

No. 2021AP1450-OA

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IN THE SUPREME COURT OF WISCONSIN

BILLIE JOHNSON, ERIC O'KEEFE,  
ED PERKINS, AND RONALD ZAHN,

*Petitioners,*

BLACK LEADERS ORGANIZING FOR COMMUNITIES,  
VOCES DE LA FRONTERA, LEAGUE OF WOMEN VOTERS OF WISCONSIN,  
CINDY FALLONA, LAUREN STEPHENSON, REBECCA ALWIN, CONGRESSMAN  
GLENN GROTHMAN, CONGRESSMAN MIKE GALLAGHER, CONGRESSMAN  
BRYAN STEIL, CONGRESSMAN TOM TIFFANY, CONGRESSMAN SCOTT  
FITZGERALD, LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA,  
GERALDINE SCHERTZ, KATHLEEN QUALHEIM, GARY KRENZ, SARAH J.  
HAMILTON, STEPHEN JOSEPH WRIGHT, JEAN-LUC THIFFEAULT,  
AND SOMESH JHA,

*Intervenors-Petitioners,*

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, in her official  
capacity as a member of the Wisconsin Elections Commission, JULIE  
GLANCEY, in her official capacity as a member of the Wisconsin Elections  
Commission, ANN JACOBS, in her official capacity as a member of the  
Wisconsin Elections Commission, DEAN KNUDSON, in his official capacity as  
a member of the Wisconsin Elections Commission, ROBERT SPINDELL, JR.,  
in his official capacity as a member of the Wisconsin Elections  
Commission, AND MARK THOMSEN, in his official capacity as a member of  
the Wisconsin Elections Commission,

*Respondents,*

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, in his  
official capacity, AND JANET BEWLEY SENATE DEMOCRATIC MINORITY  
LEADER, on behalf of the Senate Democratic Caucus,

*Intervenors-Respondents.*

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**RESPONSE BRIEF BY THE WISCONSIN LEGISLATURE**

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## ARGUMENT

Five parties have proposed alternative redistricting plans, distinct from those passed by the Legislature.<sup>1</sup> These alternatives are not appropriate remedies. The Legislature's plans are.<sup>2</sup>

### I. Only the Legislature's Plan Minimizes Population Deviation and Maximizes Core Retention.

Tables 1 and 2 contain a high-level comparison of the Legislature's Assembly and Senate plans against the five alternatives.

**Table 1**

	Proposed Assembly Plans			
	Population Deviation	Reported Overall Core Retention	Reported County/Muni Splits	Incumbent Pairings
<b>LEGISLATURE</b>	0.76%	84.2%	53 / 52	3
<b>GOVERNOR</b>	1.88%	85.8%	53 / 174	2
<b>BEWLEY</b>	1.86%	83.8%	55 / 79	8
<b>BLOC</b>	1.32%	84.2%	53 / 104	5
<b>MATH</b>	0.74%	61.0%	40 / 70	18
<b>HUNTER*</b>	1.82%	73.2%	50 / 114	10

*Source: Bryan Response Report ¶9*

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<sup>1</sup> All plans are online: <https://bit.ly/3efmxW7> (Legislature); <https://bit.ly/3Fmc4UB> (Governor); <https://bit.ly/3FoEHk6> (BLOC); <https://bit.ly/32sGKFg> (Bewley); <https://bit.ly/3Jct9TC> (Citizen Mathematicians); <https://bit.ly/3qdSFPw> (Hunter).

<sup>2</sup> The Legislature's response arguments are directed toward the alternative Assembly and Senate plans, supported by brief response reports from experts Thomas Bryan, John Alford, and Brian Gaines. For reasons stated in the Congressional Intervenor-Petitioner's briefs, the Legislature's SB622 congressional map is the proper remedy for the congressional malapportionment claims.

**Table 2**

	Proposed Senate Plans				
	Population Deviation	Reported Overall Core Retention	Reported Disenfranchised	Reported County/Muni Splits	Incumbent Pairings
<b>LEGISLATURE</b>	0.57%	92.2%	138,732	42 / 31	0
<b>GOVERNOR</b>	1.19%	92.2%	139,677	45 / 118	1
<b>BEWLEY</b>	1.61%	90.5%	135,560	48 / 52	3
<b>BLOC</b>	0.96%	89.6%	179,629	42 / 73	2
<b>MATH</b>	0.50%	74.3%	422,492	28 / 31	5
<b>HUNTER*</b>	0.95%	80.4%	240,723	42 / 79	6

*\* The Hunter plan also reconfigures some Senate Districts to include different Assembly Districts than the existing Act 43 districts. Hunter Ansolabehere Report 36-37.*

Source: Bryan Response Report ¶9

Tables 1 and 2 reveal the following about population deviations and minimum changes across plans:

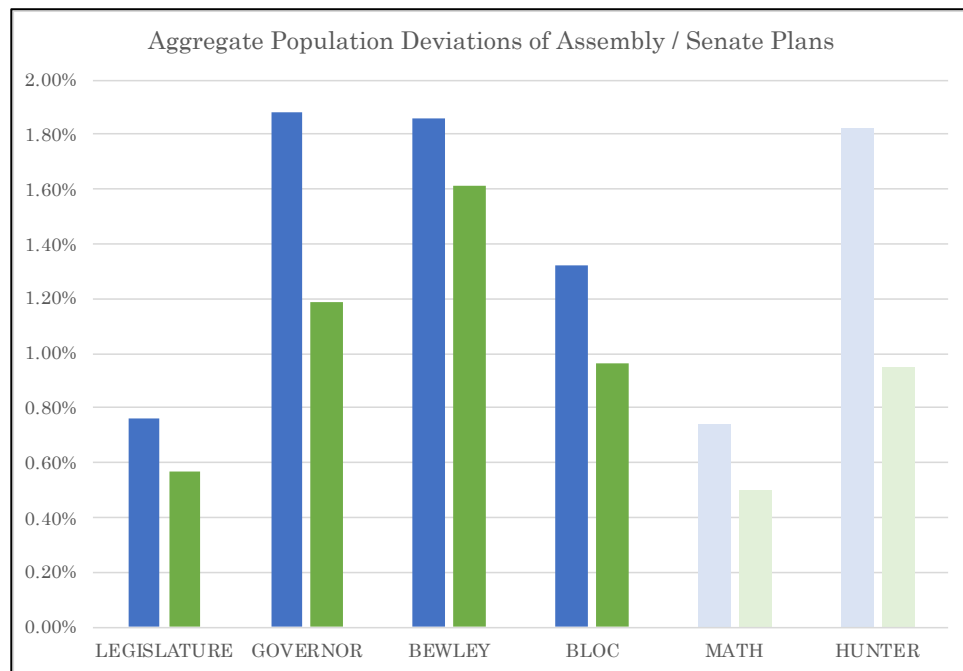
1. **Population deviation:** The Legislature and Citizen Mathematicians best minimize population deviations across districts. Every district in the Legislature's plan is within 0.5% of ideal population. By comparison, the Governor, Bewley, BLOC, and Hunter plans are a tier below when it comes to reapportionment.
2. **Minimum changes:** The Legislature keeps nearly all Wisconsinites in their existing districts. By relaxing population equality, the Governor, Bewley, and BLOC also achieve relatively high core retention at first glance. These plans also move relatively few Wisconsinites from odd- to even-numbered Senate districts (thereby minimizing six-year delays between Senate votes). Of these plans, the Legislature's has the fewest incumbent pairings and municipal splits, which are both indicative of minimum changes.

By comparison, the Citizen Mathematicians and Hunter plans cannot be considered “minimum changes” plans. Shown above, the Citizen Mathematicians retain only 61% of Assembly Districts and 74% of Senate Districts. Hunter retains only 73% of Assembly Districts and 80% of Senate Districts. Both move significantly more individuals from odd- to even-numbered Senate districts than the Legislature. Because their plans cannot be described as “minimum changes” plans and are thus not an appropriate judicial remedy, the Legislature focuses this brief on the Governor, Bewley, and BLOC plans.

