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SUPREME COURT

No. 2023AP001399-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 (DEE) 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, AND JOSEPH J. CZARNEZKI, 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; SENATOR ANDRÉ JACQUE, SENATOR TIM CARPENTER, SENATOR ROB HUTTON, SENATOR CHRIS LARSON, SENATOR DEVIN LEMAHIEU, SENATOR STEPHEN L. NASS, SENATOR JOHN JAGLER, SENATOR MARK SPREITZER, SENATOR HOWARD L. MARKLEIN, SENATOR RACHAEL CABRAL-GUEVARA, SENATOR VAN H. WANGGAARD, SENATOR JESSE L. JAMES, SENATOR ROMAINE ROBERT QUINN, SENATOR DIANNE H. HESSELBEIN, SENATOR CORY TOMCZYK, SENATOR JEFF SMITH, AND SENATOR 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.

RESPONSE REMEDIAL BRIEF OF INTERVENOR-RESPONDENT WISCONSIN LEGISLATURE AND RESPONDENTS SENATORS CABRAL-GUEVARA, HUTTON, JACQUE, JAGLER, JAMES, KAPENGA, LEMAHIEU, MARKLEIN, NASS, QUINN, TOMCZYK, AND WANGGAARD

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INTRODUCTION[1]

Last year, a judicial candidate called the State's existing districts "rigged" on the campaign trail. She invited a lawsuit to challenge them. Petitioners obliged, filing one day after her investiture. They were harmed, they said, because they couldn't get a Democratic majority in the Legislature. Pet. ¶5. But the Court refused to hear Petitioners' partisan-gerrymandering claims. *Clarke v. Wis. Elections Comm'n*, 2023 WI 70, --- Wis. 2d ---, 995 N.W.2d 779, 781. What remained should have been a dispute over Wisconsin's so-called "municipal islands" and contiguity. How naïve.

A contiguity remedy entails moving fewer than 5,000 Wisconsinites into new districts. But here, Democrats' proposed remedies move *millions* of Wisconsinites, despite most wanting districts to remain the same.[2] They preclude hundreds of thousands from voting in their next regularly scheduled senate elections. And still, Democrats have lauded their proposals in the press as "fair maps"[3] designed to

[1] The Legislature and Senator Respondents submit this response brief as required by the scheduling order and proffer two responsive expert reports in their Response Appendix. The time and space allotted are insufficient to identify and address all factual disputes raised by parties' proposals. Those disputes require further discovery and trial.

[2] *See* "SCOWIS map case," Marquette Law School Poll (Oct. 26-Nov. 2, 2023), https://perma.cc/C36G-FJWT.

[3] *E.g.*, @GovEvers, Twitter (Jan. 12, 2024, 6:33 PM), https://perma.cc/UPR4-CQGY; Press Release, Senator Dianne Hesselbein, *Senate Democrats Named in Redistricting Lawsuit Submit Legislative Map to Supreme Court* (Jan. 12, 2024), https://perma.cc/4E7T-USFB.

"shrink" Republican majorities.[4] These are not judicial remedies. They are partisan wish lists.

ARGUMENT

I. The Legislature's remedy is the only judicial remedy.

A. Other parties' proposals, moving more than 3 million Wisconsinites, exceed this Court's judicial power.

Noncontiguity affects fewer than 10,000 people statewide. Opening-App.25a-40a. It can be fixed by moving even fewer people. *See* Leg. Opening Remedial Br.24-34 ("Leg. Br."). Yet Democrats' proposed assembly remedies move more than *3 million* Wisconsinites—more than half of Wisconsin's population—and senate remedies move more than 2 million Wisconsinites.

Table 1. Population moved into new districts[5]

	LEGIS.	GOV	SEN DEM	CLARKE	WRIGHT	JOHNSON
Senate	606	2,218,816	2,195,184	2,332,996	2,696,137	1,477,384
Assembly	4,691	3,323,685	3,155,446	3,627,733	3,598,929	2,786,271

Those numbers are staggering, especially in this mid-decade redistricting case about unpopulated or sparsely populated areas of noncontiguity. Democrats' proposals would move more than three or four times the number of people moved by this Court in *Johnson* to resolve statewide malapportionment. *See Johnson v. Wis. Elections Comm'n* (*Johnson II*), 2022 WI 14, ¶¶27-28, 400 Wis. 2d 626, 971 N.W.2d 402 (roughly 450,000 (senate) and 930,000 (assembly)). Indeed,

[4] Scott Bauer, *Wisconsin Republicans' large majorities expected to shrink under new legislative maps*, AP (Jan. 15, 2024), https://bit.ly/4b5S1dk.

[5] Response-App.109a-224a.

Democrats' proposals would move roughly *1 million* more people than the Legislature moved in the 2011 Act 43 redistricting bill pursuant to its power to "district anew," Wis. Const. art. IV, §3. *See Baldus v. Mem. of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 849 (E.D. Wis. 2012) (1,205,216 (senate) and 2,357,592 (assembly)). These seismic shifts have nothing to do with contiguity.

