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CLERK OF WISCONSIN
SUPREME COURT

**STATE OF WISCONSIN
SUPREME COURT**

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,

Appeal No. 2021AP1450 - OA

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.

NON-PARTY BRIEF OF CONCERNED VOTERS OF WISCONSIN

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INTEREST OF NON-PARTIES

This brief is submitted by Republican, Democrat, and independent voters from all 33 Senate Districts of Wisconsin who want to make “We the People” heard in this redistricting process and ensure that state legislative districts are truly representative and comply with all state and federal laws. Many of these voters have witnessed the rancor caused by Act 43 and believe that, if done well, redistricting can unite, rather than divide, us as a people. With the assistance of The Wisconsin Map Assessment Project (“WIMAP”), *amici* have analyzed all maps and scorecards that were submitted by the parties and compared them to publicly available data and best redistricting practices. *Amici* posit that they are uniquely qualified to assist in objectively evaluating the proposals before the Court so that the people of Wisconsin are guaranteed a just and representative government for years to come.

INTRODUCTION

Concerned Voters of Wisconsin (“Concerned Voters”) are 36 voters hailing from every Senate District in Wisconsin. They come as friends of this Court, offering an evaluation of the Legislature’s proposed maps by The Wisconsin Map Assessment Project (“WIMAP”), which also assessed the methodologies proffered in expert reports submitted by parties in this case. Concerned Voters used the Court’s “least change” approach; partisan makeup of districts was not considered. Although WIMAP analyzed each map presented to this Court, space limitations require *amici* to focus this brief on the Legislature’s Assembly proposal, 2021 Senate Bill 621 (“SB621”).

On October 28, 2021, at a hearing on SB621, the Legislature faced fierce opposition from the public. Hundreds attended the nine-hour hearing. Not one Wisconsin voter or redistricting expert testified in favor of SB621. Only two people did: the leaders of the Assembly and Senate, who happen to benefit the most. See <https://wiseeye.org/2021/10/28/joint-committee-on-government-operations-and-state-affairs/>.

Given the virtually unanimous negative opinion expressed at the hearing, statewide polling data, county actions showing overwhelming support for nonpartisan maps, **and** Wisconsin’s highly divided government, one would expect the Legislature to negotiate with Governor Evers to draw fair and balanced maps.¹ It did not do so. And although the

¹ Several polls have addressed Wisconsin redistricting, including the Marquette Law School Poll and a You.Gov poll (for RepresentUs). Polling data can be found at <https://www.marquette.edu/news-center/2019/new-marquette-law-school-poll-finds-some-issues-less-divisive-amid-continuing-partisan-divide.php> and <https://represent.us/wp-content/uploads/2021/08/WI-Rep-US-Polling-Memo-Draft.pdf>. Dissatisfaction with current redistricting practices is evident from the fact that counties representing more than 83% of the people of this state want a nonpartisan redistricting process. See <https://www.wisdc.org/reforms/118-redistricting/6392-toolkit-for-banning-gerrymandering-in-wisconsin>.

Legislature asserts that it “solicited and **incorporated** public input” (12/30/21 Br. at 19; emphasis added), the SB621 maps were passed without any modifications. Not surprisingly, the Governor vetoed them, saying they were “sent to [his] desk over the objections of a decade’s worth of people in this state demanding better, demanding more, and demanding a fair, nonpartisan process for preparing our maps for the next 10 years.”

See <https://content.govdelivery.com/accounts/WIGOV/bulletins/2fed160>.

That veto set the stage for this case.

