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March 24, 2022

Supreme Court of Wisconsin
Attn: Sheila Reiff, Clerk of the Supreme Court and Court of Appeals
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RE: Petitioners' Response to the Governor's March 24, 2022 Letter
Johnson v. Wisconsin Elections Commission
Appeal No. 2021AP1450-OA

To the Court:

Petitioners Billie Johnson, Eric O'Keefe, Ed Perkins and Ronald Zahn submit this letter brief in response to the Governor's extraordinary request that the Court rewind the clock to November of 2021 and require all the parties to devote substantial resources to attempting to rehabilitate the Governor's preferred maps, maps that the Supreme Court of the United States just invalidated as a racial gerrymander.

The Johnson Petitioners join the Legislature's Letter Brief in full. This Court should adopt the Legislature's proposed Senate and Assembly maps and end this litigation now. This is the approach that is consistent with both (1) this Court's opinion and methodological approach in this litigation and (2) the Supreme Court's directive. It has the added advantage of (3) constituting the most straightforward path to remedying the malapportionment claims that gave rise to this suit, which greatly benefits Wisconsin voters, candidates, and clerks who need to proceed with the 2022 election cycle.

* * *

This Court explained in its March 3, 2022 decision that "at the suggestion of the parties and in recognition of [its] limitations" it wished to "select submissions from the parties that best satisfied the criteria [it] set forth." *Johnson v. Wisconsin Elections Comm'n*, 2022 WI 14, ¶6, *cert. granted, opinion rev'd sub nom. Wisconsin Legislature v. Wisconsin Elections Comm'n*, No. 21A471, 2022 WL 851720 (U.S. Mar. 23, 2022). It would "choose the maps that best conform with [its] directives, imperfect though they may be," instead of "modify[ing] submissions." *Id.* It characterized those "directives" as requiring two steps. Part One: "we begin our analysis by probing which maps make the least change from current district boundaries." *Id.* at ¶12. Part Two: "From there, we examine the relevant law to ensure that the map producing the least change also comports with all state and federal legal requirements." *Id*.

Applying this framework, this Court concluded that "the Governor's legislative maps produce the least change from current law." *Id.* at ¶33. It then proceeded to conclude that "the Governor's

legislative maps comply with all relevant legal requirements," including the Voting Rights Act, *id.* at ¶¶34-51, making the Governor's legislative maps this Court's choice for adoption.

The Supreme Court of the United States has now confirmed that "the Governor failed to carry his burden" of justifying a seventh majority-black burden or, conversely, that this Court lacked the requisite "strong basis in evidence." *Wisconsin Legislature*, 2022 WL 851720, at *2-*3 (quoting *Shaw v. Hunt*, 517 U.S. 899, 910 (1996)). In other words, whatever may be said about least change, the Governor's maps do not "comply with all relevant legal requirements." *Johnson*, 2022 WI 14, ¶51.

With the case now back before this Court, the solution is not, in late March, to throw out the last several months of litigation and begin afresh, or to give the Governor a special advantage not afforded the other parties. Instead, consistent with this Court's own reasoning, where the first place finisher is disqualified on Part Two, the second-place finisher takes his place.

Put differently, this Court made clear in its opinion that, in its view, the Legislature's maps scored second-best on least change. *See id.* at ¶¶26-33. Further, it is "undisputed" that the Legislature's maps are race-neutral. *Id.* at ¶69 (Ziegler, C.J., dissenting). They should be adopted and this litigation ended with time for Wisconsinites to get on with the business of their elections.

This approach is fully consistent with the Supreme Court's own recent decision. It did not order that evidence be reopened. It simply wished to make clear that its decision did not affirmatively *bar* this Court from taking more evidence "*if it prefers to* reconsider the Governor's maps rather than choose from among the other submissions." *Wisconsin Legislature*, 2022 WL 851720, *4 (emphasis added). This single remark does not change the fact that this Court has already expressed its preference, discussed above, as to the criteria for its decision. Under those criteria, the Legislature's maps emerge as the maps this Court should adopt.

Finally, it should be noted that the alternate proposal presented to this Court by the Governor is a non-starter. The Governor wants this Court's leave to put as much new evidence and expert opinion into the record as it can muster over the next few days (without explaining why he could not provide that evidence earlier), then requests—for appearances sake, no doubt—a "brief window" for the other parties (and this Court) to slog through this new material before April 15. Then, in the inevitable scenario where this Court is unable to salvage the Governor's racial gerrymander, the Governor requests leave to submit a second, six majority-minority district map despite this Court's admonition that parties may not "ask us to consider an alternative map while expressly standing by their initial map." Order of January 10, 2022 (re: Motions to File Corrected Maps) at 2.

This suggestion is little more than a request for this Court to depart its neutral role as decisionmaker and assist the Governor in creating a better set of maps. The truth is that the Governor and his allies have no idea how to fix his maps, which explains jumbled statements like the one made by the BLOC Intervenors today that "the record before this Court contains a wealth of evidence supporting the need for seven Black opportunity Assembly districts" but "the parties should be permitted to supplement the record with additional evidence demonstrating that the maps selected by this Court . . . comply with the Voting Rights Act."

This Court should reject the Governor's request, which will make an utter mess of the proceedings and needlessly prolong them. Aside from being the correct approach, selecting the Legislature's already-vetted maps permits this Court to resolve these proceedings now. As Wisconsin is a few months away from the August primary, and a few weeks away from the date when nomination papers may be circulated, this approach best serves the public interest as well.

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