In the 45 assembly districts with *no* contiguity violations, Democrats' proposals move more than 1 million people:

Table 2. Population moved into districts with *no* contiguity violation[6]

AD	LEGIS.	GOV	SEN DEM	CLARKE	WRIGHT	JOHNSON
AD1	0	0	0	0	0	3,970
AD4	0	41,630	56,640	59,676	59,258	49,492
AD7	0	13,415	36,610	0	0	35,457
AD8	0	0	0	0	0	0
AD9	0	0	1,753	27	0	27
AD10	0	0	17,008	0	0	0
AD11	0	0	15,923	0	0	0
AD12	0	0	9,360	0	0	4,513
AD13	0	28,878	17,658	39,921	54,536	11,434
AD14	0	28,732	34,135	59,424	31,082	28,242
AD16	0	0	3,310	0	0	0
AD17	0	0	12,167	0	0	4,740
AD18	0	0	12,412	0	0	14,195
AD19	0	0	5,053	0	0	0
AD20	0	20,795	9,541	38,545	0	6,246
AD21	0	22,846	59,859	38,807	0	2,542
AD22	0	59,167	32,022	35,297	35,297	26,807
AD23	0	2,076	19,721	4,131	2,989	3,647
AD34	0	0	3,231	0	34,272	1,372
AD35	0	6,008	19,509	9,363	31,341	35,402
AD36	0	25,562	27,304	26,606	59,001	23,863
AD49	0	16,339	6,160	5,758	59,218	7,451
AD50	0	59,024	59,447	59,568	41,561	40,861
AD51	0	60,100	17,621	29,598	59,498	21,877
AD55	0	33,902	27,868	48,066	41,921	48,194
AD56	0	27,824	60,082	59,784	39,809	59,432
AD57	0	59,642	28,927	59,645	59,603	41,290
AD62	0	38,272	43,323	59,340	60,001	22,054
AD64	96	16,897	20,695	14,813	19,147	19,531
AD65	0	14,593	12,592	59,523	6,212	11,587
AD69	0	37,633	21,597	33,561	14,302	59,272
AD71	0	5,275	6,238	59,532	59,999	9,095
AD73	0	23,294	14,512	20,384	38,600	20,689
AD74	0	36,729	28,187	20,502	38,970	34,723
AD75	9	59,980	8,566	1,866	32,262	3,971
AD77	88	28,338	15,696	28,449	53,627	32,603
AD78	44	59,825	28,038	37,560	47,864	59,527
AD82	0	58,981	33,177	59,799	17,710	57,886
AD84	0	59,218	59,637	23,177	11,882	48,316
AD85	33	16,298	59,535	8,876	8,580	14,974
AD87	0	59,487	26,548	59,383	59,383	38,268
AD89	0	57,709	59,793	57,692	59,059	40,596
AD90	0	25,738	32,431	59,505	16,302	27,265
AD92	0	58,946	59,361	59,419	59,384	12,453
AD96	0	32,274	17,564	17,564	58,992	23,625
TOTALS:	**270**	**1,195,427**	**1,140,811**	**1,255,161**	**1,271,662**	**1,007,489**

[6] Opening-App.25a-40a; Response-App.109a-224a. The Legislature's 270-person change, dissolving islands from adjacent districts, are explained in Opening-App.41a-52a.

For instance, proposals move between 75,000 and 235,000 people into Wisconsin's northern districts, where there are no contiguity violations. Response-App.109a-224a (AD34-AD36, AD73-AD75). They redraw Milwaukee County, where only *one* unpopulated census block is noncontiguous. *See* Leg. Br.44. The Governor moves nearly 200,000 people and stretches them toward Racine, while Senate Democrats move even more, including in and out of Voting Rights Act districts. Response-App.66a-67a, 109a-149a.

The same goes for districts with the most sparsely populated municipal islands. Democrats' proposals move roughly 600,000 to 800,000 people—akin to cutting off an arm to fix a hangnail.

Table 3. Population moved into districts with 0-10 person noncontiguities[7]

AD	LEGIS.	GOV	SEN DEM	CLARKE	WRIGHT	JOHNSON
AD3	0	21,179	27,569	48,746	52,608	21,473
AD24	0	27,530	35,888	39,095	37,754	35,993
AD25	2	17,463	13,333	59,801	59,165	13,333
AD28	27	42,797	19,767	16,526	13,567	25,403
AD32	0	45,570	21,238	6,334	20,363	8,221
AD33	5	59,759	59,554	53,429	57,471	53,819
AD37	0	59,609	36,354	50,159	59,866	36,571
AD39	0	59,305	59,842	30,089	11,111	17,011
AD41	6	45,506	34,655	35,290	59,358	34,698
AD44	32	12,488	8,567	59,601	25,198	8,539
AD52	0	60,100	8,126	59,335	6,714	8,126
AD59	9	38,152	39,641	59,265	59,554	51,463
AD66	0	38,284	59,051	28,589	43,825	59,490
AD72	0	18,742	30,012	59,544	59,139	32,168
AD76	0	26,683	9,211	5,744	2,022	59,456
AD81	3	47,176	58,221	52,249	39,686	47,492
AD83	8	55,084	40,931	59,628	60,051	24,865
AD91	10	36,104	25,980	32,438	42,629	4,660
AD93	0	45,679	28,676	58,988	48,768	41,171
AD95	6	28,094	16,021	41,433	60,057	8,316
AD98	35	59,835	15,397	59,713	35,716	59,500
TOTALS:	**143**	**757,210**	**616,616**	**814,850**	**758,849**	**583,952**

