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.

RESPONSE BRIEF BY JANET BEWLEY, STATE SENATE DEMOCRATIC MINORITY LEADER

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INTRODUCTION

The briefs submitted on October 25, 2021 provide ample response to the questions this Court posed in its October 14, 2021 Order. A close reading of the briefs submitted by the Petitioners, the "Wisconsin Legislature,"[1] and the Congressmen, however, reveals legally, factually, and logically lacking responses to the Court's questions. Those parties' submissions are refuted by the cases cited therein, as well as by the briefs from the other parties such as Governor Tony Evers, Lisa Hunter et al., and BLOC et al., and the Senate Democrats generally join the arguments presented by the Governor, Hunter et al., and BLOC et al. The Senate Democrats therefore seek to not overburden the Court's resources and, instead of responding at length, commend the aforementioned briefs to the Court for resolution of the questions presented.

However, the Senate Democrats by virtue of their offices are uniquely positioned -- and feel particularly compelled – to address one especially flawed argument contained in the October 25, 2021 "Brief by the Wisconsin Legislature" (hereinafter, "Br."). The argument is that, if the Legislature and the Governor are unable to together enact a redistricting plan into law, this Court should treat any redistricting plans that were ***not*** enacted, but merely proposed by bare partisan majorities in the Legislature, as "the presumptive remedial plans." (Br. at 18-20.) That claim has no support in law.

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[1] Those appearing in this action as the "Wisconsin Legislature" are actually only the Republican leadership of the Wisconsin Legislature. *See Bewley Motion to Intervene*, ¶¶ 3-5, 14.

ARGUMENT

I. Deference is only due to enacted apportionment plans.

The "Wisconsin Legislature" attempts to ground its claim that Republican Legislators' proposed but vetoed maps are "the presumptive remedial plans" in the requirement that "[t]he Court must 'reconcil[e] the requirements of the Constitution with the goals of state political policy.'" (Br. at 10, 18, 20, *citing Upham v. Seamon*, 456 U.S. 37, 43 (1982).) Yet there is no basis to suppose that any plan proposed but not enacted would embody "state political policy," let alone that it would be the presumptive remedy that this Court should adopt. To the contrary, the only legislative "policy choices" entitled to "[j]udicial deference" are those actually "enacted into law." *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. By definition, then, this ***excludes*** the potential plans that "Wisconsin Legislature" now asks the Court to defer to.

This Court has explicitly reinforced this enactment principle in the specific context of redistricting:

> Since the constitution itself places such heavy emphasis on the requirement that the legislative districts be apportioned "according to the number of inhabitants" it would be unreasonable to hold that the framers of the constitution intended to exclude from the reapportionment process the one institution guaranteed to represent the majority of the voting inhabitants of the state, the Governor. Both the Governor and the legislature are indispensable parts of the legislative process.

State ex rel. Reynolds v. Zimmerman (*Zimmerman I*), 22 Wis. 2d 544, 556–57, 126 N.W.2d 551 (1964).[2]

To be clear, there is no doubt that it is preferable that redistricting be accomplished through legislative enactment—the passage of a bill, then signed into law by the Governor--rather than by the courts. "The people of this state deserve no less" than the "political legitimacy" that comes from enactment via the legislative process. *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶ 23, 249 Wis. 2d 706, 639 N.W.2d 537. But that preference should not be confused with an endorsement of the "Wisconsin Legislature's" very different argument here: the Court owes no deference to a mere input into the legislative process, especially once it is aborted. In fact, the *Jensen* court made clear that it is only "an enacted plan" that it defers to. *Id.* at ¶ 12 (*citing Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992).

Moreover, even if at ***some*** point during that process a proposed legislative plan might be assumed to be the best available indicator of what state policy will ***become***, that would no longer be the case by the time such plan has been vetoed by the Governor and impasse has been reached. Such impasse is the only circumstance that is relevant in this matter, because it is the only circumstance under which this Court will apportion the state into new legislative districts.

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[2] Elsewhere in their brief, the "Wisconsin Legislature" admits that the "Governor has the opportunity to approve or veto the redistricting plans passed by the Legislature." (Br. at 13, 17, *citing Zimmerman I*, 22 Wis. 2d 544.)

