**IN THE SUPREME COURT OF WISCONSIN**
**APPEAL NO. 2021AP1450-OA**

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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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# REPLY BRIEF BY JANET BEWLEY, STATE SENATE DEMOCRATIC MINORITY LEADER

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## INTRODUCTION

Pursuant to the Court's orders of November 17 and November 30, 2021,[1] Senate Minority Leader Janet Bewley, on behalf of the Senate Democratic Caucus ("Senate Democrats"), respectfully submits this reply brief regarding the parties' proposed sets of district plans for the Wisconsin State Assembly and Senate. After reviewing the parties' submissions, the Senate Democrats endorse the plans offered by Governor Tony Evers (the "Governor's Maps"), in addition to the plans (the "Bewley Maps") they have previously submitted themselves, as the best maps before the Court under the law the Court has set forth.

Therefore, the Senate Democrats respectfully request that the Court adopt either the Governor's Maps or the Bewley Maps, depending on the Court's analysis of the issues surrounding Section 2 of the Voting Rights Act of 1965 ("VRA").

## ARGUMENT

### I. The Governor's Maps are the Best Maps Under the Standards of the Court's Order.

This Court has ruled that it "will confine any judicial remedy to making the minimum changes necessary in order to conform the existing . . . state legislative redistricting plans to constitutional and statutory requirements." (*Johnson*, 2021 WI 87 at ¶ 8.) In other words,

[1] This latter order, *Johnson v. Wisconsin Elections Comm'n*, 2021 WI 87, 399 Wis. 2d 623, __ N.W.2d __, is hereinafter referred to as the "Order."

the Court's adoption of new district maps would be based on a "least-change" approach.[2] (*Id.* at ¶¶ 8, 64, 66.)

As other parties acknowledge, the Bewley Maps and the Governor's Maps are two of the four plans that all perform well on the universally-accepted measure of least-change—core retention. (See, e.g., WILL Br. at 4; Legis. Resp. Br. at 6; Hunter Resp. Br. at 14-16.) However, of these, the Governor's Maps indisputably perform the best for the Assembly and Senate both individually and by composite score, as even other parties acknowledge. (Id.) Meanwhile, no party identifies a respect in which the Governor's maps fail to "conform the existing . . . state legislative redistricting plans to constitutional and statutory requirements." (*Johnson*, 2021 WI 87 at ¶ 8.) As a result, the Governor's Maps can plainly and rightfully claim to have met the Court's test; the Legislature's Maps, by contrast, cannot.

Yet now that the Court has adopted the least-change approach that WILL and the Legislature originally advocated for in this case, those parties now hypocritically attempt to distract from the Governor's Maps' superiority on that approach. Specifically, they attempt to posit deviation from a district's ideal population as a "preeminent measure" that either (a) governs once plans clear an arbitrary "threshold" of core retention or (b) is on at least equal

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[2] The parties were also advised that the Court would select as "the best alternative" the party-submitted map with the most "compelling argument" for adherence to least-change that also "compl[ies] with all relevant legal requirements." (*Id.* at ¶ 83, Hagedorn, J., concurring.)

footing with core retention from the outset. (WILL Br. at 2; Leg. Resp. Br. at 6-9.) This Court's Order allows no such thing.[3]

In fact, it is population deviation that, under the Order, is merely a threshold met by all parties here. WILL and the Legislature appear to confuse the population deviation requirements for state legislative redistricting with those of Congressional redistricting. (See Legis. Resp. Br. at 9, inappropriately citing *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).) In contrast to the latter process, "a court-ordered reapportionment plan of a ***state legislature*** ... must ordinarily achieve the goal of population equality with little more than *de minimis* variation." *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975) (emphasis added). That *de minimis* variation threshold is 2%, *see, e.g.*, *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *2 (E.D. Wis. May 30, 2002)—a figure that all parties' maps indisputably meet here.[4] By the Order's plain terms, because the

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[3] The Legislature also argues that its maps are entitled to some sort of tiebreaker or extra consideration simply because they were proposed (though not enacted) by the Legislature. (See Legis. Resp. Br. at 18-20.) That is patently incorrect, for reasons the parties have already observed and this Court has already ruled. (*Johnson*, 2021 WI 87 at ¶ 72 & n. 8; *Id.* at ¶ 86 & n. 15, Hagedorn, J., concurring; see also Bewley Nov. 1, 2021 Br.) Both the Governor and the Senate Democrats took the Court's Order seriously and came up with maps that followed the Court's instructions better than the Legislature's maps do. By contrast, the Legislature now doubles down on the argument that the Court has already rejected, going so far as to criticize both the Governor's Maps and the Bewley Maps for following the Order. (Legis. Resp. Br. at 20.)

[4] WILL drastically errs in its calculations of several metrics, notably including population deviation, where it reports a 2.77% deviation range for the Bewley maps. (See WILL Br. at 5-6. Even there, WILL does not claim that the Bewley Maps represent a failure of a legal requirement). As calculated even by the Legislature, WILL's figures on such factors as population deviation and municipal splits are highly erroneous, and all other parties agree that the Bewley Maps' deviation ranges are well within the *de minimis* threshold. (See, e.g., Legis. Resp. Br. at 5-6, Citizen Mathematicians' Resp. Br. at 17.)

parties thus meet the legal requirements regarding population deviation, the Court's analysis of the factor ends there.[5] (*Johnson*, 2021 WI 87 at ¶ 8.)

