

No. 2021AP1450-OA

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.

REPLY BRIEF BY THE WISCONSIN LEGISLATURE

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TABLE OF CONTENTS

ARGUMENT	5
I. The Legislature’s Plans Are The Appropriate Least- Changes Remedy	5
A. A least-changes remedy is not reducible to a single number	5
B. The Legislature minimizes split counties and municipalities	12
C. Incumbent pairings are an indication of least- changes	20
II. The Legislature’s Plan Complies with the Voting Rights Act	21
A. District 10 complies with the VRA.....	21
B. Packing claims are meritless.....	22
III. The Alternative Plans Are Unconstitutional Racial Gerrymanders	22
CONCLUSION	24
CERTIFICATIONS	25

TABLE OF AUTHORITIES

CASES

<i>Baldus v. Members of the Wis. Gov’t Accountability Bd.</i> , 849 F.Supp.2d 840 (E.D. Wis. 2012)	9, 22
<i>Baldus v. Members of the Wis. Gov’t Accountability Bd.</i> , 862 F.Supp.2d 860 (E.D. Wis. 2012)	21
<i>Cooper v. Harris</i> , 137 S. Ct. 1455 (2017).....	22, 23
<i>Gaffney v. Cummings</i> , 412 U.S. 735 (1973)	9
<i>Johnson v. DeGrandy</i> , 512 U.S. 997 (1994)	23
<i>Johnson v. Wis. Elections Comm’n</i> , 2021 WI 87, ___ Wis. 2d ___, ___ N.W.2d ___ (Nov. 31, 2021).....	5, 9, 12, 21
<i>LULAC v. Perry</i> , 548 U.S. 399 (2006)	21
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	9
<i>White v. Weiser</i> , 412 U.S. 783 (1973).....	9

STATUTES

52 U.S.C. §10301(b).....	21, 23
Wis. Stat. §4.001	13
Wis. Stat. §4.10(1)	21
Wis. Stat. §4.21(1)	19

OTHER AUTHORITIES

2021 Wis. Senate Joint Res. 63	5
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ARGUMENT

The north star of the Legislature’s redistricting process has been to reapportion districts “with nearly equal population” while “[r]etain[ing] as much as possible the core of existing districts.” 2021 Wis. Senate Joint Res. 63. Likewise here, the only acceptable remedy is a redistricting plan with population deviations with “as close an approximation to exactness as possible” that takes “a least-change approach.” *Johnson v. Wis. Elections Comm’n*, 2021 WI 87, ¶¶28, 72-73, ___ Wis. 2d ___, ___ N.W.2d ___ (Nov. 31, 2021) (“Order”) (quotation marks omitted); *id.* ¶¶83, 85 (Hagedorn, J., concurring). The Legislature’s resulting plans abide by these principles. They do not sacrifice population equality to maximize core retention of existing districts—as the Governor, BLOC, and Bewley plans do. Nor do they sacrifice core retention in one part of the State to maximize core retention elsewhere—as the Governor and BLOC plans do—or sacrifice core retention everywhere—as the Citizen Mathematicians and Hunter plans do. They do not racially gerrymander scores of Wisconsinites, severing minority constituent-legislator relationships or ignoring county lines and existing communities of interest—as all other plans do. Rather, the Legislature’s plans achieve nearly exact population equality *and* remarkably high core retention, while complying with state and federal law. Legislature Resp. 7-12. They are the only appropriate remedy.

I. The Legislature’s Plans Are The Appropriate Least-Changes Remedy.

A. A least-changes remedy is not reducible to a single number.

The Governor would reduce this case to a single topline number. The Governor (Resp. 8, 10) argues it is “dispositive” that his

Assembly plan retains 1.6% percent more Wisconsinites statewide than the Legislature's plan.¹ Similarly, BLOC (Resp. 21-22) emphasizes statewide core retention, rejecting other indicia of an appropriate remedy. Both the Governor and BLOC would have the Court ignore differences in population deviation—including that population deviations of the Governor's plans are more than *twice* that of the Legislature's. Likewise, they would have the Court take only a superficial look at core retention—ignoring their most-changes plans for Milwaukee. *See* Legislature Resp. 6-12.

A plan's statewide core retention is not “dispositive.” Identifying a least-changes remedy requires more than a quick-look at core retention, arbitrarily choosing a plan that is a mere percentage or two higher than another. Population deviation, district-by-district core retention, municipal splits, and incumbent pairings must all be considered.

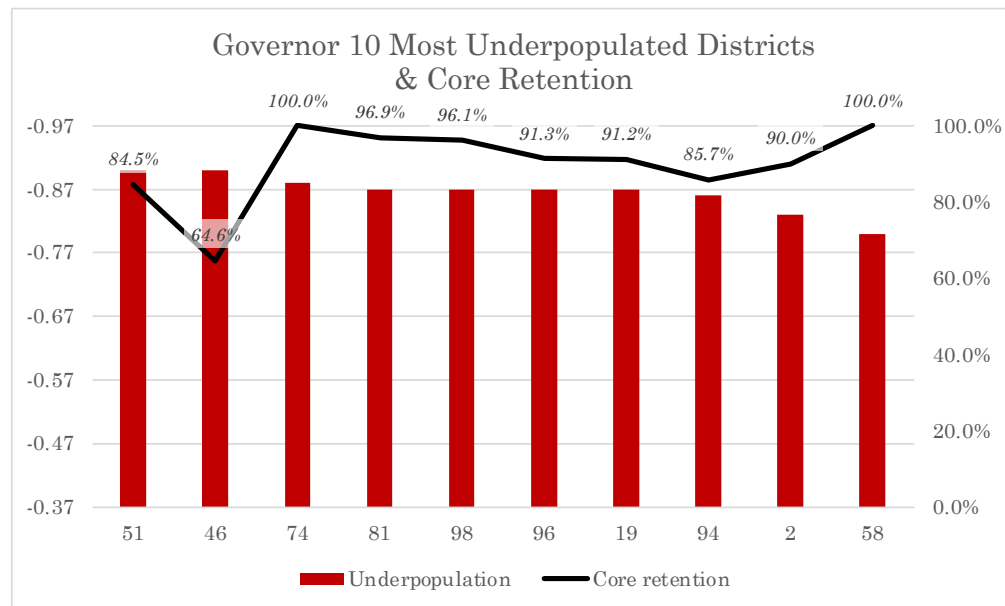
1. Population deviation: The Legislature, Governor, BLOC, and Bewley plans retain roughly the same number of individuals in their existing districts (topline core retention is within 2% for Assembly plans, and within 2.6% for Senate plans). The plans diverge, however, when it comes to population deviation. Every one of the Legislature's Assembly Districts is within 0.4% of ideal population, and every Senate District is within 0.3%. Legislature Resp. 5-8. Population deviation of districts in the Governor, BLOC, and Bewley plans are double that or more. Legislature Resp. 7-8.

