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No. 23AP1399-OA

In the Supreme Court of Wisconsin

REBECCA CLARKE, RUBEN ANTHONY, TERRY DAWSON, DANA GLASSTEIN, ANN GROVES-LLOYD, CARL HUJET, JERRY IVERSON, TIA JOHNSON, ANGIE KIRST, SELIKA LAWTON, FABIAN MALDONADO, ANNEMARIE MCCLELLAN, JAMES MCNETT, BRITTANY MURIELLO, ELA JOOSTEN (PARI) SCHILS, NATHANIEL SLACK, MARY SMITH-JOHNSON, DENISE SWEET and GABRIELLE YOUNG, PETITIONERS, GOVERNOR TONY EVERS, in his official capacity; NATHAN ATKINSON, STEPHEN JOSEPH WRIGHT, GARY KRENZ, SARAH J. HAMILTON, JEAN-LUC THIFFEAULT, SOMESH JHA, JOANNE KANE, and LEAH DUDLEY, INTERVENORS-PETITIONERS

v.

WISCONSIN ELECTIONS COMMISSION, DON MILLIS, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, JOSEPH J. CZARNEZKI, in their official capacities as Members of the Wisconsin Election Commission, MEAGAN WOLFE, in her official capacity as the Administrator of the Wisconsin Elections Commission, ANDRE JACQUE, TIM CARPENTER, ROB HUTTON, CHRIS LARSON, DEVIN LEMAHIEU, STEPHEN L. NASS, JOHN JAGLER, MARK SPREITZER, HOWARD MARKLEIN, RACHAEL CABRAL-GUEVARA, VAN H. WANGGAARD, JESSE L. JAMES, ROMAINE ROBERT QUINN, DIANNE H. HESSELBEIN, CORY TOMCZYK, JEFF SMITH AND CHRIS KAPENGA, in their official capacities as Members of the Wisconsin Senate, RESPONDENTS, WISCONSIN LEGISLATURE; BILLIE JOHNSON, CHRIS GOEBEL, ED PERKINS, ERIC O'KEEFE, JOE SANFELIPPO, TERRY MOULTON, ROBERT JENSEN, RON ZAHN, RUTH ELMER and RUTH STRECK, INTERVENORS-RESPONDENTS.

BRIEF OF INTERVENORS-RESPONDENTS BILLIE JOHNSON, CHRIS GOEBEL, ED PERKINS, ERIC O'KEEFE, JOE SANFELIPPO, TERRY MOULTON, ROBERT JENSEN, RON ZAHN, RUTH ELMER, AND RUTH STRECK IN SUPPORT OF PROPOSED MAP

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INTRODUCTION

The Johnson Intervenors primarily support the remedy that we understand the Legislature will propose, or any other similar remedy that does nothing more than fix the contiguity violation this Court has identified. Recognizing, however, that this Court may decline to adopt the Legislature's proposal, the Johnson Intervenors also submit their own proposed map, which they urge this Court to accept if, and only if, the Court rejects the Legislature's simple remedy.

ARGUMENT

I. This Court Should Adopt a Map That Absorbs the Islands Into Their Surrounding Districts and Otherwise Makes Only Those Changes That Are Necessary to Reduce Population Deviation.

The Johnson Intervenors primarily support the remedial map that they understand the Legislature will propose, or any similar map that absorbs the islands into their surrounding districts and makes only those additional changes that are necessary to get the population deviation back below whatever threshold this Court determines is appropriate. In its opinion in this case, as well as in the *Johnson* litigation, this Court indicated that a population deviation below 2% would be acceptable. *Clarke v. Wisconsin Elections Comm'n*, 2023 WI 79, ¶ 64 (listing various redistricting cases approving Wisconsin assembly maps with a population deviation ranging from .76% to 1.88%).

A. The Constitutional Remedy

As the Johnson Intervenors explained in their prior briefing, the appropriate remedy here is to make only those changes necessary to fix the constitutional violation this Court has identified. *See Johnson Intervenors' Opening Br.* at 28–29; *Johnson Intervenors' Resp. Br.* at 26. This Court has deemed the current maps unconstitutional for one, and

only one, reason: this Court’s decision that Article IV, Sections 4 and 5 of the Wisconsin Constitution require literal contiguity, and the current maps are unconstitutional because they contain noncontiguous municipal islands. *Clarke*, 2023 WI 79, ¶ 3. To remedy that violation, this Court should adopt a map that does nothing more than fix the contiguity issue. Such a remedy is consistent with the “appropriate reach of the judicial power,” which requires judicial remedies to be “appropriately tailored to any constitutional violation.” *See Johnson Intervenors’ Opening Br.* at 28–29 (quoting *Serv. Emps. Int’l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 47, 39 Wis. 2d 38, 946 N.W.2d 35 and citing several other cases illustrating the same principle). Moreover, as the Johnson Intervenors have explained at length, fixing the contiguity issue here is easy to do: simply absorb the municipal islands into their surrounding districts and then make minor adjustments to ensure that the resulting population deviation is below 2%. *See Johnson Intervenors’ Opening Br.* at 29–33; *Johnson Intervenors’ Resp. Br.* at 22–25.

