IN THE SUPREME COURT OF WISCONSIN
APPEAL 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,

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.

INITIAL BRIEF BY JANET BEWLEY, STATE SENATE DEMOCRATIC MINORITY LEADER

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ISSUES PRESENTED

In an October 14, 2021 Order, this Court directed all parties in this matter to file simultaneous briefs by noon on October 25, 2021 addressing the following questions:

1.) Under the relevant state and federal laws, what factors should we consider in evaluating or creating new maps?

2.) The petitioners ask us to modify existing maps using a "least-change" approach. Should we do so, and if not, what approach should we use?

3.) Is the partisan makeup of districts a valid factor for us to consider in evaluating or creating new maps?

4.) As we evaluate or create new maps, what litigation process should we use to determine a constitutionally sufficient map?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is called for on this briefing answering the Court's questions asked in anticipation of judicial relief following further proceedings, including presentation of evidence, further briefing and arguments.

STATEMENT OF THE CASE

This is an Original Action, initiated by a Petition for Original Action filed by Petitioners on August 23, 2021, in which Petitioners, anticipating that the Wisconsin Legislature and Governor would fail to timely enact redistricting maps based on the 2020 Census, asked the Court to take jurisdiction over redistricting and provide certain injunctive relief pending a new apportionment plan. That Petition

followed litigation filed in federal court on the same topic. *Hunter, et al. v. Bostelmann, et al.*, No. 21-cv-00512 (W.D. Wis.) and *BLOC, et al. v. Spindell, et al.*, No. 21-cv-000534 (W.D. Wis.) Following briefing from the Respondents and various amici, on September 22, 2021, the Court granted the Petition.

Motions to intervene as parties were filed and briefed per the Court's September 22, 2021 Order, and Senate Minority Leader Janet Bewley, on behalf of the Senate Democratic Caucus ("Senate Democrats"), as well as others, were granted Intervenor status by the Court's Order of October 14, 2021. In the same Order, the Court directed all Petitioners and Intervenor-Petitioners to prepare and file a single Omnibus Amended Petition, superseding the previously filed Petition in this Action, and further ordered that the parties prepare and submit to the Court by noon on November 4, 2021 a joint stipulation of facts and law, identify and list disputed facts, and suggest a procedure for resolving them. That same day the Court also ordered the parties to answer the four questions set out in the Issues Presented, above.

The Omnibus Amended Petition was filed on October 21, 2021. Answers to the Omnibus Amended Petition are due October 28, 2021.

ARGUMENT

Below are the Senate Democrats' answers to the Court's questions.

1.) Under the relevant state and federal laws, what factors should we consider in evaluating or creating new maps?

In evaluating or creating new maps, this Court should adhere faithfully to its duties under the United States and Wisconsin constitutions and the Voting Rights Act, and it should consider other factors consistently with those duties and appropriately in pursuit of the best possible plan for safeguarding the representational rights of Wisconsin's citizens, as detailed further below.

A. Federal law requires district maps that reflect equal population and provide minority protection.

First and foremost, maps must adhere to two central federal requirements: equal population and minority protection.

The U.S. Constitution requires equality of population among districts. "[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964);[1] *see also Gray v. Sanders*, 372 U.S. 368, 381 (1963) (holding that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's

[1] Specifically with regard to state legislative redistricting, "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Reynolds*, 377 U.S. at 579. An even more stringent requirement applies to Congressional districts, which based on Article I, Section 2 of the U.S. Constitution must have "populations as close to perfect equality as possible." *Evenwel v. Abbott*, 578 U.S. 54, 136 S. Ct. 1120, 1124 (2016). Population differences in such cases may still be allowed where "necessary to achieve some legitimate state objective." *Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758, 760 (2012) (*citing Karcher v. Daggett*, 462 U.S. 725 (1983)).

Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.")