¹ Exaggerating the difference between the two plans' core retention, the Governor asserts that the Legislature's plan moves “11% more people” or (with neither reference to an expert report nor basic arithmetic) “40 times more people.” Resp. 8, 10. No amount of statistical manipulation can change the fact that both plans move roughly the same number of people overall, differing by only 1.6%, and that the Legislature's plan does so better. Legislature Resp. 10-12, 21-26.

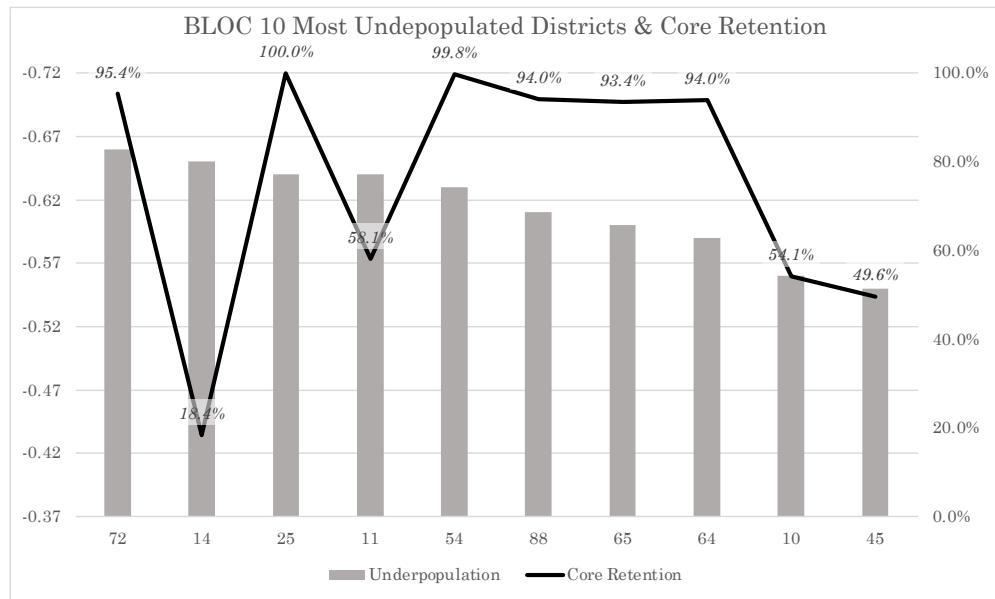
The Governor, BLOC, and Bewley plans thus *sacrificed* population deviation to achieve roughly the same core retention as the Legislature's plan. For example, the Governor's Assembly District 54 has 99.99% core retention. Bryan 12/30 App. 1J. But it is also his most overpopulated district, exceeding ideal population by 0.98%. Alford 12/30 Ex. 2. Likewise, the Governor emphasizes that Assembly Districts 58, 61, and 74 are unchanged, but these again are three of the Governor's most over- and underpopulated districts, deviating from ideal population by -0.80%, +0.74%, and -0.88%, respectively. *Id.*

The figures below show how the Governor and BLOC plans sacrifice population equality for core retention. All but one of their most underpopulated districts are either near-perfect core retention districts or Milwaukee districts, where both equality and core retention were sacrificed:

Figure 1



Source: Bryan 12/30 App. 1J; Alford 12/30 Ex. 2

Figure 2

Source: Bryan 12/30 App. 1K; Alford 12/30 Ex. 2

Had the Governor and BLOC better approximated population exactness, as constitutionally required, these districts and others would have lower core retention.

Surprisingly, the Governor *faults* the minimal population deviation of the Legislature’s plan—making the astounding claim that “*surpassing* what is required by law, while having a *greater* deviation from ‘least changes,’ is not allowed by this Court’s governing order.” Governor Resp. 13. The Governor’s criticism is wrong for the following reasons:

- First, Petitioners’ claims are malapportionment claims. The remedy must redress that malapportionment. It makes little sense that the manner of redressing that injury (a least-changes map) would unnecessarily sacrifice equality of population (the thing to be remedied). Taken to its logical extreme, the Governor’s approach would make a *no-changes* map the “dispositive” remedy, even though remedying nothing at all.

