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.

EMERGENCY MOTION OF THE CONGRESSMEN FOR AN ORDER BOTH STAYING THIS COURT'S JUDGMENT PENDING THEIR FILING OF A PETITION FOR CERTIORARI WITH THE U.S. SUPREME COURT AND PERMITTING ALL PARTIES TO SUBMIT EQUIPOPULOUS, CORE-RETENTION-MAXIMIZATION CONGRESSIONAL MAPS THIS WEEK

The Congressmen respectfully move this Court to stay its March 3, 2022 judgment as it relates to the congressional map, pending the Congressmen's filing of a petition for a writ of certiorari with the U.S. Supreme Court. The Congressmen respectfully submit that the Supreme Court is likely to grant review, and reverse, on two constitutional issues: (1) the Governor's congressional map, which this Court adopted, violates Article I, Section 2 of the U.S. Constitution; and (2) this Court's adoption of the Governor's congressional map without giving the parties an opportunity to submit proposed maps under its newly announced core-retention-maximization-only methodology for choosing congressional maps violates the Due Process Clause.

The Congressmen further respectfully request that this Court should pair this grant of a stay with an order permitting all parties to submit, within a 24-hour period, congressional maps that maximize core retention, which submissions would permit this Court to moot any need for U.S. Supreme Court involvement. Creating an equipopulous, core-retention-only-map is a trivially

easy endeavor, which would allow all parties to submit to this Court maps that move more than 97,000 fewer people than does the Governor's congressional map. There could be no basis in law or the best interests of the people of this State for this Court to adopt a map that—***objectively and without any question***—does not comply with the core-retention-maximization-only rule that this Court set out in its March 3 decision as to the congressional maps. Indeed, given the trivial simplicity of creating a lawful, core-retention-maximization-only congressional map, this Court could and should resolve this issue through the parties' submissions *this week*, which would also allow the parties to check each other's core-retention and population-equality math (and, of course, given the extremely limited changes with an equipopulous, core-retention-maximization-only congressional map, it is exceedingly unlikely that any other legal issues could arise with any proposed map).

The Congressmen respectfully request a ruling on this motion **by Wednesday, March 9, 2022**, when they plan to seek emergency injunctive relief from the U.S. Supreme Court.

With those considerations in mind, the Congressmen state the grounds for this Motion immediately below:

1. On November 30, 2021, this Court held that it would select congressional maps based upon a "least-change approach." *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶¶ 64–79, 399 Wis. 2d 623, 967 N.W.2d 623 ("*Johnson I*"). In doing so, this Court cited a series of least-changes cases that while giving properly significant weight to core retention, also considered other indicia of least changes, including not splitting up existing communities of interest, when deciding to adopt a least-change map. *Id.* ¶ 73 (citing *Crumly v. Cobb Cty. Bd. of Elections & Voter Registration*, 892 F. Supp. 2d 1333, 1344–45, 1347–50 (N.D. Ga. 2012); *Martin v. Augusta-Richmond Cty. Comm'n*, No. CV 112–058, 2012 WL 2339499, at *3 (S.D. Ga. June 19, 2012); *Below v. Gardner*, 963 A.2d 785, 794–95 (N.H. 2002); *Alexander v. Taylor*, 51 P.3d 1204,

1211–12 (Okla. 2002); *Bodker v. Taylor*, No. 1:02-cv-999, 2002 WL 32587312, at *5, *7 (N.D. Ga. June 5, 2002); *Markham v. Fulton Cty. Bd. of Registrations & Elections*, No. 1:02-cv-1111, 2002 WL 32587313, at *6 (N.D. Ga. May 29, 2002)). Then, in a concurring opinion, Justice Hagedorn—*whose vote was essential to the Court's majority*—explained that if the Court were to "receive multiple proposed maps that comply with all relevant legal requirements, and that have equally compelling arguments for why the proposed map most algins with current district boundaries," then the Court would consider compliance with "communities of interest" or "other traditional redistricting criteria," to "choose the best alternative" map for the State. *Id.* ¶ 83 (Hagedorn, J., concurring).