This Court’s decision in December did not address the Johnson Intervenors’ argument that any contiguity problem can be resolved easily by simply absorbing the islands into their surrounding districts and making only a few minor alterations to reduce the overall population deviation. *See Respondents’ Br. in Support of their Motion for Reconsideration* at 15. Nevertheless, the proposed map being submitted by the Legislature definitively establishes that it is not only possible, but quite easy to resolve the only violation this Court identified in that way. Indeed, consistent with the Johnson Intervenors’ previous briefing on this subject (*Johnson Intervenors’ Opening Br.* at 29–33; *Johnson Intervenors’ Resp. Br.* at 22–25) the Legislature’s simple fix will move very few people, will resolve the contiguity issue this Court identified, and will achieve a population deviation well within the standard set by this Court.

As the Johnson Intervenors noted in their response brief, Petitioners have not provided any coherent explanation for why this simple solution would be insufficient. *See* Johnson Intervenors' Resp. Br. at 22–31. The Johnson Intervenors therefore maintain that the Legislature's remedy, or any other remedy that fixes the contiguity issue—and does nothing more—is the proper remedy and the only one consistent with the proper role of the judiciary: to remedy the constitutional violation before it and nothing more. *See* Johnson Intervenors' Opening Br. at 28–36 and Johnson Intervenors' Resp. Br. at 26.

B. The Danger in Exceeding the Constitutional Remedy

We further urge that the simple fix proposed by the Legislature be accepted for separation of powers reasons. The argument that the current maps are unfair is predicated on an assertion that maps approved by the Legislature and Governor in 2011 are “biased” and that this bias persists in the maps approved by this Court in 2022 because of its “least changes” approach. It is, in effect, either an attempt to relitigate the issue that failed in *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012) and *Gill v. Whitford*, 138 S. Ct. 1916 (2018), or an effort to urge this Court to “fix” the policy choices made by the political branches to the extent they are still present in the current maps. But a court may not intervene in this way without a legal justification to do so.

To go beyond what is necessary to fix the constitutional violation that justifies judicial intervention would necessarily involve this Court in extralegal decision-making. No court has held that the Wisconsin Constitution precludes partisan gerrymandering and this Court has declined to consider that question. Further, if such a prohibition exists, this Court has decided that it will not consider whether or not the current maps constitute such a gerrymander. In effect, Petitioners ask this Court

to assume that the existing maps are impermissibly biased or to infer that this is so based on projected results. But to conclude that the maps are a gerrymander that would somehow “taint” this Court should they be relied upon in any way would require much more work than the truncated process which this Court has ordered.

As the United States Supreme Court observed in *Rucho v. Common Cause*, “judicial action must be governed by *standard*, by *rule*,’ and must be ‘principled, rational, and based upon reasoned distinctions’ found in the Constitution or laws.” 139 S. Ct. 2484, 2507 (2019) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278–279 (2004) (plurality op.) (emphasis in original)). Over fifty years and multiple sets of justices, a majority of that Court was unable to agree on such a standard. Even were this Court to conclude it can do what the United States Supreme Court could not, the various tests for partisan fairness that were proposed and rejected focused on complex factual questions of partisan intent, the extent of burden on opposing voters, the degree to which some challenged decision caused that burden, etc. *See Rucho*, 139 S. Ct. at 2502–06. It would involve complicated statistical questions about how these matters are to be measured and their impact assessed, as well as inquiries into legislative history and the justification (or lack of justification) for redistricting choices. As was the case with those lower courts who chose to hear such claims, litigating them would require complete briefing, discovery, and an evidentiary hearing. *See Johnson Intervenors’ Opening Br.* at 35–37; *Johnson Intervenors’ Resp. Br.* at 31–33.

With respect, the Johnson Intervenors do not believe that any of these problems can be avoided by the argument that courts must consider partisan fairness to ensure their political neutrality. The cases cited in its order of December 22, 2023, do not suggest otherwise. *Jensen v. Wis. Elections Bd.*, 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537, declined to take jurisdiction of a malapportionment claim, and *Prosser v.*

Elections Bd., 793 F. Supp. 859 (W.D. Wis. 1992) involved a rather blatant attempt to interfere with Democratic political leadership by pairing incumbents. That's not what's happening here. Petitioners are asking the Court to assess partisan fairness by the evaluation of projected partisan results. The *Prosser* court expressly rejected an invitation to assess the fairness of the maps by evaluating projected partisan impact. *See* 793 F. Supp. 859, 867–68. Likewise, *Baumgart* declined to evaluate maps by partisan performance and rejected the inferences from performance that the petitioner parties advance here. *See Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471 at *4–7 (E.D. Wis. May 30, 2002).

Moreover, there is no way for this Court to decide how these projected results should be assessed. As we shall see, whether or not the Legislature reflects statewide partisan results tells us nothing. The fact that it is possible to get closer to proportionality is meaningless because the Constitution does not require it and rigging the maps to get nearer to proportionality is no less a gerrymander than gaming them to get further from it. While social scientists may argue for or against certain measures, that does not make any of them a legal standard that imposes obligations on the Legislature or constitutes a warrant for this Court to do something other than fix a simple constitutional violation. Because no legal principle compels it, choosing such a standard is itself an extralegal political judgment that would impermissibly force this Court to decide what partisan outcomes are “fair.” *See Rucho*, 139 S. Ct. at 2499–500. This Court would have to decide just what a gerrymander is and doing so would “let [Petitioners] get in the back door what [the Court] didn't allow in the front door, that is, arguments regarding partisan gerrymandering”—precisely what Justice Ann Walsh Bradley stated she

“[doesn’t] want” to have happen. *See* Justice A. W. Bradley, Oral Argument at 46:30, *Clarke v. WEC*, 2023 WI 79 (November 21, 2023).¹

Nevertheless, should this Court reject the Legislature’s proposed remedy, the Johnson Intervenors are proposing a map that they urge this Court to accept as an alternative remedial proposal. As explained below, the Johnson Intervenors’ map performs extremely well on all of the traditional, constitutionally-required redistricting criteria, and was created without regard to partisan impact. Because this Court has stated that it will consider partisan results, we will discuss our map’s projected partisan outcome below. On this measure, the map reflects Wisconsin’s political geography and is consistent with what one would expect from the majority of randomly generated maps. If this Court rejects the Legislature’s proposed map, the Johnson Intervenors’ map should be selected.