Combining one and two, the Legislature’s plans are the only plans that *both* reapportion every district with exactness *and* leave nearly all Wisconsinites in their existing districts. They best remedy Petitioners’ malapportionment claims, while abiding by this Court’s requirement that any remedy do so in a “minimum changes” way. Order ¶8.

**A. The Legislature’s Plans Are Best For Population Equality.**

1. The comparatively lower population deviation of Legislature’s plans should be dispositive:

**Figure 1**

Wisconsin’s policy has long been to maintain minimal population deviations, achieving “as close an approximation to exactness as possible.” *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1892); *see also* 2021 Wis. Senate Joint Res. 63 (adopting policy to redistrict with population deviations “well below” what is constitutionally required). When enacting the existing Act 43 districts, the Legislature achieved aggregate population deviations of 0.76% in the Assembly and 0.62% in the Senate. *Baldus v. Members of the Wis. Gov’t Accountability Bd.*, 849 F. Supp. 2d 840, 851 (E.D. Wis. 2012). Here again, the Legislature’s 2021 plan matches the 2011 Assembly deviations and is even lower than the 2011 Senate deviations. No other minimum-changes plan matches (or beats) the Legislature’s 2011 and 2021 deviations.

This Court’s task in choosing a remedy, moreover, “is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner free from any taint of arbitrariness



or discrimination.” *Connor v. Finch*, 431 U.S. 407, 415 (1977) (quotation marks omitted). In this malapportionment case, the way to avoid that taint of arbitrariness is to choose the plan with the lowest population deviation, within the boundaries of this Court’s least-changes remedial authority. *Cf. id.* at 417-18; *see also Chapman v. Meier*, 420 U.S. 1, 26-27 (1975) (“a court-ordered reapportionment plan of a state legislature ... must ordinarily achieve the goal of population equality with little more than *de minimis* variation”). That plan is the Legislature’s.

2. Shown in Figure 1, the population deviations of the Governor, BLOC, and Bewley plans are nearly double (or more than double) the population deviations of the Legislature’s plans. These greater deviations require an explanation—especially for a proposed remedy meant to redress malapportionment. Some deviation can be justified if necessary for “compact[ness], respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives.” *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

No such justifications explain the Governor, BLOC, or Bewley plans. Far from deviating from population equality to keep municipalities intact, these plans all have *greater* municipal splits than the Legislature’s plan (*infra*, II.B.3). Nor can the plans’ population deviation be explained by efforts to keep existing districts intact or avoiding incumbent pairings, for all three have troubling core retention trends (*infra*, II.B.1) and incumbent pairings (*infra*, II.B.2). By comparison, the Legislature’s plans accomplish all of those goals equally well or better while simultaneously keeping the population in any one district within 0.5% of ideal population.

## B. The Legislature's Plans Are Best For "Minimum Changes."

A closer look at the Governor, BLOC, and Bewley plans also reveals that the Legislature's plan is the only true minimum changes plan. The Governor, BLOC, and Bewley plans are not least-changes plans for all Wisconsinites. *Cf.* Gaines Response 4-5 (illustrating that purported least-changes plan can have a disproportionate effect on one group of voters).

**1. A most-changes Milwaukee:** The *overall* core retention of the Governor, Bewley, and BLOC plans is superficially similar to the Legislature's plan. But the Governor and BLOC plans are *most-changes* plans for those in Milwaukee. Similarly, the Bewley plan substantially underperforms the Legislature's in the City of Milwaukee. She redraws Milwaukee's northside districts to cross into Waukesha County and pairs incumbents from Milwaukee's predominantly Black districts. Only the Legislature's plan is a least-changes plan across the State, without the discriminatory dismantling of districts in Milwaukee.

**Table 3**

	Assembly Plans				
	Pop Dev	Total Individuals Retained[1]	Black Individuals Retained	Milwaukee-Area Retained[2]	Milwaukee City Retained[3]
<b>LEGISLATURE</b>	0.76%	84.2%	87.0%	78.1%	92.3%
<b>GOVERNOR</b>	1.88%	85.8%	77.0%	72.6%	76.7%
<b>BLOC</b>	1.32%	84.1%	75.2%	68.3%	72.1%
<b>BEWLEY</b>	1.86%	83.7%	Not reported	79.6%	82.4%

[1] All percentages retained measured as the percent of individuals remaining in their existing district number. (If measured by "largest component," meaning the largest percentage of individuals remaining together even if in a new district number, percentages retained could increase slightly.)

[2] Existing districts with some territory in Milwaukee County, including AD7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 82, 83, & 84. Percent retained measured by "district number," meaning the percent of individuals who remain in their existing district. Bryan Response App. 1.

[3] Existing districts wholly within Milwaukee County and wholly or partially within the City of Milwaukee, including AD8, 9, 10, 11, 12, 16, 17, 18, 19, & 20. Percent retained measured by "district number," meaning the percent of individuals who remain in their existing district. Bryan Response App. 1.

The Governor, BLOC, and Bewley plans make substantial changes to Milwaukee's Black representatives' districts as compared to the Legislature's least-changes plan. Discussed in Part III, all three plans redraw Milwaukee's predominantly Black Senate District 4, currently represented by Senator Lena Taylor and comprising Assembly Districts 10, 11, and 12, so that District 4 crosses the Milwaukee County line and reaches into Waukesha County, and into Ozaukee County for the Governor and BLOC plans. (By comparison, the Legislature's Senate District 4 ends at the Milwaukee County line and does not move a single individual to a new senate district.) Consequently, the Governor's plan retains less than 60% of existing Assembly Districts 11, 12, and 17, meaning more than 40% of the population from these already-underpopulated districts moves to new districts with new representatives. Bryan Response App. 1D. Similarly, Senator Bewley moves more than 30% of individuals out of Assembly District 11 and more than 40% of individuals out of Assembly District 12, only to be replaced by 20,000 individuals from Waukesha County Districts 22 and 24. Bryan Response App. 1F; Bewley Amos Rep. Ex. 3.

The discriminatory effect can be seen statewide too. Under the Governor's plan, for example, only 77% of Black Wisconsinites statewide would stay in their existing Assembly Districts, significantly lower than the Governor's reported overall core retention of nearly 86% for all Wisconsinites. Bryan Response App. 1G.<sup>3</sup>

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<sup>3</sup> Core retention percentages will vary if measured by "district number" or by "largest component." For example, Bewley's Assembly District 97 would retain only 220 individuals from existing District 97 in her new District 97, making core retention by "district number" less than 1%. But Bewley keeps 24,647 individuals together from that district, moving them to District 84. If measured by "largest component," ignoring the new district number, core retention is nearly 50%. Bryan

Likewise, under the BLOC plan, only 75% of Black Wisconsinites statewide would stay in their existing Assembly Districts, as compared to BLOC's overall core retention score of 84%. Bryan Response App. 1H.<sup>4</sup>

The discriminatory overhaul of the Milwaukee districts is not merely an abstract harm for Milwaukee voters. All three plans would sever the representative-constituent relationship of many more voters in Milwaukee than the Legislature's plan. Those in affected districts would disproportionately bear the costs of new district lines, new constituencies, and new coalitions. Gaines Report 6-7. And some voters might skip past unfamiliar candidates running in their new districts altogether. *Id.* Such changes are not required by the Voting Rights Act, and they do not comply with this Court's least-changes remedial approach. *See* Part III, *infra*.