By contrast, with regard to ***actual*** legal requirements, the Governor and the BLOC Petitioners make persuasive arguments regarding the requirements of the VRA. Specifically, they argue that demographic changes make a seventh Black majority-minority Assembly district, as their plans incorporate, appropriate to ensure VRA compliance. (See Evers Resp. Br. at 14-19; BLOC Resp. Br. at 7-20.) The Senate Democrats do not take a position on the absolute necessity of such a district. At any rate, however, the Governor's Maps do a superior job of providing the best adherence to least-change even while making the changes necessary to ensure VRA compliance. Therefore, the criticisms of the Legislature and WILL are invalid, and by the Court's own terms it should adopt the Governor's Maps.

## II. If the Court does not Adopt the Governor's Maps, it Should Adopt the Bewley Maps.

As described *supra*, the Governor's Maps best comply with the Order and merit the Court's adoption. If, however, the Court finds faults with those maps that preclude their adoption—conceivably,

[5] Even under the conception of the analysis espoused by the Order's concurrence, it could be considered along with other traditional redistricting principles—but only where, unlike here, the least-change and legal-requirement analyses were not dispositive. (*Johnson*, 2021 WI 87, ¶ 83, Hagedorn, J., concurring.)

the changes required to create a seventh Black opportunity district—the clear choice for the Court based on its Order is the Bewley Maps.

Like the Senate Democrats, WILL acknowledges that a seventh Black majority-minority district may be required under the VRA. (See WILL Br. at 7.) However, WILL then goes off track by erroneously arguing that, if a seventh such district is not required, then the Legislature's maps are favored.

If, as WILL says, changing the number of such districts in the absence of a legal requirement to do so is a "political decision," then the least-change approach requires that the Court retain the same number of such districts that it currently has rather than reducing them as the Legislature does. As other parties acknowledge, the Bewley Maps are the only ones that preserve the benchmark maps' current policy choices as to the number of majority-minority districts. (See Hunter Resp. Br. at 20.)

Further, while other parties present persuasive arguments for ***increased*** minority voting power based on their increasing share of minority voting age population, the Legislature incongruously ***decreases*** minority voting power. While the Bewley Maps maintain the status quo majority-minority district numbers and at the same time gently reduce packing in each of the majority-minority districts, the Legislature's maps eliminate one majority-minority district and drastically increase packing in another.[6] (See BLOC Resp. Br. at 9.)

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[6] The Legislature only attempts to fault the Bewley Maps on this front for expanding "the existing *Baldus* districts beyond the Milwaukee County line" and for pairing two Black representatives, but it does not and cannot explain how that violates the standards set forth in this Court's Order. Any such explanation would be especially lacking because (a) as other parties persuasively argue,

The superiority of the Bewley Maps under the Order is also demonstrated by the fact that, as other parties agree, they perform the best of all the parties' maps in avoiding Senate voter disenfranchisement—a metric that even the Legislature argues is a measure of least-change. (See Legis. Resp. Br. at 6; Hunter Resp. Br. at 19.)

Finally, several other parties ignore the impact of the constitutional requirement of maximum-practicable compactness for Assembly districts. As other parties acknowledge, the Bewley Maps outperform the Legislature's maps—and indeed, perform the best out of ***any*** of the maps with similar core retention scores—on this metric. (See, e.g., WILL Br. at 7; Hunter Resp. Br. at 18.) Unlike, for instance, population deviation, this legal requirement is no mere threshold—it explicitly requires Assembly districts to be "in as compact form as practicable." Wis. Const., Article IV, § 4.[7] Therefore, the Bewley Maps are, by definition, alone among the parties in adherence to this constitutional requirement. Having also adhered to each other legal requirement[8] and the least-change approach, they

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incumbent protection is not a valid aim, and (b) the Bewley Maps adhere to least-change regarding the Act 43 policy choices by matching its number of geographic splits much more closely than do the Legislature's maps. (See, e.g., Citizen Mathematicians Resp. Br. at 11-12, BLOC Resp. Br. at 43-44.)

Moreover, it is absurd to imply, in light of the above, that, the Legislature's maps serve the interests of Fourteenth Amendment and VRA compliance specifically, and minority representation generally, better than the Bewley Maps do.

[7] There is no corresponding requirement for Senate districts.

[8] Again, this only potentially depends on what the Court determines regarding VRA compliance requirements.

should—by the terms of the Court's order—be the Court's chosen remedy.[9] *Johnson*, 2021 WI 87 at ¶ 8.

## CONCLUSION

The Senate Democrats respectfully request that the Court adopt either the Governor's Maps or the Bewley Maps as the redistricting plan for the Wisconsin Assembly and Senate.

Respectfully submitted this 4th day of January, 2022.

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Further, the parties agree that the Governor's Maps also outperform the Legislature's maps in terms of Assembly district compactness, so in no circumstance should the Legislature's maps be viewed as being superior in compliance with the Court's order than the Governor's.

[9] The Senate Democrats assume that, as indicated by the Order, the Court will select one of the parties' submitted maps rather than fashioning its own, either afresh or as adaptations of party-submitted maps. As the Senate Democrats and other parties have argued previously, attempting the latter route would be arduous work the Court is, respectfully, ill-suited for.

If the Court does elect to make its own modifications, the Senate Democrats request that the Court obtain assistance from the parties in the process. The Senate Democrats are prepared to demonstrate for the Court the tradeoff impacts that changes based on various factors may have on other factors.

## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 1,880 words.

Aaron G. Dumas

## CERTIFICATE OF SERVICE

I hereby certify that pursuant to the Court's November 17, 2021 Order in the above-captioned case, on January 4, 2022 I caused to be submitted the foregoing document in pdf format to the Clerk of the Court for filing via electronic mail at this address: clerk@wicourts.gov. On January 4, 2022, I also caused a paper original and ten (10) copies of this document to be delivered by personal delivery to the Clerk of Court, with the notation "This document was previously filed via email," and also caused this document to be served on all counsel of record via electronic mail.

Aaron G. Dumas