II. If This Court Rejects the Simple Remedy, It Should Adopt a Map That Meets Traditional Redistricting Criteria and Tracks Wisconsin’s Natural Political Geography as Much as Possible.

The Johnson Intervenors’ map was generated by focusing, first and foremost, on the redistricting criteria actually contained in the Wisconsin Constitution: population equality, minimizing political subdivision splits, contiguity, and compactness. The Johnson Intervenors’ proposed assembly map is available [here](#),² and their proposed senate map is available [here](#).³

¹ Available on C-SPAN at the following link: <https://www.c-span.org/video/?532026-1/wisconsin-supreme-court-hears-case-election-maps>

² Link to Johnson Intervenors’ proposed assembly map: <https://davesredistricting.org/join/55a849c8-0687-4b89-ab78-b6b3c4e8097b>

³ Link to Johnson Intervenors’ proposed senate map: <https://davesredistricting.org/join/26aa9638-8740-4373-8059-a599d48ff2ae>

Given that this Court has taken a strict text-based approach to interpreting the Wisconsin constitutional provisions in Article IV, these factors were prioritized because they are the only factors set forth in the Wisconsin Constitution. The Johnson Intervenors prioritized them as follows. First, they set three hard requirements: contiguity, as this Court defined it; keeping total population deviation under 1%; and achieving zero town splits, if possible. From there, the Johnson Intervenors attempted to keep as many counties whole as possible. After that, they attempted to minimize city and village splits and maximize compactness, balancing the two against each other. The Johnson Intervenors submit that this prioritization tracks the neutral redistricting criteria in the order that they appear in Article IV, Sections 3, 4, and 5, with population equality and contiguity taking first priority, followed by minimizing political subdivision splits, with county and town splits prioritized over city and village splits (ward splits are discussed in more detail below), and then making districts as compact as practicable given the other requirements.

A. Population Equality

In its December 22, 2023, decision, this Court noted that “[w]hen it comes to population equality, courts are held to a higher standard than state legislatures as [they] have a ‘judicial duty to ‘achieve the goal of population equality with little more than de minimis variation.’” *Clarke*, 2023 WI 79, ¶ 64 (citations omitted). In determining what that standard is, this Court noted that in *Johnson II*, 2022 WI 14, ¶ 36, 400 Wis. 2d 626, 971 N.W.2d 402, this Court approved the maps submitted by Governor Evers which had population deviations of 1.20% for senate districts and 1.88% for assembly districts. *Id.* This Court also positively cited *Prosser v. Elections Bd.*, 793 F. Supp. 859, 866, 870 (W.D. Wis. 1992) for the proposition that “[b]elow 1 percent, there are no legally or politically relevant degrees of perfection.” *Id.*

The map proposed by the Johnson Intervenor falls well within the standard set by this Court. It has a population deviation of .98% for assembly districts and .65% for senate districts. Expert Report of Dr. Thomas Brunell at 1, 3, 13.

B. Political Subdivision Splits

When evaluating maps for political subdivision splits, this Court should prioritize minimizing county and town splits first, and city and village splits second. Wards splits should be irrelevant, as explained further below, but to the extent this Court considers them, it should consider them last in importance.

As the Court is well aware, article IV, § 4 of Wisconsin's Constitution requires assembly districts to "be bounded by county, precinct, town or ward lines," but does not mention city or village lines. Accordingly, this Court has long interpreted that section as prioritizing the preservation of counties and towns over cities and villages. In *State ex rel. Lamb v. Cunningham*, for example, this Court emphasized that counties, towns, and wards are "the primary factors of each assembly district," but because there is "no other reference to cities," "it is manifest that the framers of the constitution, even at that early day, contemplated that the necessity was likely to arise for dividing up cities." 83 Wis. 90, 53 N.W. 35, 57 (1892). As Justice Lyons put it in an earlier decision that same year, "the inference is irresistible that ... the lines of cities and villages are not specified ... because it would be necessary to disregard them, and dismember such municipalities, in order to prevent the dismemberment of counties and towns." *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 742 (1892) (Lyon, C. J., concurring).

This Court's December 22 decision likewise emphasizes that the Court will consider "the extent to which assembly districts split counties,

towns, and wards (particularly towns and wards as the smaller political subdivisions),” over “municipal splits,” i.e., cities and villages. *Compare Clarke*, 2023 WI 79, ¶66, *with id.* ¶68 and n.29.