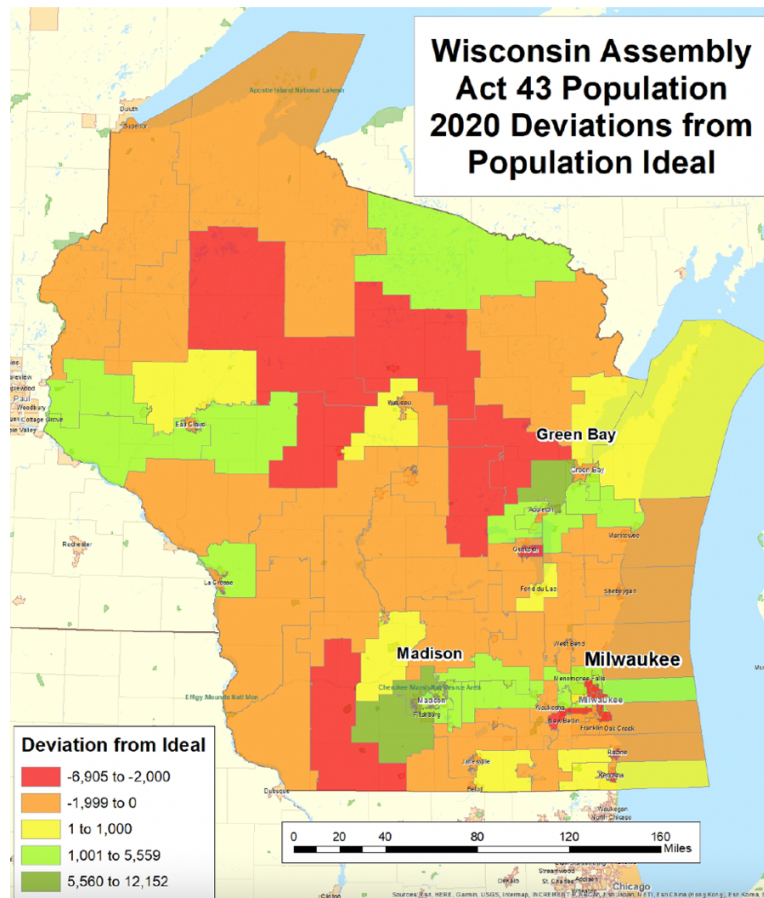
- Second, population equality is not separate from the Court's least-changes criterion. The population equality achieved in the existing maps (< 1% aggregate deviation) is itself a policy choice to be respected. *Cf. White v. Weiser*, 412 U.S. 783, 792 (1973); *see Baldus v. Members of the Wis. Gov't Accountability Bd.*, 849 F.Supp.2d 840, 851 (E.D. Wis. 2012). The 2011 maps establish the acceptable bounds of tolerable vote dilution in the absence of perfectly equal districts. Only the Legislature's plan matches 2011 population deviations while also making minimal changes to do so. Legislature Resp. 8.
- Third, and relatedly, there is no "universally recognized" 2% population deviation "safe harbor" applicable here, as the Governor and others suggest. Governor Resp. 13; *see also* BLOC Resp. 47. Their argument depends on federal cases involving federal court-drawn maps. None purports to apply the Wisconsin Constitution. This Court has never endorsed an arbitrary number as an acceptable level of deviation. Rather, this Court has interpreted Wisconsin law to require "as close [to] an approximation of exactness as possible," Order ¶28 (quoting *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 484, 51 N.W. 724 (1892)), distinct from the federal constitution's equal representation requirement for state legislative districts, which has been applied with flexibility. *See Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (requiring "as nearly of equal population as is practicable"); *see, e.g., Gaffney v. Cummings*, 412 U.S. 735, 750-51 (1973) (rejecting claim challenging 7% population deviation for statehouse districts).

Applied here, the Legislature's map proves that greater population exactness is possible than that of the Governor, BLOC, and Bewley plans. Their proposals do not perform materially better on any other metric and thus get nothing in exchange for greater

population deviation. Legislature Resp. 9. They should be rejected for these unwarranted population deviations.

2. Core retention: Every district was affected by population changes, and it is therefore unsurprising that every district changes some to return to ideal population. Leaving some districts unchanged (and over- or underpopulated) while changing others dramatically is no accomplishment, contrary to the Governor's arguments (Resp. 9).

Figure 3



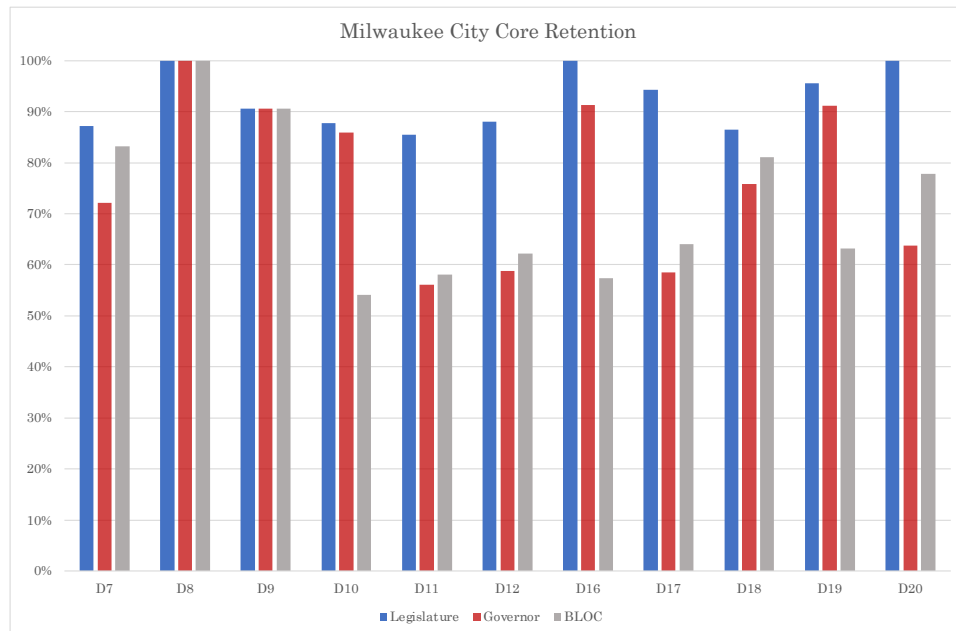
Bryan 12/15 App. 4

The Governor's focus on only overall core retention also disguises the most-changes burden his and other plans place on

Milwaukee. As Professor Brian Gaines illustrated in his response report for the Legislature (at 4-5), two plans might have the same overall core retention number but one where changes are distributed is preferred to one where disruption to voters is concentrated.

Here, there is no reason to concentrate all change in Milwaukee, given population changes statewide. The Governor (and BLOC) nevertheless foist all change on Milwaukee. While the Legislature's plan retains more than 92% of those in Milwaukee districts (exceeding core retention statewide),² the Governor and BLOC plans retain 77% and 72% of the same voters (well below core retention statewide). Legislature Resp. 10.

