STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP1450-OA

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 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.

ORIGINAL ACTION

BRIEF OF INTERVENOR-RESPONDENT GOVERNOR TONY EVERS

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In an October 14 order, this Court instructed the parties to brief answers to four questions. The following are Intervenor-Respondent Governor Tony Evers's answers.

I. What factors should be considered when evaluating maps or creating new ones?

Factors governing the creation of legislative and congressional districts come from federal law (both the United States Constitution and federal statutes) and Wisconsin law (both constitutional and statutory), and may at times include certain other map-drawing principles. In all, applying the factors "requires the balancing of several disparate goals." *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *2 (E.D. Wis. May 30, 2002).

First, the U.S. Constitution requires that apportionment be as equal as practicable: "To prevent the debasement of citizens' voting power and to honor the dictates of the Equal Protection Clause, equality of population, to the extent it is practicable, is the cornerstone of any constitutional apportionment plan." *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 633 (E.D. Wis. 1982) (applying *Reynolds v. Sims*, 377 U.S. 533 (1964)). However, some deviations from a strict population standard may be allowed to account for redistricting criteria. *Baumgart*, 2002 WL 34127471, at *3.

In addition, maps must comply with the federal Voting Rights Act, which considers whether "(1) the minority groups are sufficiently large and geographically compact to create a majority-minority district; (2) the minority groups are politically cohesive in terms of voting patterns; and (3) voting is racially polarized, such that the majority group can block a minority's candidate from winning." *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 854 (E.D.

Wis. 2012). If so, courts then evaluate "the totality of the circumstances to determine whether the minority groups have been denied an equal opportunity to participate in the political process and elect candidates of their choice." *Id.*

Second, the Wisconsin Constitution contains certain requirements for state maps, with the overall goal of "equality of representation." *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 556, 126 N.W.2d 551 (1964). Specifically, the constitution provides that Assembly members are chosen via "districts to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable." Wis. Const. art. IV, § 4. "Contiguous" means not "made up of two or more pieces of detached territory." *Wisconsin State AFL-CIO*, 543 F. Supp. at 633 (quoting *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 148, 53 N.W. 35, 57 (1892)). And courts have described "compact" as meaning "closely united in territory," but some allowances may be made for natural or political subdivision boundaries. *Id.*

Regarding the county-lines requirement, the courts have explained that it no longer strictly applies given the federal constitutional mandates: "While maintaining the integrity of county lines may be a desirable objective, we believe its general incompatibility with population equality makes it only a consideration of secondary importance." *Wisconsin State AFL-CIO*, 543 F. Supp. at 635.

Also under state law, "no assembly district shall be divided in the formation of a senate district." Wis. Const. art. IV, § 5. And, by statute, "[t]he state is divided into 33 senate districts, each composed of 3 assembly districts." Wis. Stat. § 4.001.

Third, other map-drawing principles may apply but, if applied, they may not violate the binding requirements listed above (for example, the constitutional compactness requirement): avoiding split municipalities; maintaining traditional communities of interest; avoiding unnecessary pairing of incumbents; and core retention. *Baumgart*, 2002 WL 34127471, at *3. In addition, the degree of senate "disenfranchisement" may be considered—where a vote for a state senator is delayed for two years if voters are shifted from odd to even senate districts—although some degree of that disenfranchisement is "unavoidabl[e]." *Prosser v. Elections Bd.*, 793 F. Supp. 859, 864 (W.D. Wis. 1992). Disenfranchisement is not seen as unconstitutional "so long as no particular group is uniquely burdened." *Baldus*, 849 F. Supp. 2d at 852. And, as discussed more below, courts properly consider maps' balance, fairness, and responsiveness to the vote. *E.g., Prosser*, 793 F. Supp. at 867, 871; *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973).

Approaches to these factors may vary, depending on the circumstances. For example, courts have viewed "the maintenance of municipal boundaries to be important" and "that municipal splits should be used sparingly." *Wisconsin State AFL-CIO*, 543 F. Supp. at 636. However, as for incumbency, a federal court panel that drew Wisconsin's districts declined to consider it at all: "At no time in the drafting of this plan did we consider where any incumbent legislator resides." *Id.* at 638. Another panel considered the pairing of incumbents, but only to the extent it appeared based on a partisan intent or resulted in a partisan advantage. For example, the *Baumgart* panel rejected a proposed plan that paired "a substantial number of Democratic incumbents, while several Republican incumbent pairs are pairs in name only, with one of each retiring or

running for another office." *Baumgart*, 2002 WL 34127471, at *4.