As for wards, although article IV, § 4’s bounded by clause mentions wards, this Court should not consider ward splits in evaluating proposed maps for two reasons (or at the very least it should deprioritize them compared to other splits). First, any ward splits in proposed remedial maps will be eliminated by local redistricting after this Court adopts a new map. It used to be that, after a census, municipalities would redraw ward lines *before* the assembly and senate maps were redrawn, such that the Legislature (and/or courts) would rely on those updated ward lines when drawing maps. In 2011, however, the Legislature changed the law to allow municipalities to draw their ward lines *after* an assembly or senate map is adopted, so that the new ward lines will align with that map. 2011 Wis. Act 39 § 3 (amending Wis. Stat. § 5.15(1)(c)); *see also* Wis. Stat. §§ 5.15(2)(b), (4)(c). Indeed, that is exactly what occurred in the *Johnson* litigation. After this Court adopted the current map in April 2022, municipalities redrew their ward lines to align with that map.⁴

⁴ *See, e.g., Redistricting Update*, Wisconsin Elections Commission (April 18, 2022), <https://elections.wi.gov/sites/default/files/legacy/2022-04/Redistricting%2520Update.pdf> (explaining that “localities will also be completing their statutorily required obligation to amend ward boundaries that do not align with the selected state legislative maps. ... WEC will be in contact with municipalities and counties who need to amend their wards and provide them with detailed instructions on what needs to be done.”). The new ward lines adopted after this Court’s decision in *Johnson III* are available on the LTSB’s website. *See* 2022 Wisconsin Local Redistricting Municipal Wards with *Johnson v. WEC Districts*, Legislative Technology Services Bureau, *available at* <https://gis-ltsb.hub.arcgis.com/pages/download-data>. For two examples of local ordinances amending wards after *Johnson III*, 2022 WI 19, 401 Wis. 2d. 198, 972 N.W.2d 559, *see, e.g.,* Madison Common Council Ordinance 22-40 (May 24, 2022), *available at* https://library.municode.com/wi/madison/ordinances/code_of_ordinances?nodeId=1158440; Oshkosh City Council Resolution 22-187 (May 10, 2022), *available at* <https://www.ci.oshkosh.wi.us/WebLink/DocView.aspx?id=1093378>.

Thus, ward splits in proposed maps will be eliminated by local redistricting after this Court adopts a new map.

Second, and perhaps more importantly, the ward boundaries that the parties have all stipulated to using—from August 2021, *see* January 2 Joint Stipulation—do not even represent the current ward boundaries as they exist today, given that, as just explained, municipalities redrew their ward lines in the spring of 2022 after this Court’s decision in *Johnson III*, *supra* n. 4. Thus, the ward splits in proposed maps may not reflect actual ward splits, and in any event, they will be eliminated by local redistricting after this Court selects a map.

1. Assembly Map

With that in mind, here is an overview of the total splits in the Johnson Intervenors’ proposed Assembly map. A more detailed breakdown of the splits can be found in the expert report of Dr. Thomas Brunell that accompanies the Johnson Intervenors’ submission:

Split Type	Johnson Map	Current Map	Percent Improvement ⁵
Counties	35 (or 37)	53	33.96%
Towns	0 (or 1)	15	100%
Cities & Villages	34	36	5.55%
All Municipalities (Towns, Cities, Villages)	34 (or 35)	51	33.33%
Wards	13	N/A	N/A

a. Counties. The Johnson Intervenors’ map splits a total of only 37 counties (compared to 53 in the current map). Brunell Report at 1, 5–6. Moreover, two of the county splits in the Johnson Intervenors’ proposed map should not count as county splits. Iowa and Lafayette

⁵ The percent improvement is calculated according to the fewer number of splits listed in the chart because, as explained herein, it is the fewer number of splits that should actually be counted.

counties are kept whole except for small portions of the five municipalities that cross the border between those two counties and Grant County (Muscoda Village, Montfort, Livingston, Cuba City, and Hazel Green Village). To avoid creating five additional municipal splits, the Johnson Intervenors put those five municipalities, in their entirety, into Assembly District 49 (consisting largely of Grant County). For each of those municipalities, the majority of the population is in Grant County, with only a small section crossing into Iowa and Lafayette counties. Thus, this Court should consider the Johnson Intervenors' proposed map as having only 35 county splits.

b. Towns. One of the primary goals of the Johnson Intervenors' proposed map was to split zero towns, given that the Wisconsin Constitution prioritizes avoiding town splits. The proposed map splits only one town—the Town of Madison—which, as of October 31, 2022, no longer exists.⁶ Brunell Report at 1, 7. Thus, this Court should consider the Johnson Intervenors' proposed map as splitting zero towns. The current map, by comparison, splits 15 towns.

c. Cities & Villages. The Johnson Intervenors' proposed map splits only 34 cities and villages, compared to 36 in the current map. Brunell Report at 1, 6–7. There are two additional municipalities (the city of Kaukauna and the village of Ontario) that show up in a splits report, but should not count as a split. Each of these villages contains a single census block in a different county, with zero people in it.⁷ The Johnson Intervenors' proposed map left those blocks with their

⁶ See Allison Garfield, *A 'Midwest goodbye': The town of Madison merges with Madison and Fitchburg*, The Cap Times (Oct. 19, 2022), https://captimes.com/news/government/a-midwest-goodbye-the-town-of-madison-merges-with-madison-and-fitchburg/article_0bb4f7c7-daec-5181-aa83-1fef281a0eae.html.

⁷ Block id 550150203064005 for Kaukauna, and 550819508004054 for Ontario.

respective counties to avoid an additional county split. Given that no people live in those census blocks, these should not count as splits.

d. Wards. The Johnson Intervenors' proposed map splits a total of 13 wards. Brunell Report at 1, 7–8. As explained above, ward splits should be irrelevant, or considered last in importance.

A ward splits report will show an additional 21 ward splits. Brunell Report at 8. Each of these, however, involves census blocks that the parties have stipulated have an erroneous ward assignment in the data file. The parties have also agreed that these blocks will not count for purposes of ward splits. *See* January 2 Joint Stipulation.