ARGUMENT

I. SB621 FAILS AS A “LEAST CHANGE” MAP.

WIMAP’s analysis of SB621 demonstrates how the Legislature departed from a least change rebalancing of population. Three sets of districts demonstrate how.²

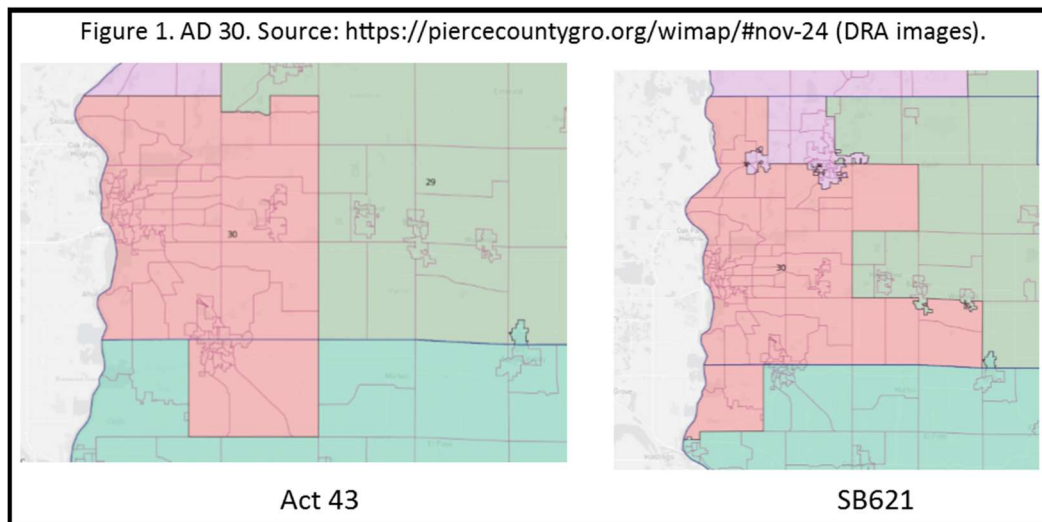
Example 1. AD 30 is on the western border of Wisconsin. It has a surplus of 3,202 people. Any attempt to minimize the difference between the old and new AD 30 while balancing the population removes some smaller wards—Wards 3, 4 and 5 in the Town of Richmond (already split in Act 43) and all of the Town of Warren—from the district, which retains 95% of AD 30’s population. In his December 15 report, the Legislature’s expert Thomas Bryan reports only a 76.5% retention rate (12/15/21 Bryan Report at 58) in SB621—a difference of about 11,000 people.

One casualty of SB621’s new AD 30 is River Falls. This city—and community of interest—was intact within AD 30 in the Act 43 map. SB621 divides the city between AD

² The examples used in this brief include demonstration maps created by *amicus* Dr. Don Leake. More examples are available at <https://piercecountygro.org/WIMAP/>.

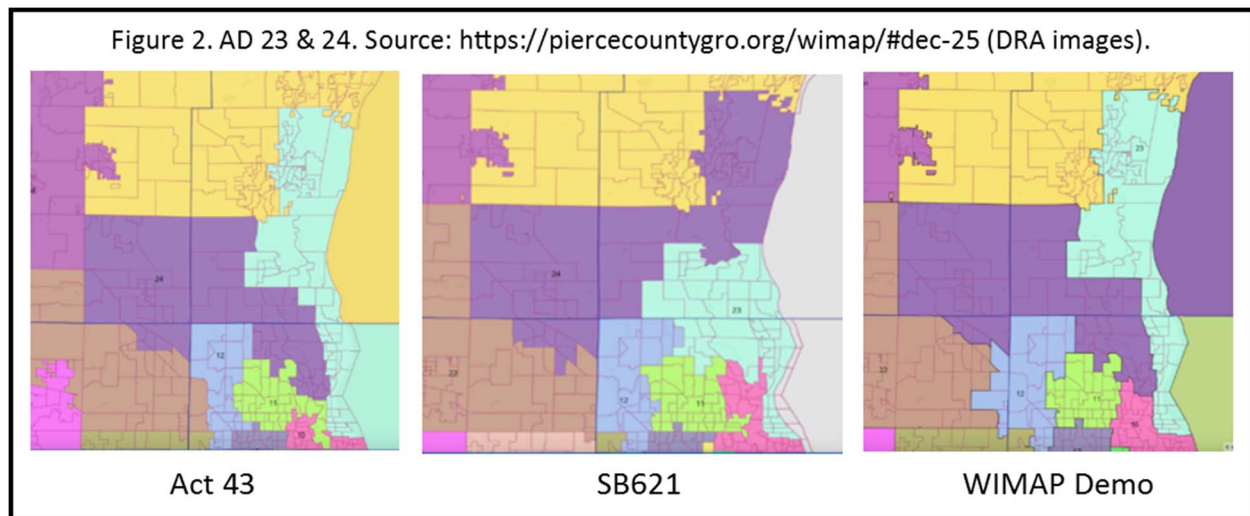
30 and 93. Residents of River Falls would not only have two different Assembly representatives, but also two different Senators. Such split representation impairs the community's ability to have its interests heard and thus not only violates the Court's least change approach but fails to keep a community of interest intact.