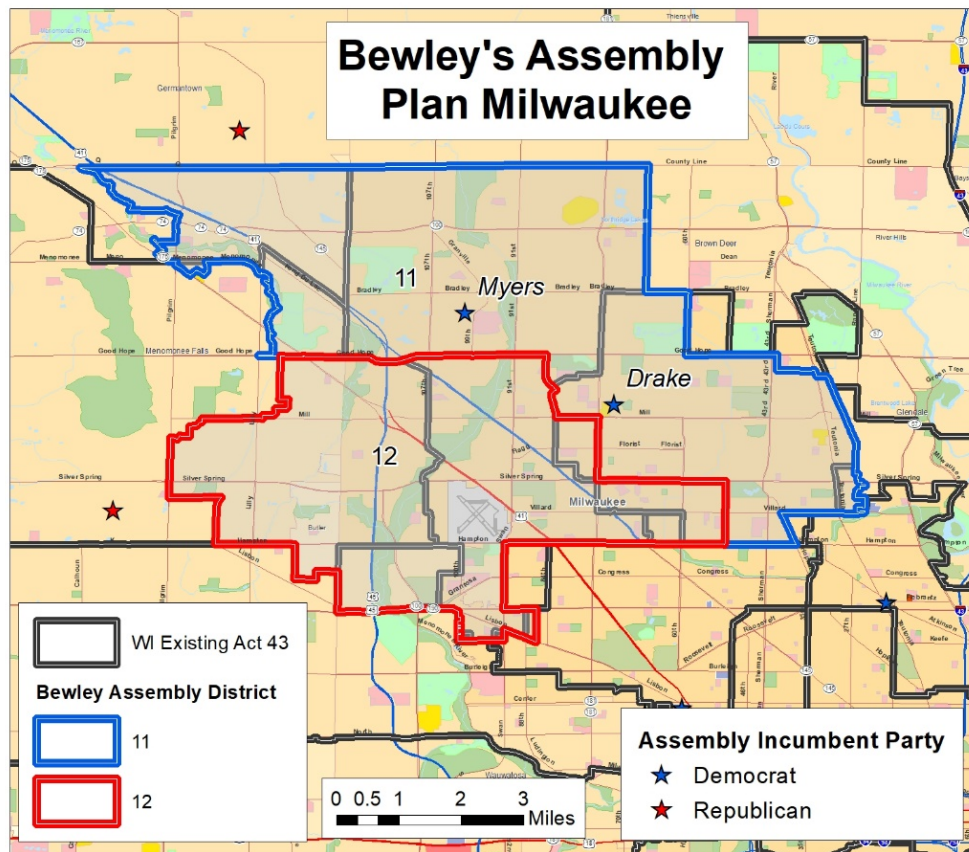
**2. Incumbent pairings:** The incumbent pairings of the Governor, Bewley, and BLOC plans are further reason to reject them.

The Bewley plan pairs 16 Assembly Representatives and 6 Senators (compared to the Legislature's 6 paired Representatives and 0 Senators). One pairing pits incumbents from Milwaukee's predominantly Black Assembly Districts 11 and 12 against one another by drawing Representative LaKeisha Myers out of her district. And 16 of the 22 members paired in the Bewley plan are Republicans. Bryan Response ¶34.

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Response ¶14. Under either measure, the Legislature outperforms the other plans in the City of Milwaukee.

<sup>4</sup> Data provided for Senator Bewley's plan did not permit a similar analysis. Bryan Response ¶25.

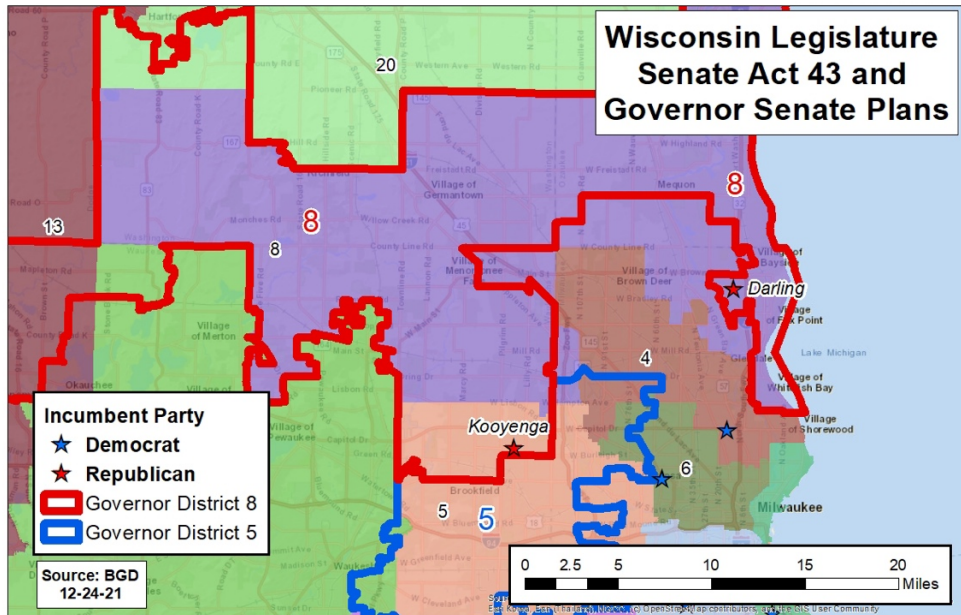
**Figure 2: Bewley AD11 & 12 Incumbent Pairing**

Source: Bryan Response ¶29

The Governor and BLOC pairings, while fewer, are also notable. The BLOC plan pairs 10 Assembly Representatives and 4 Senators, including Senate Majority Leader Devin LeMahieu, long-time Senator Alberta Darling, and 9 other Republicans. Bryan Response ¶32. The Governor's plan pairs 6 legislators, all of whom are Republicans and also include Senator Darling. *Id.* ¶30.

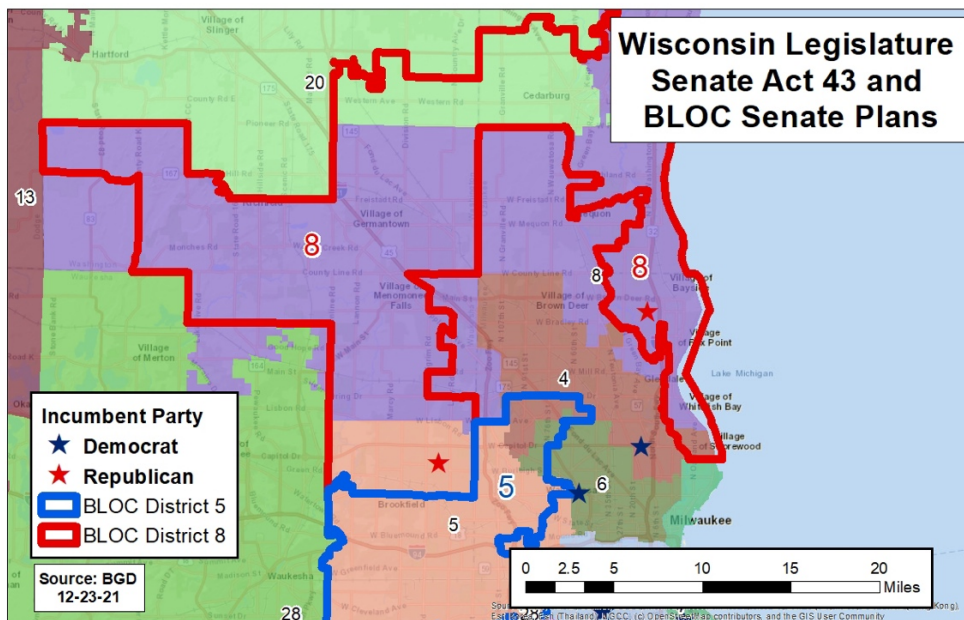
Both the Governor and BLOC plans comically redraw Senate District 8 (where Senator Darling has served since 1992) to pair her against Senator Dale Kooyenga (from Waukesha County's Brookfield):

Figure 3: Governor Darling (SD 8) Incumbent Pairing



Source: Bryan Response ¶31

Figure 4: BLOC Darling (SD 8) Incumbent Pairing



Source: Bryan Response ¶33

The pairing also highlights another unusual aspect of the Governor and BLOC plans. Both add more Milwaukee residents to Senate District 5, anchored in Waukesha County, while leaving Senator Kooyenga behind to be paired with Darling. The eastward move makes little sense given Milwaukee's population loss over the past decade. It leaves even fewer individuals in Milwaukee's already-underpopulated Senate Districts 4 and 6. For example, the Governor's plan removes nearly 50,000 more individuals from those underpopulated districts to place them into Senate District 5 (a district already at nearly ideal population after the Census). See Bryan Response App. 1M. The Legislature's plan, by comparison, retains 100% of existing Senate Districts 4 and 6. See Bryan 12/15/2021 Rep. App. 2B.

