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' REPLY BRIEF IN SUPPORT OF PROPOSED MAPS

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INTRODUCTION

The Hunter Intervenors demonstrated in their response brief that the Governor's proposed congressional map adheres most closely to the Court's "least change" mandate while also complying with state and federal law and traditional redistricting principles. The Hunter congressional map is close behind, retaining nearly as much population and geography while fully satisfying all other requirements. Nothing in the other parties' response briefs alters these conclusions.

The Congressmen have no answer to the indisputable fact that their congressional map has the highest percentage of aggregate population and geographic changes among the four proposed maps. Nor can they dispute that their map splits more municipalities than the other maps.[1] The Congressmen seek to mask the flaws in their timely proposed map by arguing it was publicly vetted through the legislative process while the maps of the other parties were supposedly drawn "behind closed doors." This argument is specious. First, this Court already addressed the Legislature's argument that its proposed maps deserve special status and concluded that the argument "fails because the recent legislation did not survive the political process." Nov. 30 Order, ¶ 39, n. 8. Justice Hagedorn elaborated, saying those maps are "mere proposals

[1] The Congressmen impermissibly seek to submit a so-called "alternative" map that is, in reality, a fundamentally new map. This belated submission violates the Court's November 17 Order and should be rejected. That Procedural Order required all parties to submit maps by December 15 and thereafter only allowed motions to submit a "correction or modification" to a previously filed map. The Congressmen's "alternative map" is not a correction or modification; it is a fundamental restructuring of CDs 3 and 7, which encompass most of the western and northern parts of Wisconsin. It would be highly prejudicial to the other parties to allow this redrawn map, as the Procedural Order leaves no room for a meaningful opportunity to respond. The Hunter Intervenors will fully address this issue in their response on January 5, 2021—per the Court's order.

deserving no special weight." *Id.* ¶ 86, n. 14. The same reasoning applies to the Congressmen's map. Second, the congressional maps the other parties submitted have hardly been hidden from public view or scrutiny. Consistent with the Court's procedures, they were publicly filed and subjected to scrutiny by all parties and experts. The Court has all the information necessary to evaluate these maps against the criteria in the November 30 Order.

Turning to the legislative maps, there also is nothing in the parties' response briefs to refute that the maps submitted by the Governor and BLOC best comply with the "least change" mandate and, critically, the Voting Rights Act ("VRA"). Those maps are essentially tied for the aggregate percentage of retained population and geography, easily exceeding the Legislature's comparable measure.

As significant, the Legislature has confirmed what was evident from its failure to create a seventh Black opportunity district in its Assembly map: the Legislature did not properly apply the VRA. Specifically, the Legislature asserts, quite remarkably, that "VRA is not a basis for departing from the Court's least-changes remedial authority." Leg. Resp. Br. at 21. But this Court has recognized that any remedial plan *must* comply with the VRA. Nov. 30 Order at ¶ 82, n. 4. As discussed below, Section 2 of the VRA must be applied by accounting for the shifts in Wisconsin's population since the last redistricting cycle. That requires establishing a seventh Black opportunity district in the Milwaukee area. The failure to create that district is fatal to the Legislature's maps, just as it is to the maps proposed by Senator Bewley and the Citizen Scientists.

The Hunter Intervenors urge adoption of the Governor's congressional map or, alternatively, the Hunter congressional map, and adoption of either the Governor's or BLOC's legislative maps.

ANALYSIS

I. The governing legal framework.

The proper framework for the analysis of the proposed maps, based upon the November 30 Order, is described in the Hunter Intervenors' response brief and does not bear repeating. However, several parties interpret that framework in ways that conflict with this Court's pronouncements, the VRA, and the Fourteenth Amendment. Their misapplication of the law underlies the flaws in their proposed maps.

First, the proposals of the Legislature and the Congressmen are not entitled to any special deference. When the parties previously briefed the proper criteria for a remedy, the Legislature argued that the maps passed by the Legislature and vetoed by the Governor should be the "presumptive remedial plans." Leg. Resp. Br. at 19, Oct. 25, 2021. This Court squarely—and rightly—rejected that argument, stating that it "fails because the recent legislation did not survive the political process." Nov. 30 Order. ¶ 39, n. 8. *See also id.* ¶ 86, n. 14 (J. Hagedorn).

Undeterred, the Legislature argues its "plans are ideally and most properly the remedy" if all other things are equal, and that "only the Legislature's plan is the product of policymaking by Wisconsin's elected representatives." Leg. Resp. at 20. In addition to having been refuted by the Court already, the logic actually runs the other way: the Legislature's and the Congressmen's maps are the only plans that have

been *rejected* by Wisconsin's elected representatives. In that sense, the Legislature's plans bear the least legitimacy because, if adopted, that would repudiate the will of Wisconsin's elected officials.