The other ironclad tenet of federal redistricting law is minority protection. This tenet has two basic sources of law. The first is the Equal Protection Clause of the Fourteenth Amendment, which was enacted with the central purpose of "preventi[ng] official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). Specifically, it prohibits the state from separating citizens into different electoral districts on the basis of race without sufficient justification. *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017). If race is the predominant motivating factor in how a district's boundaries are drawn, the state must satisfy strict scrutiny by proving that it has imposed the map in a narrowly tailored manner to achieve a compelling interest. *Miller v. Johnson*, 515 U.S. 900, 920 (1995). Unconstitutional racial gerrymanders include, *inter alia*, the act of either placing a disproportionately large population of a minority group in a single district, known as "packing," or of thinning out the minority group's members among a number of districts, known as "cracking." *Shaw v. Reno*, 509 U.S. 630, 670–71 (1993) (White, J., dissenting (citing precedents)).

The other major federal source of minority protection is Section 2 of the Voting Rights Act of 1965 ("VRA"), which prohibits states from imposing—whether intentionally or not—any voting requirement or condition "in a manner which results in a denial or

abridgement" of the right to vote based on race.[2] 52 U.S.C. § 10301(a). The Section 2 analysis applies a "totality of the circumstances" test to determine whether a standard, practice, or procedure has the effect of discriminating against a racial, color, or language minority group, regardless of intent. 52 U.S.C. § 10301(a), (b). Section 2 thus "prohibits any practice or procedure that, 'interacting with social and historical conditions,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) (*quoting Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)).

A redistricting plan violates Section 2 of the VRA if it results in vote dilution; that is, if the plan splits up a protected group that could constitute a majority in an electoral district and instead combines its members with a majority group, effectively limiting the ability of that minority group to elect a candidate of its choice. *Id.* The conditions that can trigger a vote dilution claim are:

- The minority group in question is sufficiently large and geographically compact to otherwise create a majority-minority district.
- The minority group is politically cohesive in terms of voting patterns—i.e., the group tends to vote as a bloc.
- The majority group votes sufficiently as a bloc to enable it, in the absence of special circumstances, to defeat the minority's preferred candidate.

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[2] Drawing district boundaries on the basis of race in order to comply with the VRA can, but does not always, satisfy strict scrutiny under an Equal Protection Clause claim. *Bush v. Vera*, 517 U.S. 952, 977 (1996).

Thornburg, 478 U.S. at 50-51.

Thus, equal population and minority protection are paramount principles the Court must adhere to.

B. State law and related traditional principles require that districts be contiguous and compact.

Mandatory redistricting considerations are also provided by the Wisconsin Constitution. It provides that assembly districts must "be bounded by county, precinct, town or ward lines, [to] consist of contiguous territory and be in as compact form as practicable." Wis. Const. art. IV, § 4. Further, senate districts must consist "of convenient contiguous territory" and be comprised of whole assembly districts. Wis. Const. art. IV, § 5.[3]

These provisions reflect that Wisconsin has enshrined certain traditional redistricting principles as paramount: geographic compactness and contiguity.

"The term 'compact' has not been defined in Wisconsin, but other states with similar constitutional requirements have defined 'compact' as meaning closely united in territory." *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 634 (E.D. Wis. 1982) (*citing People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N.E. 307 (1895)). In assessing compactness, the U.S. Supreme Court has used an "eyeball" test focused on the regularity of the district's shape. *Bush*, 517 U.S. at 960.

[3] Unlike with state legislative redistricting, Wisconsin has no constitutional or statutory guidelines as to Congressional redistricting.

This Court "has defined 'contiguous' to mean that a district 'cannot be made up of two or more pieces of detached territory.'" *AFL-CIO*, 543 F. Supp. 630 at 634 (*citing State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 148, 53 N.W. 35, 57 (1892)). Thus, each part of a district should be connected to every other part, and it should be possible to travel to all parts of a district without crossing district lines.

C. Maps should also follow other traditional redistricting principles including preserving the unity of political subdivisions and communities of interest.

Finally, there are certain "traditional" redistricting principles that are not constitutionally required and are subservient to the above requirements. *Shaw*, 509 U.S. at 647. Nonetheless, some of these factors, when applied, can justify some deviation from requirements of perfect population equality[4] or some map shaping that might otherwise qualify as impermissible gerrymandering. *Id.*; *Evenwel*, 136 S. Ct. at 1124.

One such principle is the preservation of the unity of political subdivisions. This may be viewed as related to the Wisconsin constitutional requirement that districts "be bounded by county, precinct, town or ward lines" (though not itself mandated by that provision, given that, for example, districts bounded by ward lines can plainly cross many other municipal boundaries). Wis. Const. art.

