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

GOVERNOR TONY EVERS'S RESPONSE BRIEF ON PROPOSED MAPS

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INTRODUCTION

This Court ruled that demonstrating "least changes" is the "primary concern" in these proceedings, and that other considerations would only come into play if several maps equally met that requirement. *Johnson v. Wisconsin Elections Commission*, 2021AP1450-OA, Nov. 30, 2021, Opinion ¶ 81 (Bradley, R., J.); *id.* ¶¶ 83, 87 (Hagedorn, J., concurring) (hereinafter "Op."). The Court now has the parties' submissions, and they are not equal on the key "least changes" measure. Rather, the Governor's proposals significantly outperform the others and also comply with all other legal requirements. That is decisive.

Rather than best satisfying the measure it proposed, the Legislature attempts to steal a base: it asserts that its proposal is entitled to special weight just because it is the Legislature's. (Leg. Opening Br. 6–7, 30.) However, this Court already explicitly rejected that proposition: the Legislature's proposed maps "are mere proposals deserving no special weight." Op. ¶ 86 n.15 (Hagedorn, J., concurring); *see also id.* ¶ 72 n.8 (Bradley, R., J.). The Legislature not only ignores this Court's decision but also that the Governor, just as much as the Legislature, is jointly responsible for redistricting. *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 557–59, 126 N.W.2d 551 (1964).

Applying this Court's criteria, the Governor's proposed maps should be selected.

ARGUMENT

As set out by this Court, "least changes" governs, allowing for only legally "necessary" deviation. Op. ¶ 81 (Bradley, R., J.); *id.* ¶¶ 85, 87 (Hagedorn, J., concurring). That means that, *if* two sets of maps "have equally compelling arguments for why the proposed map most aligns with

current district boundaries," then the Court could weigh other factors when picking one. *Id.* ¶ 83 (Hagedorn, J., concurring). However, if the maps are not equal on "least changes," then there is no occasion to exercise that judgment. That would insert this Court into exactly the kind of picking of winners and losers that it vowed to avoid.

Specifically, the Court ruled, "A least change approach safeguards the long-term institutional legitimacy of this court by removing [it] from the political fray and ensuring [the court] act[s] as judges rather than political actors." *Id.* ¶ 77. Or as stated by the plurality, "A least-change approach is the most consistent, neutral, and appropriate use of [the Court's] limited judicial power . . . ." *Id.* ¶ 85 (Hagedorn, J., concurring).

Here, the Governor's proposed maps outperform all other maps on the "least changes" mandate, while complying with necessary legal requirements. That is dispositive.

I. The Governor's proposed Assembly and Senate maps should be adopted because they outperform all others on the "least-changes" mandate and otherwise satisfy all legal requirements.

A. The Governor's proposed maps have the best "core retention" of the current districts.

The Governor's proposed Assembly map significantly outperforms any other proposal on the key "least changes" measure, including bettering the Legislature's proposal by moving nearly 100,000 fewer people. And the Senate map (which is a product of combining Assembly districts) is essentially the same on this measure. Because the Governor's Assembly proposal is significantly better—and because the Senate map is driven by that Assembly map—the Governor's proposed Assembly and Senate maps should be adopted.

The Governor's maps outperform on "least changes" by "retaining previous occupants in new legislative districts." *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002). As the Legislature's expert puts it: a "proposed plan with high core retention scores is indicative of a plan that makes minimum changes to Wisconsin's existing districts, as required by this Court." (Leg. Opening Br., Bryan Rep. ¶ 62.) The Johnson petitioners likewise explain that the most straightforward way of measuring "least changes" is "determining the number of people moved from their existing district to a new district." (Johnson Opening Br. 4.) And the Congressmen similarly advocate for its use. (Congressmen Opening Br. 20–21, 34.) Thus, the use of population retention to measure compliance with this Court's "least changes" mandate is undisputed vis-à-vis these parties.