2. Thereafter, on December 15, four parties submitted proposed congressional remedial maps: (1) a group of private citizens under the moniker "the Citizen Mathematicians and Scientists"; (2) the Congressmen; (3) Governor Tony Evers; and (4) another group of private citizens under the name "the Hunter intervenors-petitioners." *Johnson v. Wis. Elections Comm'n*, 2022

WI 14, ¶ 7 ("*Johnson II*"); *see* Br. Of Congressmen Supporting Proposed Congressional District Map, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 15, 2021) ("Congressmen Br."); Gov. Tony Evers's Br. In Supp. Of Proposed Maps, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 15, 2021) ("Gov. Br."); Hunter Intervenor-Pet'rs' Br. In Supp. Of Proposed Maps, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 15, 2021) ("Hunter Br."); Br. of Intervenors-Pet'rs Citizen Mathematicians & Scientists, *Johnson v. Wis. Elections Comm'n*, No.2021AP1450-OA (Wis. Dec. 15, 2021) ("Citizen Math. Br."). Each party's proposed map focused—understandably—on *both* core retention *and* community-of-interest considerations, including avoiding the splitting of counties and municipalities. Congressmen Br. 31–44; Gov. Br. 18–19; Hunter Br. 15–17; Citizen Math. Br. 31–35. **No party submitted a proposed map that claimed to focus only on core-retention-maximization and, therefore, no party came close to submitting a map that would move the number of people that would obtain if the**

map drawers' only goal were core-retention-maximization and compliance with the law.

3. On March 3, this Court ruled—as relevant to this Motion—that for the congressional districts, it would consider only two factors: core-retention-maximization and compliance with the law, in deciding which of the submitted congressional maps to select. *Johnson II*, 2022 WI 14, ¶¶ 11–25 & nn.3–8.

4. This Court then adopted the Governor's proposed map, concluding that this map performed best on core-retention-maximization of the four maps that this Court accepted. *Id.* ¶¶ 13–19. This Court also held that the Governor's malapportioned map complied with Article I, Section 2 of the U.S. Constitution, despite acknowledging that "there is 'no excuse for the failure to meet the objective of equal representation for equal numbers of people in congressional districting other than the practical impossibility of drawing equal districts with mathematical precision.'" *Id.* ¶ 22 (quoting *Mahan v. Howell*, 410 U.S. 315, 322 (1973)). This Court then reasoned that the "excuse" for this map's deviation from

perfect population equality was maximizing core retention, even though the Governor had conceded that the *only* reason for his map's deviation was his mistake view of the law, *see infra* ¶ 7.

5. "Courts must consider four factors when reviewing a request to stay an order pending appeal: (1) whether the movant makes a strong showing that it is likely to succeed on the merits of the appeal; (2) whether the movant shows that, unless a stay is granted, it will suffer irreparable injury; (3) whether the movant shows that no substantial harm will come to other interested parties; and (4) whether the movant shows that a stay will do no harm to the public interest." *Waity v. LeMahieu*, 2022 WI 6, ¶ 49, 400 Wis. 2d 356, 969 N.W.2d 263.

6. The Congressmen have made a strong showing of likelihood of success on the merits that they are likely to succeed before the U.S. Supreme Court on two federal constitutional issues, and the U.S. Supreme Court is likely to grant relief on both issues and reverse this Court's adoption of the Governor's congressional map. *See id.* ¶ 49.

7. The U.S. Supreme Court is likely to grant review of, and reverse, this Court's decision that the Governor's malapportioned map complies with Article I, Section 2 of the U.S. Constitution. In *Evenwel v. Abbott*, 578 U.S. 54 (2016), the Court held that "States must draw congressional districts with populations *as close to perfect equality as possible*," *id.* at 59 (emphasis added), and there is no dispute that the Governor's map has a greater population deviation than is "possible." *See id.*; *Johnson II*, 2022 WI 14, ¶ 21. Further, even if the U.S. Supreme Court concludes that the pre-*Evenwel* rule from *Karcher v. Daggett*, 462 U.S. 725 (1983), still applies, the Governor's congressional map is still unconstitutional because the Governor did not offer any "justification" for his map's failure to achieve perfect population equality, other than his mistake about the requirements of Article I, Section 2, and the U.S. Supreme Court's case law. *See id.* at 734. Indeed, the Governor admitted this at oral argument before this Court. Oral Argument Recording at

