's United States Supreme Court decision.

Permitting the Governor to submit new evidence is prejudicial to other parties and the Wisconsin voters. It imposes costs on those other parties and unnecessarily prolongs these proceedings. Any serious engagement with the Governor's new evidence would necessitate additional briefing, supported by response expert reports responding to that new evidence. The Legislature, for its part, already met its briefing and evidentiary deadlines months ago by submitting multiple rounds of expert reports in support of its proposed remedy and in response to others. If the Governor is given a third bite at the apple—having already submitted rounds of expert reports in December *and* a supplemental expert report for his "technical" corrections in January—the Legislature and

other parties must re-enlist their experts again at substantial cost and under significant time constraints. That makes no sense. Had the Governor timely submitted this eleventh-hour evidence as he was required to do months ago, the Legislature and other parties could have responded to the Governor's evidence months ago.

No legal standard has changed that could justify the Governor's failure of proof or his untimeliness. Indeed, the Governor's error was so straightforward that, when this Court adopted that error at his urging, it was *summarily reversed* by the United States Supreme Court. The Governor's request to supplement the record should be denied as too little, too late.

II. The Governor's untimely hired expert evidence does nothing to remedy his unlawful map.

The Governor contends that his new evidence—which could have been submitted months ago—shows that the three *Gingles* factors are met. Mot. 4-9. Even if that were so,[2] establishing the *Gingles* factors are met "is necessary but not sufficient to show a §2 violation." *Wis. Legislature*, 595 U.S. at ___ (slip op. at 4-5); *see also DeGrandy*, 512 U.S. at 1007-09 (rejecting that maximization

[2] The Legislature reserves the right to dispute any such evidence with response briefing and a responsive expert, but the Legislature will not undertake such costs unless and until directed to do so by this Court. For all of the reasons discussed, such additional briefing and reports (and accompanying costs and loss of time) are unwarranted.

of majority-minority districts was required even assuming all *Gingles* factors were met and even with evidence of historical discrimination). The "totality of circumstances" must still show that the existing districts are not "equally open" to voters—connoting "the absence of obstacles and burdens that block or seriously hinder voting." 52 U.S.C. §10301(b); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2337-38 (2021). That totality-of-circumstances analysis must account for the proportionality of the existing districts. *See DeGrandy*, 512 U.S. at 1013-14.

Applied here, the Governor's confusion about what the totality-of-circumstances analysis entails will land this case right back before the United States Supreme Court. The Governor has nothing to add to the totality-of-circumstances beyond borrowing from another parties' expert report about historical discrimination. Mot. 10-12. That evidence is not new; it was in the record when the Supreme Court summarily reversed; and it is no more availing now than it was then.

Ultimately, the Governor perpetuates the same errors here as those requiring reversal in *DeGrandy*. In *DeGrandy*, even though there was evidence of a "history of discrimination," the totality-of-circumstances did not demand an additional district because the existing district lines already "provid[ed] political effectiveness in proportion to voting-age numbers." *DeGrandy*, 512 U.S. at 1013-

14. So too here—six districts are proportionate to voting-age numbers.[3] The Voting Rights Act does not command, and the Constitution would not tolerate, that an additional district must be drawn merely because it can be drawn (by employing an unconstitutional racial target to dilute the BVAP of the existing districts, no less). *See id.* at 1016-17.

