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IN THE SUPREME COURT OF WISCONSIN

No. 2023AP1399

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, CARRIE RIEPL, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS 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 AMICI CURIAE WISCONSIN JUSTICE INITIATIVE, INC. & WISCONSIN FAIR MAPS COALITION RE: SUBMITTED MAPS

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INTRODUCTION

Amici provide public education about redistricting, elections, and democracy. They advocate for districting maps that address the needs, interests, and desires of Wisconsinites who seek fair representation.

Wisconsin Justice Initiative, Inc. (WJI) is a § 501(c)(3) nonprofit organization that educates the public about state government, Wisconsin's justice system, and voting; and advocates for progressive changes in government and the justice system to effect more just outcomes, especially for minority and low-income individuals.

Wisconsin Fair Maps Coalition (FMC) is an unincorporated coalition of unincorporated citizen activist groups, including North Shore Fair Maps, SW Fair Maps, Jefferson County Fair Maps, Dane County Fair Maps, Columbia County Fair Maps, Iowa County Fair Maps, Midstate Fair Maps, 8th Congressional District (CD) Fair Maps, 7th CD East Fair Maps, 7th CD West Fair Maps, 4th CD Fair Maps, 3rd CD Fair Maps, Western Wisconsin for Nonpartisan Voting Districts, and Wisconsin Maps Assessment Project (WIMAP). The groups' work is guided by the FMC Lead Team, including Wisconsin Democracy Campaign, League of Women Voters–Wisconsin, Wisconsin Conservation Voters, Common Cause Wisconsin, and others.

FMC member WIMAP is a team of volunteers from across Wisconsin who love maps and math. They have spent the past two years analyzing every statewide redistricting map submitted to this Court and every such map submitted by the

public to the Wisconsin Legislature and People's Maps Commission. In November 2023, WIMAP published *Wisconsin Redistricting 2020-2022*, available at https://drive.google.com/file/d/1v3QBpAOAgQqSoPEkas5OceqheMiFEHrK/view. WIMAP members' biographies are in the report.

On January 12, 2024, parties in this case filed six sets of proposed Wisconsin legislative maps. Immediately thereafter, WIMAP began reviewing those maps and accompanying materials. As WIMAP members assessed the submissions, this became increasingly clear: it is possible to draw Wisconsin Assembly maps that meet recognized population equality standards and other redistricting requirements while also ensuring that assembly districts are bounded by ward lines.

ARGUMENT

I. The Wisconsin Constitution requires consideration of ward boundaries.

On December 22, 2023, this Court declared Wisconsin's then-existing state legislative maps unconstitutional and ordered them redrawn. The Court began with the text of the Wisconsin Constitution, which "sets the ground rules for how Wisconsin Assembly members are elected and how their districts are to be established." *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶11. The Constitution sets out rules for senate elections and districts as well. *Id.*, ¶12.

The Constitution calls for assembly districts "to be bounded by county, precinct, town or ward lines, to be contiguous territory and be in as compact form as practicable." Wis. Const. art. IV, § 4; *Clarke*, 2023 WI 79, ¶11. Assembly district

boundaries affect senate district boundaries. *See* Wis. Const. art. IV, § 5; *Clarke*, 2023 WI 79, ¶12.

In *Clarke*, the Court determined that the maps challenged by the petitioners were not contiguous and thus were unconstitutional, remarking that "[c]ontiguity is binary; territory is either contiguous (touching, in contact) or it is not (separate, detached)." *Clarke*, 2023 WI 79, ¶20.

The Court set forth five principles for its process to adopt remedial legislative maps. The Court listed compliance with population equality requirements first and compliance with Article IV (boundaries along county, town or ward lines; contiguity; and compactness) second. *Id.*, ¶¶64-69.

II. Avoiding ward splits is possible.

As the Court emphasized in *Clarke*, redistricting is grounded in the state constitution. *Id.*, ¶11. But where state constitutional requirements conflict with the United States Constitution or federal law, the state constitution must yield. *Johnson v. Wis. Elections Comm'n*, 2022 WI 19, ¶66, 401 Wis. 2d 198, 972 N.W.2d 559 (*Johnson III*) ("Article IV, Section 4 must be given 'full effect' to the extent it does not conflict with federal law.").

