**IN THE SUPREME COURT OF WISCONSIN**

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.*

# PETITIONERS' RESPONSE BRIEF REGARDING THE COURT'S OCTOBER 14, 2021 QUESTIONS

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

Richard M. Esenberg (WI Bar No. 1005622)
Anthony F. LoCoco (WI Bar No. 1101773)
Lucas T. Vebber (WI Bar No. 1067543)
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
Phone: (414) 727-9455
Fax: (414) 727-6385
Rick@will-law.org
ALoCoco@will-law.org
Lucas@will-law.org

*Attorneys for Petitioners*

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## INTRODUCTION

This Court asked all parties to file responses to a series of four questions regarding how this litigation should proceed. With those responses now in hand, it is clear that the parties are largely in agreement as to what factors should be considered when reviewing or crafting redistricting maps. The primary areas of difference appear to be whether the use of "least change" to craft any new maps is appropriate, whether the partisan makeup of districts should be considered by the Court, and what the litigation process itself should look like.

For the reasons stated in our initial brief, and as further explained herein, Petitioners maintain that "least change" is the most neutral and efficient way for this Court to make any changes that may be necessary, and that the partisan makeup of districts must not be a factor considered in reviewing or crafting any redistricting map. Further, Petitioners continue to believe this litigation can be resolved quickly and efficiently with limited need for fact finding.

In this response brief, Petitioners will once again address the four questions of the court in order, responding to the various claims made by other parties therein.

## ARGUMENT

### I. Responses to Question One

With regards to the factors, for the most part all parties appear to be in general agreement as to the factors that should be considered, at least for the factors that do not relate to other questions: "least change" and partisanship review.

#### a. Agreement on factors

Petitioners initially listed the following factors for this Court to consider: population equality, compactness, contiguity, honoring municipal boundaries, preserving the cores of prior districts, maintaining traditional communities of interest, and respecting the requirements of the Voting Rights Act. (Pet. Br. at 10.) Other Parties brought forward additional considerations. Some are simply a recognition of mandatory requirements of the state Constitution, including the nesting of complete Assembly Districts within Senate Districts, the numbering of Districts, the number of Districts, and the creation of single-member districts. We have no objection to this or to adherence to constitutional prohibitions on discrimination using suspect or semi-suspect classifications such as race, national origin or sex.

**b. Core retention**

One of the points of disagreement in response to the Court's first question was whether "Core Retention" should be a factor. Petitioners noted in our initial brief how this approach has been favored by courts reviewing Wisconsin districts in the past. (Pet. Br. at 15-17.) Indeed, the District Court panel in the 2002 redistricting noted that it "undertook its redistricting endeavor in the most neutral way it could conceive—by taking the 1992 reapportionment plan as a template and adjusting it for population deviations." *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *7 (E.D. Wis. May 30, 2002), amended, No. 01-C-0121, 2002 WL 34127473 (E.D. Wis. July 11, 2002).

A goal of core retention is moving as few voters as possible into new districts, which serves legitimate state interests. *See, e.g., Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758, 764, 133 S.Ct. 3, 183 L.Ed.2d 660 (2012); see also *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983).

Several parties noted opposition to Core Retention as a factor, and that opposition was primarily due to the relationship between Core Retention and those parties' opposition to the "least change" approach, which was discussed as part of responses to Question Two. They don't like that approach because they want to relitigate the "fairness" of the

current maps that were challenged and left standing. We will address that issue in Section II of this brief.

**c. Partisan makeup of districts**

Several parties sought to include the partisan makeup of districts as a factor for the Court to consider, Petitioners oppose that request – for the reasons outlined in our initial brief and for the additional reasons in Section Three of this brief.

The most important reason for avoiding reviewing the partisan makeup of districts, as explained in greater detail in our opening brief and further in Section III herein, is that state law does not allow for such a review, and there are no standards in place which would guide the Court.