2. Senate Map

Below is an overview of the total splits in the Johnson Intervenors' proposed Senate map. Again, a more detailed breakdown can be found the expert report of Dr. Thomas Brunell:

Split Type	Johnson Map	Current Map	Percent Improvement ⁸
Counties	29	42	30.95%
Towns	0 (or 1)	7	100%
Cities & Villages	22	23	4.35%
All Municipalities (Towns, Cities, Villages)	22 (or 23)	30	26.66%
Wards	9	N/A	N/A

a. Counties. The Johnson Intervenors' map splits a total of only 29 counties (compared to 42 in the current map). Brunell Report at 1, 14. Senate District 17 in the proposed map combines the assembly districts

⁸ Again, the percent improvement shown above is calculated according to the fewer number of splits listed in the chart because, as explained herein, it is the fewer number of splits that should actually be counted.

for Grant, Iowa, and Lafayette counties, so the additional reduction noted above for the Assembly map does not apply for the Senate map.

b. Towns. As with the Assembly map, the proposed Senate map splits only the Town of Madison, which no longer exists, compared to 7 town splits in the current map. Brunell Report at 1, 15. Thus, this Court should consider the Johnson Intervenors' proposed map as splitting zero towns.

c. Cities & Villages. The Johnson Intervenors' proposed map splits 22 cities and villages, compared to 23 in the current map. Brunell Report at 1, 14–15. The Kaukauna and Ontario issue noted above applies to the Senate map in the same way as in the Assembly map.

d. Wards. The Johnson Intervenors' proposed map splits a total of 9 wards. Brunell Report at 1, 15. As explained above, ward splits should be irrelevant, or considered last in importance.

As with the Assembly map, a ward splits report will show an additional 12 ward splits. *Id.* at 15–16. Each of these, however, involves census blocks that the parties have stipulated have an erroneous ward assignment in the data file. The parties have also agreed that these blocks will not count for purposes of ward splits. *See* January 2 Joint Stipulation.

C. Contiguity

The Johnson Intervenors' proposed map contains 99 single-member Assembly Districts and 33 single-member Senate Districts. *See* Wis. Const. art. IV, §§ 4, 5 (requiring single-member Senate and Assembly Districts). The Johnson Intervenors' 99 Assembly and 33 Senate Districts are literally contiguous within this Court's interpretation of Article IV, Sections 4 and 5 in its December 22, 2023, decision. *See Clarke*, 2023 WI 79, ¶¶ 10–35. The boundaries of each

district are physically connected to their respective surrounding districts, and no districts contain municipal islands or any other detached territory, except for Assembly Districts 1, 21, 36, 56, 73, 74, 89, and 90, and Senate Districts 1, 7, 12, 19, 25, and 30, which are constitutional by reason of “water contiguity.” *See Id.* at ¶ 27; *See also* Brunell Report at 8, 16. The Johnson Intervenors’ map is therefore contiguous.

D. Compactness

Per the Brunell Report at 1, 8 and 16, the map submitted by the Johnson Intervenors have compactness scores as follows:

<u>Assembly Map Compactness Scores</u>				
<u>Johnson Map</u>		<u>Current Map</u>		<u>Percent Change</u>
Reock Scale	0.4128	Reock Scale	0.3582	15.24% improvement
Polsby Scale	0.3472	Polsby Scale	0.2450	41.71% improvement

<u>Senate Map Compactness Scores</u>				
<u>Johnson Map</u>		<u>Current Map</u>		<u>Percent Change</u>
Reock Scale	0.3877	Reock Scale	0.3684	5.24% improvement
Polsby Scale	0.2793	Polsby Scale	0.2268	23.15% improvement

For evaluating compactness in this context, higher numbers are better. As shown above, the Johnson Intervenors’ maps show marked improvement over existing maps. Thus, the Johnson Intervenors’ proposed maps improve the compactness scores by 15% and 5% on the Reock scale and by 42% and 23% on the Polsby scale.

E. Federal Law Compliance

The map proposed by the Johnson Intervenors creates no federal law compliance issues. Race was not considered in creating this map. See *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 401 (2022) (explaining that race-conscious districting is permitted by the Equal Protection Clause only if strict scrutiny is satisfied). To the extent that the current number of majority-minority districts are required by federal law, the Johnson Intervenors' map satisfies such a requirement.

After the map was created, the Johnson Intervenors determined the number of majority-minority districts. The Johnson Intervenors Proposed Map has 8 assembly districts⁹ and 2 senate districts which are majority-minority. Brunell Report at 11, 17. This is the same number of majority-minority districts as in the existing maps. All of these districts are generally in the Milwaukee area. The districts and the populations by race are as follows:

<u>Assembly Majority-Minority Districts:</u>		
Majority Black		
<u>District</u>	<u>Johnson Map</u> Percent Black Voting Age Population	<u>Current Map</u> Percent Black Voting Age Population
AD 10	47.19%	47.19%
AD 11	73.28%	73.28%
AD 12	59.36%	57.01%
AD 16	54.13%	54.13%
AD 17	58.51%	61.81%
AD 18	53.21%	52.57%

⁹ Assembly District 10 is majority Black by population but the Black voting age population is 47.19% both in the current map and the Johnson Intervenors' proposed map.