After "one-person, one-vote" became the law of the land, requiring no more than de minimis population deviation among districts, strict compliance with the "bounded by" language seemed an impossible redistricting task. Regarding the "bounded by" provision, this Court in *Clarke* said it "considers the extent to which assembly districts split counties, towns, and wards (particularly towns and wards as

the smaller political subdivisions), *although we no longer interpret the requirement to entirely prohibit any splitting of the enumerated political subdivisions, as we once did*." 2023 WI 79, ¶66 (footnote omitted) (emphasis added). In his dissent, Justice Hagedorn wrote that "absolute compliance with the 'bounded by' clause is impossible given the one-person, one-vote decisions of the United States Supreme Court." *Id.*, ¶296 (Hagedorn, J, dissenting). He added that contiguity and keeping towns and wards together were requirements pitted against each other and might not both be met by proposed maps. *Id.*, ¶297.

Nevertheless, even if avoiding ward splits was thought impossible, minimizing them remained important. This Court has advised caution toward splitting wards:

> We are particularly skeptical of town and ward splits because "the smaller the political subdivision, the easier it may be to preserve its boundaries." In particular, "gratuitously break[ing] up wards," the smallest political unit in the state, makes little sense because they are "the basic unit of Wisconsin state government for voting purposes. You vote by ward." For voters in the same ward to have different ballots is an "inconvenience" to the administration of elections and provides, at most, nominal "gain[s] in population equality[.]".

Johnson III, 2022 WI 19, ¶66 (citations omitted). Prior decisions advised that splitting municipalities or wards should be avoided if possible. *Baumgart v. Wendelberger,* Nos. 01-C-1021, 02-C-366, 2002 WL 34127471, at *3 (E.D. Wis. May 30, 2002) ("[R]espect for the prerogatives of the Wisconsin Constitution dictate[s] that wards and municipalities be kept whole where possible."); *Wis. State*

AFL-CIO v. Elections Bd., 543 F. Supp. 630, 636 (E.D. Wis. 1982) (stating that while splitting municipal boundaries was necessary for one person, one vote purposes, "[w]e believe that municipal splits should be used sparingly and we have tried to do so in our plan.").

WIMAP's analysis of the parties' submitted maps and related data indicates that because of advances in technology it is now possible to create maps that check all of the constitutional boxes. Mapmakers have presented this Court with districts that are contiguous, bounded by ward lines, compact as practicable, and more. Even citizen math and map enthusiasts like the WIMAP members, who lack the experience and technology of the parties and Court's consultants, can see that two of the parties—the Johnson intervenors and the Legislature—presented maps with what can be called "gratuitous" ward splits.

III. WIMAP's ward-split analysis of sample assembly maps.

WIMAP reviewed the parties' six assembly maps using Dave's Redistricting App (DRA).[1] The most notable discovery during that review related to ward splits, which can be divided into three categories:

- *Islands.* Wards that are composed of detached pieces of territories ("islands"). These wards never have the boundary of a district passing

[1] DRA "is a free mapping software program that is easy to use and has been made use of by some other state courts. Posting a map on DRA strongly facilitates public access to any proposed map." Mem. from Consultants re: Tech. Specs. 1, Dec. 26, 2023.

through any of their islands, so although they are split they do not violate the "bounded by" language of the Constitution.