In all, a map must comply with federal and state constitutional and statutory requirements, and may also include other considerations, if appropriate under the circumstances and not in conflict with the binding requirements.

II. Should a "least-change" approach apply to the maps; if not, what approach is appropriate?

Applying a "least-change" approach would be inappropriate. Rather than minimize the judiciary's involvement in politics, a "least-change" approach would entrench partisan advantage and districts that are unresponsive to voters, and it would contravene the will of the voters as expressed through the election of Governor Evers and the adoption in most Wisconsin counties of resolutions supporting fair maps. Adopting a "least-change" approach thus would "involve the judiciary in the politics of the people," *State ex rel. Reynolds*, 22 Wis. 2d at 561, far more than following the traditional principles for judicial redistricting would. That is true for three reasons.

First, it would elevate one nonbinding principle over all others, including binding statutory and constitutional requirements.

Second, it would violate the universally-recognized requirement that court-drawn or court-selected maps avoid partisan advantage. Here, using the existing maps as the starting point would undermine the principle that courts must be apolitical, as it would adopt a baseline of extreme partisan advantage for the new maps.

Third, and relatedly, it would be antidemocratic. Redistricting is a means to achieve fair and effective representation. Here, the existing maps do not reflect the will of the statewide electorate. For example, not only did Governor Evers win the most recent statewide vote, but also his platform included redistricting reform. The will of the people is thwarted if maps are not at all responsive to that vote—a "least-change" approach ignores these basic democratic principles.

Finally, it is worth noting that not only does the "least-change" approach have no constitutional or statutory basis, but the Legislature itself declined to follow it when it last redistricted in 2010.

A. A "least-change" approach is not warranted legally, would impermissibly subordinate legally-mandated factors, and is contrary to the Legislature's own approach in 2010.

First, there is no justification for following a "least-change" approach. Elevating a nonbinding approach would necessarily violate other binding redistricting principles noted above.

For example, the Wisconsin Constitution requires Assembly districts be "in as compact form as practicable." Wis. Const. art. IV, § 4. In contrast, there is no "least-change" requirement in the constitution. It follows that the compactness requirement, and other statutory and constitutional principles, must be given priority and cannot be subordinated to a "least-change" proposal, which has no statutory or constitutional basis.

Tellingly, for the 2010 redistricting, the Legislature did not follow a "least-change" approach. Far from it. "Only 323,026 people needed to be moved from one assembly district

to another in order to equalize the populations numerically, but instead Act 43 moves more than seven times that number—2,357,592 people . . . ." *Baldus*, 849 F. Supp. 2d at 849. "Similarly, only 231,341 people needed to move in order to create equal senate districts, but Act 43 moves 1,205,216–more than five times as many." *Id.* Thus, not only does a "least-change" approach improperly subordinate other requirements, but also it would be contrary to the last redistricting accomplished by Wisconsin's political branches (and one of the intervenors in this case). There is no basis for making it the approach now.

B. A "least-change" approach would enshrine a map found to contain extreme partisan advantage, which courts are not allowed to do.

Second, elevating a "least-change" approach is especially inappropriate here because it would mean adopting as a starting point a map that was drawn by one party and, thus, favored that party. Restated, adopting the existing maps as a starting point is anything but apolitical under the circumstances, and so would be improper. Courts previously have recognized as much, making it clear that it would be improper for a court to adopt an existing plan as a starting point if it was "politically biased from the start." *Prosser*, 793 F. Supp. at 871. While that approach to redistricting is not unconstitutional under federal law when done by the political branches, a court should not maintain a partisan plan when redistricting itself.

Although eventually vacated based on a lack of standing, a federal panel found that "[t]he evidence at trial establishes that one purpose of Act 43 was to secure the Republican Party's control of the state legislature for the decennial period." *Whitford v. Gill*, 218 F. Supp. 3d 837, 890

(W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018). Restated, the panel found that "the evidence establishes that one of the purposes of Act 43 was to secure Republican control of the Assembly under any likely future electoral scenario for the remainder of the decade, in other words to entrench the Republican Party in power." *Id.* at 896. Further, it found that "Act 43's large partisan effect is not due to Wisconsin's natural political geography." *Id.* at 926. Even apart from those findings, however, it takes no special insight to know that a political party—whether Republican or Democrat—that controls the redistricting process likely will enact maps that favor that party.