This Court should issue an order making clear the factors that will be a part of any review (either if reviewing any new maps adopted by the Legislature and signed into law, or in crafting its own maps). Those factors should include those noted herein, and should not include the partisanship of any district.

## II. Responses to Question Two

In response to the Court's second question, several parties raised objections to Petitioners' proposed "least change" approach to the redrawing of map lines.

The basic theme underlying those objections is exactly as Petitioners anticipated it would be in our opening brief (Pet. Br. at 17): certain parties view the current maps as "unfair" and so they oppose using those maps as the baseline for drawing new maps—and thus oppose the use of a "least change" approach.

But on what basis could these maps be seen as "unfair?" They were challenged on that basis and that challenge failed, with the Supreme Court concluding that the question had no judicial answer. *Gill v. Whitford*, 138 S. Ct. 1916, 201 L. Ed. 2d 313 (2018). No justiciable legal standard could be applied to invalidate the maps. In the absence of such a standard, consideration of partisan "fairness" necessarily asks this Court to depart from the quotidian business of what the law requires and take on the role of super-legislature to make by itself some of the most important public policy decisions for the state of Wisconsin. Giving the game away, some parties referred to this alternative approach as the "best map" or "best possible" approach. (*See, e.g.*, Citizen Mathematicians and Scientists' Br. at 36; *see* also Senator Bewley Br. at 19).

But who decides what is "best"? And just what does "best" mean? As this Court noted in in *State ex rel. Reynolds v. Zimmerman*, 22 Wis.2d 544, 565-566, 126 N.W.2d 551 (1964): "[T]he problem of drafting a [new

reapportionment] plan convinces us that there is no single plan which the constitution, as a matter of law, requires to be adopted to the exclusion of all others, and that there are choices which can validly be made within constitutional limits." Senator Bewley asks this court to "apply its own values" in the drawing of maps. (Bewley Br. at 18.) But what would those be and on what basis would the Court impose them?

Like the *Baumgart* and other courts, Petitioners offered the "least change" approach as the fairest and most neutral way for this Court to ensure population equality and all other selected factors are met. The only serious objection offered to doing so is that the outcome would be partisanally unfair. But this view ignores the both the constitutional text and, as we shall see in response to Question Three, the constitution's limitation of the judicial role.

**a. The Legislature is vested with the primary role in redistricting**

The Wisconsin Constitution vests the power to draw district lines in the Legislature. Wis. Const. art. IV, § 3. As Petitioners explained in our opening brief, the drawing of district lines is inherently a legislative task. (Pet. Br. at 21-22.) Indeed, this Court has recognized as much, noting that redistricting is "an inherently political and legislative—not judicial—task." *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶ 10, 249

Wis.2d 706, 639 N.W.2d 537. Some of the litigants here may not like that, but it is our constitutional disposition. When judicial involvement becomes necessary, this Court should strive as much as possible to adhere to the Constitutional mandate that the Legislature's role in the process is primary.[1]

**b. The "least change" approach is most consistent with the text of the Wisconsin Constitution**

Various parties have now argued that the "least change" approach has no basis in Wisconsin law and should be discarded. For example, the BLOC Intervenors argue this approach has "no support in Wisconsin Law" and "would radically depart from this Court's extensive Precedent in interpreting and applying the express language of state statutes and the Wisconsin Constitution." (BLOC Br. at 34.) This "lack of authority" argument is ironic, because these same parties espousing it have paired it with a request for this court to engage in a partisan review of proposed districts which is, in no way, supported by Wisconsin law.

But the "least change" approach *is* supported by Wisconsin law. The question in this case is one of remedy. There is no doubt that the

[1] The Legislature, as an Intervenor-Respondent in this matter argues that any map they adopt should be the presumptive remedial plan. (Legislature Br. at 18 et seq.) Petitioners do not agree. Unless this Court revisits *Zimmerman*, 22 Wis.2d at 556-57, the baseline map must be the map which is current law—i.e., the existing districts. The problem is that, unlike the 2011 maps, the newly-enacted maps would not be enacted law.

districts as they exist in current law are no longer lawful. The question for this Court is how to "fix" those lines so that the maps can meet the requirements outlined in Section One of this brief.