**3. Municipal splits:** A third reason to reject the Governor, BLOC, and Bewley plans is their greater number of municipal splits, signaling a departure from the existing districts. Each creates new splits in excess of the Legislature's 2011 and 2021 plans.

**Table 4**

	Assembly		Senate	
	County	Municipal[1]	County	Municipal
<b>ACT 43</b>	58	78	46	48
<b>LEGISLATURE</b>	53	52	42	31
<b>GOVERNOR</b>	53	174	45	118
<b>BLOC</b>	53	104	42	73
<b>BEWLEY</b>	55	79	48	52

*[1] The Legislature's municipal splits include pre-existing splits, whereby a municipality crosses county line; other municipal splits could be undercounted if such splits are not included. For splits reporting, see Bryan 12/15 Rep. 18-19; Governor Clelland Rep. 6; Bewley Amos Rep. 16; Bryan Response App. 2.*

Consider the following examples:

- The Governor would split 7 new municipalities in Waukesha County's Assembly District 99, including Oconomowac and Pewaukee. Similarly, the Governor would add 8 municipal splits in Dane County, including Stoughton and Sun Prairie, even though not previously split by Act 43.<sup>5</sup>
- Similarly, BLOC would split both Waukesha County's Oconomowoc and Ozaukee County's Cedarburg between three districts, even though Act 43 did not split these cities. In Dane County, BLOC would split Sun Prairie, the town of Madison, and others. BLOC would also create new splits in Washington (4 new splits) and Fon du Lac (4 new splits).<sup>6</sup>
- Bewley would split Milwaukee's Whitefish Bay between Assembly Districts 23 and 10, even though Act 43 kept Whitefish Bay whole. Similarly, in her own Senate District 25, Bewley would split the Lac Courte Oreilles Reservation and Price County between her district and another, even though Act 43 kept both whole. Bewley would also add new splits in

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<sup>5</sup> Compare Bryan App. 2 (Governor splits report), *with* 2011 Wis. Act 43, Wis. Stat. §§4.38(3)(a) (city of Oconomowac), 4.43(1)(a) (Rutland), 4.46(5) (Stoughton and Sun Prairie), 4.47(1) (Blooming Grove, Dunn, town of Madison), 4.79 (village of Cross Plains and town of Middleton), 4.98(2)-(3) (city of Pewaukee, village of Sussex), 4.99(1) (towns of Merton and Ottawa), 4.99(4) (villages of Merton and Dousman).

<sup>6</sup> Compare Bryan App. 2 (BLOC splits report), *with* 2011 Wis. Act 43, Wis. Stat. §§4.22(2)(a) (Erin), 4.38(3)(a) (Oconomowoc), 4.41(3)(a) (Ripon), 4.42(4)(a) (Metomen), 4.46(1) (Sun Prairie, Pleasant Springs), 4.47(1) (town of Madison), 4.58(3) (Jackson), 4.59 (Barton, Kewaskum, Eden), 4.60(1)(d) (Cedarburg), 4.79(1) (town of Middleton).



Dane County, including the village of Cottage Grove and the towns of Blooming Grove, Madison, and Middleton.<sup>7</sup>

By comparison, the Legislature *eliminates* splits in Waukesha County, unifying the large municipalities of Brookfield and New Berlin, consistent with public input. *See* Order ¶35 (“respect for the prerogatives of the Wisconsin Constitution dictate that wards and municipalities be kept whole where possible”).<sup>8</sup> Likewise in Dane County—where other plans add to existing splits—the Legislature’s plan *reduces* them. *See* Legislature Br. 21.

\* \* \*

The Legislature’s plans have lower aggregate population deviation, higher core retention without any disparate effect on Milwaukee districts, minimal movement of individuals from odd- to even-numbered Senate districts, only three (all Republican) Assembly pairings, fewer county and municipal splits than the existing districts, and otherwise comply with state and federal law.

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<sup>7</sup> *Compare* Bewley Plan (LTSB), <https://bit.ly/32sGKFg>, and Bryan App. 2 (Bewley splits report), *with* 2011 Wis. Act 43, Wis. Stat. §§4.23(1)(a) (Whitefish Bay), 4.46(4) (village of Cottage Grove), 4.47(1) (towns of Madison and Blooming Grove), 4.74(1) (Price County), 4.79(1) (town of Middleton).

<sup>8</sup> The Legislature and the Governor’s Peoples Maps Commission (PMC) solicited public input via their websites. Public submissions identified New Berlin and Brookfield as communities of interest. *See* Legislature New Berlin Submissions (<bit.ly/3Jy6LnQ>; <bit.ly/3pwqzzK>); Legislature Brookfield Submission (<bit.ly/3ewPQn8>); PMC New Berlin Submissions (<bit.ly/3sAmgFG>; <bit.ly/3ErXOZq>); PMC Brookfield Submission (<bit.ly/3mBQog8>). Even so, the Governor’s map retains the New Berlin and Brookfield splits. Bryan Response App. 2.

Based on these features alone, the Legislature's redistricting plans are the only remedy for this reapportionment dispute.<sup>9</sup>

## **II. Even If All Other Things Were Equal, the Legislature's Plan Would Prevail.**

Even if the Court were to conclude that multiple plans are appropriate remedies, any tie goes to the Legislature. As this Court has recognized, the Legislature is "ideally and most properly" the architect of any redistricting plans. *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶17, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam). "[R]eapportionment is primarily a matter for legislative consideration and determination," *Reynolds v. Sims*, 377 U.S. 533, 586 (1964), and "state legislatures have primary jurisdiction over legislative reapportionment," *White v. Wesier*, 412 U.S. 783, 795 (1973).

The Legislature's redistricting authority and know-how does not disappear in the face of impasse. The framers entrusted the Legislature with redistricting. Wis. Const. art. IV, §3; U.S. Const.