The U.S. Supreme Court did not take up or question those factual determinations. Rather, it reversed based on standing. In doing, it did not question that Wisconsin's current map affected "the fortunes of political parties." *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018). As Chief Justice Roberts noted when writing for the majority, the evidence included that, "[i]n 2012, Republicans won 60 Assembly seats with 48.6% of the two-party statewide vote for Assembly candidates. In 2014, Republicans won 63 Assembly seats with 52% of the statewide vote." *Gill*, 138 S. Ct. at 1923.

When a court is involved in drawing or selecting a map, judges must not select a plan that promotes partisan advantage "even if they would not be entitled to invalidate an enacted plan that did so." *Prosser*, 793 F. Supp. at 867. Here, using a "least change" approach would mean using a partisan map as a starting point, improperly adopting its partisan nature as the baseline for a court-drawn-map proceeding. As the *Prosser* panel explained, courts may not use existing maps as a starting point if they are "politically biased from the

start." *Id.* at 871.[1] Because the current maps are, this is a second reason why a "least-change" approach cannot be followed.

C. A "least-change" approach would be anti-democratic.

Third, as the courts have long recognized, the ultimate goal of reapportionment is ensuring "fair and effective representation." *Gaffney*, 412 U.S. at 748. Its effect on the State's inhabitants concerns basic democracy and so implicates "the majority of the voting inhabitants of the state." *State ex rel. Reynolds*, 22 Wis. 2d at 556–57. Here, enshrining the existing partisan advantage is neither fair nor responsive to the vote, as the effect of the existing maps is untethered from the statewide electorate's will.

For example, in 2018, Wisconsin voters elected Governor Evers, who ran on a platform that included redistricting reform.[2] Adopting the current maps as a starting point would neither reflect that statewide vote nor would it reflect the public's support for redistricting reform. The state electorate's support for redistricting reform also is reflected in a report that 56 of 72 Wisconsin counties had passed

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[1] While some panels have referred to working off of existing maps when those maps were not shown to be politically-biased, *see Baumgart*, 2002 WL 34127471, at *7; *Prosser*, 793 F. Supp. at 871, that is not the case here.

[2] *E.g.*, *Non-Partisan Redistricting*, 2018 Campaign Website of Tony Evers, http://web.archive.org/web/20181116215743/https:/tonyevers.com/plan/non-partisan-redistricting/ (last visited Oct. 25, 2021); *Tony Evers Announces "Government for Us" Agenda*, Oct. 1, 2018, http://www.thewheelerreport.com/wheeler_docs/files/1001evers.pdf.

resolutions or referendums supporting fair maps.[3] The people have spoken through their votes that redistricting should be done fairly and impartially. Similarly, a poll by Marquette Law School found that an overwhelming majority of Wisconsinites—72 percent—support fair maps.[4] Adopting the current maps as a starting point, which were created under one-party control, would undermine the will of the electorate.

In fact, the "least-change" approach would mean that an extreme partisan gerrymander would entrench partisan advantage not just for a decade but indefinitely. In other words, it would mean that by locking themselves into a legislative majority a decade ago, Republicans in the legislature, absent major shifts in voting patterns, also locked themselves into a majority for the next decade, the decade after that, and so on. That not only is incompatible with any notion of democratic fairness, but it is simply antidemocratic.

In sum, as discussed in the answer to Question 1, courts properly apply certain statutory and constitutional requirements and at times consider other factors when drawing maps, none of which are adopting partisan advantage through a "least-change" approach here.

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[3] *56 Counties Back Fair Maps*, Fair Maps Coalition, https://www.fairmapswi.com/learnmore (last visited Oct. 25, 2021).

[4] *New Marquette Law School Poll Finds Some Issues Less Divisive Amid Continuing Partisan Divide*, Jan. 29, 2019, https://www.marquette.edu/news-center/2019/new-marquette-law-school-poll-finds-some-issues-less-divisive-amid-continuing-partisan-divide.php.

III. Is partisan makeup of districts a valid factor?

Partisan makeup of districts can be, and should be, analyzed when evaluating maps to help ensure maps are fair and balanced. Again, reapportionment is meant to ensure "fair and effective representation." *Gaffney*, 412 U.S. at 748. Considering partisan metrics is appropriate to ensure a court does not improperly promote unfair partisan advantage. Further, partisan makeup should be considered to encourage responsiveness to the vote. When significant shifts in voting patterns only lead to small changes in the makeup of the Legislature, it makes legislators less accountable to the people.