The Congressmen package this argument slightly differently, arguing that "all of the other parties who submitted their proposed remedial maps drew their maps behind closed doors—unlike the Congressmen's Proposed Remedial Map." Cong. Resp. Br. at 8. The unjustified solicitude to vetoed maps is only one of the fallacies behind this argument; it also misrepresents the map drafting and vetting process. The parties here have drafted proposed maps, revealed them with all underlying data, and subjected them to vetting via the robust judicial process of expert analysis and adversarial briefing.[2] There is no basis for giving these maps second-class status against maps that were vetted *and rejected* by the legislative process.

Second, the Legislature misconstrues the significance of the VRA when it states that the "VRA is not a basis for departing from the Court's least-changes remedial authority." Leg. Resp. Br. at 21. Any remedial plan *must* comply with the VRA, and it cannot be seriously argued otherwise. Nov. 30 Order at ¶ 82, n. 4. This means that any map must be rejected, consistent with Section 2 of the VRA, if it disperses minority voters "into districts in which they constitute an ineffective minority of voters," or concentrates minority voters "into districts where they constitute an excessive majority." *Thornburgh v. Gingles*, 478 U.S. 30, 46 n.11 (1986). And, contrary to the Legislature's contention, there is

[2] Indeed, the only illegitimate and inappropriate remedial map would be the Congressmen's unsought Alternative Map proposal, which was drafted behind closed doors and has not been vetted by either the legislative *or* the judicial process.

nothing unconstitutional about this requirement of federal law. The U.S. Supreme Court has long recognized that VRA compliance is a compelling interest and that "race-based districting is narrowly tailored to that objective if a State had good reasons for thinking that the [VRA] demanded such steps." *Cooper v. Harris*, 137 S.Ct. 1455, 1469 (2017) (quotations omitted).

Third, several parties emphasize the value of greater population equality between districts in the legislative maps—highlighting the lower population deviations in their own maps. *See, e.g.*, Leg. Rep. Br. at 6. All the legislative maps, however, are within 2% population deviation. That is consistent with decades of practice in Wisconsin, *AFL–CIO v. Elections Bd.*, 543 F. Supp. 630, 634 (E.D. Wis. 1982), and deviations within this range are not a reason to adopt one map over another.

***Fourth*,** the Johnson Petitioners suggest that the Court can "easily and rapidly compare maps" using their scorecard method. Johnson Ltr. at 1. However, the complex task of redistricting cannot reliably be simplified through use of singular metrics. Moreover, the Johnson Petitioners' supposedly objective scorecard, prepared by someone who recently was a redistricting expert for the Legislature, reveals arbitrary application and bias. For example, the Johnson Petitioners claim the congressional maps of the Congressmen and Governor "score relatively close with respect to least-changes"—even though the Congressmen's map moves nearly 60,000 more people. However, they describe the Hunter Intervenor's map as moving "noticeably more people," even though it moves less than 25,000 more people than the Congressmen. These oversimplified metrics with biased

and arbitrary cut-offs are simply not a reasoned basis for a court to redistrict a state.

II. Only the Governor's and the Hunter Intervenors' congressional maps comply with the Court's criteria.

The Court need consider only three questions in selecting a congressional map. *First*, does the map equalize population according to constitutional standards? *Second*, does it follow the least-change approach? *Third*, does it serve traditional districting criteria? The maps that fare best under these criteria are the Governor's, followed by the Hunter Intervenors'.

All four congressional proposals equalize Wisconsin's population across congressional districts. *See, e.g.*, Johnson Letter Resp. at 10; Congressmen Resp. Br. at 12.[3] However, there are notable differences among the proposals in their adherence to "least-change" and traditional districting criteria.

A. Only the maps proposed by the Governor and the Hunter Intervenors follow the least-change approach.

Assessing compliance with least-change requires considering both top-line measures of overall change and examining specific changes to districts. As to the former, the critical metrics are the number of people moved, the percentage of people who remain in their district, and the percentage of geography that remains in its district. All three measures reveal the Governor's map leads in least-change and is plainly superior.

[3] The Citizen Scientists are the only party to question another proposals' population equality, complaining that the Hunter Intervenors' map and the Governor's map deviate by one additional person. However, the Citizen Scientists cannot explain—nor can they identify a single case explaining—why an additional 0.000136% deviation is legally relevant.