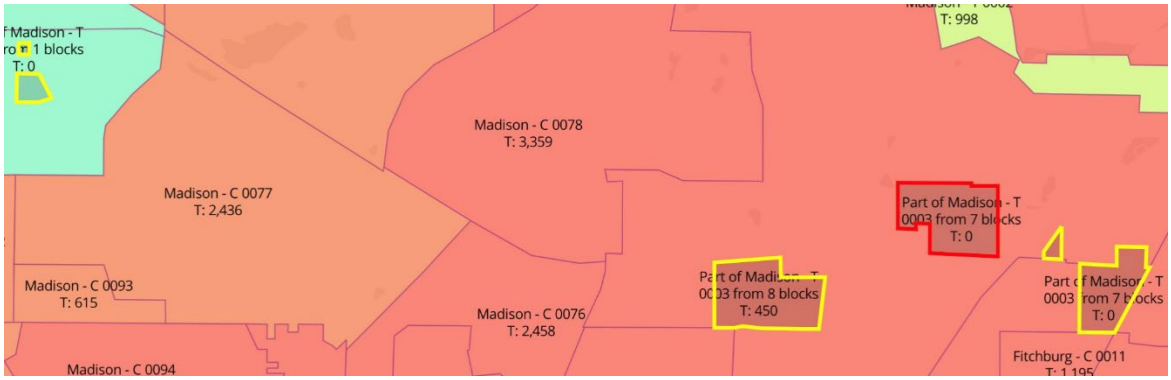
- *Zero population.* Wards that are contiguous but split so one part has zero population. Because they lack population, they have no impact on the map or the people who live in the mapped territory.
- *Contiguous and populated.* Wards that are contiguous and split so that people reside in both of the districts causing the split.

The third type—contiguous, populated splits—is what matters. These splits affect real people.

Three examples illustrate the parties' different approaches to mapmaking:

A. **The Clarke map** has one ward split: a detached piece of land territory (island).[2]

Town of Madison – Ward 3 Six-Island Ward in Clarke Map

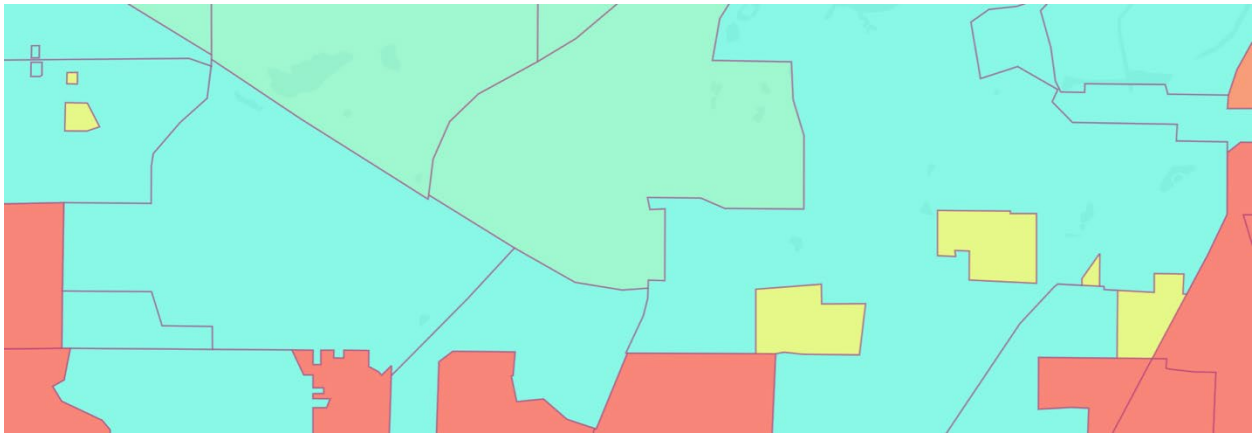


[2] DRA: https://davesredistricting.org/maps#viewmap::ff1639cf-9a8f-463d-9934-3d17454dd7eb.

