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ST. JOHN LLC

March 24, 2022

VIA EMAIL AND SERVICE

Hon. Sheila Reiff
Clerk of the Supreme Court and Court of Appeals
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Re: Letter Brief in Response to Governor's Request for Extended Proceedings, *Johnson v. Wisconsin Elections Commission*, No. 2021AP1450

Dear Ms. Reiff,

Today the Governor asks this Court to reopen evidence so the Governor can get a second chance to submit evidence that, if it existed, would have been his burden to submit months ago. He requests additional briefing and more costly expert reports in support of his unconstitutional redistricting plan. For the following four reasons, the request should be denied, the Legislature's Assembly and Senate maps should be adopted, and these proceedings should be brought to an end.

1. The United States Supreme Court has made it pellucidly clear that the Governor failed to carry his burden of proof in these proceedings. *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. ___, ___ (2022) (per curiam) (slip op. at 4-5). In the words of the Supreme Court, the Governor "provided almost no other evidence or analysis supporting his claim that the VRA required the seven majority-black districts that he drew." *Id.* at 4. Citing the Governor's filings in this Court, the Supreme Court stated the Governor's "main explanation for drawing the seventh majority-black district was that there is now a sufficiently large and compact population of black residents to fill it, … apparently embracing just the sort of uncritical majority-minority district maximization that we have expressly rejected. *De Grandy*, 512 U.S., at 1017

("Failure to maximize cannot be the measure of § 2")." *Id.* (citing Brief for Intervenor-Respondent Evers (Wis. Sup. Ct., Dec. 15,2021), p. 14; *Johnson v. DeGrandy*, 512 U.S. 997, 1017 (1994)). Simply put, the Governor did not establish his maximizing proposal satisfied strict scrutiny, but that is always the burden of any state actor employing "odious" race-based sorting. *Shaw v. Reno*, 509 U.S. 630, 643 (1993); *see Wis. Legis.*, 595 U.S. at ___ (slip op. at 4).

The Governor has misstated the Supreme Court's remand instructions as an instruction to reopen this case to new evidence. The Supreme Court said that *if* this Court is to reconsider the Governor's districts, then it *must* take more evidence. Any such evidence, if it were to exist, would be held to the exacting legal standards articulated in the Supreme Court's decision. *Wis. Legis.*, 595 U.S. at ___ (slip op. at 7). Simultaneously, the Supreme Court explained in the strongest terms that the Governor's maximization plan has all the markers of a constitutionally "odious" plan unless and until proven otherwise. *Id.* at 2. And so unsurprisingly, the Supreme Court also said that this Court could simply choose among the well-litigated alternatives. The Governor is wrong to presume that the only path forward is the uphill and likely impossible battle of proving the constitutionality of his districts.

The Governor should not get a second chance now. Four months ago, this Court ordered the parties to propose remedies by December 15 that complied with state *and federal* law. *See Johnson v. Wis. Elections Comm'n*, 2021 WI 87, 399 Wis.2d 623, 967 N.W.2d 569. The Court ordered that the parties agree on required discovery, including expert reports. The parties complied with that order—some more than others. Both the Legislature and the BLOC Intervenor-Petitioners supported their remedies and responses to other remedies with a dedicated Voting Rights Expert. And from the get-go, the Legislature pointed out that the Governor's plan violated the Equal Protection Clause and was not justified under controlling United States Supreme Court precedent. The Governor chose not to respond. He had no VRA expert. He had no response as to the unconstitutionality of his plan at argument, hours of which focused on the very issues the United States Supreme Court just addressed.

It would be extraordinary and contrary to the way in which this Court has conducted these proceedings to permit the Governor to attempt to rehabilitate his case at this eleventh hour. At multiple stages of these proceedings, when it was clear that other parties in this litigation failed to carry their burden of proof, those other parties asked for a second chance. In the middle of briefing, the Congressmen asked for a chance to submit a proposal with better core retention (which the Governor opposed), and this Court denied that request. Order re. Motions to File Corrected Maps (Jan. 10, 2022). During argument, the Congressmen renewed that request. After argument, the Hunter Intervenor-Petitioners asked to make additional submissions, Hunter Int-Pet. Mot. For Leave To Provide Additional Authorities In Response To Oral Argument Question, p. 5 (Jan 25, 2022), and the Court never granted that request. (For his part, the Governor was permitted to submit "technical" corrections, which a majority of this Court distinguished from other requests to substantively rehabilitate a party's case. Order re. Motions to File Corrected Maps*, supra.*)