The Governor's proposed Assembly plan does significantly better than any other map on that key measure. It moves only 14.21% of the population to a different district, or 837,659 people. (Clelland Initial Rep. 2–3, 8; Clelland Resp. Rep. 10.)[1] By contrast, the Legislature's proposal, Senate Bill 621, moves significantly more people: 15.84% of the population, or approximately 933,604 people. (*Id.*) Thus, the Governor's proposal moves nearly 100,000 fewer people—95,945—than the Legislature's. Put differently, the Legislature moves over 11% more people than the Governor's plan. That is not a de minimus difference.

The various plans, in order of population moved from least to most, are as follows:

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[1] Professor Clelland's report submitted with the Governor's opening brief is designated "Clelland Initial Rep."; her report submitted with this response brief is designated "Clelland Resp. Rep."

Assembly Proposals	Percent of Population Moved
Governor	14.17%
BLOC	15.8%
Legislature	15.84%
Senate Democrats	16.2%
Hunter	26.8%
Citizen Mathematicians	39.0%

(Clelland Initial Rep. 8; Clelland Resp. Rep. 10; Leg. Opening Br., Byron Rep. ¶ 73; BLOC Opening Br., Mayer Rep. 1, Appx. 115; Bewley Opening Br. 7; Hunter Opening Br., Ansolabehere Rep. ¶ 14; Citizen Mathematicians Opening Br., Duchin Rep. 19.)[2] Restated at the individual district level, the majority of the Governor's proposed districts move fewer people than the Legislature's proposal. (Clelland Resp. Rep. 10 & Figure 4.)

Further, not only does the Governor's proposal perform significantly better on population retention, but it also makes *no* changes to 13 districts: Districts 1, 27, 28, 32, 43, 52, 58, 60, 61, 63, 74, 91, and 92. (Clelland Initial Rep. 3, 8.) The Legislature's proposed Assembly map leaves no district unchanged.

In turn, the Governor's proposed Assembly districts are nested in proposed Senate districts, as required by law. Measuring retention in the Senate maps shows that the

[2] The Clelland Report compares the Governor's maps to SB 621 and 622 using a uniform method. The other figures are taken from the respective parties' reports. To the extent that those parties may have used slightly different computational methods, any differences to core retention would be minor and would not change the overall results. (Clelland Resp. Rep. 2, 6–7.)

Governor's proposal is on par with the Legislature's and outperforms all other proposals. On an individual district level, the movement in most districts of the Governor's map is slightly lower than in the Legislature's proposal. (Clelland Resp. Rep. 10–11 & Figure 5.) And, overall, the Governor's map moves less than one half of one percent (0.4%), or about 2,167, more people. (Clelland Resp. Rep. 10.) That is dramatically less than the difference between the Assembly proposals (again, there, the Legislature's Assembly map moves 11% more people).

The following shows the retention percentages of the maps from the lowest population moved to the most:

Senate Proposals	**Percent of Population Moved**
Legislature	7.79%
Governor	7.83%
Senate Democrats	9.5%
BLOC	10.4%
Hunter	19.6%
Citizen Mathematicians	25.7%

(Clelland Initial Rep. 8; Clelland Resp. Rep. 10; Leg. Opening Br., Byron Rep. ¶ 68; BLOC Opening Br., Mayer Rep. 1, Appx. 115; Bewley Opening Br. 7; Hunter Opening Br., Ansolabehere Rep. ¶ 15; Citizen Mathematicians Opening Br., Duchin Rep. 16.)

That the Governor's Assembly plan has, by far, the highest core retention is dispositive under this Court's November 30th decision, which adopts "least changes" as key. Looking at both the Assembly and Senate maps collectively, the Legislature's proposals move 40 times more people overall. The Legislature, Johnson petitioners, and

Congressmen (among others) all agree that "core retention" is the most straightforward way of determining "least changes." Because the Governor's Assembly map significantly outperforms on that measure—and the Senate map derived from that Assembly map is essentially the same on it—the Governor's proposed Assembly and Senate maps should be adopted.

B. The Governor's proposed state legislative maps are similar to the Legislature's on other measures proposed by the Legislature.