This screenshot from the Clarke map shows the six islands comprising ward 3 in the Town of Madison. Five of the islands are outlined in yellow and one is outlined in red. The four red-orange islands are part of district 47 and have a combined population of 450. The two small aqua islands have populations of 3 and 0 and are part of district 78. Therefore, ward 3 is technically split. However, both districts 47 and 78 are still bounded by ward lines: the district boundaries do not pass through any island and meet the "bounded by" language of Wisconsin's Constitution.[3]

B. **The Wright map** has no ward splits. The Wright mappers went to great lengths to include all islands of Madison Town Ward 3 in a single district as seen in this DRA screenshot.[4]

Town of Madison – Ward 3 (yellow highlights added) in Wright's District 94 (aqua)

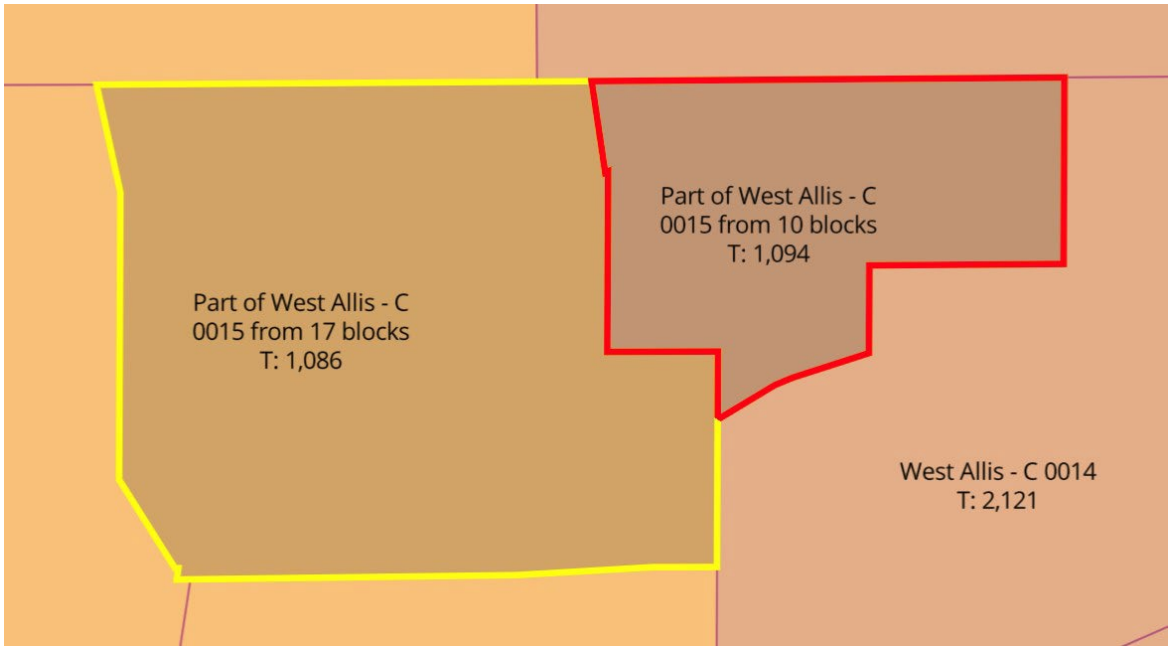


Most likely, this effort to avoid a ward split reduced the Wright map's compactness, which remains comparable to that of the Clarke map.

[3] The Town of Madison no longer exists, and this particular ward is now six separate City of Madison wards following the October 31, 2022 dissolution of the town into the city.
[4] DRA: https://davesredistricting.org/maps#viewmap::e3b13d38-885b-40e9-be1c-26e112149ca2.

C. **The Johnson intervenors' map** splits wards with impunity.[5] Their brief lists 13 split assembly wards. Johnson Br. 14, Jan. 12, 2024. The example below shows how a single contiguous populated ward split benefited the Johnson map's population equality numbers.

West Allis – Ward 15 in Johnson Assembly Map



West Allis ward 15 was split into two parts. The western part, outlined in yellow, is part of district 15 and has a population of 1086. The eastern part, outlined in red, is part of district 7 and has a population of 1094. With the ward split in place, district 15 has a population deviation of 67 and district 7 has a deviation of -208. If one were to unify the ward, following the "bounded by" requirement, the most efficient way would be to add the western part of the ward to district 7 in the east. That would change the population deviation of district 7 to 878 and district 15 to -1019.

[5] DRA: https://davesredistricting.org/maps#viewmap::3f344d5d-daed-45bd-a765-1150f0bf4ca4.