II. The Court must consider all relevant factors, without deference to any one party's proposal.

The preference for a legislatively-enacted map should also not be confused with the inability of this Court, once impasse between the Legislature and the Governor is reached, to independently consider all the factors relevant to redistricting in its own plan selection process. Where enactment by the political branches fails,[3] this Court becomes the primary "institution of state government" entrusted with drawing a redistricting map. *Jensen*, 2002 WI 13 at ¶ 17. Indeed, "[t]he power of the judiciary of a State to require valid reapportionment ***or to formulate a valid redistricting plan*** has not only been recognized by [the U.S. Supreme] Court but appropriate action by the States in such cases has been specifically encouraged." *Scott v. Germano*, 381 U.S. 407, 409 (1965) (emphasis added).

Such encouragement is appropriate and necessary for this Court to fashion a suitable remedy. To instead defer to the whim of one of the political branches—particularly when doing so would plainly come at the expense of the other—would work a dangerous and unconstitutional abdication of the Court's duties as well as cause a legislative encroachment upon the Executive's powers. "It is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and

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[3] As this Court has long recognized, such failure constitutes failure by those branches in their constitutional duty to perform redistricting "anew," in time for the next election, upon the results of each census. *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35, 57 (1892) (*citing* Wis. Const. art. IV, § 3). Thus, deference to either new, unenacted legislative proposals ***or*** pre-census enacted maps would impermissibly violate the Wisconsin Constitution. *Id.*

the Judicial—shall be, in its sphere, independent of the others." *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 7, n. 5, 376 Wis. 2d 147, 897 N.W.2d 384 (quoting *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147, 20 L. Ed. 519 (1872)). "Our founders believed the separation of powers was not just important, but the central bulwark of our liberty." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 30, 393 Wis. 2d 38, 946 N.W.2d 35.

As a result, when this Court enacts its own redistricting plan following legislative impasse, it performs its own analysis afresh, without deference either to old maps or to legislative proposals for new maps. *State ex rel. Reynolds v. Zimmerman ("Zimmerman II")*, 23 Wis. 2d 606, 606-07, 128 N.W.2d 16 (1964). In this process, this Court must consciously disregard preferences that would be legitimate for the Legislature to consider. As an example particularly applicable in this matter, "[j]udges should not select a plan that seeks partisan advantage . . . even if they would not be entitled to invalidate an enacted plan that did so." *Jensen*, 2002 WI 13 at ¶ 12 (*quoting Prosser*, 793 F.Supp. at 867).

Thus, the argument for the Legislative Republicans' proposed map, vetoed by the Governor, to serve as the "presumptive remedy" in this court process conflicts with bedrock Wisconsin and U.S. law. Unsurprisingly, then, none of the cases the "Wisconsin Legislature" relies on actually support that argument. Instead, they reinforce that enactment into law is a prerequisite for deference.

For example, in *Upham* the state plan that the U.S. Supreme Court ordered deference to, was a new plan that actually had been enacted into law. *Upham*, 456 U.S. at 38, 42-43. In *Whitcomb v. Chavis*,

403 U.S. 124, 124, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971), redistricting was not the subject of the action but rather merely the remedy ordered when a court invalidated an enacted state statute establishing multi-member legislative districts. *Id.* at 1859–60. In *White v. Weiser*, 412 U.S. 783 (1973), the Court found a violation where, between two similar, alternative redistricting plans, a lower court chose the one that was ***not*** based on the just-enacted (but unconstitutional) "S.B. 1, a duly enacted statute of the State of Texas." *Id.* at 795–96. Even then, the Court declared that deference to enacted state policy was acceptable "only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge," and that it should never, "in the name of state policy, refrain from providing remedies fully adequate to redress" violations. *Id.* at 797. In contrast, the Legislative Republicans' proposed plans (if made law) would be extremely vulnerable to legal challenge. Further, because there is as yet no enacted Wisconsin districting plan for the 2020 cycle, a fully adequate remedy requires districting "anew," with a fresh examination of all applicable redistricting factors. *See, e.g., Cunningham*, 53 N.W. at 57.

The same problems render each of the cases cited by the "Wisconsin Legislature" inapposite to their argument. *Perry v. Perez*, 565 U.S. 388 (2012) also only concerned a lower court's consideration of "the State's newly enacted plans." *Id.* at 391. In *North Carolina v. Covington*, 138 S. Ct. 2548, 2554, 201 L. Ed. 2d 993 (2018), the U.S. Supreme Court determined that a lower federal court in a racial gerrymandering suit erred by rejecting "enacted remedial plans" simply because of a state ban on mid-decade redistricting. 138 S. Ct.

at 2552, 2554–55. And in *Abrams v. Johnson*, 521 U.S. 74 (1997), rather than reinforcing ***any*** principle of deference to a legislature, the Supreme Court upheld a lower court's ***refusal*** to defer to Legislature. *Id.* at 79. Notably, the lower court also expressly rejected a "least change" approach, and instead applied traditional redistricting criteria (despite the underlying suit being a limited Voting Rights Act challenge). *Id.* at 83-85.[4] Thus, even setting aside the bedrock law to the contrary, the cases cited by the "Wisconsin Legislature" plainly provide no support for the proposition that any unenacted bills should serve as the "presumptive remedy" here.