Because the *Legislature* is vested with the power to draw district lines and make the "inherently political and legislative" choices necessary in doing so, then this Court's involvement should seek to preserve as many of those legislative choices as possible. The "least change" approach is the best way for this Court to do so. The "least change" approach begins with those lawfully adopted maps in order to *minimize* the number of "inherently political and legislative" choices this Court will be required to make if it needs to craft a new plan.

The reality is that "least change" *is* based in Wisconsin law, in fact it is the only way for this Court to draw maps that would still respect the various aspects of Wisconsin law on redistricting.

#### i. The Wisconsin Constitution does not prohibit "least change"

The BLOC intervenors go further than arguing that there is just no basis in law for "least change"—they actually make the argument that because the Wisconsin Constitution requires the legislature to adopt districts "anew", that this Court is actually *prohibited* from using the "least change" approach. (BLOC Br. at 41-47.)

But the BLOC Intervenors' purported textual argument is nonsense. The resulting *new* map would, of course, always be a map which had been adopted "anew." The district lines therein would have been set "anew." This argument posits some undefined standard of "novelty." A map must be sufficiently "different." But this is little more than a variation of the classic philosophical puzzle of Theseus' Ship.[2] This court, thankfully, does not need to engage in this philosophical discussion. Any map adopted by this Court would have been adopted "anew."

The best way for this Court to provide a remedy in this case while also still adhering to the Constitutional mandate vesting the legislature with the power to redistrict is to adopt the Petitioners' proposed "least change" approach.

### ii. Least change is not "antidemocratic"

Governor Evers argues that adopting a least change approach is "antidemocratic" because he ran for office on a platform of redistricting reform. (Gov. Br. at 12.) In order to avoid this problem, the Governor

[2] Theseus' Ship examines a ship that is replaced plank by plank, with the discarded planks used to construct a replica alongside the original. The question is whether either or both of the two resulting ships share an identity with the original. *See* Andre Gallois, *Identity Over Time*, The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., Winter 2016 ed.), https://plato.stanford.edu/archives/win2016/entries/identity-time/.

suggests ignoring state law (*i.e.*, the current maps which were adopted by democratically elected representatives) and to have this Court adopt an entirely new districting scheme *not* related to any district approved by the people's representatives. This is, to put it as kindly as we can, preposterous, suggesting that, in applying state law and the state and federal constitutions (which is all it may do), this Court is somehow bound by whatever promises, sentiments, feints and bromides a successful candidate for Governor (but not the various winning candidates for the legislature) has made. The argument is, perhaps more than any other made here, embarrassingly laughable.

Here is the problem that this–or any other court–faces in drawing maps. It takes a legally enacted and constitutional set of districts that must be changed only because they are no longer equal in population. Had the census not changed, there would be no constitutional problem; no cause of action; no need for a remedy. The inequality in population is the only legal problem to be solved and it comes before this Court only if the legislature and the governor are unable to solve it. Some of the parties want to treat this failure as free pass to allow the Court to do whatever strikes its fancy; whatever it believes to be "best."

But that's not what courts do. Here, the Court is asked to address maps that were perfectly legal and fix what is no longer legal. No less,

but decidedly no more. "Least change"—fixing no more than the law requires—is what the Constitution requires and what courts do. It allows for this Court to defer to the democratic process as much as possible by beginning with the maps which are enacted in current law. The Governor's argument that we should entirely throw out democratically adopted state laws that he disagrees—because he talked about in some campaign speech—is nonsense.

**c. The "least change" approach is the most efficient way to meet the other mandatory factors and resolve this litigation**

As Petitioners noted in our opening brief, the current maps are still in place after multiple legal challenges. (Pet. Br. at 17-18.) As the result of population shifts that are now known from Census data, those district lines are no longer adequate. The easiest way to ensure Wisconsin's maps meet population equality and all other mandatory criteria is to start with the maps that were found to have met those criteria previously, and make the minimal changes necessary to ensure they continue to meet the criteria going forward.