It would be futile to further engage with the Governor's new evidence when that new evidence would only cement the fundamental legal errors beneath the Governor's proposal. The Governor has not, for example, proffered any evidence of material changes to Milwaukee's existing population or district lines that

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[3] It is undisputed that 6 predominantly Black assembly districts (6.1% of the assembly) are proportionate to Black voting-age population statewide (between 6.1 and 6.5%). *See Johnson II*, 2022 WI 14, ¶48. What's more, the Black voting-age population ("Black 18") in Milwaukee has increased by only 6,609 individuals, nowhere near a majority of an assembly district. The county's Black voting-age population ("Black 18") grew slightly from 168,280 individuals in 2010 to 174,889 individuals in 2020. *Compare* "2020 Wisconsin Counties with P.L. 94-171 Redistricting Data" (reporting 168,280 "Black 18" individuals) *with* "2010 Wisconsin Census Voting Age Population Counts, LTSB, https://legis.wisconsin.gov/ltsb/gis/data/ (reporting 174,889 "Black 18" individuals). Even if one were to assume *all* multi-race individuals in Milwaukee should also be included in those Black voting-age population figures, Black voting-age population would still have increased by fewer than 8,000 persons over the decade. *Id.* The Governor now notes there was a census "undercount" (Mot. 4), but that observation is not specific to Wisconsin, let alone Milwaukee and in any event does not materially impact these very minimal population changes.

would necessitate the creation of an additional majority-minority district in a particular Milwaukee locale. *Cf. League of United Latin American Citizens* (*LULAC*) *v. Perry*, 548 U.S. 399, 427-30 (2006) (rejecting redistricting plan where existing majority-minority district was dismantled and replaced with a new majority-minority district elsewhere). Rather, the Governor has proffered generalized evidence about the three *Gingles* preconditions alongside the observation that it is mathematically *possible* to "draw[] Black population from … current districts" to make that seventh district—that is, to maximize the number of districts. Ex. A at 14-15, 22-24.

The Governor's maximization theory remains contrary to binding United States Supreme Court precedent: Even if all three *Gingles* factors are met, even if there are "incidents of societal bias," and even if there is "a history of discrimination," a court still *cannot* equate "dilution" with "anything short of the maximum number of majority-minority districts." *DeGrandy*, 512 U.S. at 1007-09 (assuming all three *Gingles* factors met); *id.* at 1013 (discussing evidence of discriminatory racial relations); *id.* at 1016 (rejecting maximization). But that is what the Governor continues to ask the Court to do here—define "dilution" as the failure to add a seventh district, merely because it is mathematically possible to draw it. *See* Ex. A at 24-25. If that weren't enough, no expert report can remedy the fact that the Governor adds that seventh district

by setting a constitutionally impermissible racial target (50% BVAP) to guarantee the maximization of majority-minority districts. Never has the Voting Rights Act or the Constitution condoned such a proposal. *See*, *e.g.*, *DeGrandy*, 512 U.S. at 1016-17; *Miller v. Johnson*, 515 U.S. 900, 925-27 (1995); *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017).

III. The Governor's erroneous arguments with respect to the Legislature's districts continue.

Finally, the Governor states that new evidence would show "that only the Governor's maps comply with the VRA." Mot. 2. Any new evidence would show the opposite. It would show that the Governor's districts are animated by maximization, not required by the Voting Rights Act and not permitted by the Constitution, *supra.* And it would show that the Legislature's districts comply with the Voting Rights Act without running afoul of the Constitution, *infra*.

The Governor's own expert—whose report should be rejected as procedurally improper and far too late in the proceedings—would *concede* that "the Black-preferred candidate … would win all six districts in the Legislature's Plan." Ex. A at 24. Meaning, the Governor's expert would agree that voters in the Legislature's six predominantly Black districts can elect their candidates of choice. They are "equally open." 52 U.S.C. §10301(b).

The expert's only criticism of the Legislature's plan would be that it "*overconcentrate*[*s*] Black voters into districts well beyond what is needed to elect Black-preferred candidates," which in turn "impedes the ability of Black voters to elect their candidates of choice *in an additional district*," which in turn "*dilutes* the ability of Black voters to participate in the electoral process and elect candidates of their choice." Ex. A at 24-25 (emphasis added). Sound familiar? It should to this Court even if it does not to the Governor's ears (deaf to *DeGrandy* and mute in response yet again). Failure to maximize is not synonymous with dilution, as the United States Supreme Court said time and again.