2:13:00–2:15:34.* And while this Court held that the requisite justification for this population deviation was maximizing core retention, no party before this Court raised this argument, *see United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1581 (2020), which is not factually correct regardless. The Governor did not claim that his map's population deviation was in service of maximizing core retention, and—in any event—this Court had before it a demonstration map from the Congressmen that moved far fewer people and achieved "populations as close to perfect equality as possible." *Evenwel v. Abbott*, 578 U.S. at 59; Congressmen's Mot. to Submit Modified Version Of Proposed Remedial Congressional Map, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Dec. 30, 2021). The U.S. Supreme Court is unlikely to conclude that, just because the Governor's map has greater core maximization than any of the other three maps that this Court chose to look at, this is a sufficient justification for

* Available at https://wiseye.org/2022/01/19/wisconsin-supreme-court-oral-arguments-johnson-v-wisconsin-elections-commission/ (last visited Mar. 7, 2022).

violating the U.S. Constitution, when it is undisputed that a higher core-retention map could have easily been achieved without sacrificing any of the State's interests.

8. The U.S. Supreme Court is also likely to grant review on, and reverse, this Court's decision to announce and then apply a core-retention-maximization-only methodology for choosing a congressional map on March 3, without giving the parties an opportunity to submit maps under that methodology. The Due Process Clause requires allowing a party "a chance to put his evidence in" under a newly announced legal standard. *See Saunders v. Shaw*, 244 U.S. 317, 319–20 (1917); *accord Reich v. Collins*, 513 U.S. 106, 110–14 (1994); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950); *Bouie v. City of Columbia*, 378 U.S. 347, 353–55 (1964). In this case, this Court on November 30, 2021, announced a least-changes methodology that included not only considerations of core-retention, but also other well-recognized least-changes factors, such as not unnecessarily splitting up existing communities of interests—including existing

counties and municipalities—consistent with every prior least-changes decision that this Court cited. *Johnson I*, 2021 WI 87, ¶¶ 72–73 (collecting cases); *id.* ¶ 83 (Hagedorn, J., concurring). Every party submitting proposed remedial congressional maps thereafter put forward proposed maps that used core maximization as one of multiple least-changes factors. *See supra* ¶ 2. Yet, in its March 3 decision, this Court unexpectedly and without warning adopted a core-maximization-only methodology, and then selected from the parties' submissions based on that methodology. *Johnson II*, 2022 WI 14, ¶¶ 11–25 & nn.7–8. This violated the parties' due-process rights because had this Court announced a core-maximization-only methodology before the parties submitted maps, *every* party's congressional submission would have been far different. Indeed, it would have been trivially easy for every party to move (at least) 97,000 fewer people than they did in their submissions of December 15, if they disregarded considerations of communities of interests, including county and municipal splits, in the pursuit of core-retention-maximization.

9. The Congressmen will suffer multiple forms of irreparable harm absent stay relief. *See Waity*, 2022 WI 6, ¶ 49. Adoption of the Governor's unconstitutional map will require the Congressmen to run and vote in unconstitutionally malapportioned districts, while also expending substantial, unrecoverable resources campaigning in communities that they have not previously represented. Second Aff. Of Congressman Bryan Steil, ¶¶ 7–9. Further, the Congressmen will suffer irreparable harm from the loss of their due-process rights to a fair judicial process. The Due Process Clause gives the Congressmen a constitutional right to "put [their] evidence in" under this Court's newly-announced core-maximization-only standard, *Saunders*, 244 U.S. at 319–20, and the map that they would submit under this standard would move more than 97,000 fewer people than does the Governor's congressional map.

10. No party would suffer any prejudice from this Court issuing the requested relief, and the public interest would greatly benefit from such a stay. As a threshold matter, safeguarding the

rights enshrined in the U.S. Constitution protects all parties' interests, *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964), as well as forwards the public's core concerns, as a matter of law, *Nken v. Holder*, 556 U.S. 418, 435 (2009); *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). Further, granting this motion would benefit all concerned parties, especially considering how trivially easy it would be for this Court to resolve all Article I, Section 2, and Due Process Clause concerns raised herein. Submitting a core-maximization-only congressional map that complies with all legal requirements, including Article I, Section 2, is a trivially easy exercise, which any interested party could accomplish within a 24-hour period. The parties' checking each other's core-retention and population-equality math would take no more time than that. This Court could then—acting within a week—simply choose the constitutional map that moves the fewest number of people out of the prior districts based upon core-retention and equal population figures. The resulting map would

far better achieve the rule of law that this Court set out in its March 3 decision than does the Governor's congressional map.

For the foregoing reasons, the Congressmen respectfully request that this Court grant this Motion.

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