Although core retention—keeping voters where they already are—is the most direct measure of "least changes," the Governor's proposals also perform well on other measures that the Legislature contends may relate to "least changes."

Namely, the Legislature relies on two secondary measures: temporary Senate disenfranchisement and incumbent pairings. (Leg. Opening Br. 25–30.) The Governor's proposals are similar to the Legislature's on these measures. The Governor's plans have temporary disenfranchisement within 1,000 people of the Legislature's and perform well on incumbent pairings. These measures do not affect the "least changes" analysis, which, again, is most directly measured by core retention.

Regarding temporary senate disenfranchisement, the Governor's proposed Senate map would temporarily disenfranchise about 139,677 people, less than half than the last plan. (Clelland Initial Rep. 3, 9.) The Legislature's proposed Senate map is very similar: it would temporarily disenfranchise 138,732 people. (Leg. Opening Br., Bryan Rep. ¶ 90.) The difference is about 945 people, meaning the Governor's proposal moves about 2/3rds of one percent more people (0.68%) than the Legislature's proposal.

That difference is de minimus by any standard. And that tiny difference is nowhere near the 11% greater movement of population in the Legislature's Assembly map as compared with the Governor's proposal. Thus, temporary senate disenfranchisement does not move the needle, especially since this factor is not even a legal requirement. *See Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 852 (E.D. Wis. 2012).

On the second measure the Legislature identifies—incumbent pairings—the maps perform similarly, and are better than the previous maps. Incumbent pairings do not, in themselves, say anything about moving voters. In any event, the Governor's proposals perform well. (Governor's Opening Br. 18–19.)[3]

* * * *

The Governor's proposed Assembly and Senate maps clearly outperform any other proposals, including the Legislature's, on retaining people where they already are—the undisputed best way to measure "least changes." The Legislature's proposals are not "equally compelling" on that primary concern and, thus, no subordinate concerns come into play under the Court's mandate. Op. ¶ 81 (Bradley, R., J.); *id.* ¶ 83, 85 (Hagedorn, J., concurring). The Governor's maps should be selected.

C. The Governor's proposed Assembly and Senate maps properly apply federal law.

This Court explained in its decision that a departure from "least changes" was only permissible when legally "necessary"; otherwise, "least changes" must govern. Op. ¶ 81 (Bradley, R., J.); *id.* ¶¶ 85, 87 (Hagedorn, J., concurring).

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[3] The pairings discussed in the opening brief are based on the publicly available information.

Here, the Governor's proposed Assembly and Senate maps comply with any requirements under federal law.

1. The Governor's maps comply with one-person-one-vote principles.

The Legislature asserts that its maps "surpass" what is required by law regarding population equality. (Leg. Opening Br. 11.) But *surpassing* what is required by law, while having a *greater* deviation from "least changes," is not allowed by this Court's governing order. Rather, the parties were instructed to make only legally "*necessary* modifications" while otherwise adhering to "least changes." Op. ¶ 85 (emphasis added) (Hagedorn, J., concurring); *see also id.* ¶ 81 (Bradley, R., J.). As the Legislature admits, its particular population equality is not legally necessary.

That conclusion is reflected in the case law. It is universally recognized that a state legislative plan with a deviation below 2% has a de minimus deviation requiring no further inquiry. A court-drawn plan is of the "'de minimis' variety," and thus requires no particular justification, when "below 2 percent." *Baumgart*, 2002 WL 34127471, at *2. Restated, a plan "kept below 2%" is "constitutionally acceptable." *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 634 (E.D. Wis. 1982). Plans drawn by the political branches are given even more latitude, needing only to stay within a 10% deviation. *Evenwel v. Abbott*, 578 U.S. 54, 136 S. Ct. 1120, 1124 (2016).

The 2-percent rule is recognized nationwide. For example, in the last cycle, a federal district court collected cases from across the country, explaining that, although some courts have allowed more than 2% as de minimus for court-drawn maps, 2% is recognized as a safe harbor: "District courts . . . have approved maps ranging up to two percent total

deviation." *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1082–83 (D. Kan. 2012) (collecting cases).