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<sup>9</sup> Additionally, the Legislature's plan splits no 2020 wards, Legislature Br. 31, while the Governor and BLOC plans do. See Bryan Response ¶12. Bewley and other plans are based on not-yet-complete 2021 ward lines. See, e.g., Hunter Br. 21 & n.4. But a map drawn on 2020 ward lines is consistent with Wisconsin law. See Wis. Stat. §4.006(2) ("Ward' means a ward prescribed by a municipality based upon municipal boundaries *in effect on April 1 of the year of the federal decennial census* in accordance with the most recent revision of municipal wards under §5.15 upon which the districting plans described under subchs. II and III are based." (emphasis added)). It also makes good sense, given that plans were submitted before all 2021 ward lines were complete, and elections are looming. If the Court disagrees, any remedy can be slightly modified to follow forthcoming 2021 ward lines.

art. I, §4, cl. 1; see Order ¶19.<sup>10</sup> And the Legislature has carried out that responsibility this year again. By joint resolution, the Legislature identified principles to guide redistricting, including low population deviations and “[r]etain[ing] as much as possible the core of existing districts, thus maintaining existing communities of interest, and promoting the equal opportunity to vote by minimizing disenfranchisement due to staggered Senate terms.” 2021 Wis. Senate Joint Res. 63. The Legislature also solicited and incorporated public input.<sup>11</sup> There were public committee hearings on the bills, followed by lengthy floor sessions, culminating in a vote by Wisconsin’s 132 elected representatives to approve the very plans that the Legislature submits here. See 2021 Wis. Senate Bill 621; 2021 Wis. Senate Bill 622. All other things equal (and they are not), and consistent with the state and federal constitutions’ vesting of redistricting authority in the Legislature, the Legislature’s plans are ideally and most properly the remedy.<sup>12</sup>

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<sup>10</sup> Relatedly, various parties confuse the relevance of the existing 2011 map. The degree of changes made in 2011 from the prior plan are not relevant as statistical “benchmarks.” See, e.g., Bewley Br. 7; Gov. Br. 18; BLOC Br. 61. The 2011 legislatively enacted plans owed no deference to prior plans. The 2011 maps themselves are the embodiment of legitimate and lawful legislative policy choices. And here, the 2011 maps are relevant because any judicial remedy must respect those policy choices embodied therein.

<sup>11</sup> For example, by unifying Brookfield and New Berlin, *supra*.

<sup>12</sup> Relatedly, constitutional avoidance counsels in favor of adopting the Legislature’s plans for Assembly and Senate districts. Given the text and history of article IV, §3, there is a lurking constitutional question about whether the Legislature’s reapportionment plans are sufficient to effectuate redistricting without the Governor’s approval. See Legislature’s Redistricting Factors Br. 20-22 (Oct. 25, 2021).

Of the five plans currently before the Court, only the Legislature's plan is the product of policymaking by Wisconsin's elected representatives. Not even the Governor or Bewley plans have been through any public policymaking process. The Governor abandoned his own commission's plans and instead proposed new, unseen, and untested plans to this Court.<sup>13</sup> Likewise, Senator Bewley abandoned the plans she introduced as substitute amendments in the Legislature and likewise submitted new, unseen, and untested plans to this Court.<sup>14</sup> The Legislature's plans are the only plans created by a legislative body, considered by a legislative body, and approved by a vote of the legislative body. They are fully consistent with this Court's minimum changes requirement and are the obvious remedy for Plaintiffs' reapportionment claims.

### **III. The VRA Does Not Require A Milwaukee Redraw, and Doing So Would Raise Serious Constitutional Questions.**

Finally, every plan but the Legislature's would substantially alter Milwaukee-area districts. The Bewley plan expands the existing *Baldus* districts beyond the Milwaukee county line.<sup>15</sup> The

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<sup>13</sup> See generally PMC, "Work & Records," <https://govstatus.egov.com/peoplesmaps/work-records>.

<sup>14</sup> See SSA1-SB621, [https://docs.legis.wisconsin.gov/2021/related/rd/ssa1\\_sb621.pdf](https://docs.legis.wisconsin.gov/2021/related/rd/ssa1_sb621.pdf); SSA2-SB621, [https://docs.legis.wisconsin.gov/2021/related/rd/ssa2\\_sb621.pdf](https://docs.legis.wisconsin.gov/2021/related/rd/ssa2_sb621.pdf); Wis. Legislative Reference Bureau Memorandum to Sen. Janet Bewley, at 2 (Nov. 5, 2021), [https://legis.wisconsin.gov/democrats/media/2209/lrb-s0263-2-ab624-sb621-and-2011-act-43-analysis\\_bewley.pdf](https://legis.wisconsin.gov/democrats/media/2209/lrb-s0263-2-ab624-sb621-and-2011-act-43-analysis_bewley.pdf).

<sup>15</sup> The *Baldus* districts include predominately Black Senate District 4 (and corresponding Assembly Districts 10, 11, and 12), Senate District 6 (and corresponding Assembly Districts 16, 17, and 18), as well

remaining parties go a step further. They all propose what they describe as a seventh Black district in Milwaukee, which they contend the Voting Rights Act requires. *See* BLOC Br. 14-15 (“demographic changes in and around Milwaukee compel that area’s legislative districts to be re-drawn to ensure compliance with Section 2 of the VRA”); Governor Br. 14; Math Br. 16; Hunter Br. 19. They are very wrong.

The VRA is not a basis for departing from the Court’s least-changes remedial authority. As this Court has observed, the existing districts already survived federal judicial review in the *Baldus* VRA litigation, subject to the slight adjustment to Assembly Districts 8 and 9, and “[t]reading further than necessary to remedy their current legal deficiencies ... would intrude upon the constitutional prerogatives of the political branches and unsettle the constitutional allocation of power.” Order ¶¶4, 64. The “minimum changes” requirement should apply no less in Milwaukee than the rest of the State.

#### **A. The Milwaukee Redraw**

Table 4 compares each plan’s proposed demographic makeup of the Milwaukee districts challenged in the *Baldus* litigation:

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as predominantly Hispanic Assembly Districts 8 and 9. Legislature Br. 34.

**Table 4**

	Act 43	Legislature	Governor	BLOC	Bewley	Math	Hunter
	BVAP	BVAP	BVAP	BVAP	BVAP	BVAP	BVAP
SD4	58.4%	57.2%	49.2%	49.6%	54.4%	52.0%	51.8%
SD6	61.0%	54.5%	48.8%	49.0%	55.4%	50.8%	48.9%
AD10	61.8%	45.8%	50.0%	50.8%	52.3%	40.1%	50.1%
AD11	61.9%	71.5%	48.9%	49.3%	61.7%	83.2%	57.0%
AD12	51.5%	55.5%	48.7%	48.8%	49.4%	35.2%	49.5%
AD16	61.3%	52.6%	48.5%	49.0%	53.0%	59.3%	45.2%
AD17	61.3%	60.2%	48.9%	49.2%	64.7%	38.4%	49.1%
AD18	60.4%	50.8%	48.9%	48.8%	48.8%	55.8%	51.6%
<i>Proposed Seventh District</i>			49.5%	49.2%		39.2%	44.0%
	HVAP (Baldus)	HVAP	HVAP	HVAP	HVAP	HVAP	HVAP
AD8	67.7%	65.9%	66.6%	65.9%	66.6%	58.0%	58.8%
AD9	47.5%	53.0%	52.1%	53.0%	52.8%	58.2%	54.7%
<i>Note: BVAP is "Black18" as reported by LTSB and includes "non-Hispanic Black" and "non-Hispanic (Black + White)." If BVAP is expanded to include additional multi-race sub-categories from raw census data, BVAP percentage could increase slightly.</i>							

*Source: Alford Response 4 & Ex. 2*

Table 5 compares the Governor, BLOC, and Bewley districts specifically, adding core retention calculations. The “Total Retained” is the percentage of individuals who would remain in their existing districts under each proposal:<sup>16</sup>

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<sup>16</sup> The Citizen Mathematicians and Hunter plans are omitted from the chart for simplicity, since neither can be considered a least-changes plan compared to others, *supra*.