[4] Population deviation between the largest and smallest district should still in all cases be minimized, and where the maximum deviation between districts exceeds 10%, a map is presumptively impermissible. *Evenwel*, 136 S. Ct. at 1124.

IV, § 4. Although sometimes viewed as an "important" factor, it nonetheless has been recognized as secondary in light of the advent of the one person, one vote principle. *AFL-CIO*, 543 F. Supp. at 635-636.

A "closely related" principle "is the objective of preserving identifiable communities of interest in redistricting." *Id.* at 636; *see also Evenwel*, 136 S. Ct. at 1124. "One important aspect of this concern is avoiding any dilution in the voting strength of racial and ethnic minorities." *AFL-CIO*, 543 F. Supp. at 636.

Finally, the Court in its work should account for the factor of partisan influence over Wisconsin's extant districting scheme. As described in detail below, the importance of this factor is based not merely in tradition, but in constitutional imperatives which elevate it above other factors that the Senate Democrats anticipate other parties shall promote.

2.) The petitioners ask us to modify existing maps using a "least-change" approach. Should we do so, and if not, what approach should we use?

While the original Petitioners and Intervenors-Petitioners the Congressmen advocate maps made by applying a "least-change" approach to the presently-existing maps, the other Intervenor-Petitioners do not. *Omnibus Amended Petition*, ¶¶ 120, 121, 138, 159. The Senate Democrats join the BLOC Intervenors-Petitioners and the Hunter Intervenors-Petitioners in opposing creation of new maps by modifying existing maps using a "least-change" approach. To do so would violate the above-discussed laws and principles that the

Court is required to apply. It would also result in the non-partisan Wisconsin Supreme Court's unseemly adoption of a decade-old, politically gerrymandered redistricting scheme.

First, there is no broadly recognized traditional redistricting principle called "least-change;" at best this term has a nebulous meaning. *See Evenwel*, 136 S. Ct. at 1124. Petitioners and Intervenors-Petitioners the Congressmen simply describe it as "making the least number of changes to the existing maps as are necessary to meet the requirement of equal population and the remaining traditional redistricting criteria." *Omnibus Amended Petition*, ¶¶ 118, 158.

This proposed "least-change" approach should not be confused with the principle of "core retention." Core retention is a limited traditional redistricting principle plausibly related to values of preserving continuity for voters, avoiding disenfranchisement of those forced to wait more than four years to vote for a senator because of moves between districts, and administrative ease. It may be an acceptable consideration in certain contexts—though, as explained below, it would be inappropriate here under the present circumstances. *See Bethune-Hill v. Virginia State Bd. of Elections*, 141 F. Supp. 3d 505, 544 (E.D. Va. 2015), *aff'd in part, vacated in part on other grounds*, 137 S. Ct. 788, 197 L. Ed. 2d 85 (2017)).

By contrast, the Petitioners' and Congressmen's "least-change" proposal does not speak to the loftier rationales given to support the "core retention" principle, and indeed belies a desire to simply calcify the redistricting process and lock in, to the greatest extent possible, the partisan-gerrymandered maps from the last cycle.

Even core retention would be a problematic principle for the Court to utilize here. Unlike other factors discussed in the answer to the Court's first question, above, it is not required by federal or state law, and its consideration as a factor of ***any*** value has not been endorsed by any Wisconsin state court. Where core retention is urged as a principle, courts should "examine the underlying justification for the original lines or original district," as it may impermissibly "be used to insulate the original basis for the district boundaries." *Bethune-Hill*, 141 F. Supp. 3d at 544–45. Such untoward insulation is precisely what original Petitioners and the Congressmen urge the Court not merely to uphold—but to themselves perform—here.[5]

First, any endorsement of the core retention approach by Legislative Republicans[6] and their allies smacks of hypocrisy. The most recent redistricting cycle, the 2010 cycle, was the lone redistricting cycle in modern history in which a redistricting plan

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[5] As explained *infra*, even where the core retention principle has been considered in the past by other courts, that consideration has only been justified by circumstances that are not present here. *See Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *3, *7 (E.D. Wis. May 30, 2002), *amended*, No. 01-C-0121, 2002 WL 34127473 (E.D. Wis. July 11, 2002). To apply it here as a guiding light would be to unlawfully elevate it above the factors that must predominate.