Figure 4

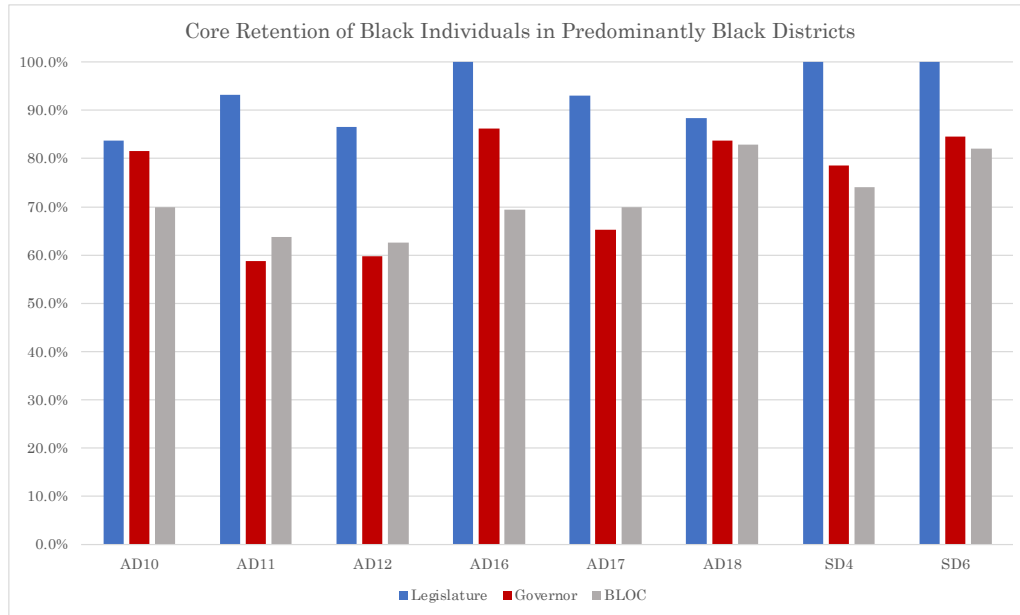


Source: Bryan 12/15 App. 2C; Bryan 12/30 App. 1J-K

² Greater retention in Milwaukee than elsewhere is consistent with the fact that Milwaukee was underpopulated, except for Assembly District 19. Bryan 12/15 App. 2C (providing existing district totals). Milwaukee districts generally needed to add individuals, not remove them.

The Legislature’s plans also do not discriminate among racial groups, whereas the Governor and BLOC plans retain significantly fewer Black individuals statewide (77% and 75% respectively), and in Milwaukee’s predominantly Black districts in particular:

Figure 5



Source: Bryan 12/15 App. 2B-2C; Bryan 12/30 App. 1J-K, 1M-N

* * *

As the above illustrates, there is nothing laudable about a superficially high overall core retention number, achieved by relaxing population equality and disguising disproportionate change in Milwaukee.

B. The Legislature minimizes split counties and municipalities.

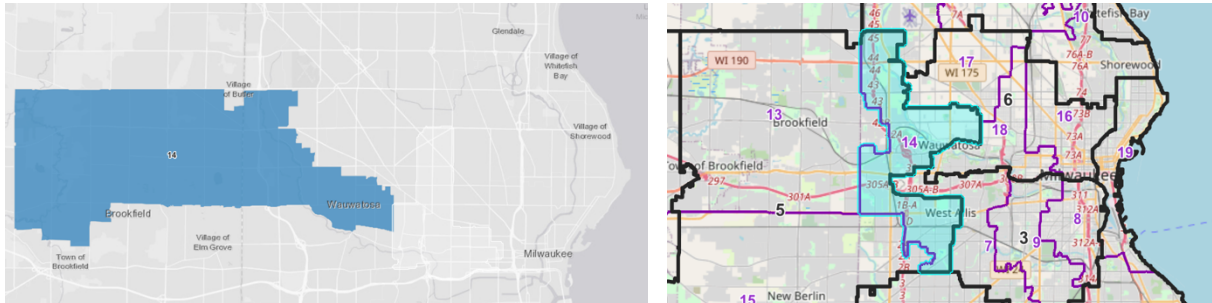
The Wisconsin Constitution “directs assembly districts ‘be bounded by county, precinct, town or ward lines[.]’” Order ¶35 (quoting art. IV, §4). “[R]espect for the prerogatives of the Wisconsin Constitution dictate[s] that wards and municipalities be kept

whole where possible.” *Id.* And while this is not an inviolable principle, “the smaller the political subdivision, the easier it may be to preserve its boundaries.” *Id.* The Legislature’s plan best abides by this constitutional requirement. No least-changes plan has fewer splits than the Legislature’s. Legislature Resp. 15-17. New splits introduced by other plans signal changes (for the worst) from the existing districts. *Id.*

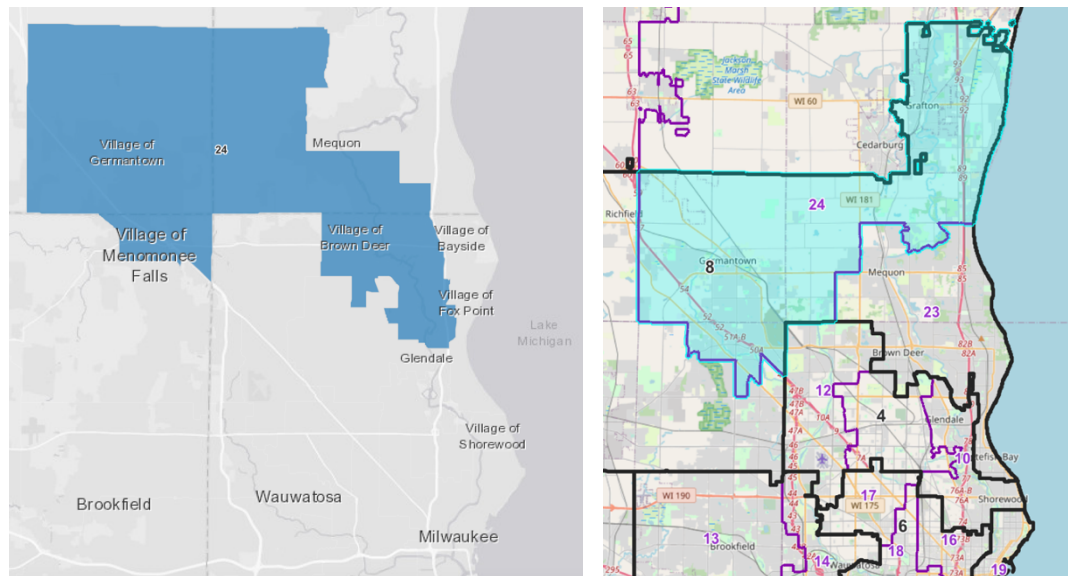
The Governor, for his part, wrongly contends only town splits are relevant, then miscalculates Act 43 as splitting 89 towns, and finally concludes that his proposal’s 80 town splits is an improvement (Resp. 20-21). How many towns were split by Act 43 is ascertainable by reading the statute, identifying in text every town split. There were 30, not 89. Wis. Stat. §4.001, *et seq.* The Governor’s proposal more than doubles that number (Resp. 21), while the Legislature’s proposal nearly halves it. Bryan 12/15 Rep. ¶57.