It would also change the population deviation of the Johnson map to 1897, or 3.19%, well over the deviation numbers seen in decades of Wisconsin redistricting. *See Johnson III*, 2022 WI 19, ¶61; Michael Gallagher, et al, Wis. Legis. Reference Bureau, *Redistricting in Wisconsin 2020: The LRB Guidebook* 10 (2020), https://docs.legis.wisconsin.gov/misc/lrb/wisconsin_elections_project/redistricting_wisconsin_2020_1_2.pdf.

WIMAP found more examples of this type of ward split in the Johnson map, spread across the state in both rural and metropolitan areas, affecting many thousands of people. Whether they split the wards to meet the one-person, one-vote requirement or for other reasons, the Johnson mappers chose to ignore the Wisconsin Constitution's "bounded by" requirement. Instead, they said it should be "irrelevant." Johnson Br. 12.

Ward boundaries are highly relevant, and one need only compare the Johnson map to those of Clarke and Wright to see that Johnson's ward splits are unnecessary.

The Legislature's assembly map contains far more ward splits than the Johnson intervenors'—51, according to their brief. Legislature Br. 34, Jan. 12, 2024. It appears neither Johnson nor the Legislature tried to meet the constitutional requirements regarding boundaries—one can see it in their maps. Even if this Court is flexible in allowing ward splits, contiguous populated wards should not be split "gratuitously," as *Johnson III* recognized.

IV. Neither outdated ward lines nor 2011 Wisconsin Act 39 justifies gratuitous ward splits.

In their briefs, the Johnson intervenors and Legislature first downplay ward splits because they are based on historical data. According to the Legislature, its proposed assembly map splits "51 wards between assembly districts … *if one were to assume that the 2021 ward lines are the ward lines today*." Legislature Br. 40. According to the Johnson intervenors, "the ward boundaries that the parties have all stipulated to using—from August 2021—do not even represent the current ward boundaries as they exist today." Johnson Br. 14 (citation omitted).

Although the Johnson intervenors are correct that the joint stipulation called for use of historic data,[6] once they and the Legislature agreed to using that data, they were bound by the results. They agreed to follow certain rules and cannot now ignore them.

Next, the Johnson intervenors and Legislature claim that ward splits can easily be rectified under 2011 Wisconsin Act 39. Faced with outlier numbers of ward splits, they simply tell the Court it need not worry because under Act 39 the splits will be eliminated by local redistricting after the Court issues its decision. Johnson Br. 14; Legislature Br. 40-42. The Johnson intervenors go so far as to say, contrary to the very text of the Constitution and relevant caselaw, that "[w]ard splits should be irrelevant" and, if they are considered at all, they fall "last in importance." Johnson Br. 12.

[6] Amici believe current ward lines are close to the "historic" lines to be used in this case.

Act 39 is codified at Wis. Stat. § 5.15(4)(a) and provides:

> If the legislature, in an act redistricting legislative districts under article IV, section 3, of the constitution, or in redistricting congressional districts, establishes a district boundary within a municipality that does not coincide with the boundary of a ward established under the ordinance or resolution of the municipality, the municipal governing body shall, no later than April 10 of the 2nd year following the year of the federal decennial census on which the act is based, amend the ordinance or resolution to the extent required to effect the act. The amended ordinance or resolution shall designate the polling place for any ward that is created to effect the legislative act.

The Wisconsin Legislative Reference Bureau described how Act 39 switched the steps in redistricting from bottom-up to top-down:

> Congressional and legislative redistricting typically occur each decade only after municipalities have adjusted ward boundaries. However, if that situation should be reversed in any redistricting cycle, as it was in the 2010 cycle, municipalities are required to adjust ward boundaries to the extent necessary to accommodate a previously enacted congressional or legislative redistricting plan.