Further, if this Court gives any weight to core retention, an "approach" as derivative of that factor as "least change" apparently is would further and impermissibly amplify these considerations over the factors that the Court must account for.

[6] The Legislative Republicans appear in this case as the "Wisconsin Legislature," though, as discussed in the Senate Democrats' Motion to Intervene at paragraphs 3-5, the legal representation and advice being provided ostensibly to the "Wisconsin Legislature" with respect to redistricting has not been shared with Senate Democrats and is restricted from them. Consequently, the Senate Democrats refer to them as "the Legislative Republicans."

was enacted by the Wisconsin Legislature and Governor rather than selected by courts. *See Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012). The Republican-majority Legislature and Republican Governor operated on the background of a 2000 cycle court-created districting plan that—for the first time in Wisconsin history—explicitly applied the principle of core retention. *See Baumgart*, No. 01-C-0121, 2002 WL 34127471, at *3, *7. However, the Republicans who enacted that 2010-cycle plan showed utter disregard for core retention. Indeed, their plan moved more than seven times as many people to a new assembly district—and more than five times as many to a new senate district[7]—as was necessary to achieve legal requirements. *Baldus*, 849 F. Supp. 2d at 849. The court that considered challenges to that plan found that it was "clearly" driven by "partisan motivation." *Id.* at 851.

Yet now the Legislative Republicans and their allies (such as Petitioners and the Congressmen) suddenly reverse their position on core retention, embracing it, as well as a new concept dubbed "least-change." The reason for this sudden Republican reversal on core retention is no mystery—it is solely to ensure highly partisan maps that will inevitably result if the core retention principle and/or the "least-change" approach is applied now.

District maps driven by "partisan motivation," *Baldus*, 849 F. Supp. 2d at 851, passed by a Legislature and signed by a Governor

[7] The exact numbers of Wisconsin citizens so moved were 2,357,592 and 231,341, respectively—figures that the *Baldus* court found "striking." *Id.*

may nevertheless be found lawful by courts when called upon to review them deferentially, for constitutional and statutory compliance. However, an entirely different circumstance will present if this Court selects the redistricting plan that will apply for the next decade. First, rather than simply giving deference to a policy choice of publicly accountable lawmakers, the Court will be called upon to apply its own values and put its own thumb on the scale. This implicates a vastly different responsibility of the Court: instead of deferentially reviewing an enacted map to determine "whether it struck a reasonable balance among the considerations enumerated above," the Court must itself take responsibility for selecting the "best possible" plan. *Prosser v. Elections Bd.*, 793 F. Supp. 859, 865, 866-867 (W.D. Wis. 1992).

Second, the necessity of resolution by this Court now, without a redistricting plan being passed by the Legislature and signed by the Governor, would mean that an impasse exists between a Legislative political majority (though not a veto-proof one) and a Governor of ***different*** parties. It would thus be highly, and particularly, anti-democratic and inappropriate for this Court to adopt an approach plainly—and successfully—tailored to preserve Republican-gerrymandered maps when the voters of Wisconsin have chosen to split the political levers of redistricting between the major parties. For these reasons, the core retention principle should not be utilized here, nor should the "least-change" approach advocated by the Petitioners and Congressmen.

Therefore, in resolving an impasse between executive and legislative branches of state government, should there be one, the

Court should reject any "least-change"-type approach that thinly masks partisanship with a veneer of neutrality. Instead, it must take full responsibility for its agency, as a court in equity, in selecting a redistricting plan for Wisconsin in this cycle. It must adopt an open and clear plan for this selection process designed to do "best possible" service to principles of fair representation embodied in the governing federal and state law, and as supported by traditional redistricting principles.

3.) Is the partisan makeup of districts a valid factor for us to consider in evaluating or creating new maps?

The partisan makeup of districts is not only a valid factor for the Court to consider; it is one that the Court ***must*** consider in order to avoid imposing a partisan map of its own. In other words, it must be aware of the partisan makeup of current and possible future districts, and steer clear of them, in order to make the best possible selection it can in the service of the constitutional and other legal rights of all of Wisconsin's citizens: Democrats, Republicans, and those of all other political persuasions.