The Hunter Intervenors argue that adopting the "least change" approach would expand the scope of this litigation. (Hunter Br. at 21.) However, this is plainly wrong—indeed, the opposite is actually true. The "least change" approach would reduce the need for any complicated

fact finding or lengthy litigation. They seem to think that using the existing maps as a baseline would warrant relitigating them—for a third time. But the U.S. Supreme Court has already decided that there was no legal reason to disrupt those maps and no state law claim was ever asserted.

The Court should issue an order making clear that it will utilize the "least change" approach if it is called upon to adopt a new redistricting plan.

## III. Responses to Question Three

Various parties argued why they believe this court *should* engage in a partisan review of districts, but none of their reasons put forward change the fact that there is: (1) no authority to engage in a partisan review; nor (2) any legal standards on which such a review should be based. This Court should reject those parties' requests for it to engage in partisan politics.

With regards to racial discrimination, the U.S. Supreme Court has said: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007). The same logic can be applied to partisan gerrymandering.

The way to stop gerrymandering on the basis of partisanship is to stop gerrymandering on the basis of partisanship.

The parties' argument amounts to a claim that they believe that maps should be scrutinized to determine whether each party wins "enough" seats to be regarded as "fair." As we have pointed out, there is no reason to believe that, in a system of single member geographic districts, that the composition of the legislature would match the aggregate vote for the various partisan candidates for each of these offices. That is unlikely to happen even if the voters for candidates of each party could be readily identified and were evenly geographically concentrated, but they cannot be and they are not.

**a. There is no basis for partisan review in Wisconsin law**

As Plaintiffs explained in our opening brief, Wisconsin law provides no basis for this Court to engage in a review of the partisan makeup of legislative districts. (Pet. Br. at 29-32.) Other parties have explained why they do not want this to be so—they want the Court to ensure that one party wins "enough" seats—but none has established where the Court would find the authority to do so and how it might be done.

### i. The Wisconsin law does not mandate a partisanship review

The BLOC Intervenors want this Court to find a *requirement* to review the partisan makeup of districts in Wis. Const. art. I, § 22. (BLOC Br. at 29.) This appears to be a long shot attempt by the BLOC Intervenors to get this Court to make a finding similar to what the Pennsylvania Supreme Court did in in *League of Women Voters v. Commonwealth*, 645 PA 1, 178 A.3d 737 (2018). In that case, the Pennsylvania Supreme Court found that the Pennsylvania Constitution's "free and equal elections" clause, which reads "[e]lections shall be free and equal. . .", Pa. Const. art. I, § 5, could give rise to a claim that a redistricting plan is invalid due to alleged partisan gerrymandering.

Why "free and equal" elections means equal or proportional results as opposed to an opportunity for candidates to run for office and qualified electors to vote is unexplained. The Wisconsin Constitution' s art. I, § 22, is entitled "Maintenance of free government" and it provides "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." But whatever another court in another state might make of a different constitutional

provision, nothing in art I, § 22 even suggests the court should engage in a partisanship review of districts, much less *require* it as the BLOC Intervenors have requested.

**b. There are no adequate standards to guide this Court**

Another problem with partisan review is that there are no standards to guide this Court. First, the determination of how a proposed district will vote is not the easy task that some parties have suggested. In Wisconsin, an Assembly Seat may well elect a Democrat one year, a Republican the next. Or perhaps the same district votes for a Republican candidate for the State Assembly and a Democrat for Governor. Or vice-versa. How it votes will be determined by the candidates and the positions they take. For example, some political observers have noted that Republicans have done increasingly better with rural and working-class voters and lost support in suburbs as they fielded candidates with a more populist approach.[3] Those trends might well be reversed if they nominate more traditional GOP candidates. Few even imagined—in 2015—that Donald Trump would be elected President in the following year. Political seers are not scientists.