There is no judicial power to redraw districts statewide for reasons other than noncontiguity, just as there would be no judicial power to redraw Eau Claire districts to remedy a Milwaukee VRA violation. This Court cannot "order far broader relief than necessary" to remedy the contiguity violation. *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶46, 393 Wis. 2d 38, 946 N.W.2d 35; *see Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (remedy must be "dictated by the extent of the violation established"); Leg. Br.15-24. Identifying one constitutional defect does not authorize this Court to redistrict "anew," Wis. Const. art. IV, §3. Even the Legislature may not

[7] Opening-App.25a-52a; Response-App.109a-224a.

reapportion mid-decade after enacting a plan; it may cure only constitutional defects in that plan. *State ex rel. Smith v. Zimmerman*, 266 Wis. 307, 312-13, 63 N.W.2d 52 (1954). Here too, it is not open season on all legislative districts. *See, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018) (per curiam).

Parties have offered *no* evidence that remedying noncontiguity has a "ripple effect" statewide. *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶56, --- Wis. 2d ---, 998 N.W.2d 370. The Legislature's proposal proves the opposite: noncontiguities can be remedied by moving fewer than 5,000 people. There is no reason to move millions more.

B. These remedial proceedings are not a beauty contest.

Parties have lost sight of the task at hand: curing contiguity violations. Senate Democrats haven't even done that.[8] And parties omit critical information about their supposed "neutrality." Shown below, their redrawn districts might split fewer municipalities, but they also preclude hundreds of thousands of Wisconsinites from voting in their next regularly scheduled senate election and pair upwards of 35 Republican incumbents:

[8] *See Senate Democrats Proposed Assembly Districts*, LTSB, https://bit.ly/3HpG70i (*e.g.*, AD45, AD47, AD48, AD91, AD92); *see also* John Johnson, *Analysis of Proposed Legislative Redistricting Plans*, Marquette (Jan. 13, 2024), https://perma.cc/FMG3-3K5D. Contrary to the Marquette analysis, there is no "stipulation" for contiguity, only ward splits.

Table 4. Senate Proposals[9]

	Johnson II	*Johnson III*	LEGIS.	GOV	SEN DEM	CLARKE	WRIGHT	JOHNSON
Population Dev.	1.20%	0.57%	0.49%	1.46%	1.36%	0.65%	1.19%	0.65%
Population Moved	461,029	459,061	606	2,218,816	2,195,184	2,332,996	2,696,137	1,477,384
Disenfranchisement	139,606	138,732	141	671,543	600,979	697,154	750,208	431,396
Incumbents Paired	2 R / 0 D	None	None	10 R / 3 D	8 R / 3 D	11 R / 4 D	13 R / 4 D	3 R / 3 D
County Splits	45	42	42	33	42	34	37	29
Town Splits	32	8	15 (25)	12	16	6	8	1
Reported Ward Splits	179*	0	24 (59)	2	2	1	0	9
City/Village Splits	44	20	30 (40)	18	26	22	27 (26)	20
Compactness Avg. (Reock)	0.392	0.39	0.374	0.42	0.361	0.404	0.40	0.3877

Table 5. Assembly Proposals[10]

	Johnson II	*Johnson III*	LEGIS.	GOV	SEN DEM	CLARKE	WRIGHT	JOHNSON
Population Dev.	1.88%	0.76%	1.10%	1.96%	1.86%	0.92%	1.83%	0.98%
Population Moved	837,426	933,604	4,691	3,323,685	3,155,446	3,627,733	3,598,929	2,786,271
Incumbents Paired	4 R / 0 D	6 R / 0 D	None	25 R / 5 D	27 R / 10 D	31 R / 8 D	28 R / 7 D	26 R / 11 D
County Splits	53	53	53	45	51	44	47	37
Town Splits	50	16	35 (51)	22	27	9 (10)	15	1
Reported Ward Splits	258*	0	51 (118)	5	2	1	0	13
City/Village Splits	65	32	43 (61)	29	40 (38)	33	37 (36)	31
Compactness Avg. (Reock)	0.397	0.39	0.366	0.42	0.403	0.406	0.42	0.4128

The Legislature's proposal, by comparison, moves few Wisconsinites, pairs no incumbents, remedies all noncontiguities, and meets all other legal requirements. The nonpartisan Legislative Technology Services Bureau made every change pursuant to fixed rules devoid of any partisan considerations and logged how each noncontiguous census block was resolved. *See* Opening-App.7a-8a, 41a-52a. The resulting remedy moves so few Wisconsinites that it can have no conceivable "partisan impact." *Clarke*, 2023 WI 79, ¶71.