If the Court were to instead seek to maintain "blindness" as to partisanship of existing and proposed maps, it would simply be complicit in the perpetuation of any partisan effects that are inherent in them. Partisanship is at the heart of our democratic system, built into the very fabric of our civic life, and both an inevitable feature of virtually any proposed map and a key component of the map's impact on the representational interests of Wisconsin's citizens. Yet here, the Court is stepping into an impasse between a Republican-

controlled Legislature and a Democratic Governor and must sit in equity for all citizens. To ignore the partisan makeup of individual districts and of redistricting schemes as a whole would be a dereliction of the Court's duty.

The U.S. Supreme Court has ruled that federal courts cannot now entertain challenges to enacted redistricting maps based on partisan advantage because of the lack of a "clear, manageable and politically neutral" standard "for deciding how much partisan dominance is too much." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498, 2500 (2019). That is hardly, however, a judicial endorsement of partisan gerrymandering itself, which that Court has long recognized is "incompatib[le] with democratic principles." *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004).

Moreover, the justiciability of challenges to enacted redistricting plans has nothing to do with the Court's responsibility now that it has taken this case. Indeed, it has long been recognized that when a court is ***itself*** charged with selection of redistricting maps, partisan features are among the important factors it should consider. Unlike court-chosen plans, "[a]n enacted plan would have the virtue of political legitimacy." *Prosser*, 793 F. Supp. at 866. Thus,

> [j]udges should not select a plan that seeks partisan advantage—that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda—even if they would not be entitled to invalidate an enacted plan that did so.

Id.

In fact, the factor of partisan advantage is important for the Court to consider, not simply on par with other traditional

redistricting principles that are not mandated by law, but in order to protect the constitutional rights of Wisconsin's citizens:

> [T]he First Amendment [protects an] interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views. Under general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest . . . . As [listed] precedents show, First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.

Vieth, 541 U.S. at 314 (Kennedy, J., concurring) (*citing Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion); *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000)).

Thus, the Court should endeavor to maximize the vindication of the First Amendment rights of the citizens of Wisconsin such that their votes are not diluted on a partisan basis.

4.) As we evaluate or create new maps, what litigation process should we use to determine a constitutionally sufficient map?

In order to promote fairness, openness, accountability, and legitimacy, any litigation process that this Court chooses should be based on several key features:

- Allow all parties to this matter to present their proposed redistricting plans and try them directly to this Court;
- Require the Court to take into account all party-submitted plans, and to ultimately select from among

them, with minimal modification or reliance on outside arbiters, in promulgating a final plan.

The Senate Democrats defer to the Governor on all other questions as to the specifics of the litigation process.

CONCLUSION

The Senate Democrats respectfully request that the Court undertake handling of this case consistent with the laws and principles discussed herein.

Respectfully submitted this 25th day of October 2021.

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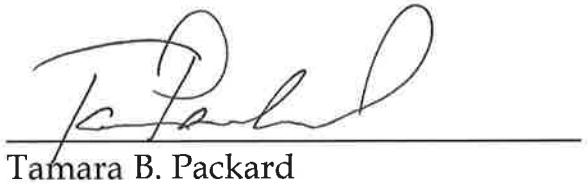
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the form, length, pagination, appendix, and certification requirements for an appellate brief-in-chief produced with a proportional serif font. The length of this brief is 3,780 words.



Tamara B. Packard

CERTIFICATE OF SERVICE

I hereby certify that pursuant to the Court's October 14, 2021 Order in the above-captioned case, on October 25, 2021 I caused to be submitted the foregoing document in pdf format to the Clerk of the Court for filing via electronic mail at this address: clerk@wicourts.gov. On October 25, 2021, I also caused a paper original and ten (10) copies of this document to be delivered by personal delivery to the Clerk of Court, with the notation "This document was previously filed via email," and also caused this document to be served on all counsel of record via electronic mail and by U.S. Mail to counsel for Wisconsin Elections Commission Respondents and the Hunter Intervenor-Petitioners.

Tamara B. Packard