SB621 also reduces the compactness of AD 30. Bryan sums four compactness ratings to get an aggregate score for each district. AD 30's score in the Act 43 map is 2.73 (12/15/21 Bryan Report at 68), which Bryan classifies as "best" or most compact. AD 30's score in SB621 is 1.60, which Bryan classifies as "poor" (*Id.* at 71.)



Example 2. AD 23 and 24 lie in the northern suburbs of Milwaukee, with small surplus populations of 1,228 and 1,204 respectively. A reasonable least change map could yield a core retention rate of about 98% for each district. In that context, the changes made to AD 23 and 24 by SB621 are stunning. Bryan reports that SB621's AD 23 has a 66.2% core retention, and AD 24 has a mere 54.2% core retention. (12/15/21 Bryan Report at 57.) Bryan classifies the latter as "extreme change" and the fifth worst retention rate in SB621. Instead of reaching down into Milwaukee County to balance AD 24, SB621 extends to

include the Village and Town of Grafton, displacing over 20,000 people—**almost 17 times more than necessary**.³ In addition, the Village of Brown Deer, intact in Act 43, is split by SB621. AD 23 absorbs most of the people from Milwaukee County that exit AD 24. Bryan asserts that the very low core retention rates in the Milwaukee area are “unavoidable and to be expected given the population shifts in and between Madison and Milwaukee.” (12/15/21 Bryan Report at 25.) However, the WIMAP Demo in Figure 2 below (excerpted from an alternative least change map drawn by WIMAP with a 1.95% total deviation) shows that a true least change revision of AD 23 and 24 is readily attainable.⁴ The core retention for WIMAP’s Demo is 98.0% for AD 23 and 95.9% for AD 24—much better than SB621.



³ This drastic change is reminiscent of Act 43, when the Legislature last shuffled millions of voters into new districts. <https://www.jsonline.com/story/news/politics/2021/09/27/wisconsin-gop-wants-few-redistricting-changes-after-moving-millions-voters/5885010001/>. What wasn’t “least change” then is not “least change” now.