As discussed above, partisan advantage is not a permissible factor when redistricting, at least when it involves the courts. "Judges should not select a plan that seeks partisan advantage—that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda." *Prosser*, 793 F. Supp. at 867. A court thus should not adopt a plan that "would inure to the political benefit of any one person or party." *Wisconsin State AFL-CIO*, 543 F. Supp. at 638. As this Court has stated, "It is hostile to a democratic system to involve the judiciary in the politics of the people." *State ex rel. Reynolds*, 22 Wis. 2d at 561 (citation omitted).

Consistent with this principle, courts reject proposed plans that show signs of tinkering for partisan advantage. To illustrate, in *Baumgart*, a proposed map was rejected because it "pair[ed] a substantial number of Democratic incumbents," while not meaningfully pairing Republican incumbents; "move[d] a number of incumbent Democrats into strongly Republican districts and either pack[ed] Democrats into as few districts as possible or divide[d] them among strong Republican districts"; and included "questionable splits on the

county level in districts with Democrat incumbents, and appear[ed] to have been designed to ensure Republican control of the Senate." *Baumgart*, 2002 WL 34127471, at *4. The court likewise rejected plans that "divide[d] the City of Madison into six districts radiating out from the Capitol in pizza slice fashion" as an attempt to gain partisan advantage for Democrats. *Id.*

While courts should not promote partisan *advantage*, it is proper to evaluate partisan *balance*. For example, in *Prosser*, the panel explained that the court's plan promoted "balance" and was "the least partisan" compared to plans proposed by the parties. *Prosser*, 793 F. Supp. at 871.

Further, encouraging fairness and responsiveness to the vote have long been recognized by the U.S. Supreme Court as valid considerations. For example, in *Gaffney*, the Court reiterated that "the achieving of fair and effective representation for all citizens is . . . the basic aim of legislative apportionment." *Gaffney*, 412 U.S. at 748 (quoting *Reynolds*, 377 U.S. at 565–66). It followed that it was proper when redistricting for a state "to allocate political power to the parties in accordance with their voting strength." *Id.* at 754.

In sum, considering partisan balance is proper. It should be used to evaluate the partisanship of proposed maps to avoid this Court improperly adopting a plan that enshrines a partisan advantage and weakens the democratic process.

IV. What litigation process should be used to evaluate or create maps?

The liability phase—whether the existing maps are legal—requires no litigation, as it will be beyond dispute that the existing maps must be redone given population changes. Rather, this litigation will be focused on the remedy of new maps. When drawing maps, the process involves "[h]ighly

sophisticated mapping software" using layers and overlays for various boundaries and districting criteria. *Whitford*, 218 F. Supp. 3d at 847–48, 889. Presumably, the parties' experts would include use of such software.

In turn, the litigation on what maps are appropriate would include experts, discovery, the submission of proposed maps, and a trial before this Court.

To help illustrate, most recently, the *Whitford* federal litigation included expert disclosures and discovery, followed by a four-day trial with testimony from eight witnesses, including five experts. *Whitford*, 218 F. Supp. 3d at 857. In *Prosser*, the court held a two-day trial after "evidence in support of the various plans was introduced in written form, so that the hearing could be devoted to cross-examination of the experts and to opening and closing arguments of counsel." *Prosser*, 793 F. Supp. at 862. A similar procedure would be needed here for the parties to present their proposed maps to the Court.

Specifically, this Court should set aside time for a trial where the parties, at a minimum, may cross-examine experts and witnesses and present opening and closing arguments to the Court, as occurred in *Prosser*. Given the number of litigants involved, that trial likely would require three to four days for cross-examinations and argument, and more if the trial also includes full direct examinations. Given the great statewide importance of the case, it is imperative that this Court itself hear and consider the evidence so that it may properly render a decision at its conclusion.

Dated this 25th day of October 2021.

Respectfully submitted,

JOSHUA L. KAUL
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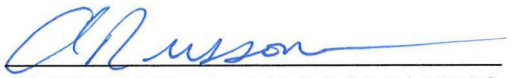

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3163 words.

Dated this 25th day of October 2021.

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12) (2019–20)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12) (2019–20).

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 25th day of October 2021.

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