For the Assembly, the Governor's proposal has a mean deviation of 0.47% from the ideal district, with maximum deviation of 0.98% from ideal, meaning all districts are within 1.0% of ideal, with a range of deviation from the largest to smallest district of 1.88%. (Clelland Initial Rep. 7.) For the Senate, there is a mean deviation of 0.25% and maximum deviation of 0.62%, with a range of deviation from the largest to smallest district of 1.19%. (*Id.*) No matter how these figures are sliced, they are all under 2%. And while the Legislature's deviations may be slightly lower, those figures "surpass" what is "necessary," as the Legislature admits. (Leg. Opening Br. 11.) Op. ¶ 85 (Hagedorn, J., concurring).

The bottom line is that the Governor's maps are below the universally-accepted de minimus safe harbor, meaning they comply with the one-person-one vote requirement. Because both the Governor's and the Legislature's proposals are below the de minimus threshold, they are equally legal under one-person-one-vote principles. They both "comply," which is all that matters under this Court's decision and the case law. Op. ¶ 87 (Hagedorn, J., concurring).

In sum, the Governor's maps are superior under this Court's "least changes" criteria, while complying with any "necessary" one-person-one-vote requirements.

2. The Governor's proposals comply with the Voting Rights Act, while the Legislature's maps risk violating the Act.

As explained in the first brief, it is noncontroversial that majority-minority districts are required in Milwaukee, as occurred in the last cycle. Indeed, the proposals here recognize as much by creating those districts.

However, the Governor's Assembly proposal, like BLOC's proposal, creates seven Black majority-minority districts, instead of the Legislature's five (plus one district under 50%). The Governor's approach not only satisfies the Voting Rights Act, but also outperforms the Legislature's proposal, which risks violating the Act with fewer packed Black-majority districts.

Unlawful vote dilution under the Act may occur in one of two ways: "[1] by fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them, or [2] by packing them into one or a small number of districts to minimize their influence in the districts next door." *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994). The Act "prohibits either sort of line-drawing where its result, 'interact[ing] with social and historical conditions,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters.'" *Id.* (citation omitted).

Where, as here, the Act applies and a different "configuration" provides better "electoral prospects," it "should be created." *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 495 (2006) (Roberts, C.J., concurring).

As the material before this Court shows, in the last ten years, Wisconsin's white population decreased, while the Black population, and that of people who identify as multiracial, grew. Specifically, Wisconsin's white population dropped by 3.4%, while its Black population grew by 4.8%.[4] And it is possible to draw seven majority-minority Black

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[4] *Wisconsin grows modestly and more diverse while Milwaukee plummets to 1930s levels, Census data show*, Milwaukee Journal Sentinel, available at https://www.jsonline.com/story/news/politics/2021/08/12/census-wisconsin-grows-modestly-while-milwaukee-drops-1930-s-levels/8110913002/.

districts in the Milwaukee area—as both the Governor's and BLOC's proposals demonstrate. Because that area is indisputably covered by the Act, it follows that seven "should be created," instead of the five proposed by the Legislature. *LULAC*, 548 U.S. at 495 (Roberts, C.J., concurring).

The specific reasons for this are stated in detail in the filings and expert reports of the BLOC petitioners and are not repeated in detail here. (*See* BLOC Opening Br. 29–47, Collingwood, Canon, and Mayer Reports.) The analyses in the BLOC reports apply equally to the Governor's map because both cover similar areas in Milwaukee. (Clelland Resp. Rep. 12–13.) And the combined Black voting age population in the BLOC and Governor plans are within about 2% of each other. (Clelland Resp. Rep. 13.) Further, the Assembly maps proposed by the Governor and BLOC have very similar Black voting age populations in the Milwaukee area:

District	Governor BVAP	BLOC BVAP
10	51.4%	52.3%
11	50.2%	50.6%
12	50.2%	50.2%
14	50.9%	50.5%
16	50.1%	50.5%
17	50.3%	50.6%
18	50.6%	50.5%

(Clelland Initial Rep. 11; BLOC Opening Br., Mayer Rep. 10, App. 124.)