Just as other parties were prohibited from submitting new evidence or new proposals, the Governor cannot be permitted to do so here. The alternatives are well-known to this Court. Having failed to carry his burden of proof, the Governor does not get to re-insert his proposed plans—or substantive modifications to his proposed plans that would surely be necessary—as one of the already-litigated alternatives. He cannot bring forth evidence that he could and should have brought forth months ago, and then require parties who have already shouldered their litigation responsibilities to respond again. The United States Supreme Court's decision did not change the law; it reversed for legal error. *Wis. Legislature*, 595 U.S. ___ (slip op. at 2).

If there is any path forward consistent with the Supreme Court's decision, the way this Court has conducted proceedings, and the statements made by the Governor and many others regarding timing, it is to choose the Legislature's race-neutral, least-changes alternative.

2. The Governor's request is contrary to everything he has told this Court and the United States Supreme Court about the remaining time to adopt redistricting plans. In this Court, the Governor urged it

to deny the Legislature's motion for a stay pending appeal because the remaining time was too short. Governor's Response to Legislature's Motion for Stay, p.1, 3 (March 9, 2022). In the United States Supreme Court, the Governor made extensive arguments that there was no time for more proceedings and that the districts needed to be finalized for the elections commission by March 1. Governor's Response to Stay Application, 4, 31-33 (U.S. S. Ct.). The Wisconsin Elections Commission has similarly explained to this Court and the United States Supreme Court that time is of the essence. WEC's Response to Stay Application (U.S. S. Ct.). So, too, have other parties. *See, e.g,* Response of Hunter-Intervernor's Response to Wisconsin Legislature's Motion to Stay, p.5 (March 9, 2022); BLOC Intervenor's Response to Wisconsin Legislature's Motion to Stay, pp. 17-19 (March 9, 2022).

The Governor cannot have it both ways. As the Johnson Petitioners and the Wisconsin Legislature have explained since taking this appeal, any remand proceedings ought to be simple and expedited because the alternatives are well-known to this Court and have been litigated for months. By this Court's preferred metrics, the Legislature's plan was the second-best when this Court concluded the Governor's plan was legal. The Legislature's plan is now indisputably the best because this Court was reversed on that conclusion.

Importantly, what the Governor is requesting is a substantial commitment of time and resources. The United States Supreme Court has made clear to this Court and all parties that any reconsideration of the Governor's plan will require this Court "to take additional evidence" and "[a]ny new analysis … must comply with [the Supreme Court's] equal protection jurisprudence." *Wis. Legislature*, 595 U.S. at ___ (slip op. at 7). (Or, this Court can simply "choose from among the other submissions." *Id.* at 7.) The message from the Supreme Court is clear: any rehabilitation of the Governor's plan, if any such rehabilitation is even possible, will take substantial evidence and would require an "intensely local appraisal," not mere "generalizations." *Id.* at 6-7 (quotation marks omitted). There are no guarantees that he can do so ever, let alone in the time remaining before candidate qualifying begins.

3. Most fundamentally, no amount of evidence will remove the taint of the Governor's racial gerrymander. There is no evidentiary basis for explaining this:

Wisconsin State Legislative District	2022 Black Voting-Age Population
Wisconsin State Senate District 4	50.62%
Wisconsin State Senate District 6	50.33%
Wisconsin State Assembly District 10	51.39%
Wisconsin State Assembly District 11	50.21%
Wisconsin State Assembly District 12	50.24%
Wisconsin State Assembly District 14	50.85%
Wisconsin State Assembly District 16	50.09%
Wisconsin State Assembly District 17	50.29%
Wisconsin State Assembly District 18	50.63%

It is a waste of all parties' resources to litigate something that cannot possibly be proved as legal, in light of controlling Supreme Court precedent. As the Johnson Petitioners and the Wisconsin Legislature explained in extensive briefing before the United States Supreme Court, the Governor's proposal has all the trappings of the fundamental errors of law explained in the Supreme Court's decisions in *DeGrandy*, *Miller*, *Cooper*, and other controlling precedents. No amount of evidence can undo the deployment of the Governor's 50-percent racial target, all to guarantee the maximization of majority-minority districts.