BLOC contends that the Legislature should be *faulted* for abiding by this constitutional requirement, describing the Legislature’s reunification of split municipalities as “forbidden by the ‘least-change’ approach.” BLOC Resp. 27; *id.* at 38 (describing decrease in municipal splits as “departure from ‘least-change’”). That makes little sense. One of the parameters in any remedy is following “county, precinct, town, or ward lines,” *supra*.

BLOC also faults the Legislature for responding to population shifts by bringing Assembly Districts 14, 24, and 83 fully inside or outside of county lines. Shown below, existing Districts 13, 14, and 15 all crossed into Milwaukee County. Population changes in the area permitted the Legislature (and the Governor and BLOC) to combine population inside of Milwaukee County from existing Districts 13, 14, and 15—thereby bringing District 14 fully within Milwaukee County and reducing the footprint of Districts 13 and 15 in Milwaukee:

Figure 6: Act 43 / SB621 AD14

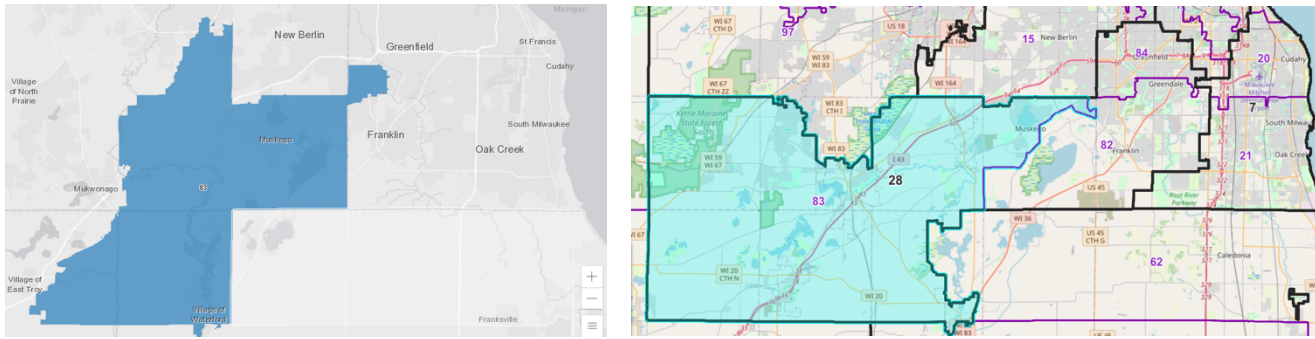
Similarly, existing Assembly District 24 previously reached into Milwaukee County. The Legislature's District 24 (which was overpopulated) sheds population to Districts 10 and 12 (both underpopulated and within Milwaukee County) and exchanges population with District 23, leaving District 23 as the only district crossing Milwaukee's northern border:

Figure 7: Act 43 / SB621 AD24

The Legislature took a similar approach in southeastern Milwaukee County. Several districts, including existing District 83, crossed into Milwaukee County. Population decline pushes existing District 83 away from Milwaukee, in turn permitting the

reunification of Waukesha's city of New Berlin in District 15 to the north of District 83:

Figure 8: Act 43 / SB621 AD83



These changes are in response to population changes and in furtherance of the constitutional requirement to minimize splits. Meanwhile, BLOC's plan makes even more extreme changes to the very districts it faults the Legislature for adjusting. BLOC's Districts 14, 24, and 83 retain only 18%, 44%, and 52% of individuals in those existing districts. Bryan 12/30 App. 1K.

In particular, both the Governor and BLOC change District 24 substantially after extending neighboring Milwaukee District 11 well beyond the Milwaukee County line—departing entirely from the existing district lines and causing a Senate pairing between Senators Kooyenga and Darling (whose Senate District includes Assembly District 24):