[9] Opening-App.6a, 62a-80a, 90a-110a; Response-App.109a-300a. "Population Dev." is aggregate population deviation. Municipal splits are as reported by WISE district reports, Response-App.275a-300a; municipal splits without population are reported in parentheses. Due to time constraints, ward splits are as reported by the parties; *Johnson II* ward splits, which were not reported in the Governor's 2022 corrected expert report, are sourced from *Johnson II*, 2022 WI 14, ¶152 (Ziegler, C.J., dissenting). To the extent there are disputes about these metrics, further factfinding is required.

[10] *Supra* note 9.

More fundamentally, this not the "whole towns," "communities of interest," or "fair maps" case. *See id*. ¶66 (splitting political subdivisions is not "prohibit[ed]" and "this court has never adopted a particular measure of compactness"); *Clarke*, 995 N.W.2d at 781. It is a contiguity case. And this Court must remedy that constitutional violation as a Court, not a Legislature. *See* Leg. Br.27-29.

Only the Legislature's remedy addresses contiguity without throwing this Court into the political thicket of redistricting policy. That remedy does not otherwise disturb districts already compliant with federal and state law requirements, *see Johnson v. Wis. Elections Comm'n* (*Johnson III*), 2022 WI 19, ¶70, 401 Wis. 2d 198, 972 N.W.2d 559, just as a VRA remedy would not disturb districts with no VRA violation. Unlike other proposals, the Legislature's does not redefine communities of interest[11] or pick new municipalities to split, beyond what was necessary for remedying noncontiguities. Its near-0 population deviation and municipal splits resembling those accepted in *Johnson II* and *III* comply with all legal requirements. *See* Leg. Br.34-46. And while it splits 2021 wards, it does so only as necessary to comply with this Court's contiguity holding. Leg. Br.40-43; *see* Opening-App.41a-52a. At any rate, 2021 wards are not the current wards. Thus,

[11] Communities of interest reflected in the existing lines and undisturbed in the Legislature's remedy are the product of a robust public process, including a public portal and hearings for 2021 Wis. Senate Bill 621 (accepted in *Johnson III*). *See* Testimony of Speaker Robin J. Vos 2, Wis. State Legislature (Oct. 28, 2021), https://perma.cc/TBD4-VAVR. These "policy decisions" are best left to "the give-and-take of the legislative process." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537.

all proposed remedies will also require changes to current ward lines. Leg. Br.40-42; Opening-App.9a.

If the Court or its consultants believe there is some shortcoming in the Legislature's proposal, it can be modified. But no party justifies moving more than half the State's population, severing millions of constituent relationships, and injecting confusion and uncertainty into forthcoming elections.

C. Other proposed remedies are not "neutral."

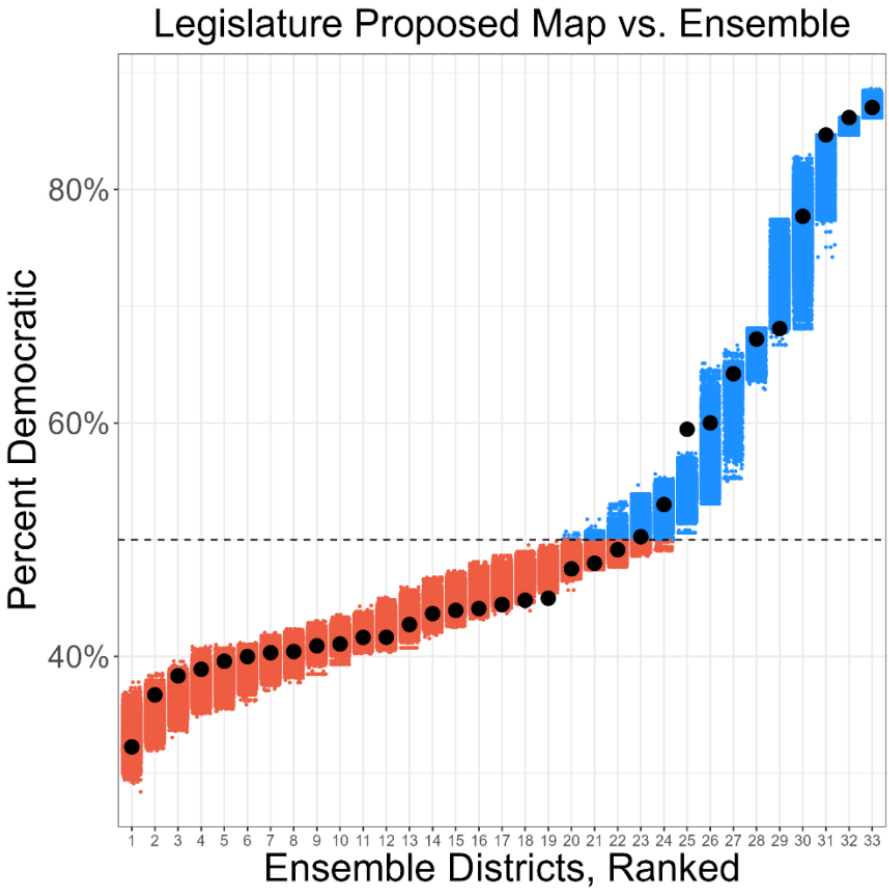
1. The Legislature's proposal is neutral, resolving noncontiguity by moving only a few thousand people with no conceivable "partisan impact." *Clarke*, 2023 WI 79, ¶¶70-71. Democrats' proposals, by comparison, move millions of Wisconsinites *precisely because* of the "partisan impact." Parties are unabashed about their intent to oust Republicans in the Legislature. *E.g.*, Sen.-Dems. Br.21-26; Gov. Br.12-23. They target *dozens* of Republican incumbents by pairing them mostly with other Republicans. Response-App.240a-274a. They do precisely what this Court and the three-judge court in *Prosser* said was *not* neutral: disturbing the existing political balance of the State by judicial decree. *Jensen*, 2002 WI 13, ¶12; *Prosser v. Elections Bd.*, 793 F. Supp. 859, 867, 871 (W.D. Wis. 1992).