Some of the high points regarding the Voting Rights Act are as follows, all of which are stated in more detail in the cited reports.

First, as all parties acknowledge either expressly or implicitly, Milwaukee contains a compact and segregated Black population. In fact, no expert report is needed to establish this well-known fact that has led all parties, and previous courts, to establish majority-minority districts in Milwaukee.[5] *See Baldus*, 849 F. Supp. 2d at 848 (explaining that previous Assembly plan had six majority-minority Black districts). That is confirmed by the materials before this Court detailing the concentrated and segregated Black population in the Milwaukee districts, with significant portions of Milwaukee containing over 50% Black voting age populations. (Mayer Rep. 8–10, Appx. 122–24; *see also* BLOC Opening Br. 29–35.)

As to the other criteria under the Act, it also is well-accepted that voting is politically cohesive and polarized in Milwaukee. (*See* Governor Opening Br. 13–14.) And the materials before this Court further support that. For example, the data shows that Black and white voters support Black candidates at dramatically different rates. Support from Black voters for a Black candidate in a given election was between 65% and 70% while support from white voters was between 25% and 36%, which is a pattern that is repeated in other elections. (Collingwood Rep. 6–23, 28, Appx. 18–35, 40; *see also* BLOC Opening Br. 36–41.)

And surrounding factors also support the application of the Act. *See Thornburg v. Gingles*, 478 U.S. 30, 35–36 (1986) (listing additional factors). For example, there is a history of disparate impacts on Black voters in the region and of minority vote dilution; fewer polling places in Milwaukee per

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[5] *See, e.g.*, Special Report, *Democratic, Republican voters worlds apart in divided Wisconsin*, Milwaukee Journal Sentinel, available at https://archive.jsonline.com/news/statepolitics/democratic-republican-voters-worlds-apart-in-divided-wisconsin-b99249564z1-255883361.html.

capita in recent elections; hindrances in access to housing, employment, and other opportunities that affect political participation; and a failure of Black candidates to achieve higher offices, such as mayor of Milwaukee. (Canon Rep. 3–5, Appx. 61–63 (summarizing findings); *see also* BLOC Opening Br. 41–47.) Thus, unsurprisingly, no one seriously disputes that the Act applies in Milwaukee.

But districts still must be drawn so as not to dilute Black voting strength. The Legislature's approach is to pack Black voters into fewer districts. That is forbidden. *Johnson*, 512 U.S. at 1007. The Legislature's map packs 73.28% Black voting population into District 11 and 61.81% into District 17. (Clelland Initial Rep. 11.) By contrast, the Governor's proposal has no district with over 51.39% Black voting age population, demonstrating that the packing in the Legislature's plan was not warranted by geography or other considerations (especially since the Governor's plan also has greater core retention). The Legislature's maps thus improperly pack Black voters into "a small number of districts to minimize their influence in the districts next door." *Id.*

And although less extreme, a similar pattern can be seen in the Legislature's Senate map—it unnecessarily packs between 56–58% Black voting age population into Senate districts, whereas those districts could have been drawn with a majority between 50–51%, (Clelland Initial Rep. 11), thus increasing Black influence "in the districts next door."

This packing makes the Legislature's districts subject to invalidation under the Act and, thus, further supports rejecting those maps.

In sum, that the Act applies in Milwaukee is undisputed. And, as both the Governor's and BLOC's proposals demonstrate, seven majority-minority Black

districts can be drawn in Milwaukee and so "should be."[6] *LULAC*, 548 U.S. at 495 (Roberts, C.J., concurring). Thus, not only do the Governor's proposed maps comply with the Act, but they do so better than the Legislature's proposals, which risk violating the Act.[7] This consideration thus does not change that the Governor's "least changes" maps should govern.

D. The Governor's proposed Assembly map better satisfies the constitutional compactness requirement than the Legislature's map, and the Governor's maps comply with remaining requirements.

No other legal requirement changes the foregoing.