<u>Assembly Majority-Minority Districts:</u>		
Majority Hispanic		
District	<u>Johnson Map</u> Percent Hispanic Voting Age Population	<u>Current Map</u> Percent Hispanic Voting Age Population
AD 8	65.9%	65.9%
AD 9	52.97%	52.97%

<u>Senate Majority-Minority Districts:</u>		
Majority Black		
<u>District</u>	<u>Johnson Map</u> Percent Black Voting Age Population	<u>Current Map</u> Percent Black Voting Age Population
SD 4	59.54%	58.76%
SD 6	55.27%	56.13%

These Milwaukee-area districts have been largely untouched by the Johnson Intervenors because the districts in that area caused no contiguity problems. However, some very minor changes were made to eliminate municipal splits for Brown Deer and Wauwatosa. But, as seen from the charts above, those changes create no material difference in the racial composition of these districts. If this Court desires that no changes be made to these districts, even to minimize splits, that minor adjustment can easily be made and that would not cause any material change to anything else with respect to the Johnson Intervenors' map.

As the Petitioners themselves pointed out in their initial brief filed in this case, "no party in this litigation alleges that any existing district violates the federal Equal Protection Clause or Section 2 of the VRA." Pet'rs. Opening Br. at 42. The Legislature agreed in its initial brief. *See*

Legislature's Opening Br. at 57–58, stating that “there is no basis for exposing the region to further allegations of vote dilution.” Thus, leaving those districts largely “as is,” as the Johnson Intervenors have done, creates no federal law compliance issues.

F. Communities of Interest

“Communities of interest” have been discussed as an appropriate factor for courts to consider in redistricting disputes, though it appears nowhere in the Wisconsin Constitution and is not legally required. *Johnson I*, 2021 WI 87, ¶ 48, 399 Wis. 2d 623, 967 N.W.2d 469 (majority op.) (noting that compliance with constitutional redistricting criteria “tends to preserve communities of interest”); *Johnson I*, 2021 WI 87, ¶ 83 (Hagedorn, J., concurring) (“[Communities of interest] is not a legal requirement, but it may nonetheless be an appropriate, useful, and neutral factor to weigh”); *Abrams v. Johnson*, 521 U.S. 74, 99–100 (1997) (concluding that a federal district court properly considered “communities of interest” when implementing a new redistricting plan).

While “communities of interest” may be used to justify variations in constitutionally-required criteria, such as a higher population deviation, for example, it is not an independent factor capable of superseding constitutionally-required redistricting criteria. *See Abrams*, 521 U.S. at 98–100. That being said, the Johnson Intervenors’ map complies with this factor by considering and preserving communities of interest.

The Johnson Intervenors’ proposal keeps “communities of interest” together by minimizing community splits as much as possible. *See Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 636 (E.D. Wis. 1982) (“Closely related to the goal of maintaining the integrity of county and municipal lines is the objective of preserving communities of interest in redistricting.”). This was achieved by first minimizing county

and town splits and then minimizing city and village splits. The result is a map that reduces the number of county and municipal splits by about thirty percent when compared to the current map.

As identified *supra*, Part B, and reiterated here, the Johnson Intervenors' proposed state assembly map has 34% fewer county splits and 33.3% fewer total municipal splits than the current assembly map, and the Johnson Intervenors' proposed senate map has 31% fewer county splits and 27% fewer total municipal splits than the current senate map—significantly outperforming the current map on this metric.

And, as explained *supra*, Part E, the Johnson Intervenors did not make any significant changes to the Milwaukee area districts which contain majority-Black or majority-Hispanic voters, thus preserving the communities of interest within those districts. *Wisconsin State AFL-CIO*, 543 F. Supp. at 636 (“One important aspect of this [communities of interest] concern is avoiding any dilution in the voting strength of racial and ethnic minorities”).

The Johnson Intervenors' map therefore preserves communities of interest.

G. Political Neutrality

1. Proportional Representation Is Not a Permissible Redistricting Criteria.

As the United States Supreme Court has recognized, “[p]artisan gerrymandering claims invariably sound in a desire for proportional representation.” *Rucho*, 139 S. Ct. at 2499. But the idea that a legislature’s partisan composition should match some measure of statewide partisan support “is based on a ‘norm that does not exist’ in our electoral system—‘statewide elections for representatives along party lines.’” *Id.* (quoting *Davis v. Bandemer*, 478 U.S. 109, 159 (1983))

(opinion of O'Connor, J.)). As Justice O'Connor put it, the Supreme Court has “clearly foreclose[d] any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.” *Davis*, 478 U.S. at 130 (plurality op.).

There is no reason to reach a different conclusion in Wisconsin because assembly representatives and state senators are chosen from single districts that are geographically defined. Wis. Const. art. IV, §§ 4, 5. In such a system, it is quite possible—even likely—that the aggregate results of the various single-district elections will not match the statewide vote for partisan candidates. In fact, the latter would happen only when the voters of each political party are geographically distributed in a way that allows each to win a share of seats matching its percentage of statewide votes. When, as in Wisconsin, the voters of one party in an evenly divided state are more heavily concentrated than those of the other, even neutrally drawn districts will give the latter a natural advantage over the former.

Given that our constitution requires single-member geographic districts, the fact that the “natural political geography” of Wisconsin, *Rucho*, 139 S. Ct. at 2500 (citation omitted), can—or is likely to—produce a legislature with a partisan makeup that does not reflect statewide partisan results compels the same conclusion that the United States Supreme Court has previously reached. Proportional representation is not a “norm” in our system. It is certainly not required and is not even something to be strived for. The framers of our Constitution chose geographic districts. In doing so, they necessarily allowed for a legislature whose partisan composition would not match aggregated partisan outcomes. While districts must be equal in population, there is no requirement that they must produce a legislature that is proportional

to the statewide vote for partisan candidates. To the contrary, our Constitution permits such a result and we must respect that choice.