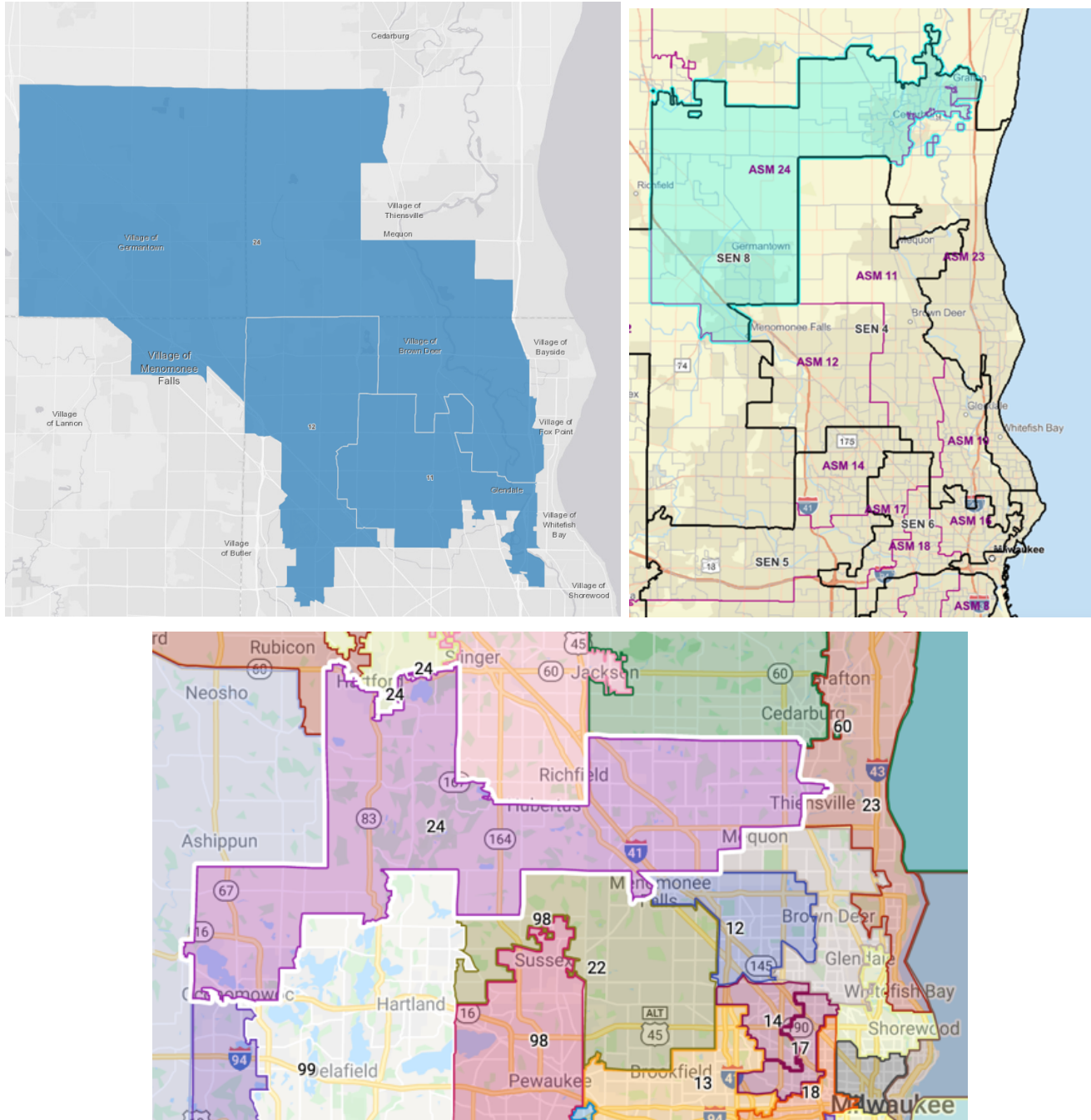
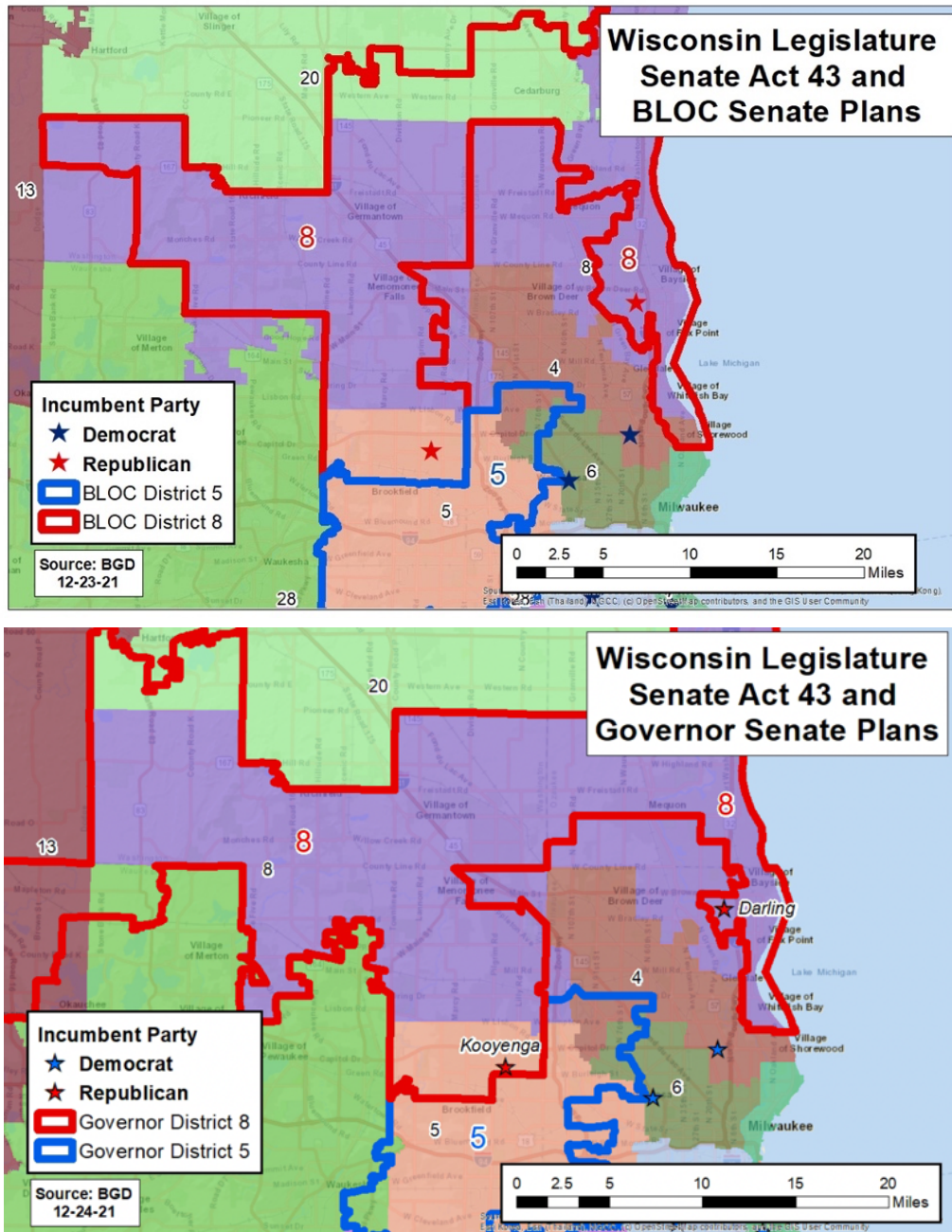
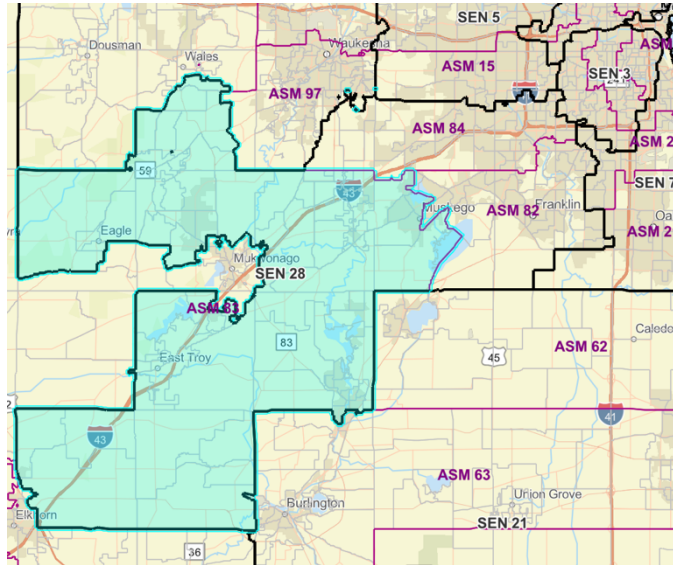
Figure 9: Act 43 AD24 / BLOC / Governor AD24