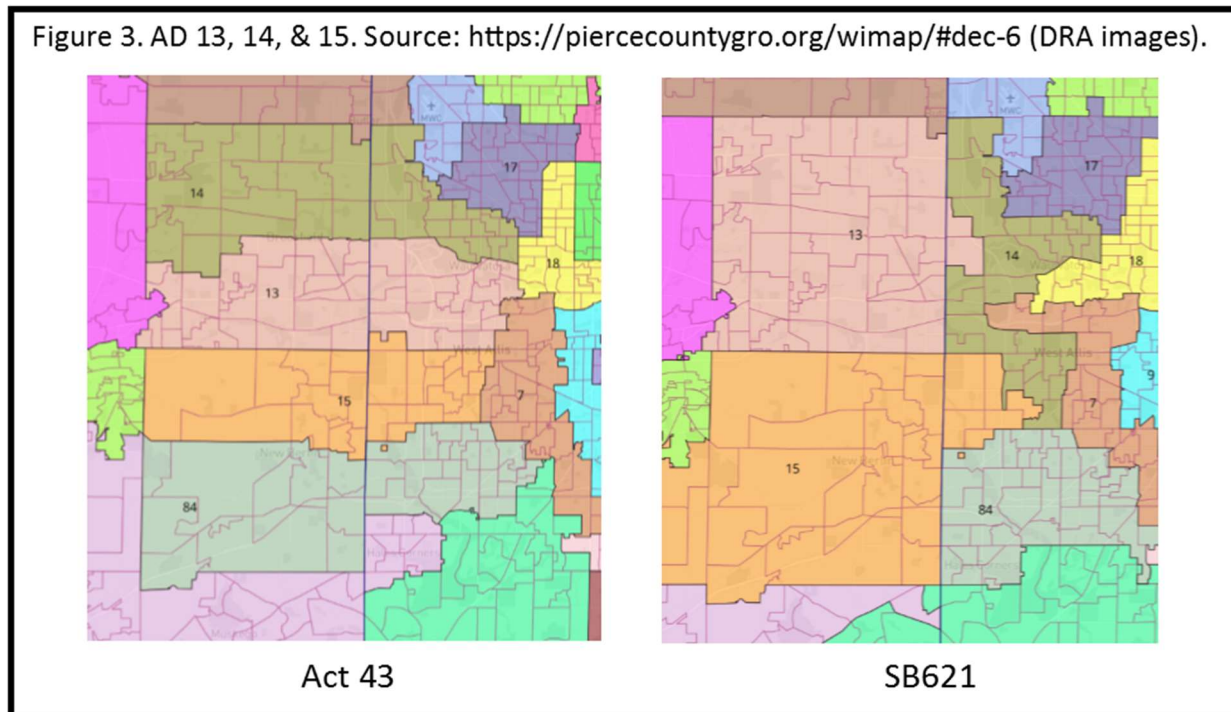
⁴ While 1.95% is higher than the 0.76% total deviation of SB621 that Bryan praises, the three-judge panel that redistricted Wisconsin in 1982 defined “de minimis” population deviations as below two percent. *AFL-CIO v. Elections Bd.*, 543 F.Supp. 630, 634 (E.D.Wis. 1982).

Example 3. Arguably the most dramatic change to Act 43 in SB621 is within the 5th Senate District comprising AD 13, 14, and 15. SB621 transforms the three horizontally oriented districts into two squarish districts (AD 13 and 15) linked by a sinuous AD 14. In SB621, AD 13 is mainly Brookfield (split in Act 43), its surrounding township, and the Village of Elm Grove. AD 15 is the square city of New Berlin (split in Act 43) with a bit of West Allis and part of Waukesha Township. AD 14 zigs and zags its way through Wauwatosa and West Allis in Milwaukee County.

Figure 3 below shows the Legislature's changes. Bryan summarizes the following percentages of Act 43 populations retained in the new districts: 47.7% (13), 40.0% (14), and 62.4% (15). (12/15/21 Bryan Report at 56-57.) Of the 99 districts, these three rank first, third, and ninth in poorest core retention.

The Court should also consider the decline in Milwaukee County's population that requires an infusion of approximately 40,000 people into Senate Districts 3, 4, and 6. That additional population primarily comes from a surplus in Dane County shifted district-by-district in an eastern path. SD 5, sandwiched between Dane and Milwaukee Counties, will naturally be affected. Bryan's analysis shows that Act 43's SD 5 contributes 4.4% of its population to SB621's SD 3 and 9.2% to SD 6. (12/15/21 Bryan Report at 52.) That leaves 86.4% of the population within SB621's SD 5. Distributed somewhat uniformly with least change in mind, one could expect core retention percentages in the 80s for the three Assembly districts nested in SD 5, but instead the result is retention percentages that average 50.0%—remarkably low and easily avoidable. In addition, although SB621 puts

all of Brookfield into one Assembly district, it does further damage to Wauwatosa, which is now fractured into four Assembly districts instead of three.



The Legislature's changes to Act 43 are unnecessary **and** decrease core retention. SB621 unites many cities, towns, and villages that are split in Act 43, but also splits some communities that are intact in Act 43, such as River Falls, Whitewater, and Brown Deer. SB621 also reduces the number of Black Voting Age Population majority districts from six in Act 43 to five. These changes to individual districts are not reflected in the average core retention of the map but must be considered by the Court.