Table 1: Congressional Map Core Retention Scores			
	People Moved	**Population Retention**	**Geographic Retention**
Governor	324,858	94.5%	98.0%
Congressmen	384,272	93.5%	90.6%
Hunter	408,875	93.0%	97.1%
Citizen Scientists	502,470	91.5%	95.9%

Notably, the Hunter Intervenors' map also scores high on geographic retention. That is an important metric, because without parsing the source of every relocated resident, it generally reflects preservation of communities of interest ("COI"). A map with lower geographic retention likely pairs geographically remote voters with each other, disrupting COIs. In addition to scoring lowest on geographic retention, the Congressmen's map scores lowest on the percentage of counties kept in their existing districts.

Table 2: Percentage of Counties Kept in Existing District			
	Governor	**Hunter**	**Congressmen**
Whole Counties Kept	97%	97%	93%
Partial Counties Kept	92%	83%	71%

The Congressmen argue that the changes in the Governor's and Hunters' maps to southern Wisconsin are excessive but equalizing population in that region inevitably requires substantial movement. CD-4 is severely underpopulated, and it is surrounded by three

underpopulated districts—which means that when population is added to CD-4, that requires even further population shifts in surrounding districts. Further, CD-2 is significantly overpopulated, which requires moving population to CDs 1, 5, and 6.

The Congressmen claim that the changes in the Hunter Intervenors' map are "unexplained and inexplicable by reference to achieving population equality," Cong. Resp. Br. at 13, but all of these changes result from necessary population shifts among CDs 1, 2, 4, 5, and 6. For example, the Congressmen challenge the Hunter map's movement of portions of Sauk County from CD-2 to CD-6 on the ground that it stretches "District 6 from Lake Michigan to west of the Wisconsin River." *Id.* The Congressmen fail to note that under the current map—and the Congressmen's map—CD-6 *already* stretches from Lake Michigan to west of the Wisconsin River. They also fail to acknowledge that CD-2 needed to lose population and CD-6 needed to gain population, meaning the most minimalist solution was to move population from CD-2 to CD-6.

In deciding on these population shifts in the southern portion of the state, the Hunter Intervenors prioritized population equality and, as part of making those necessary shifts, increased compactness and reduced municipality splits. The Governor's Assembly map achieves similar improvements in traditional districting criteria in the southern portion of the state.

Table 3: County Splits Among CDs 1, 4, and 5

	Enacted	**Governor**	**Hunter**	**Congressmen**
County Splits	6	5	3	7

In contrast to the southern region, the northwestern region requires minimal modification to achieve equal population. CD-3 is underpopulated by only 3,131 people. Consistent with that minimal need for change, the Hunter map moves only 983 people out and 4,645 people into CD-3, while the Governor moves only 4,136 people out and 7,268 people into CD-3.

In clear conflict with the least-change mandate, the Congressmen move 238,929 people in and out of the CD-3—more than 75 times the number of people who needed to move to achieve ideal population. Those alterations share no nexus with the necessary remedy of equalizing population and, on its own, these drastic alterations should disqualify the Congressmen's congressional map.

III. The Governor's and BLOC's legislative maps map comply most with the Court's Order.

There is agreement among the parties that the Court should assess each parties' proposed Assembly and Senate maps as one package. In selecting a set of remedial legislative maps, the Court must consider five questions. *First*, does the map equalize population according to constitutional standards? *Second*, does it otherwise comply with the Wisconsin Constitution? *Third*, does it comply with the VRA and the Fourteenth Amendment? *Fourth*, does it follow the least-change approach according to the Court's Order? *Fifth*, does it serve traditional districting criteria?

The parties' maps provide a range of different levels of population deviation, with all the maps having total deviation of less than two percent. Though some parties highlight lower levels of deviation, no party has identified any cognizable right that would be violated where

total deviation is kept below the two percent benchmark followed in Wisconsin. *See AFL–CIO.*, 543 F. Supp. at 634. There is no legal basis upon which to differentiate the proposed legislative maps based on population deviation—they all are within an acceptable range.

With respect to the requirements of the Wisconsin Constitution, the Citizen Scientists argue that other parties' proposed maps should be rejected because they split too many political subdivisions. However, the Citizen Scientists have not identified a legal deficiency with any of the other parties' proposals. Indeed, all the proposed legislative maps *improve* upon the existing map in terms of the average number of subdivisions split.[4]

The most substantial differences among the legislative maps involve compliance with the VRA and the Fourteenth Amendment. A majority of the maps create seven Black opportunity Assembly districts.[5] This includes the Hunter Intervenors' map, the Governors' map, and BLOC's map. Only Senator Bewley's map and the Legislature's map fail to create a seventh opportunity district, a deficiency which is fatal to both maps.

A. The VRA requires seven Black opportunity districts in the Milwaukee area.

As discussed, the Legislature is wrong in claiming that compliance with the VRA is insufficient reason for deviating from least-change. Federal law is controlling, as this Court recognized in its November 30 Order. Nor is there merit to the Legislature's argument that because the

[4] Further, the Citizen Scientists map is the only map to increase the number of county splits as compared to the existing map.