[3] *See, e.g.*, Don Gonyea, *With Trump Off The Ballot, Republicans Look To Regain Votes In The Suburbs*, NPR, April 2, 2021 https://www.npr.org/2021/04/02/983385949/with-trump-off-the-ballot-republicans-look-to-regain-votes-in-the-suburbs (last visited Nov. 1, 2021).

Partisanship is not an immutable characteristic. People change and candidates and issues in elections matter. Voters do not always vote for one party or the other. In fact, Wisconsin state law recognized this back in 2011 when the Legislature eliminated so-called "straight party ticket" voting.[4] *See* 2011 Wisconsin Act 23 (which included, among other changes, eliminating "straight party ticket" voting in Wisconsin except as required by federal law for overseas and military electors). That is, the public policy in Wisconsin, established by the people through the legislature, recognizes that partisanship should not be a factor and that individuals can (and do) vote for candidates from a variety of parties for different offices on the same ballot.

But putting this problem aside, the United Supreme Court tried in vain for almost fifty years to discern a standard for determining what partisan outcome was "fair," finally giving the project up in *Rucho v. Common Cause*, 139 S. Ct. 2484, 204 L. Ed. 2d 931 (2019). None of the parties here have explained how this Court could manage to do what numerous justices on the United States Supreme Court over half a century could not.

[4] Straight Party Ticket voting is when a voter selects a political party on a ballot (and in doing so, casts a vote for all candidates of that party on the ballot) rather than selecting individual candidates for each office.

## IV. Responses to Question Four

The final area of significant disagreement amongst the submittals to the Court was in how this litigation should be structured going forward. There were essentially two broad groups that parties fell into: (1) efficient and minimal fact finding by this court; and (2) a more extensive and unbounded factual inquiry into a whatever the parties might find interesting. Petitioners originally proposed the former, and continue to believe that is the best way for the Court to handle this litigation.

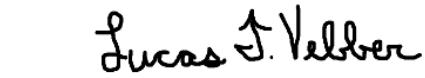
The Court's decision on how to move forward with this litigation will likely flow from its decision on the other questions regarding the scope of this litigation and the review that will be applied. As discussed *supra*, Petitioners believe that adopting the "least change" approach would be the most efficient way for this Court to resolve this litigation.

This Court could set forth the factors for consideration, and then require parties to submit a proposed map that meets those factors while making the least changes from the current maps. This would limit (if not eliminate) the need for fact finding or a lengthy trial, and would allow all parties to be heard and to fully brief the Court on why their map most adequately meets the requirements which are set forth.

## CONCLUSION

For these reasons, as well as those in our initial brief on these questions, Petitioners respectfully request the Court proceed as requested.

Respectfully submitted this 1st day of November, 2021.



WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
Richard M. Esenberg (WI Bar No. 1005622)
Anthony F. LoCoco (WI Bar No. 1101773)
Lucas T. Vebber (WI Bar No. 1067543)
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
Phone: (414) 727-9455
Fax: (414) 727-6385
Rick@will-law.org
ALoCoco@will-law.org
Lucas@will-law.org

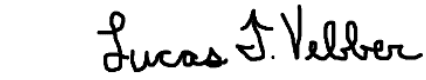
*Attorneys for Petitioners*

## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief produced with a proportion serif font. The length of this brief is 3,741 words.

Dated this 1st day of November, 2021,

Signed,



Lucas T. Vebber (WI Bar No. 1067543)
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
Phone: (414) 727-9455
Fax: (414) 727-6385
Lucas@will-law.org

*Attorney for Petitioners*

**CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)**

I hereby certify that:

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

I further certify that:

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

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 1st day of November, 2021,

Signed,

Lucas T. Vebber

Lucas T. Vebber (WI Bar No. 1067543)
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141
Phone: (414) 727-9455
Fax: (414) 727-6385
Lucas@will-law.org

*Attorney for Petitioners*