Figure 10: BLOC / Governor Incumbent Pairing

Source: Bryan Response ¶¶31, 33

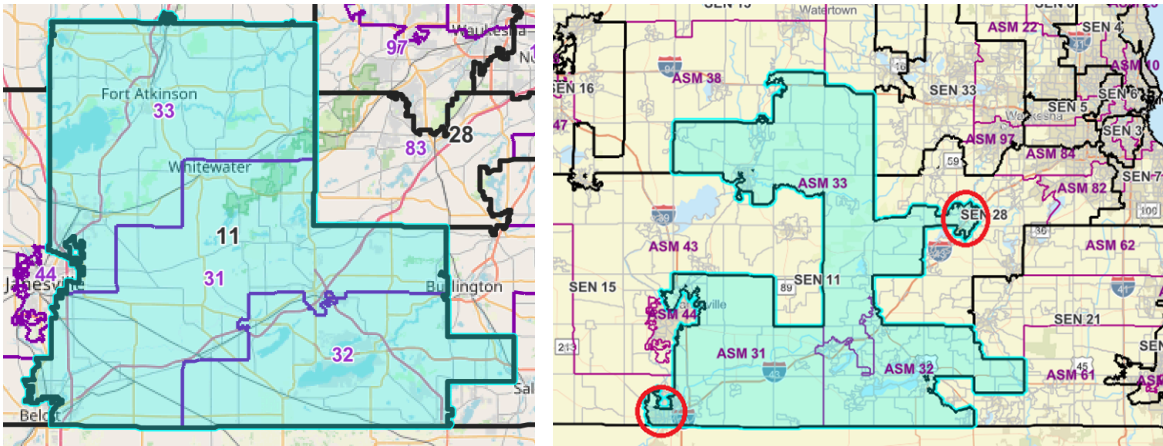
Similarly, BLOC redraws District 83 into a serpentine shape, wrapping around Mukwonago:

Figure 11: BLOC AD83



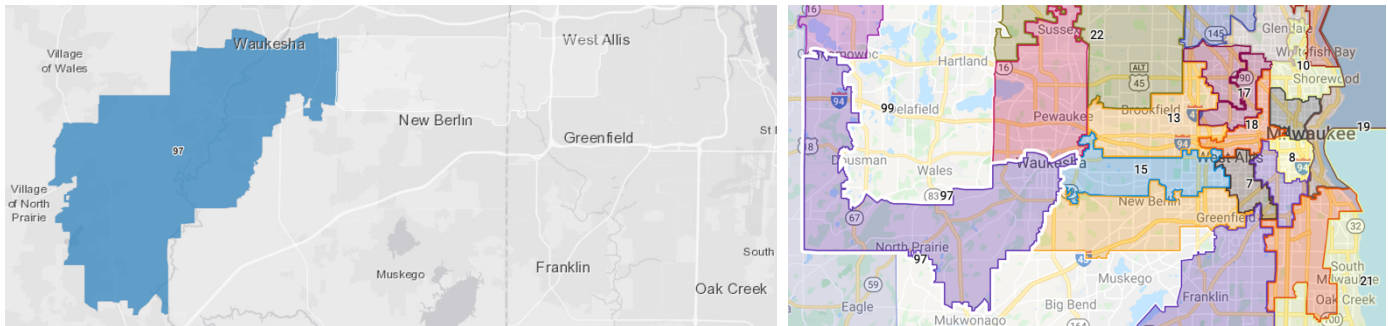
By carving out Mukwonago from AD83 BLOC leaves Mukwonago as part of a sprawling Senate District 11 that strangely combines Mukwonago with Beloit:

Figure 12: SB621 / BLOC SD11



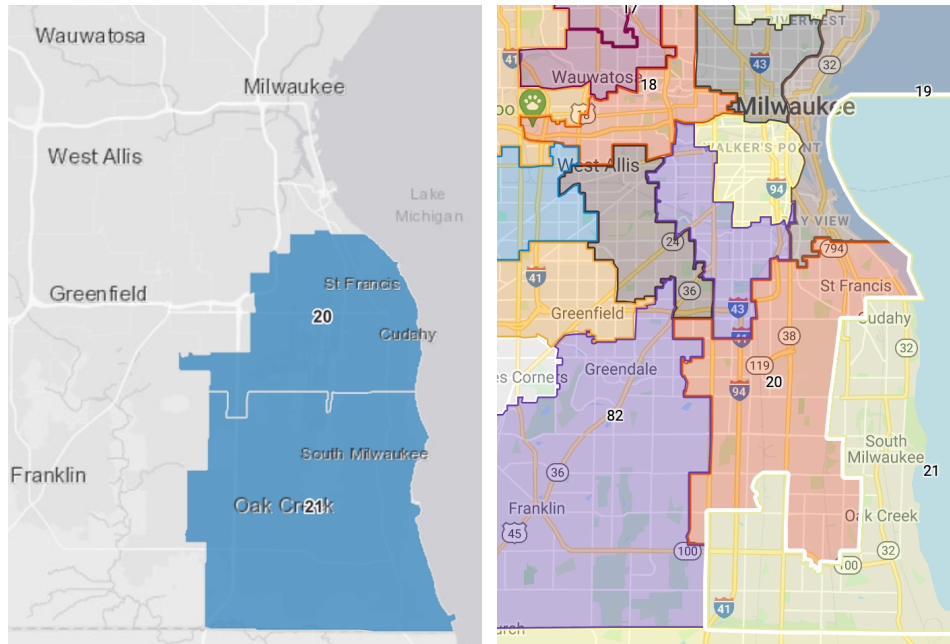
But it is ultimately the Governor's plan that takes the prize of creating more splits than any other party, more than doubling those in Act 43. Legislature Resp. 15. His disregard for municipal boundaries is particularly pronounced between Madison and Milwaukee. His Assembly plan has more municipal splits in Milwaukee, Waukesha, Jefferson, and Dane counties (61) than the Legislature's plan has in all 72 Wisconsin counties (52). Bryan Rep. ¶57; Bryan 12/30 App. 2. For example, District 97 (more overpopulated than any of the Legislature's Assembly Districts) is redrawn to snake around District 99 and reach all the way to Oconomowoc, leaving various Waukesha splits, including splitting Oconomowoc between three districts. Legislature Resp. 16; Bryan 12/30 App. 2.

Figure 13: Act 43 / Governor AD97



For another example, the Governor also reorients Milwaukee's District 20 and 21, swapping more than a third of the existing population in the districts and newly splitting the cities of Oak Creek and South Milwaukee.³

³ Compare Bryan 12/30 App. 2, with Wis. Stat. §4.21(1).