[5] It is unclear whether some of the Citizen Scientists' supposed opportunity districts would sufficiently enable Black voters to elect a candidate of their choice.

"existing districts already survived federal judicial review in the *Baldus* VRA litigation," they need not be changed a decade later. *Id.*

While seven Black opportunity districts may not have been required a decade ago when *Baldus* was litigated, Section 2 requires considering the significant population shifts that have occurred over the past decade. *See, e.g.*, *Garza v. Cty. of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990) (holding that outdated census data cannot preclude a Section 2 claim). As the BLOC Plaintiffs describe, application of Section 2 to those changes affirmatively requires creating a seventh Black opportunity district. BLOC Resp. Br. at 8-16.

Relatedly, the Legislature misconstrues the interaction between the Fourteenth Amendment's prohibition on racial gerrymandering and compliance with Section 2. Of course, the precise use of race in redistricting merits constitutional scrutiny. However, as noted above, the Legislature omits that the U.S. Supreme Court has long recognized that VRA compliance is a compelling interest and that "race-based districting is narrowly tailored to that objective if a State had good reasons for thinking that the [VRA] demanded such steps." *Cooper,* 137 S.Ct. at 1469. (2017) (quotations omitted).

Simply put, if the statutory elements of Section 2 of the VRA are satisfied, a map that fails to create the necessary Black opportunity districts is unlawful. While the Court must be cautious of implementing a map that unnecessarily engages in precise race-based districting, it need only have "good reason" to think that Section 2 requires detailed consideration of race to avoid a Fourteenth Amendment violation.

Notably, the Legislature does not meaningfully contest the elements of a Section 2 claim, limiting its protestation to only two points. *First*, it makes an unfounded argument about moving voters out of existing districts in a "discriminatory" way. Leg. Resp. Br. at 11. *Second*, it argues that Wisconsin's Black population has not grown and is proportionally represented with six Assembly districts. *Id.* at 33. While the latter argument is at least relevant to Section 2, neither claim comes close to refuting that Section 2 requires creating a seventh Black opportunity district.

The Legislature does not identify any alleged legal violation resulting from moving Black voters into new districts. Nor does it argue that the maps with seven opportunity districts move Black voters with the intent or effect of diluting the influence of Black voters through packing or cracking. Instead, the Legislature claims that moving Black voters "sever[s] the representative-constituent relationship." *Id.* at 12. This argument is wrong both factually and legally. As a factual matter, every voter (Black or otherwise) will continue to be represented in the Assembly by the candidate who was elected in 2020 until the next election. Any The representative-constituent relationships existing beyond that that hinge on a mountain of political speculation over which candidates will run for re-election, whether candidates will run in their current districts or change districts, and myriad other considerations—a "political thicket" to say the least.

Further, the Legislature has not identified any legal basis or precedent for protecting a voter's relationship to the same representative across elections. In contrast, Section 2 establishes binding, concrete legal requirements for establishing Black opportunity districts. For example,

under the Legislature's map, Black voters in Brown Deer—a village which is nearly 30% Black—are placed in Assembly District 23, which is almost 85% White. Under the Hunter Intervenors' map, the Brown Deer community is brought into District 11, where Black voters can elect a candidate of their choice. If the elements of Section 2 are satisfied, those voters have a statutory right to such a map.

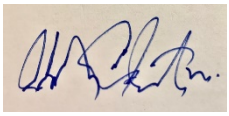
The Legislature also offers the equally invalid argument that creation of a seventh Black opportunity district is unnecessary because Black voters are already proportionally represented with six opportunity districts. The U.S. Supreme Court has expressly rejected any attempt to characterize proportional representation as a "safe harbor" or "affirmative defense" to a Section 2 claim; it is merely one of the "totality of circumstances" a court must consider. *See Johnson v. De Grandy*, 512 U.S. 997, 1024 (1994).

CONCLUSION

The Court should adopt congressional, assembly, and senate maps consistent with the foregoing analysis.

Dated this 4th day of January, 2022.

Respectfully Submitted,



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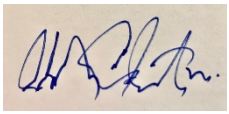
FORM AND LENGTH CERTIFICATION

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 November 17 Order for a reply brief produced with a proportional serif font. The length of this brief is 3,277 words.

Dated: January 4, 2022



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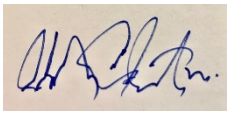
CERTIFICATE OF SERVICE

I certify that on this 4th 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 4, 2022

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