A debate regarding the political philosophies underlying representative democracy is beyond the scope of this case. Our framers prioritized and decided on the representation of geographic communities. This is certainly not the only way a democracy may be organized but it is the way that ours is organized. It is not for this Court to change it.

2. Wisconsin’s Political Geography Tilts Toward Republicans.

The various methods of measuring fairness advanced by the Petitioners—whether the “efficiency gap,” mean-median difference, or otherwise—reduce to measures of the differing geographic distribution of each party’s voters. As noted in our prior briefing, the federal courts in redistricting litigation last cycle found—after extensive fact-finding, by the way—that Wisconsin’s “political geography ... affords the Republican Party a natural, but modest, advantage in the districting process,” particularly due to the “high concentration of Democratic voters in urban centers like Milwaukee and Madison.” *Whitford v. Gill*, 218 F. Supp. 3d 837, 921 (W.D. Wis. 2016). This is not a new phenomenon. Over twenty years ago, in *Baumgart v. Wendelberger*, the three-judge panel noted:

The Baumgart intervenors’ method for analyzing political fairness was more sophisticated than the base-race method and is correct in the results found, namely, that even if the Democrats win a bare majority of votes, they will take less than 50% of the total number of seats in the Assembly. The problem with using this finding as the basis for a plan is that it does not take into account the difference between popular and legislative majorities, and the fact that, practically,

there is no way to draw plans which use the traditional criteria and completely avoid this result.

Baumgart, 2002 WL 34127471 at *6. The Court went on to observe that because “Wisconsin Democrats tend to be found in high concentrations in certain areas of the state, and the only way to assure that the number of seats in the Assembly corresponds roughly to the percentage of votes cast would be at-large election of the entire Assembly...” *Id.* See also *Johnson I*, 2021 WI 87, ¶48.

Even severe critics of the current maps concede that Wisconsin’s natural political geography will favor Republicans in state legislative races because of the clustering of democrats in larger cities. See e.g., John Johnson, *Why do Republicans overperform in the Wisconsin State Assembly? Partisan Gerrymandering vs. Political Geography*, Marquette University Law School Faculty Blog (February 11, 2021) (“A large and growing number of Democrats in Wisconsin are self-packed into urban areas. Wisconsin law mandates that legislative maps avoid crossing county and municipal boundaries where practical. Federal law requires that a certain number of majority Black and majority Latino districts be drawn as well. All of this means that virtually any process of redistricting will create a set of heavily blue urban seats “packed” with Democrats...”).¹⁰

“Natural political geography” can be measured. One metric to determine the effect of the natural political geography of a state was

¹⁰ John Johnson, *Why do Republicans overperform in the Wisconsin State Assembly? Partisan Gerrymandering vs. Political Geography*, Marquette University Law School Faculty Blog (February 11, 2021), available at <https://law.marquette.edu/facultyblog/2021/02/why-do-republicans-overperform-in-the-wisconsin-state-assembly-partisan-gerrymandering-vs-political-geography/>

developed by Professor Jon Eguia at Michigan State University.¹¹ The metric is reported in Dave’s Redistricting as “geographic seats”¹² and “geographic bias”¹³ (and as used there, “bias” means a numerical deviation from a baseline caused by geography).

The metric works as follows: The metric treats counties as if they were districts with a fractional number of seats proportional to their population, and then assigns those seats to whichever party won that county.¹⁴ This is particularly relevant in Wisconsin because the Wisconsin Constitution prioritizes keeping counties together (with the exception that counties may be split to achieve population equality).

As explained in Dr. Brunell’s report, using a composite of six statewide elections between 2016 and 2020, the metric estimates that Democrats would win 42.76 Assembly seats and 14.25 Senate seats, based on the natural political geography of Wisconsin. Brunell Report at 2, 12, 18. This result makes perfect sense: if counties are kept together to the maximum extent possible—consistent with equal population concerns—Democrats will win less than half of the seats because Democratic voters are clustered in certain counties while Republican voters are more disbursed.

All four of the Petitioner Parties quote *Prosser v. Elections Bd.*, 793 F. Supp. 859, 867 (W.D. Wis. 1992), for the proposition that this Court should not select a map that allows “one party [to] do better than it would

¹¹ See generally, Jon X. Eguia, *Artificial Partisan Advantage in Redistricting* (September 20, 2020), available at <https://dx.doi.org/10.2139/ssrn.3335967>

¹² The number of expected legislative seats based on the natural political geography.

¹³ The percentage of the total seats accounted for by the political geography of the state.

¹⁴ See *supra* n.11 for a more detailed description of this method.

do under a plan drawn up by persons having no political agenda.” Pet’rs. Opening Br. at 39; Atkinson Intervenors’ Opening Br. at 39; Governor’s Opening Br. at 28; Democratic Senators’ Opening Br. at 26. Yet that is exactly what this Court would be doing if it ignored Wisconsin’s political geography and required any remedial map to allow each party to equally translate their share of the statewide vote into legislative seats, as the Governor and Democratic Senators urge.

3. The Johnson Intervenors’ Maps Reflect Wisconsin’s Political Geography.

The Johnson Intervenors did not take partisan breakdown into account when creating their map. Instead, the Johnson Intervenors’ proposed map was prepared to best comply with Wisconsin’s constitutional redistricting criteria discussed *supra*, Parts A–D.