On the constitutional compactness requirement for Assembly districts, the Governor's maps do better than the Legislature's proposals. Wis. Const. art. IV. § 4 (stating that Assembly districts are to "be in as compact form as practicable"). The Governor's Assembly plan has a higher Polsby-Popper mean (0.251) than the Legislature's plan (0.243), meaning it is more compact overall. (Clelland Resp. Rep. 18.) And, similarly, the Governor's Assembly plan also has a higher mean Reock score (0.397) than the Legislature's proposed plan (0.379), further supporting that the Governor's plan is more compact. (*Id.*) And using the "cut edges" measure, the Governor's Assembly plan has fewer cut edges, meaning it is more compact: it has 18,441 cut edges to 19,196 for the Assembly plan. (*Id.*) Thus, these measures show that the Governor's Assembly proposal is more compact than the

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[6] The Legislature points out that its majority BVAP districts pair no incumbents. The same is true of the Governor's plan.

[7] The Governor's proposal also complies with the Act was to Hispanic voters, as discussed in the first brief. (Governor's Opening Br. 15, Clelland Initial Rep. 5, 11.)

Legislature's under the constitutional compactness requirement.

The compactness requirement does not apply to the Senate, so it has no legal bearing on the outcome here. In any event, the Governor's Senate plan and the Legislature's plan are essentially the same on that measure. The Governor's plan has a mean Reock score of 0.392 and a mean Polsby-Popper score of 0.217; similarly, the Legislature's plan has a mean Reock score of 0.395 and a mean Polsby-Popper score of 0.224. (Clelland Resp. Rep. 18.) These close scores provide no reason to select the Legislature's plan given that there is no constitutional compactness requirement for Senate districts. The Governor's plan does notably better on the measure that matters legally—compactness of Assembly districts.

In addition, under the constitution, Assembly districts also are to "to be bounded by county, precinct, town or ward lines." Wis. Const. art. IV, § 4. However, it is accepted that this proviso is not absolute. Consistent with that, all parties, including the Legislature, split some counties and towns.

As for counties, the Governor's and Legislature's Assembly maps are the same: each split 53 counties, less than the 58 split in the last map. (Clelland Initial Rep. 13; Bryan Rep. ¶ 57.)[8] Thus, this has no bearing on selecting maps.

Beyond that, certain parties discuss "municipal" splits, but there is no municipal-split provision in the constitution or any other law. Rather, the constitutional provision only applies to "towns" and says nothing about cities or villages. Wis. Const. art. IV, § 4; *see also Wis. State AFL-CIO*, 543 F. Supp. at 635 (explaining that, in the Wisconsin

[8] The county splits provision does not apply to the Senate and so has no legal bearing. The Legislature's map splits slightly fewer counties—42 to the Governor's 45—both of which are less than the current map. (Clelland Initial Rep. 13; Bryan Rep. ¶ 57.)

Constitution, "absent is any requirement that city and village boundaries be maintained"); *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35, 57 (1892) (same). Thus, only the quantity of town splits may be legally relevant to this Court's mandate.

Each proposal split towns—in other words, everyone agrees there is no absolute prohibition. In fact, the existing Assembly map splits more towns than the Governor's proposal. Specifically, the 2011 Plan splits 89 towns, whereas the Governor's proposed Assembly map lowers that to 80 towns. (Clelland Resp. Rep. 16–17.)[9] *Improving on* the existing maps' compliance with town splits means that the Governor's map necessarily satisfies the town-split consideration under this Court's "least changes" mandate. Indeed, this Court's November 30th decision begins from the proposition that the existing maps are legal, but for the malapportionment issue arising from the 2020 Census. Op. ¶ 64; *id.* ¶ 82 (Hagedorn, J., concurring). And that is exactly what the Legislature argued before this Court. (*E.g.*, Leg. Resp. Br. Nov. 1, 2021, at 14–15.) While the Governor's map splits more towns than the Legislature's new proposal, that is largely driven by the Governor's better adherence to "least changes" for the existing map.[10] As the existing map demonstrates, there is no legal requirement that splits be below a certain number, and of course having 10% *fewer* splits

[9] As the Clelland Report explains, the more accurate way of computing splits is to use the Census Bureau's block assignments for the 2011 plan, which these figures reflect. (Clelland Resp. Rep. 6–8, 16.)

