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January 4, 2022

Supreme Court of Wisconsin
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RE: *Billie Johnson, et al. v. Wisconsin Elections Commission, et al.*
Appeal No. 2021AP001450-OA

To The Court:

In their previous filing, the Petitioners recommended this Court adopt the Legislature's proposed state legislative maps and either the Legislature's or the Governor's proposed congressional map as the remedy in this case. Having now reviewed the responses submitted by the parties, the Petitioners have not changed their position (although they do suggest some additional means of choosing between the two Congressional maps). Rather than restate the arguments fully set forth in their previous letter-brief, the Petitioners make the following additional points.

I. Least Changes

The parties, unsurprisingly, differ in their approaches to weighing the many relevant factors in assessing district map proposals. The Petitioners have argued that this Court should take a three-part approach.

First, this Court should immediately eliminate from consideration any maps that would require the Court to depart from its role to say what the law is and instead engage in policy-making. The most straightforward measure in this context is to study the number of people moved to a new district or retained within an existing district under each

proposal. Assuming the remaining maps are otherwise lawful, the outliers—those that engage in a much greater degree of disruption in remedying the existing malapportionment of Wisconsinites—are clearly asking this Court to do more than simply resolve legal deficiencies.

Second, of the maps that clear this threshold, this Court should determine which best accomplish the task at hand, namely ensuring equally-populated districts.

Third, performance with respect to other constitutionally-mandated requirements provides any tiebreaker.

Some parties seek to portray their maps as superior by presenting a different hierarchy of relevant parameters. Most notably, the Citizen Mathematicians and Scientists criticize the parties for treating "the least-change principle" as "a standalone legal requirement" "privileged . . . over nearly all other considerations." Citizens' Resp. Br. 4-5.

It is obvious why the Citizens are uncomfortable with least-change. Their legislative maps move more Wisconsinites across districts than anyone else—by far. In the case of the Senate, the Citizens move *almost a million more people* than the map that moves the fewest (the Legislature's). Gimpel Resp. Rep. ("Gimpel Rep.") 5-6. That is inexcusable. And the Citizens do not receive much bang for their buck. On the preeminent measure, population deviation, they score only 0.02% better than the Legislature on the Assembly and 0.07% better on the Senate.

The Citizens misunderstand least-change. It is based on "[t]he constitutional confines of [the Court's] judicial authority" and thus is most certainly a standalone legal requirement. *Johnson v. Wisconsin Elections Comm'n*, 2021 WI 87, ¶64. Put simply, the Court will not "tread[] further than necessary to remedy [the] current legal deficiencies" of the existing maps, the same as it would act in any other case. *Id.* It is obvious from the submission of parties that span the spectrum of political interests—the Legislature, the Governor, the BLOC Intervenors, Senator Bewley—that remedial maps are available that

move only a fraction of the number of Wisconsinites that the Citizen (and Hunter) maps would move. These latter maps thus push the Court out of the realm of law-declaration and into the realm of law-creation and cannot be accepted.

II. Voting Rights Act

It is apparent that the requirements of the Voting Rights Act could be determinative in this case as to which map is selected. But the VRA is not a freestanding warrant to maximize the number of majority minority districts or a scale on which one can do "better" or "worse." If it is violated, then that violation requires a remedy. If it has not, it drops out as a consideration. The Petitioners have argued that to the extent the VRA does not *require* the creation of additional districts, whether to create such districts is a policy decision that should be left to the political branches under this Court's least-changes approach. *See, e.g.*, *Johnson*, 2021 WI 87, ¶64. Indeed, even more than this, absent some legal compulsion or prohibition, using race to draw district lines creates grave constitutional concerns. *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) ("[S]trict scrutiny applies when race is the 'predominant' consideration in drawing the district lines such that 'the legislature subordinate[s] traditional race-neutral districting principles . . . to racial considerations.'" (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (alteration in original)).

Nor are the requirements of the Voting Rights Act as easily triggered as some parties have suggested. The Supreme Court of the United States recently observed the following with respect to § 2 of the Voting Rights Act:

> The key requirement is that the political processes leading to nomination and election (here, the process of voting) must be "equally open" to minority and non-minority groups alike, and the most relevant definition of the term "open," as used in § 2(b), is "without restrictions as to who may participate," Random House Dictionary of the English Language 1008 (J. Stein ed. 1966), or "requiring no special status,

> identification, or permit for entry or participation," Webster's Third New International Dictionary 1579 (1976).

Brnovich v. Democratic Nat'l Comm., ___ U.S. ___, 141 S. Ct. 2321, 2337 (2021).