4. Finally, with respect to the Legislature's districts, the Governor states "no other path is tenable" including because the Legislature's districts are "inconsistent with the VRA's restrictions on packing and cracking voters." Gov. Letter 3. This is just another evidence-free assertion—one even less supported than the idea that the VRA requires seven districts in Milwaukee. This Court expressed "*some concern* that a six-district configuration *could* prove problematic." *Johnson v. Wis. Elections Comm'n*, 2022 WI 14, ¶49, ___ Wis.2d ___, ___ N.W.2d ____

(emphasis added). Yesterday's opinion discussing the interplay between the Equal Protection Clause and the Voting Rights Act should alleviate any such concern. Only if strict scrutiny is satisfied can a court order a race-based change to the Legislature's race-neutral districts.

The Governor's arguments to the contrary continue to perpetuate the errors that have brought the parties and this Court to this point here today. For this Court to adopt his suggestions about the Legislature's districts in rejecting them, based on no evidence whatsoever other than demographic numbers, would be to commit the very same "VRA-light" error that precipitated yesterday's reversal. The Legislature's plans are *race-neutral* and that is undisputed. The Legislature's proposals thus do not pose the constitutional Equal Protection concerns that plague the Governor's and other parties' maps. *See Miller v. Johnson*, 515 U.S. 900, 913 (1995). It was the Governor's and other parties' burden to establish the Legislature's race-neutral proposal violated the Voting Rights Act. They have not presented the detailed and intensely local evidence required for such a claim.

What's more, in the litigation, a Voting Rights Act expert explained that those race-neutral districts comply with the Voting Rights Act. Accordingly, the Legislature would have *no constitutional basis* for dialing up a district to 50 percent or dialing down a district to 50 percent—as the Governor has done—if the districts as *neutrally* drawn comply with the VRA. That is the lesson of *Cooper v. Harris*. 137 S. Ct. 1455, 1471-72 (2017), as the Supreme Court just explained—again. Ultimately, the Governor's arguments fare no better than the failing arguments in *DeGrandy*. They are no different than contending that (race-neutral) district lines in northern Milwaukee's largely minority communities "could have been drawn elsewhere." *DeGrandy*, 512 U.S. at 1015. "But some dividing by district lines and combining within them is virtually inevitable and befalls any population group of substantial size. Attaching the labels 'packing' and 'fragmenting' to these phenomena, without more, does not make the result vote dilution when the minority group enjoys substantial proportionality." *Id.* at 1015-16.

The Governor's arguments are baseless and will walk this Court into the very same error that the Supreme Court has just summarily reversed—necessitating additional proceedings in that court.

* * *

The parties and the voters of Wisconsin cannot be made to shoulder the cost and waste of time it will take for the Governor to try (again) and fail (again) to prove his plan is legal. The Court should adopt the Legislature's proposed districts. They are race-neutral and thus avoid all of the serious constitutional failings of the Governor's districts. Adoption of those districts will end these proceedings and move all parties and all voters along to the forthcoming elections—which until today, the Governor had argued were so pressing that no further proceedings were tenable.

Respectfully submitted,

Electronically Signed By
Kevin M. St. John

CONSOVOY MCCARTHY PLLC
Jeffrey M. Harris*
Taylor A.R. Meehan*
James P. McGlone**
1600 Wilson Boulevard, Suite 700
Arlington, Virginia 22209
703.243.9423
jeff@consovoymccarthy.com
taylor@consovoymccarthy.com
jim@consovoymccarthy.com

* *Admitted pro hac vice*
** *Admitted pro hac vice; licensed to practice in Mass.*

BELL GIFTOS ST. JOHN LLC
Kevin M. St. John, SBN 1054815
5325 Wall Street, Suite 2200
Madison, Wisconsin 53718
608.216.7990
kstjohn@bellgiftos.com

LAWFAIR LLC
Adam K. Mortara, SBN 1038391
125 South Wacker, Suite 300
Chicago, Illinois 60606
773.750.7154
mortara@lawfairllc.com

Attorneys for the Wisconsin Legislature

cc: All counsel of record