Because this Court has stated that it will consider partisan results (over the objection of the Johnson Intervenors), after creating their map, the Johnson Intervenors determined the partisan result of their map. The projected partisan results of the Johnson Intervenors’ proposed map are consistent with Wisconsin’s natural political geography: the high concentration of Democrats in cities results in likely Republican majorities, but smaller majorities than those expected under the current map.

The Johnson Intervenors are reporting the partisan results of their map using the 2016–2020 composite election data available in the Dave’s Redistricting App.¹⁵ That data is a compilation of the geographic two-party voting behavior in six recent elections: the 2016 Presidential, 2016

¹⁵ The 2016-2020 composite election data can be located by accessing the link to either of the Johnson Intervenors’ proposed maps, navigating to and selecting the “settings” symbol, selecting the “data selector” the drop-down arrow, and clicking into the box next to the term “Election” under the “Primary Datasets” heading.

U.S. Senate, 2018 U.S. Senate, 2018 Governor, 2018 Attorney General, and 2020 Presidential. Based on the geographic voting patterns seen in those elections, the partisan results of the Johnson Intervenors maps are as follows:

<u>Johnson Map Partisan Results</u> ¹⁶			
<u>Projected Assembly Seats</u>		<u>Projected Senate Seats</u>	
Democrat	43	Democrat	13
Republican	56	Republican	20

See Brunell Report at 1–2, 12, 18. This result is very consistent with the results of the metric discussed above, which, as noted, predicts 42.75 Assembly seats and 14.25 Senate seats for Democrats. As expected by a map drawn to adhere as much as possible to Wisconsin’s natural political geography, the Johnson Intervenors’ proposed maps vary only slightly from this metric, and in both directions: they project Democrats with one more seat in the Assembly, and Republicans with one more seat in the Senate than predicted.

As further confirmation, the Johnson Intervenors’ expert, Christopher Blunt, randomly generated 20,000 possible Wisconsin state assembly and 20,000 possible Wisconsin state senate maps that adhere as closely as possible to traditional redistricting criteria. Expert Report of Dr. Christopher Blunt at 1, 6, 9–10. His simulations did not take race, partisanship, or the existing district boundaries into account. Blunt Report at 1, 4. The simulations allowed him to compare the likely outcomes from the Johnson Intervenor’s proposed map to the outcomes which would be likely to emerge from a neutral computer-driven map-drawing process that followed traditional criteria.

¹⁶ The so-called “efficiency gap” of the Johnson Intervenors’ assembly map is 7.90%, and 11.46% for their senate map. Brunell Report at 11, 17. The Johnson Intervenors do not agree that the “efficiency gap” is a relevant measure of anything or that it can be used in any legal standard.

Dr. Blunt's report shows that the simulated plans would be expected to yield, on average, between 41 and 42 Democratic assembly seats. *Id.* at 1, 6. The Johnson Intervenors' map has 43 Democratic-leaning seats and includes more competitive seats than most of the simulated plans, making it slightly more favorable to Democrats than the natural political geography would predict. *Id.* at 1–2, 6–8. With respect to the senate, Dr. Blunt's report shows that the simulated plans would be expected to yield, on average, around 14 Democratic-leaning senate seats, and the Johnson Intervenors' map anticipates 13 Democratic senate seats, making it slightly more favorable to Republicans. *Id.* at 1–2, 9–10. However, the Johnson Intervenors' senate map is above average in competitiveness, containing 10 competitive districts as opposed to the simulated average of 8.8 competitive districts. *Id.* at 10. As the Blunt report notes, “[o]nly 33 percent of the simulated plans have at least ten competitive districts,” placing the Johnson Intervenors' map in the top two-thirds for competitiveness according to the number of competitive districts it contains. *Id.*

While the practical result is that Republicans are projected to win more legislative seats than Democrats under the Johnson Intervenors' map, that result is based on the political geography of Wisconsin. The political geography that causes this result was noted by the district court in *Whitford v. Gill*, 218 F. Supp. 3d 837, 919 (W.D. Wis. 2016), *vacated and remanded on other grounds*, 138 S. Ct. 1916 (2018) (“Having carefully examined the evidence bearing on this issue, we find that substantial portions of the record indicate, at least circumstantially, that Wisconsin's political geography affords Republicans a modest natural advantage in districting. Indeed, the plaintiffs conceded as much in their closing argument...”).

By prioritizing counties, the Wisconsin Constitution creates a political geography that currently provides Republicans with an advantage in single member districts. That, of course, could easily

change if Wisconsin's political demographics change. The important point is that the constitutionally-imposed natural tilt in favor of one party (due to the priority the Wisconsin Constitution places on keeping counties together) is not a basis for failing to enforce the constitutional requirement.

The Republican advantage in the Johnson Intervenors' map is based on the natural political geography of Wisconsin and not any attempt by the Johnson Intervenors to create such an advantage. The Johnson Intervenors prepared their proposed map to maximize the scores on the redistricting criteria set forth in the Wisconsin Constitution and without regard to political results, and this Court ought to judge all of the maps on that same, neutral basis.

CONCLUSION

This Court should adopt the simple fix proposed by the Legislature, or, if it rejects that obvious remedy, adopt a map that prioritizes the redistricting criteria actually set forth in the Wisconsin Constitution and tracks Wisconsin's natural political geography as much as possible.

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Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 7,203 words.

Dated: January 12, 2024.

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