2. Other parties begin with the failed premise that past elections for (some) statewide candidates can predict future elections for (all) assembly and senate candidates. *But see* Leg. Br.50-51. That assumption requires substantial factfinding and demands cross-examination. *Infra* Part III.B. As Dr. Brian Gaines's report explains, partisanship is

not immutable, and "candidates accrue votes not only from utterly loyal Democrats (or Republicans), but from a substantial number of voters with mixed preferences" and ticket-splitters, even in a place as intensely partisan as Dane County. Response-App.8a-10a (using ballot images to analyze split-ticket voting in Dane County). Down-ticket candidates can outperform top-of-the-ticket candidates, and *vice versa*. Leg. Br.48-49. If Senate Democrats could run candidates like U.S. Senator Tammy Baldwin in every district, they would win majorities. *Id.*; *see also* Response-App.98a-100a (Trende).

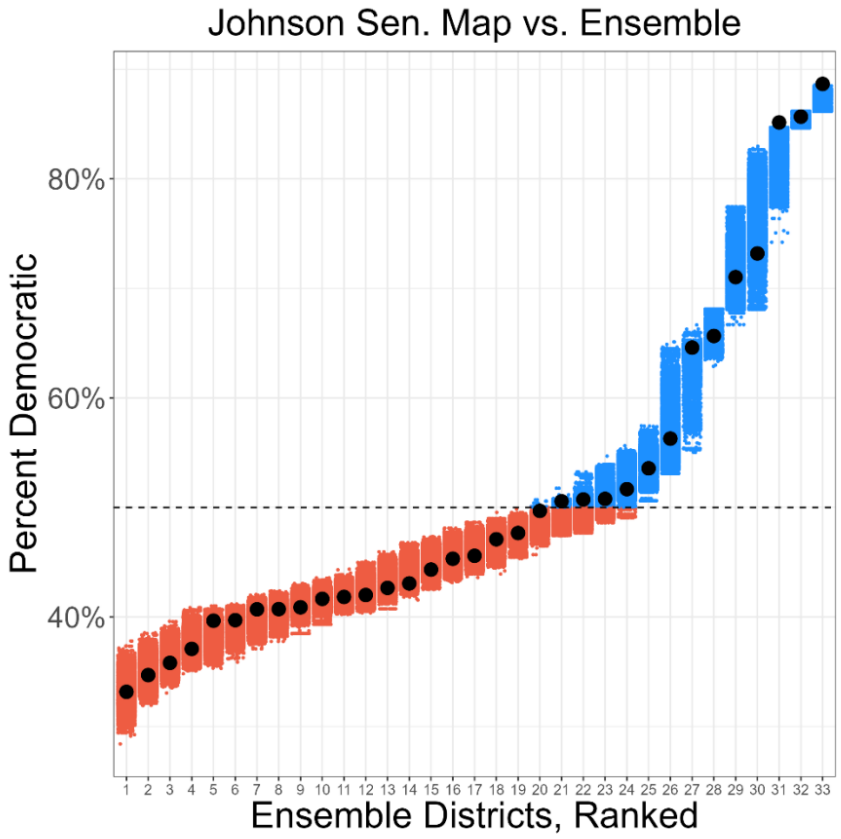
Democrats' experts confirm that candidates matter. Senate Democrats' expert, for example, initially included closely contested 2018 gubernatorial and attorney-general elections in his 8-election composite used to evaluate partisanship. Mayer Rpt.23-24 (Jan. 12, 2024). He has since "corrected" his report to exclude those two races. *See* Corrected Mayer Rpt.23-24 & tbl.6 (Jan. 16, 2024). He did so without explanation, and the Court's orders preclude parties from cross-examining him about it, *contra Prosser*, 793 F. Supp. at 868. What results from that "correction" is telling: he projects Wisconsin has more Democrats today than it did 10 days ago and that Senate Democrats' districts look more favorable to Democrats today than they looked 10 days ago. Response-App.18a (Gaines); Response-App.98a (Trende). Yet nothing about the State or those districts has changed other than his methodology.