The Voting Rights Act does *not* "require States to create majority-minority districts wherever possible." *Miller*, 515 U.S. at 925. And it certainly does not require States to intentionally dial down the BVAP of existing districts to pursue such a goal. *See DeGrandy*, 512 U.S. at 1016-1017. "[R]eading §2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast." *Id*. at 1017.

So if—as the Governor's expert would concede (Ex. A at 24)—the Legislature's six predominantly Black districts permit Black voters to elect their candidates of choice, the Voting Rights Act

requires no more. Failure to further maximize the number of majority-minority districts "cannot be the measure of §2." *DeGrandy*, 512 U.S. at 1017. And any such maximization is especially dubious here, where the Legislature's six predominantly Black districts are proportionate to the State's Black voting-age population, *supra*. *See id.* at 1014 ("Treating equal political opportunity as the focus of the enquiry, we do not see how these district lines, apparently providing political effectiveness in proportion to voting-age numbers, deny equal political opportunity."). Again, the Voting Rights Act cannot *require* districts to be drawn merely because it is *possible* for them to be drawn. *See Miller*, 515 U.S. at 925.

Finally, no expert can rewrite the Constitution, however dissatisfied an expert might be with the BVAP percentages of neutrally drawn districts. The Governor's expert would critique the particular BVAP percentages of the Legislature's plan—believing some to be too high and some to be too low—even though she would concede that all six districts permit voters to elect their candidates of choice. Ex. A at 19, 24. The critique appears to be that the Legislature's race-neutral districts do not employ a racial target of 50% BVAP like the Governor's do. *Id.* at 19 (stating "the Legislature fails to unpack the over-concentrated majority Black districts."). The Constitution prohibits any such race-based change to the Legislature's race-neutral districts. *See* Legislature's Resp.

Letter Br. at 5-6 (Mar. 24, 2022).[4] It certainly prohibits racial targets to justify such changes. *See Cooper*, 1455 S. Ct. at 1472. Such race-based changes would violate the Equal Protection Clause. They would be no different than North Carolina's error in *Cooper v. Harris*, where the State unconstitutionally modified district lines so that the BVAP of districts just exceeded 50%. *See id*. Working within these constitutional parameters, the Governor's new evidence would only confirm the legality of the Legislature's existing districts.

CONCLUSION

For the foregoing reasons, the Legislature requests that the Court deny the Governor's motion to supplement the record and

[4] Senator Bewley has argued, without any basis, that the Legislature's districts are not race-neutral. *See* Bewley Resp. Letter Br. at 2 (Mar. 25, 2022). It is undisputed that the Legislature drew its districts without any consideration of race. *See Johnson II*, 2022 WI 14, ¶88 (Ziegler, C.J., dissenting). No party has controverted what is in the record—that the Legislature's "employees were instructed not to consider race when drafting the legislative maps, instead, relying on classic redistricting principles, adjusting for population changes." *See* Bryan Expert Rep. at 116 (Dec. 15, 2021) (Testimony of Speaker Robin J. Vos). Arguments by counsel or opinions by experts in this later litigation, which necessarily discuss the demographics of the resulting districts for purposes of establishing that the districts comply with federal law, do not transform the Legislature's race-neutral process into a race-based one.

end these proceedings by adopting the Legislature's race-neutral assembly and senate districts.

Dated this 1st day of April, 2022.

Respectfully submitted,

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CERTIFICATION

Filing, Electronic Filing, and Service. I certify that on this day I caused this Opposition to Motion to Supplement to be filed with the Court by emailing the clerk, per the Court's order dated March 11, 2022. Per the same order, I will cause the paper original and 10 copies of this document to be filed with the Court by 12:00 noon on the next business day, April 4, 2022. I further certify that on this day, I caused service copies of these documents to be sent by email to all counsel of record, all of whom have consented to service by email.

Dated this 1st day of April 2022.

Respectfully submitted,

Electronically Signed by
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