**Table 5**

	Act 43	Legislature		Governor		BLOC		Bewley	
	BVAP	BVAP	Total Retained	BVAP	Total Retained	BVAP	Total Retained	BVAP	Total Retained
SD4	58.4%	57.2%	100.0%	49.2%	79.5%	49.6%	68.9%	54.4%	93.8%
SD6	61.0%	54.5%	100.0%	48.8%	84.2%	49.0%	76.3%	55.4%	98.9%
AD10	61.8%	45.8%	87.7%	50.0%	85.8%	50.8%	54.1%	52.3%	100.0%
AD11	61.9%	71.5%	85.4%	48.9%	56.1%	49.3%	58.1%	61.7%	66.8%
AD12	51.5%	55.5%	88.1%	48.7%	58.7%	48.8%	62.3%	49.4%	55.7%
AD16	61.3%	52.6%	100.0%	48.5%	91.3%	49.0%	57.4%	53.0%	100.0%
AD17	61.3%	60.2%	94.3%	48.9%	58.5%	49.2%	64.0%	64.7%	96.7%
AD18	60.4%	50.8%	86.4%	48.9%	75.9%	48.8%	81.0%	48.8%	80.2%
<i>Proposed Seventh District</i>				49.5%	12.7%	49.2%	18.4%		
	HVAP (Baldus)	HVAP	Total Retained	HVAP	Total Retained	HVAP	Total Retained	HVAP	Total Retained
AD8	67.7%	65.9%	100.0%	66.6%	100.0%	65.9%	100.0%	66.6%	94.6%
AD9	47.5%	53.0%	90.6%	52.1%	90.5%	53.0%	93.4%	52.8%	77.2%

*Note: BVAP is "Black18" as reported by LTSB and includes "non-Hispanic Black" and "non-Hispanic (Black + White)." If BVAP is expanded to include additional multi-race sub-categories from raw census data, BVAP percentage could increase slightly.*

*Sources: Alford Response 5; Bryan Response App. 1D-F*

As the tables show, the Governor and BLOC plans follow the same formula: Draw seven new districts at razor-thin margins, whereby Black voters make up just over (or under) 50 percent of the voting-age population. Move existing constituents in excess of the razor-thin margin *out* of their districts, severing the existing constituent-representative relationship and undermining existing voter coalitions (Gaines Response 6-7). The Bewley plan similarly retains fewer individuals than the Legislature's plan, including by reconfiguring Milwaukee's Assembly Districts 11 and 12 so that only 67% and 56% of individuals in those existing districts remain.

The formula these plans follow is no different than the Governor's now-abandoned PMC plan. Speaking on the PMC plan from the Assembly floor, Representative Sylvia Ortiz-Velez (AD8) described such plans as the manifestation of "a national effort to

dilute minority communities to create more Democratic seats.”<sup>17</sup> She remarked that the Governor’s PMC plan “surely accomplished what they want—partisan gerrymandering at the expense of legal rights of the communities of interest.”<sup>18</sup> The Governor has abandoned that plan here. But in its place are multiple new plans that do the very same thing. They dismantle existing majority-minority districts and (without any sense of irony) profess that the VRA requires such dismantling. *See, e.g.*, BLOC Br. 14-15.

As part of that formula, every plan but the Legislature’s redraws Milwaukee’s northern districts to reach beyond the county line to grab voters outside of Milwaukee County. Specifically, the Governor and BLOC plans redraw Senate District 4 to extend into Waukesha and Ozaukee Counties, shown in Figures 5, 6, and 7 below. Both plans would stretch Senate District 4 to reach from Lake Michigan west to Menomonee Falls in Waukesha County, and as far north as Mequon in Ozaukee County. What results is a substantially decreased Black Voting Age Population (BVAP) in Milwaukee’s predominantly Black districts. Table 4, *supra*. For example, the Governor’s Senate District 4 (currently represented by Senator Lena Taylor) would remove more than 33,000 constituents from her existing district and replace them with more than 40,000 new constituents from Senate District 8 (including Waukesha and Ozaukee County residents), reducing BVAP from 58% to 49%. Bryan Response App. 1M.

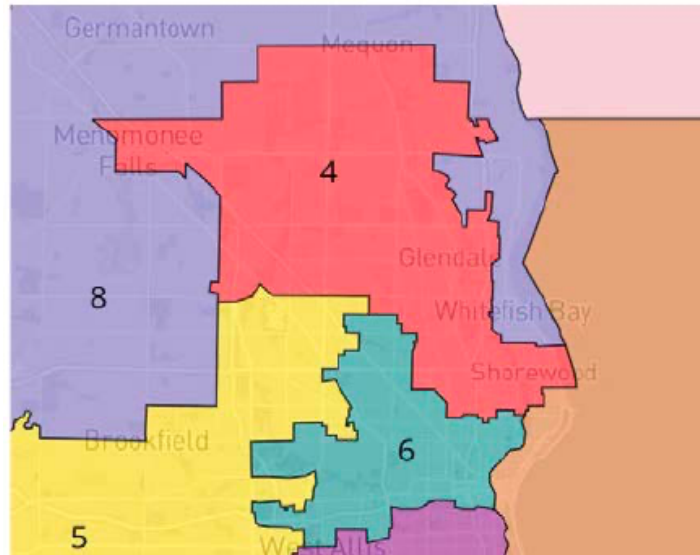
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<sup>17</sup> Assembly Floor Session (Nov. 11, 2021), recording available at <https://wiseye.org/2021/11/11/wisconsin-state-assembly-floor-session-42/> at 2:18:05.

<sup>18</sup> *Id.* at 2:18:54.