3. Other parties also make claims about "neutrality" without accounting for Wisconsin's political geography. While Wisconsin might be "purple," it is not the "mythical State with voters of every political identity distributed in an absolutely gray uniformity." *Vieth v. Jubelirer*, 541 U.S. 267, 343 (2004) (Souter, J., dissenting); *see* Opening-App.183a-187a. Parties' briefs and experts show considerable debate about how to account for that problem. *See* Response-App.11a-20a (Gaines) (describing "uncertainties" in any model). Dr. Sean Trende's response report shows that the Legislature's districts follow the same pattern as politically neutral simulations drawn to respect compactness, county splits, and VRA districts:



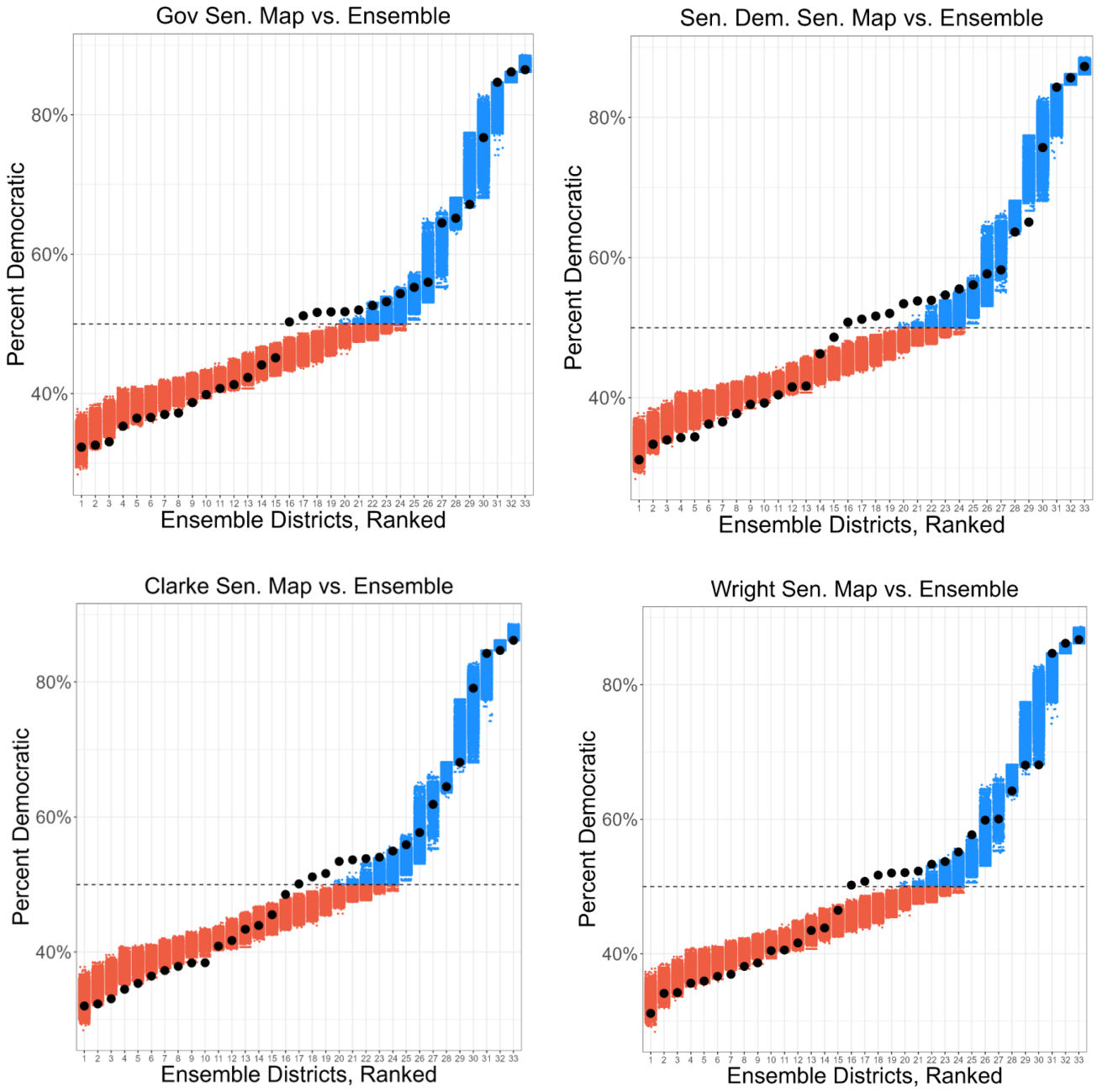
Response-App.47a.