Gallagher, et al, *supra*, at 28. "In the past, redistricting . . . always proceeded on a 'bottom up' basis: ward lines would be redrawn based on the new census figures, villages and towns would recompute their populations, and the counties would build on those figures." *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 845 (E.D. Wis. 2012). Act 39 "upend[ed] more than a century of practice in Wisconsin," and instead required local governments to draw new ward lines *after* redistricting by the legislature, adjusting the wards to the new legislative districts. *Id.* at 846.

It is questionable whether § 5.15(4)(a) even applies to maps adopted as a remedy by the Court (rather than maps adopted through the legislative process) in 2024 (because the two-year post-census deadline has passed). It is also questionable whether § 5.15(4)(a) can, after-the-fact, cure maps that violated the "bounded by" constitutional text when passed. The Constitution reigns supreme. A violation of the constitutional mandate that districts be bounded by ward lines cannot be answered by saying a statute compels a different result. *See SEIU, Local 1 v. Vos,* 2020 WI 67, ¶121, 393 Wis. 2d 38, 946 N.W.2d 35 (Kelly, J.) (stating that if the legislature can ignore constitutional mandates, then constitutions represent '"absurd attempts on the part of the people to limit a power in its own nature illimitable'") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The Johnson intervenors and Legislature are attempting to use *a statute* to rectify their maps' *constitutional* deficiencies.

Using § 5.15(4)(a) to rewrite ward lines for reasons *other* than "one person, one vote" or Voting Rights Act compliance raises significant state constitutional concerns. Popular sovereignty is the core of Wisconsin's representative democracy. *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶54, 399 Wis. 2d 623, 967 N.W.2d 469 (*Johnson I*); *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 520-21, 51 N.W. 724 (1892) (Lyon, C.J., concurring). Wisconsin's constitutional structure is premised on a local role in redistricting. Voters adopted a state constitution only when it included single-member districts bounded by county, town, or ward lines. Gallagher, et al., *supra*, at 38 (noting absence of single-

member districts as a reason the 1846 constitution failed); *see Baldus*, 849 F. Supp. 2d at 845. Wards drawn by municipalities make sense, as municipalities are closest to the people, *see City of Janesville v. Rock Cnty.*, 107 Wis. 2d 187, 190 & n.3, 319 N.W.2d 891 (Ct. App. 1982), and best-situated to identify local communities of interest. Further, bounding assembly districts by county, town, or ward lines limits the power of the legislature. *Cunningham*, 81 Wis. at 521 (Lyon, C.J., concurring). Applying Act 39 outside of addressing federal constitutional issues would disregard this history and the plain language of the state constitution. It is no solution to ward-splitting at all.

But the Court need not delve into those issues because it has been presented with maps that comply with the Constitution's "bounded by" provision, without any reliance on a state statute to cure ward boundary problems. Maps that comply with the ward boundary requirement of the Wisconsin Constitution should be preferred over maps with excessive, gratuitous ward splits.

CONCLUSION

Compliance with Wis. Const. art. IV, § 4, including the "bounded by" language regarding wards, is extremely important. The Court should reject the Johnson intervenors' and Legislature's assembly maps because they excessively and gratuitously split wards and thus do not comply with Wis. Const. art. IV, § 4. And because compliance with the Constitution impacts assembly boundaries, it impacts proposed senate districting maps as well.

Wisconsinites need an end to maps that fail to comply with the Wisconsin Constitution. Mapmakers should create maps that comply with not just parts of it, but all of it. Certain parties in this case have shown that such maps are possible. Ward splits, which previously were thought impossible to avoid, can be avoided.

Maps that comport with the "bounded by" clause in the Constitution should be preferred over maps that do not. Most parties made a valiant effort to draw maps that strictly comply with the Wisconsin Constitution. But the Johnson intervenors and Legislature did not; their maps should be rejected as a result.

Further, the parties to this case, and future Wisconsin legislators and governors who find themselves tasked with enacting redistricting plans into law, should be put on notice that if constitutional requirements can be met, they should be. Wisconsinites deserve nothing less.

Dated: January 22, 2024

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of the brief is 3,266 words (3,171 words in text and footnotes as counted by Word plus 95 words within images).

/s/ Margo S. Kirchner

Margo S. Kirchner