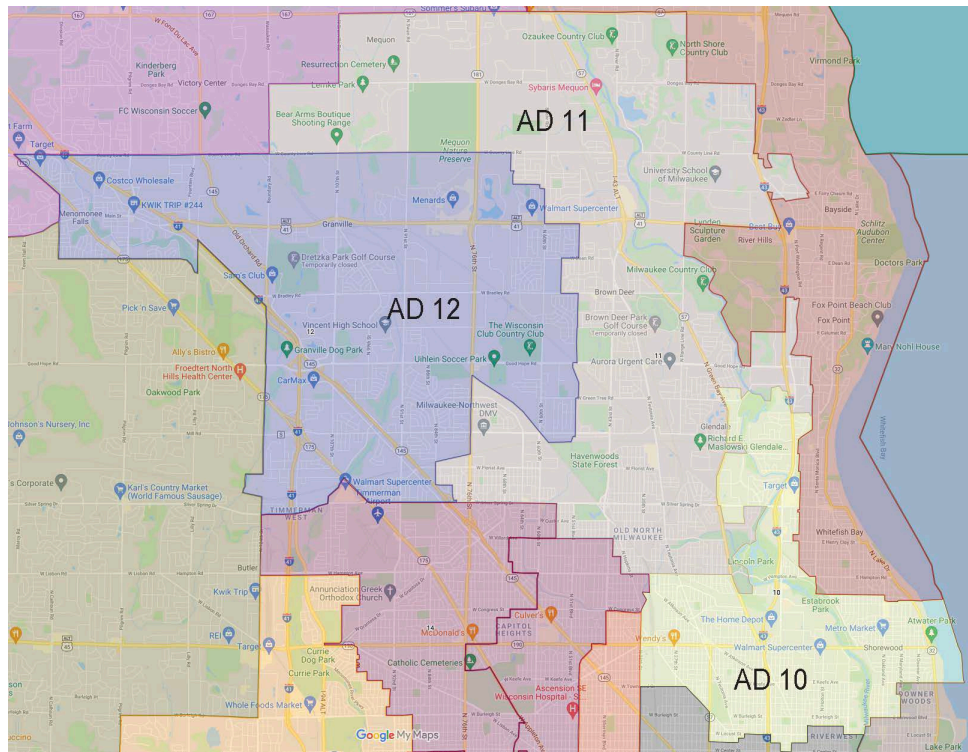


**Figure 5: Governor SD4**



Source: Governor Clelland Report Maps

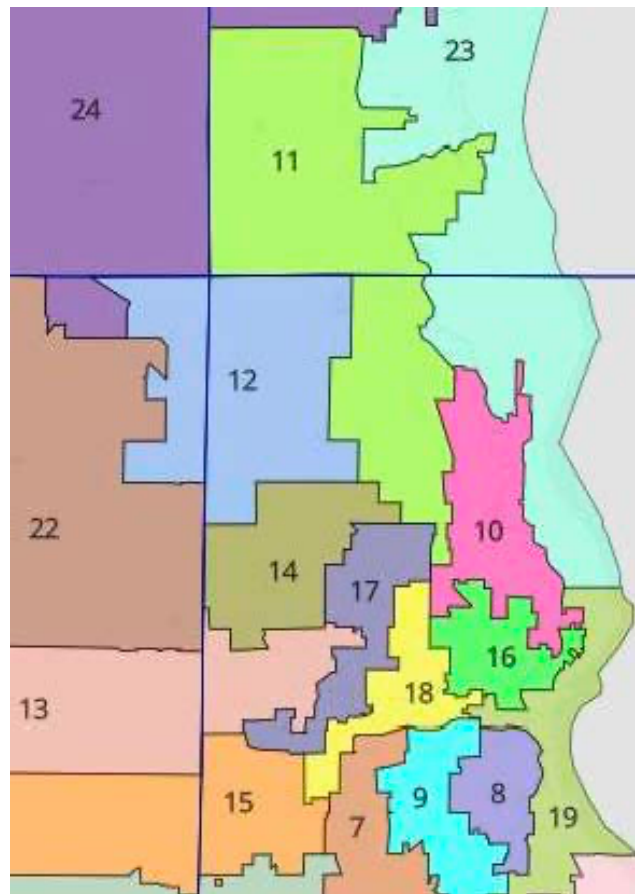
**Figure 6: Governor AD10, 11, 12 (SD4)**



Source: Governor Posted Plan, <https://bit.ly/3puisnu> (district numbers added)

Likewise, BLOC extends the Milwaukee districts well beyond the county line. The plan removes more than 50,000 constituents from Senator Taylor's District 4, replacing them with nearly 50,000 constituents from Senate District 8, including new constituents from Waukesha County to the west and Ozaukee County to the north. Bryan Response App. 1N.

**Figure 7: BLOC AD10, 11, 12 (SD4)**



*Source: BLOC Submitted Maps*

Assembly District 12's current representative, LaKeisha Myers, already decried the absurdity of such sprawling districts. Commenting on the Governor's now-abandoned commission proposal

for Senate District 4—resembling the proposals here<sup>19</sup>—she stated, “There is no way that people who live at the lake, in [Milwaukee’s] 53206, on Good Hope Road, and at Ernie Von Schledorn [in Menomonee Falls] have all the same interests” and catalogued the differences in economic interests, poverty, and racial demographics.<sup>20</sup> Regarding an Assembly District 11 extending to Mequon—just as the Governor and BLOC propose here—Representative Myers asked rhetorically, “Why? That’s going across the county line. Doesn’t make sense. Doesn’t make sense at all....That’s not going to stick when it comes to people’s interests. That’s not going to stick when it comes to thinking you’re going to elect people that look like me.”<sup>21</sup>

Similarly, even though the Bewley plan does not redraw Milwaukee to create a seventh Black majority-minority district, her plan nonetheless redraws Assembly Districts 11 and 12 to reach across the county line into Waukesha, driving down the BVAP of Senate District 4 and Assembly District 12 in particular. Her plan adds more than 15,000 individuals to Milwaukee’s Assembly District 12 from Waukesha’s District 22.<sup>22</sup> District 11 would similarly break the county line to add 5,000 individuals from

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<sup>19</sup> See generally PMC, “Work & Records,” <https://govstatus.egov.com/peoplesmaps/work-records>.

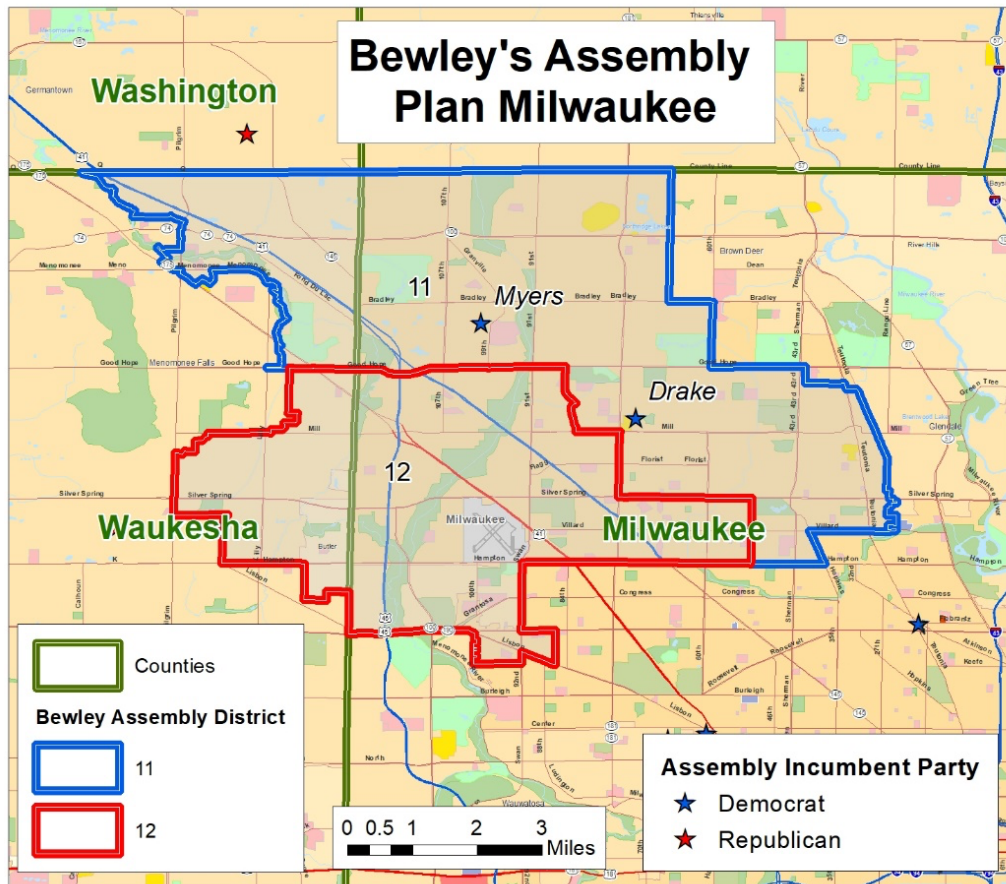
<sup>20</sup> Assembly Floor Session (Nov. 11, 2021), recording available at <https://wiseeye.org/2021/11/11/wisconsin-state-assembly-floor-session-42/> at 2:46:55.

<sup>21</sup> *Id.* at 2:47:55.

<sup>22</sup> Bewley Amos Rep. Ex. 3. Voters in the added portion have voted overwhelmingly for Republican Representative Janel Brandtjen and Senator Darling. See WEC, Ward-by-Ward 2020 Assembly Election Results at 37, <https://bit.ly/3EAzX9T>; WEC, Ward-by-Ward 2020 Senate Elections Results at 15, <https://bit.ly/3qDZ1I2>.

Waukesha’s District 24.<sup>23</sup> As a result, she pairs Black Representatives Myers (AD12) and Dora Drake (AD11) in her redrawn District 11, *supra*.

**Figure 8: Bewley AD11 & 12**



Source: Bryan Response ¶ 29

<sup>23</sup> Bewley Amos Report Ex. 3. Voters in existing District 24 have voted overwhelmingly for Republican Representative Dan Knodl and Senator Darling. See WEC, Ward-by-Ward 2020 Assembly Election Results at 41, <https://bit.ly/3EAzX9T>; WEC, Ward-by-Ward 2020 Senate Elections Results at 15, <https://bit.ly/3qDZ1I2>.

By bipartisan votes, the Legislature voted down the Governor's PMC plan.<sup>24</sup> Similar efforts by the Governor, BLOC, Bewley, and others to dismantle Milwaukee's districts must be rejected here too.