Finally, the "Wisconsin Legislature" mistakenly argues that if the Court does not defer to the Legislative Republicans' proposal, "then the Court itself would be rebalancing the redistricting criteria—compactness, contiguity, communities of interest, protection of incumbents, and so forth—that the Legislature already balanced as part of the redistricting process both now and ten years ago." (Br. at 40, *citing* 2021 Wis. Senate Joint Res. 63 and certain of the inapposite cases discussed *supra*.) The resort to these sources again underscores the lack of authority that exists for that argument. Further, as the Senate Democrats explained in their brief in chief, the only "balancing" of the factors applicable to Wisconsin's redistricting that ***any*** legislature has accomplished are the

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[4] The cases that the "Wisconsin Legislature" cites largely concern court consideration of plans that were submitted to the U.S. Attorney General as part of the "preclearance" requirements applicable to certain states under the Voting Rights Act. *See, e.g., Perry*, 565 U.S. at 388, *Abrams*, 521 U.S. at 74, *Upham*, 456 U.S. at 37. Such plans were only even eligible for preclearance after "final enactment" by the states. 52 U.S.C.A. § 10304 (a); 28 C.F.R. §§ 51.21, 51.22(a)(1).

provisions in the federal and state constitutions and federal statutes that set out the relevant mandates.

Like an unenacted plan, a joint resolution has no force of law and thus does not state a policy entitled to any deference. Neither does (or can) the "Wisconsin Legislature" attempt to show that Legislative Republicans' current proposals derive any authority from the Legislature's past enactments so as to make them the presumptive remedy here.

Moreover, there are no applicable "balancing" guidelines in place from ten years ago. *See Cunningham*, 53 N.W. at 57. It would be an impossible task for the Court to attempt to discern just how the Legislature "balanced" the applicable redistricting criteria ten years ago. Surely, accounting for population changes in the meantime, preservation of current maps would be an extremely poor proxy for whatever those criteria may have been. The "Wisconsin Legislature" provides no reliable indicia as to what (if any) allowable criteria were used—or under what "balancing" principles they were used—such that the Court could follow them now. In fact, what evidence does exist suggests that criteria ***unallowable*** to this Court, such as partisan preference, drove the maps. *Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 851 (E.D. Wis. 2012) Ultimately, if there were ***any*** cognizable "state policy" that this Court could derive from the most recently enacted redistricting plan, it would simply be the ***rejection*** of a "least-changes" or core retention-based approach. *See id.* at 849. Yet that is exactly the approach that the Legislative

Republicans (presenting to the Court as the "Wisconsin Legislature") and their allies favor now.

The "Wisconsin Legislature" thus can show no actual support for the radical proposition that any map it proposes is the "presumptive remedy." In fact, as explained *supra*, both Wisconsin and federal law prohibit such presumption. The Legislative Republicans, just like the Senate Democrats, are a group of lawmakers who have not succeeded, in collaboration with the Governor, in enacting a plan. Rather, they are but a party to this action and entitled to submit a proposed plan to this Court, just like the Senate Democrats. Neither party's proposed plan is entitled to status as "presumptive remedy" any more than any other. Both must rise and fall on their own merits in this Court's analysis, just like the proposals from all other parties.

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 1st day of November 2021.

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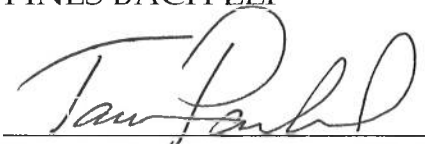

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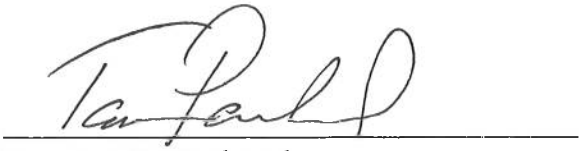
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the form, length, pagination, appendix, and certification requirements for an appellate response brief produced with a proportional serif font. The length of this brief is 2,362 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 November 1, 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 November 1, 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.



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