[10] Just maintaining the existing lines would have meant that the 79 municipal splits in the current plan increased to 126 splits, due to the changing of boundaries over time. (Citizen Mathematicians Opening Br. 5–6; Duchin Rep. 18.)

than the existing map poses no legal problem. None of this alters the "least changes" analysis above.[11]

* * * *

The Governor, better than any other party, has satisfied this Court's "least-changes" mandate, and has done so while complying will all other legal requirements. As a result, this Court should give effect to the criteria in its November 30th decision by implementing the Governor's Assembly and Senate maps.

II. The Governor's congressional plan also outperforms on "least changes" and satisfies the other legal requirements, and so should be selected.

A. The Governor's proposed congressional map outperforms on the key "core retention" measure.

Again, the Court has mandated that the governing factor—and the one that the Court stated would preserve its neutrality—is "least changes." The Governor's proposed congressional map again outperforms all other proposals. Because that map complies with all other legal requirements, it should be selected under this Court's mandate.

The Governor's proposed congressional map significantly outperforms the Congressmen's proposal of Senate Bill 622. The Governor's proposal moves only 5.50% of the population or 324,415 people. (Clelland Initial Rep. 8; Clelland Resp. Rep. 10.) By comparison, SB 622 moves over a

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[11] Although not legally required, the Governor's plans for the Senate and Congress also split equal or fewer towns than the existing plans. (Clelland Resp. Rep. 17.) And taking "municipal" splits as a whole, all of the Governor's plans improve upon the existing ones. (*Id.*)

one percent more—6.52% of people or 384,456 people. (*Id.*) That equates to moving over 60,000 more people than the Governor's map.

The various plans, in order of population moved from least to most, are as follows:

Congressional Proposals	**Percent of Population Moved**
Governor	5.47%
Congressmen	6.52%
Hunter	6.9%
Citizen Mathematicians	8.5%

(Clelland Initial Rep. 8; Hunter Opening, Ansolabehere Rep. ¶ 13; Citizen Mathematicians Opening, Duchin Rep. 13.) In addition, on an individual district level, the movement in a majority of districts is lower in the Governor's proposal than in the Congressmen's proposal. (Clelland Resp. Rep. 11.)

Appropriately, the Congressmen advocate for using the movement of people to measure "least changes." (Congressmen Opening Br. 20–21, 34.) Since its map underperforms on that undisputed measure, it cannot be selected under this Court's mandate. Again, the Congressmen's proposal moves 60,000 more people, or 18% more people, than the Governor's proposal. It is not "equally compelling" on the governing principle. Op. ¶¶ 83, 85 (Hagedorn, J., concurring).

And, as explained next, no other map is "necessary" under any binding legal requirement, meaning the exception to "least changes" under this Court's order does not apply. Op. ¶ 81 (Bradley, R., J.); *id.* ¶¶ 85, 87 (Hagedorn, J., concurring).

B. The Governor's proposed congressional map complies equally well with federal law requirements as the Congressmen's map.

First, under the one-person-one-vote requirement, a congressional map should have nearly perfect equality. *See Evenwel*, 136 S. Ct. at 1124. Both the Governor's proposal and the Congressmen's, in SB 622, equally comply with that requirement. Specifically, the Governor's proposal has the same deviation as the Congressmen's proposal—only one person. (Clelland Initial Rep. 7; Congressmen Opening Br. 28.)

Second, the maps must comply with the Voting Rights Act. Here, again, both the Governor's and the Congressmen's proposals satisfy it. Under the old maps, there was one majority non-white-voting-age-population (NWVAP) district, District 4. (*See* Congressmen Opening Br. 19–20.) Both proposals here retain District 4 as a NWVAP district, and do so nearly identically, with the Governor's proposal having a 52.95% NWVAP population and the Congressmen's proposal having a 52.45% NWVAP population. (Clelland Initial Rep. 10.) Thus, both proposals are equivalent for Voting Rights Act purposes.