As for the statewide redraws, only Johnson Intervenors' proposal respects the State's existing political geography:



Response-App.46a. What results is telling: fewer people moved and disenfranchised and nearly no splits. *Supra* tbls. 4 & 5.

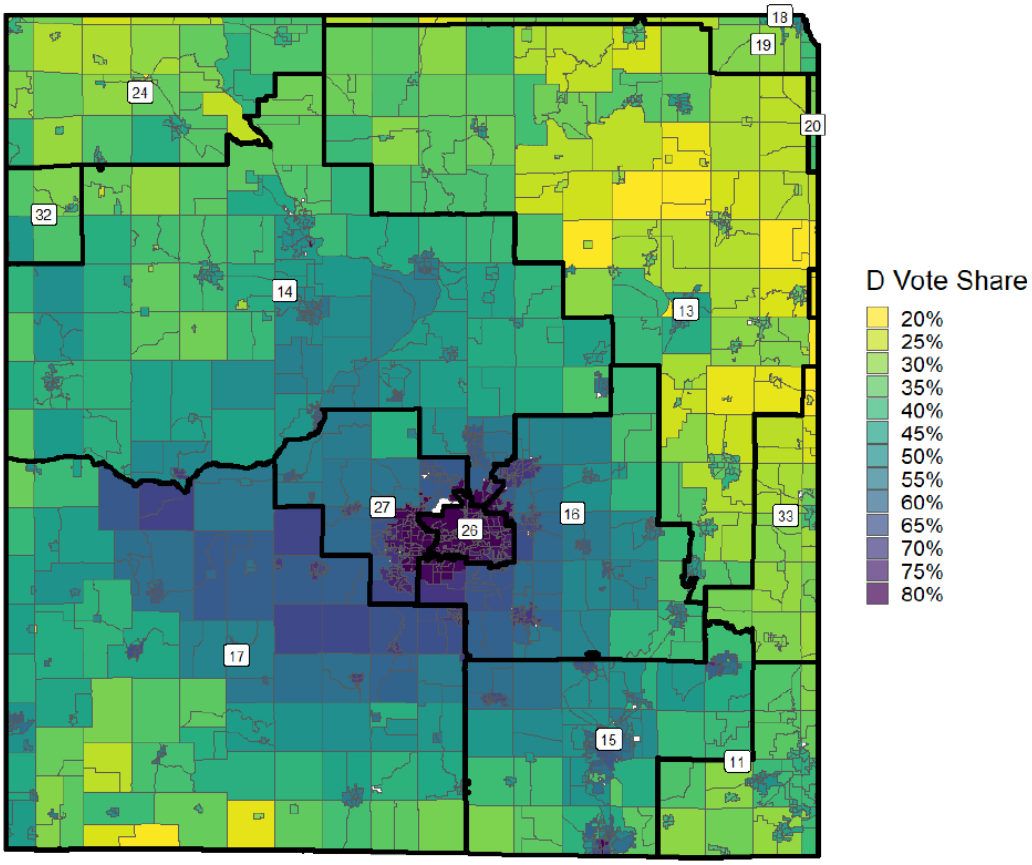
Contrast that with Democrats' purportedly "fair" districts. Dr. Trende shows them to be outliers—Democratic gerrymanders—given the natural distribution of voters in the State, the need to account for Milwaukee's VRA districts, and other requirements. Response-App.47a-96a. They are not "neutral."



Response-App.47a-52a ("significant deviations from what we would expect from maps drawn free of partisanship").

Democrats' proposals redraw districts "[b]y fighting Wisconsin's political geography" and "free[ing] up" Democratic voters "to create more Democratic-leaning districts." Response-App.48a. The

Governor's SD14, for example, reaches into the City of Madison, shown below. That "'tweak[]'" is the difference between a projected Republican and Democratic victor in that district, and they "appear all over the map." Response-App.65a ("That arm gave Joe Biden 65% of the vote; without it, Donald Trump narrowly won the district.").



This is one of many examples of Democrats' "'pinwheel'" gerrymandering, where heavily Democrat urban areas are spliced with more Republican outlying areas. Response-App.64a-69a, 88a-95a (discussing Janesville splits, 5-way Jefferson County split, Milwaukee districts redrawn to sacrifice compactness, and choices that "border[] on unserious").

The Court cannot simply declare that some experts are right and others are wrong when it comes to proposals' purported "partisan impact" without further discovery and a hearing. *Infra* Part III.

II. Parties' Proposals Raise Serious Constitutional Questions.

A. Proposals unnecessarily disenfranchise hundreds of thousands of Wisconsinites.

There is no justification for a remedy disenfranchising hundreds of thousands of Wisconsinites. But Democrats' proposed remedies move an unprecedented 600,000 to 750,000 people from even- to odd-numbered senate districts. Affected voters will have voted for senate in 2020 and not vote again until 2026.[12]

Table 6. Senate Disenfranchisement[13]

LEGIS.	GOV	SEN DEM	CLARKE	WRIGHT	JOHNSON
141	671,543	600,979	697,154	750,208	431,396

Those disenfranchisement numbers are staggering compared to numbers moved in *Johnson*, *Baumgart*, or *Prosser*—all malapportionment cases—to comply with *federal* constitutional requirements.[14] And while some disenfranchisement is "unavoidabl[e]" and "an inevitable concomitant of redistricting" after the census given staggered

[12] The "drastic remedy" of special elections in odd-numbered senate districts is off the table. *Clarke*, 2023 WI 79, ¶74. That would cut lawfully elected senators' four-year terms short, contravening *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568, exacerbating federal constitutional violations, and denying the results of the 2022 election.