In the foregoing examples, the phrase "least change" reflects what is sometimes called "core population continuity." But there is obviously more than one way to draw a "least change" map. One WIMAP member (*amicus* Dan Russler) has used core geographic continuity to create least-change maps that improve on SB621 in traditional redistricting

criteria like compactness, preservation of political boundaries, and communities of interest. See <https://www.healthinbulk.com/geographic-continuity>. Citizen Mathematicians also approach “least changes” differently, which warrants attention. (12/30/21 Deford Report.)

II. THE COURT SHOULD NOT PROTECT INCUMBENTS IN THE REDISTRICTING PROCESS.

Several parties in this case ask the Court to avoid pairing incumbents, claiming continuity of representation as a guiding principle. (*See, e.g.*, Legislature Br. at 29.) Yet few actions are more political than protecting an incumbent, and this Court expressly said it would not delve into political questions (11/30/21 Order at 21), would not consider the partisan makeup of districts (*id.*), and would “fulfill [its] role as apolitical and neutral arbiters of the law” (*id.* at 43). The Legislature’s expert Brian Gaines admits that incumbents “have no inherent right to familiar and friendly electorates.” (12/30/21 Gaines Report at 7.) There is no way the Court can protect incumbents while avoiding questions of partisanship.

The Court also said that the pursuit of least change is subject to redistricting criteria in Wisconsin’s Constitution, but it appears that the Legislature has prioritized incumbent protection over the compactness required by Article IV, Section 4 of the Constitution. Both the Legislature (12/30/21 Br. at 12-14) and Bryan (12/30/21 Report, App. 3) cite data and provide analysis of incumbent pairings but minimize compactness and ignore the fact that SB621 has the lowest Polsby-Popper score and the second lowest Reock score. (*See* fn. 6, *infra.*) This Court should ignore calls to protect incumbents, no matter who makes them, and focus instead on established legal principles governing redistricting if it is to remain true to the principles it has espoused.

III. THE COURT SHOULD REJECT THE USE OF SCORECARD METRICS TO IDENTIFY THE “BEST MAP.”

This Court highlighted the difficulties in taking original jurisdiction of a redistricting case:

We have no established protocol for the adjudication of redistricting litigation in accordance with contemporary legal standards. A procedure would have to be devised and implemented, encompassing, at a minimum, deadlines for the development and submission of proposed plans, some form of fact finding (if not a full—scale trial), legal briefing, public hearing, and decision. We are obviously not a trial court; our current original jurisdiction procedures would have to be substantially modified in order to accommodate the requirements of this case.

(5/14/21 Op. and Order at 2; citing *Jensen v. Wis. Elections Bd.*, 2002 WI 13, 240 Wis.2d 706, 639 N.W.2d 537, ¶ 20.) The Court nevertheless took original jurisdiction of this case in September. (9/22/21 Op. and Order at 1-3.) Concerned Voters agree that the task at hand is challenging for this Court, which is not institutionally suited for the task. It cannot and should not be accomplished in the manner Petitioners now propose.

Instead of submitting a map, Petitioners offer the Court Dr. James Gimpel’s “simple scorecard,” saying: “These scorecards will allow the Court to easily and rapidly compare maps and to measure how they comport with the parameters this Court announced it will apply in considering potential remedies.” (12/15/21 Br. at 1.) For several reasons, use of a scorecard—that is, choosing a few metrics for various criteria, something that is done in all parties’ briefs—cannot make highly complex redistricting analysis either easy or rapid.

First, no matter how extensive scorecards are, they never tell the whole story of a map. A single entry giving the number of majority-minority districts cannot capture the complexity of conforming to the Voting Rights Act (“VRA”), 52 U.S.C. § 10101 *et seq.* In fact, faced with this complexity, Gimpel simply dropped the VRA from his scorecard

altogether. Petitioners' original scorecard included the number of Black majority-minority districts; their December 30 scorecard does not. Rather, Petitioners state they "have no current position on it" because they failed to "engage an expert specifically to review that issue." (12/30/21 Br. at 7.) Petitioners use this sleight of hand to eliminate a federal statutory requirement from consideration in their identification of the "best map."