These federal requirements do not move the needle. Rather, they demonstrate that it was possible to adhere to the "least changes" approach better than the Congressmen's proposal while equally satisfying federal law. This shows that the Congressmen's proposal may not be selected under this Court's mandate—there is nothing legally "necessary" about its departure from "least changes" as compared to the Governor's proposal. As a result, it does not "equally" satisfy this Court's mandate. Op. ¶ 81 (Bradley, R., J.); *id.* ¶¶ 85, 87 (Hagedorn, J., concurring).

C. The Congressmen's resort to non-legal justifications cannot support their departure from "least changes."

Instead of pointing to legal requirements, the Congressmen attempt to justify their map based on policy choices—something this Court ruled it would not enter into. Op. ¶ 81 (Bradley, R, J.); *id.* ¶ 85 (Hagedorn, J., concurring). The Congressmen's resort to non-legal considerations should therefore be rejected because its map does not perform nearly as well as the Governor's on what is mandated.

For example, the Congressmen argue in favor of major changes that their proposed plan makes to District 3, (Congressmen Br. 14–15), which moves almost 240,000 people in and out of the district, even though District 3 was only 3,779 people under ideal population. (Schreibel Rep. Ex. 3 at 2–3.) This is completely inconsistent with a least changes approach to districting.

The Congressmen spend a good deal of energy explaining how their proposed plan attempts to minimize county and municipal splits. (Congressmen Br. 31–44.) However, there is no constitutional provision or statute that restricts splits in congressional maps. A plain language reading of the constitution shows it covers only Assembly districts: "The members of *the assembly* shall be chosen biennially, by single districts, . . . such districts to be bounded by county, precinct, town or ward lines." Wis. Const. art. IV, § 4." This requirement cannot be imported here as legal justification—it does not apply—and this Court's November 30th mandate does not allow it to be used to deviate from "least changes."[12] Splits are irrelevant because the Congressmen have failed to adhere to "least changes" unless

[12] Compactness also does not justify the Congressmen's departure because it does not apply to congressional districts.

legally necessary to act otherwise. The Congressmen's proposal should be rejected.

For the sake of completeness only, it bears mentioning that the Governor's proposal contains only 12 county splits, which is the same as in the last plan; the Congressmen's proposal contains 10 county splits. (Clelland Initial Rep. 13; Schreibel Rep. 31.) There is nothing out of the ordinary about the Governor's proposed plan on this measure, even if it did apply to congressional maps.

* * * *

The Governor's proposed maps clearly outperform on this Court's mandated "least changes" approach. No other maps are their equal. Since the Governor's maps comply with all other legal requirements, they should be selected under this Court's prior ruling.

CONCLUSION

The Court should adopt the Governor's proposed maps under the criteria stated in the November 30th decision.

Dated this 30th day of December 2021.

Respectfully submitted,

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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 5,302 words.

Dated this 30th day of December 2021.

ANTHONY D. RUSSOMANNO
Assistant Attorney General

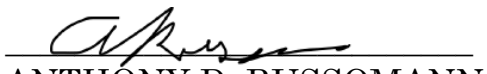
CERTIFICATE FILING OF SERVICE

I hereby certify that *Governor Tony Evers's Response Brief on Proposed Maps* was email filed in pdf form to clerk@wicourts.gov, on or before 12:00 p.m. on December 30, 2021.

I further certify the original and 10 copies of this brief, with the notation that "This document was previously filed via email," were hand-delivered for filing to the Wisconsin Supreme Court Clerk's Office, 110 East Main Street, Madison, WI 53701, no later than 12:00 p.m. on December 31, 2021.

I further certify that on this day, I caused service of a copy of this brief to be sent via electronic mail to counsel for all parties who have consented to service by email. I caused service of copies to be sent by U.S. mail and electronic mail to all counsel of record who have not consented to service by email.

Dated this 30th day of December 2021.



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