**B. The Voting Rights Act In No Way Requires the Milwaukee Redraw**

The Governor and BLOC assert that their plans are required by the Voting Rights Act, given population changes since 2010. Governor Br. 15; BLOC Br. 15. In short, they appear to believe that if seven 50.01% Black districts can be drawn, they must be drawn. These assertions are wrong as a matter of law. The VRA does not (and cannot) require that systematic maximization of majority-minority districts—especially at the cost of intentionally reducing existing predominantly Black districts to bare majorities. And they are wrong as a matter of fact. Milwaukee's Black population has changed very little since the 2010 Census, meaning there is every reason to keep Milwaukee's existing districts largely the same.

1. The U.S. Supreme Court has already rejected the sordid formula presented here by the Governor, BLOC, and others. Interpreting the VRA to require the maximization of majority-minority districts "causes its own dangers, and they are not to be courted." *Johnson v. DeGrandy*, 512 U.S. 997, 1016 (1994). Any alleged "[f]ailure to maximize" majority-minority districts "cannot be the measure of §2." *Id.* at 1017. Indeed, in *DeGrandy*, the Supreme Court explored a what-not-to-do hypothetical districting scheme, little different than the proposals here:

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<sup>24</sup> SSA3-SB621 (rejected by a vote of 11 Ayes and 22 Notes), <https://bit.ly/3eDjF5G>; ASA1-SB621 (rejected by a vote of 21 Ayes and 77 Noes), <https://bit.ly/3eywrlY>.

Assume a hypothetical jurisdiction of 1,000 voters divided into 10 districts of 100 each, where members of a minority group make up 40 percent of the voting population and voting is totally polarized along racial lines. With the right geographic dispersion to satisfy the compactness requirement, and with careful manipulation of district lines, the minority voters might be placed in control of as many as 7 of the 10 districts. Each such district could be drawn with at least 51 members of the minority group 51 members of the minority group, and whether the remaining minority voters were added to the groupings of 51 for safety or scattered in the other three districts, minority voters would be able to elect candidates of their choice in all seven districts.<sup>12</sup>

<sup>12</sup> Minority voters might instead be denied control over a single seat, of course. Each district would need to include merely 51 members of the majority group; minority voters fragmented among the 10 districts could be denied power to affect the result in any district.

*Id.* at 1016 & n.12. The Court concluded that the VRA cannot be read to require such a districting scheme: “reading §2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose.” *Id.* at 1016-17. And it rejected the district court’s singular focus on “whether additional districts could be drawn in which either Hispanics or blacks would constitute an effective majority.” *Id.* at 1024. The Governor and BLOC proposals risk repeating that error.

At best, the proposed Milwaukee redraw is an attempt to extract from the VRA something that it does not require: maximal majority-minority districts. The VRA does not demand even proportional representation. 52 U.S.C. §10301(b) (“Provided, That

nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”); *DeGrandy*, 512 U.S. at 1014 n.11 (Section 2’s proviso “confirms what is otherwise clear from the text of the statute, namely, that the ultimate right of §2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.”); accord *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019) (rejecting claim “that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be”). It necessarily follows that the VRA does not demand the Governor’s or BLOC’s super-proportionality maximization.

At worst, their proposed Milwaukee redraw would raise serious constitutional questions about the VRA. There is no question that the proposed maps reveal a “policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote),” meaning there is ample “evidence that race motivated the drawing of particular lines.” *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 267 (2015); see also *Cooper v. Harris*, 137 S. Ct. 1455, 1468-69, 1472 (2017) (concluding race unconstitutionally predominated in redistricting when drafter selected 50% racial target). Most troubling, the plans’ “mechanical racial targets” are the *dialing down* of existing districts to the bare minimum—severing many Milwaukee residents’ existing relationships with their representatives and disproportionately affecting Black Wisconsinites. Bryan Response ¶¶17, 21; Gaines Response 7. If section 2 of the VRA could be read to require such a thing—racially gerrymandering district lines so that the fewest number of Black constituents continue to live in each majority-minority district—then the VRA would itself be unconstitutional. See U.S. Const. amend.

XIV; see also *Shaw v. Reno*, 509 U.S. 630, 646-49 (1993); *Holder v. Hall*, 512 U.S. 874, 905-07 (1994) (Thomas, J., concurring in judgment).

2. The factual assumptions underlying the Milwaukee redraw are also all wrong. The parties wrongly assert that population changes require it. According to the Governor (at 14), “with population changes since 2010, there is a sufficiently large and compact population of Black residents to produce seven majority Black districts in the Assembly.” According to BLOC (at 15), “based on data in the 2020 Census, Section 2 now requires drawing a seventh [majority-minority] district in the Milwaukee area.” Other parties similarly focus only on *statewide* population changes while ignoring what did (and did not) change in *Milwaukee* specifically. See Math Br. 16.

The 2020 Census tells a different story. Discussed in the accompanying response expert report by Dr. John Alford, Black population has *decreased* in both Milwaukee County (-4,337) and the City of Milwaukee (-12,854) between 2010 and 2020. Alford Response 7. Isolating for only voting age population, the Black Voting Age Population (BVAP) increased slightly—from 23.7% to 24.3% in Milwaukee County—but nowhere near half of an Assembly District. *Id.*<sup>25</sup> There has thus been no material population change in Milwaukee since *Baldus* that could require the Governor’s, BLOC’s, and others’ reconfiguration of Milwaukee’s predominantly Black Assembly and Senate Districts.

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<sup>25</sup> Even if one were to include all multi-race individuals who identify in part as Black, the multi-race voting-age-population in Milwaukee County is <1% of total voting age population and therefore will not be a material increase. See “2020 Wisconsin Counties with P.L. 94-171 Redistricting Data as U.S. DOJ Summarized Fields,” LTSB, <https://legis.wisconsin.gov/ltsb/gis/data/>.



In short, Milwaukee's six predominantly Black districts continue to be roughly proportional to Wisconsin's Black Voting Age Population statewide (roughly 6%) and well exceed proportionality in the Milwaukee area specifically. Alford Response 6-7. The VRA does not require dismantling the existing districts. The parties have offered *zero* evidence that the existing districts do not give all voters equal opportunity to elect their candidate of choice. They have offered only a theory of majority-minority district maximization that has no place in the Voting Rights Act or the Fourteenth Amendment of the U.S. Constitution.

There is every reason to keep the existing districts intact, as the Legislature's plans do, consistent with this Court's "minimum changes" remedial authority.

### CONCLUSION

For the foregoing reasons and those stated in the Legislature's opening brief, the Legislature's redistricting plans are the only appropriate remedy for Petitioners' claims.

Dated this 30th day of December, 2021.

Respectfully submitted,

Electronically Signed By  
Kevin M. St. John

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## CERTIFICATIONS

**Form and Length.** I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c) for a brief and appendix produced with proportional serif font. The length of this brief is 5,482 words as calculated by Microsoft Word, not including the caption, table of contents, table of authorities, signatures, and these certifications.

**Appendix.** I hereby certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

**Filing, Electronic Filing, and Service.** I hereby certify that I caused the foregoing brief, the Legislature's Appendix, and the Response Expert Reports of Thomas Bryan, Brian Gaines, and John Alford to be filed with the Court as attachments to an email to clerk@wicourts.gov, sent on or before 12:00 noon on this day. I further certify that I will cause a paper original and 10 copies of these materials with a notation that "This document was previously filed via email" to be filed with the clerk no later than 12:00 noon tomorrow. This method of filing and electronic filing was required by the Court's Order dated November 17, 2021.

I further certify that on this day, I caused service copies of these documents to be sent by email to all counsel of record, all of whom have consented to service by email.

Dated this 30th day of December, 2021.

Respectfully submitted,

Electronically Signed by  
Kevin M. St. John

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