Thus, the statutory requirements of "equal openness and equal opportunity are not separate" ones, *id.* at 2337-38, and the former remains the "touchstone" of VRA compliance. As noted above, those claiming a VRA violation must show a "restriction[] as to who may participate" or a "*special* status, identification, or permit for entry or participation" (emphasis added). Based on the evidence submitted in this case, none of the parties have done that. To the extent that lower court decisions can be read to create an obligation to maximize minority-majority districts in light of bloc voting or societal discrimination, they do not survive *Brnovich*.

It is wrong, therefore, to say that the existence of some degree of racial bloc voting or reasonable and constitutional voting requirements (such as photo identification) that might be argued to have a disparate impact imposes a requirement to maximize the number of majority minority districts. Nor can such a requirement be found in allegations of general societal discrimination. If a litigant wishes to say there is a legal requirement—much less permission—to draw a seventh majority minority district, it will take more than the type of generalized allegations on offer here.

III. State Legislative Maps

The Petitioners observed in their previous brief that the Hunter and Citizen Mathematician legislative maps moved far too many people across districts for their maps to qualify as "least change." Of the remaining maps, the Legislature's performed the best on the most important metric, population equality, suggesting that their maps should be chosen. None of the remaining factors changed this result.

The Governor, the Legislature's main competitor with respect to performance according to this Court's direction, reverses this approach.

In his view, any maps with under 2% population deviation are permissible options (but permissible is not the same as preferable), and of those options the one that scores the very best on least-changes measures should be chosen. But as the Governor acknowledges, while his *Assembly* map moves the fewest individuals across districts, the Legislature's *Senate* map moves the fewest individuals across districts. Gimpel Rep. 5-6. There is no obvious explanation for why forcing someone out of a Senate district is preferable to forcing someone out of an Assembly district. Nor is there a single obvious solution to how these least-changes measures should be balanced against each other.

In the Petitioners' view, while large differences among the parties in core retention is disqualifying for purposes of least changes (as in the case of the Citizens and Hunter Intervenors), small differences among the parties in this measure do not provide clear evidence that this Court has, in the exercise of its remedial authority, transgressed constitutional bounds (which is the purpose of the least change requirement). This is so because, as the Legislature has demonstrated, a small sacrifice in core retention can equal large gains with respect to the curing of the legal deficiency that is at the heart of this lawsuit—population inequality. The Legislature's legislative maps are twice as good (half the population deviation range) with respect to population equality as the Governor's. Given how closely the two score on core retention, this should provide the tiebreaker.

IV. Congressional Maps

The Petitioners previously argued that because drawing legally-compliant Congressional maps is more straightforward than drawing state legislative maps, it is more difficult to distinguish between the parties' four Congressional proposals. Because the parties achieve perfect population equality, some greater sensitivity to least-changes is justified. The Legislature and Governor score best on this metric, although the Governor has a slight edge. Looking to splits and compactness for other tiebreakers, the Legislature has a slight edge. *See generally* Petitioners' Br. 10-11. Consequently, the Petitioners suggested that the Court could readily accept either proposal.

In their response, the Congressmen have argued that contrary to their own approach, the other parties (including the Governor) have "offered no meaningful explanation for any of their proposed changes, including in terms of Wisconsin's political geography." Congressmen's Br. 5. Justice Hagedorn noted in his concurrence that these types of considerations—those relating to preserving communities of interest, for example—may provide one way of selecting between multiple legally-compliant maps. *Johnson v. Wisconsin Elections Comm'n*, 2021 WI 87, ¶83 (Hagedorn, J., concurring). The Petitioners would expect the Governor to attempt to explain his changes in reply, and this Court's decision between the two could rest on its assessment of this discussion.[1]

Sincerely,

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[1] An alternate tiebreaker has been identified by the Citizen Mathematicians. They observe that the Governor's Congressional map exhibits a two-person deviation range. Citizens' Resp. Br. 15; *accord* Gimpel Rep. 6. This compares to the Legislature's one-person deviation range. Because of the importance of population equality and the ability for parties to obtain a one-person deviation, this could provide an additional ground for selection among the two maps.

CERTIFICATION

I hereby certify that this letter-brief conforms to the rules contained in s. 809.19 (8) (b)-(c) for a brief produced with a proportional serif font. The length of this letter-brief is 1,644 words.

Dated this 4th day of January, 2022.

Signed,

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this letter-brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12).

I further certify that:

This electronic letter-brief is identical in content and format to the printed form of the letter-brief filed as of this date.

Dated this 4th day of January, 2022.

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