Figure 14: Act 43 / Governor AD20 & 21

A decade of population changes in Wisconsin makes some change inevitable. The Legislature took that opportunity to reunify municipalities and follow county lines. The Governor and BLOC did not. That, too, is reason enough to reject their plans.

C. Incumbent pairings are an indication of least-changes.

Some parties contend that incumbent pairings cannot be considered, including “because this criterion requires the Court to balance partisan considerations.” BLOC Resp. 43; *see also* Math Resp. 3-4. Exactly the opposite. Every incumbent pairing signals a change from an existing district. The Court need not “balance partisan considerations” to observe that more incumbent pairings signal more changes. Avoiding incumbent pairings to “keep the constituency intact so the officeholder is accountable for promises made or broken” is a “protection” that “accord[s] with concern for

the voters,” *LULAC v. Perry*, 548 U.S. 399, 440-41 (2006), and should not entail partisan considerations.

II. The Legislature’s Plan Complies with the Voting Rights Act.

A. District 10 complies with the VRA.

All of the Legislature’s six predominantly Black districts permit voters equal opportunity to elect a candidate of their choice. 52 U.S.C. §10301(b). Contrary to BLOC’s arguments (Resp. 19 & n.4), and as Dr. Alford’s accompanying reply report explains, there is no error in Dr. Alford’s conclusion that, by any measure, the Black-preferred candidates would win in reconstituted elections in the Legislature’s proposed Assembly District 10. Alford Reply 5-6 & n.3. BLOC’s expert’s speculation that the 2018 gubernatorial primary (Resp. 20) might have turned out differently had the gubernatorial primary been a two-candidate contest rests on a pile of unwarranted assumptions. Alford Reply 6. Dr. Alford explains that voters in proposed District 10 would have elected their candidate of choice in the 2018 gubernatorial primary election, as well as a real-life two-candidate contest on the same date for Lieutenant Governor. Alford Reply 4-6.

BLOC also asserts (at 20) that Shorewood—currently included in District 10 under Act 43, Wis. Stat. §4.10(1)—must be excluded from District 10 per the VRA. But as Dr. Alford’s analysis shows, a District 10 that retains Shorewood performs perfectly fine. BLOC might wish that Shorewood were out for other reasons, but the Voting Rights Act does not compel that change. *Cf. Baldus v. Members of the Wis. Gov’t Accountability Bd.*, 862 F.Supp.2d 860, 862 (E.D. Wis. 2012) (rejecting proposed change not required by the VRA); *see also* Order ¶85 n.12 (Hagedorn, J., concurring) (“This court has no license to ignore laws based on our own

personal policy disagreements or those of today's elected officials.”). The Legislature’s least-changes remedy appropriately keeps Shorewood in District 10.

B. Packing claims are meritless.

The Governor (at 18), BLOC (at 10), and Hunter (at 21) further contend that the Legislature’s plan “packs” voters into Milwaukee’s existing predominantly Black districts. They appear to believe that any district failing to *reduce* the percentage of minority voters is packed—quite a novel theory. That theory would require race to *always* predominate in redistricting, to ensure districts have sufficiently *retrogressed* from the last redistricting cycle. That is little different than the theory rejected by the Supreme Court in *Cooper v. Harris*—that the VRA permits a legislature to blindly dial up a district to 50% Black Voting Age Population. 137 S. Ct. 1455, 1472 (2017). Contrary to such novel and likely unconstitutional arguments, the Legislature’s redistricting plan was drawn without regard to race, does not pack voters into any district, and properly retains populations in existing boundaries that survived legal challenge. *See* Legislature Br. 33.

* * *

If the Court had any lingering concern about the Legislature’s Assembly Districts 10 and 11, the solution is simple. Population could be shifted between those two contiguous districts, just as the *Baldus* court did for Districts 8 and 9. 849 F.Supp.2d at 859-60. But the Court need not dismantle every Milwaukee district, as parties unconstitutionally suggest the Court *must* do.

III. The Alternative Plans Are Unconstitutional Racial Gerrymanders.

Parties repeat that the Voting Rights Act *requires* 7 majority-minority districts due to statewide population changes. Governor

Resp. 15-16; BLOC Resp. 8-9. For reasons already briefed, it does not. Legislature Resp. 23-33.

There is no question that race predominated in the drawing of these 7-district plans, each of which dial down the percentage of Black voters to just above (or below) 50%. Legislature Resp. 22. Race cannot predominate in redistricting absent a compelling government interest. *Cooper*, 137 S. Ct. at 1464. There is no such interest that can forgive racial gerrymandering here. The Voting Rights Act itself says that proportionality is not required, 52 U.S.C. §10301(b), let alone *maximization* of majority-minority districts in excess of what would be proportional.⁴ The Supreme Court in *DeGrandy* rejected such maximization as required and warned that “to define dilution as a failure to maximize in the face of bloc voting ... causes its own dangers, and they are not to be courted.” 512 U.S. at 1016. More recently in *Cooper*, noted above, the Court rejected that intentionally drawing “50%-plus BVAP” districts was in furtherance of a compelling interest that could justify racial gerrymandering. 137 S. Ct. at 1472. It follows that dialing existing districts down to just over 50% is not in furtherance of a compelling interest that could justify the race-based districts here. The other plans harm minority voters by dismantling their districts at a greater rate than other districts in Wisconsin. *See* Gaines Resp. 6-7. They are racial gerrymanders. And no federal law requires them.

⁴ Missing the forest for the trees, BLOC (at 13) disagrees about whether 6 districts or 6.4 districts would be proportional. It doesn’t matter. Alford Reply 7. As BLOC (at 13) and others concede, proportionality is not dispositive. One reason for that is to avoid the very plans that the Governor and BLOC plans have proposed—racially gerrymandering Black voters. *Johnson v. DeGrandy*, 512 U.S. 997, 1019 (1994).

CONCLUSION

The Legislature's redistricting plans are the appropriate remedy for Petitioners' claims.

Dated this 4th day of January, 2022.

Respectfully submitted,

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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 3,221 words as calculated by Microsoft Word, not including the caption, table of contents, table of authorities, signatures, and these certifications.

Filing, Electronic Filing, and Service. I hereby certify that I caused the foregoing brief, the Legislature's Appendix, and the Reply Expert Report of 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 4th day of January, 2022.

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