Second, scorecards are helpful only if they are accurate. Using the software tool he apparently created, Gimpel reported that 928,306 people were moved by SB621 (12/15/21 Gimpel Report at 7-8), but he later represented the number as 936,312 (12/30/21 Gimpel Report at 5-9). There is no way to tell whether either of these assertions is accurate.

Finally, the choice of metrics to include in the scorecard is critical. Gimpel's first scorecard includes the two most widely used compactness measures: Polsby-Popper and Reock. But his second scorecard inexplicably dropped Reock in favor of a "Schwartzberg" score, which he defined incorrectly.⁵ The Schwartzberg score is merely the square root of Polsby-Popper. Gimpel's second scorecard swaps out a widely used measure for an obscure and duplicative one, that hides SB621's unfavorable Reock score.⁶

Gimpel's scorecards are too simple, incomplete, inconsistent, and opaque. Critical questions of alternative definitions of least change are ignored. Moreover, a scorecard is

⁵ Dr. Linda Green from the University of North Carolina explains how Schwartzberg is computed in https://www.youtube.com/watch?v=6Z_fuedTt4U.

⁶ There are discrepancies in the Reock scores for SB621's Assembly map, which makes Concerned Voters question the data presented by the Legislature. Gimpel reports it as .363, consistent with Bewley's LRB memo (at 4), but Bryan reports it as .39 (12/15/21 Bryan Report at 33), giving the false impression that it is an improvement over LRB's .378 average Reock score for Act 43. https://legis.wisconsin.gov/democrats/media/2209/lrb-s0263-2-ab624-sb621-and-2011-act-43-analysis_bewley.pdf

nothing more than a listing of metrics for the criteria that will be used to assess alternative maps. The important and difficult task is to decide which criteria to apply and the relative weights or importance to assign them. Given that there are unavoidable tradeoffs among the criteria (one cannot be improved without harming another), determining the best map depends on how the criteria are prioritized by the Court. Listing the metrics in a scorecard does not relieve the Court of making the difficult tradeoffs among criteria because each choice constrains what is attainable on other desirable criteria. These choices must be guided by law. In addition, metrics prioritization should be decided before maps are evaluated, not in hindsight to avoid reverse-engineering a predetermined outcome, as Gimpel appears to have done.

CONCLUSION

In its November 30, 2021 Order, the Court cautioned the parties to use a least change approach, ignore partisan makeup of districts, and heed the law to resolve a dispute between two branches of government. Petitioners and the Legislature have failed in that task. When it suits their purpose, they violate the Court's "least change" approach, take the Court into the political arena, and encourage it to use a "scorecard" in a manner that obfuscates the most important necessary decisions. The Court's order equates "least change" with the "minimum" change necessary (11/30/21 Op. and Order, ¶ 73.) But as MathSci quips, the parties "elevated 'least change' from a principle of judicial modesty to an overarching legal requirement, prioritizing it over the express dictates of federal and state law." (12/30/21 Br. at 3.)

For the reasons set forth herein, Concerned Voters ask this Court to reject SB621 along with Petitioners' application of their scorecard; and, recognizing the specialized expertise required for this inherently complicated task, invite the federal court to take jurisdiction over this dispute for appropriate fact-finding and decision-making. If the Court retains jurisdiction, it should clearly articulate how it prioritizes the redistricting criteria in reaching its decision.

Dated this 4th day of January 2022.

/s/ Joseph S. Goode

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Toso, and Vicki Aro-Schackmuth*

FORM AND LENGTH OF CERTIFICATION

I hereby certify that this brief conforms to the Court's November 17, 2021 order and the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a non-party brief with a proportional serif font. The length of this brief is 2,760 words.

Dated this 4th day of January 2022.

By: s/Joseph S. Goode
Joseph S. Goode
State Bar No. 1020886

CERTIFICATE OF COMPLIANCE WITH WIS. STAT § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed version of the brief that will be filed pursuant to the Court's November 17, 2021 order.

A copy of this certificate will be served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 4th day of January 2022.

By: s/Joseph S. Goode
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