[13] Response-App.225a-239a. Numbers could fluctuate depending on how incumbents and election officials resolve uncertainties with respect to incumbent pairings affecting odd-numbered districts.

[14] *See* Leg. Br.44 & n.34 (roughly 140,000 people in *Johnson III*); *Baumgart v. Wendelberger*, 2002 WL 34127471, *7 (E.D. Wis. May 30, 2002) (171,613 people); *Prosser*, 793 F. Supp. at 871 ("257,000 voters").

elections, *Prosser*, 793 F. Supp. at 864-66, this is a mid-decade contiguity case, and such disenfranchisement is entirely avoidable. Because this Court can remedy noncontiguities *without* burdening voting rights, it must do so. *See Baldus v. Brennan*, 2011 WL 5040666, *3 (E.D. Wis. Oct. 21, 2011) (three-judge court) ("a redistricting plan cannot unnecessarily disenfranchise voters").

1. Disenfranchisement creates "prejudice … of the highest magnitude." *Knox v. Milwaukee Cnty. Bd. of Elections Comm'rs*, 581 F. Supp. 399, 405 (E.D. Wis. 1984). States must "make an honest and good faith effort" to avoid such vote dilution. *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). Just as a State could not preclude all voters whose last names end in "e" from voting in the next election, this Court cannot unnecessarily move Wisconsinites in ways that will preclude several hundred thousand from voting in their next senate election. Contiguity does not require it, and such "unnecessary disenfranchisement" will fail constitutional scrutiny. *Baldus*, 2011 WL 5040666, at *3.

Every proposed remedy except for the Legislature's "has a real and appreciable impact on the exercise of the franchise." *Bullock v. Carter*, 405 U.S. 134, 144 (1972). There is no conceivable basis for burdening federal rights to correct a violation of *state* law, especially one that should entail moving a few thousand people at most.

2. Moreover, Democrats' proposals disenfranchise *unequally*. They move tens of thousands more Republican voters than Democrat voters:

Movement of WI Residents, Even to Odd Senate Districts

by map

Proposed Map	Population Shifted	Trump Vote Shifted	Biden vote shifted	R Voters, 2022 Gov., Shifted	D Voters, 2022 Gov., Shifted	Trump %	R Gov. 22 %
Clarke	697,154	233,064	170,944	186,910	144,666	57.69%	56.37%
Governor	671,543	209,801	172,467	167,775	146,013	54.88%	53.47%
Johnson	431,396	110,220	119,143	85,840	100,414	48.05%	46.09%
Senate Dems	600,979	168,089	159,983	131,665	133,303	51.24%	49.69%
Wright	750,208	270,360	162,907	218,319	137,984	62.40%	61.27%
Legislature	141	24	57	24	64	29.86%	27.30%

Response-App.44a (Trende). It appears the Governor and Senate Democrats disenfranchise Intervenor Billie Johnson.[15] And Wright Intervenors would have 100,000 more Trump voters skip their next scheduled senate election than Biden voters. Response-App.44a

It is anything but "neutral" for this Court's remedy to "uniquely burden[]" "particular group[s]." *Baldus*, 849 F. Supp. 2d at 852. Just as a court couldn't impose different voter eligibility requirements on Republicans versus Democrats, this Court cannot adopt a plan where a "particular group will suffer more disenfranchisement than the remainder of the population." *Id.*; *see Anderson v. Celebrezze*, 460 U.S. 780, 786-88 (1983); *cf. Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (per curiam) (state courts have "obligation to avoid arbitrary and disparate treatment of the members of its electorate").

3. Any remedy disenfranchising voters in these ways must satisfy heightened scrutiny. *See Williams v. Rhodes*, 393 U.S. 23, 31 (1968). A *state* constitutional requirement is not a weighty enough interest to

[15] *Proposed Districts*, LTSB, https://bit.ly/3SmHJ1f; Am. Pet. ¶30, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Oct. 21, 2021).

justify mass disenfranchisement—especially where, as here, the Legislature's proposal shows contiguity can be satisfied *without* burdening *federal* rights. *See Espinoza v. Mont. Dep't of Rev.*, 140 S. Ct. 2246, 2260 (2020) (compliance with state constitutional provision "'cannot qualify as compelling' in the face of the infringement" of federal rights); U.S. Const. art. VI, cl.2.[16] This Court "may not choose means that unnecessarily restrict constitutionally protected liberty" where, as here, it "has open to it a less drastic way of satisfying its legitimate interests." *Anderson*, 460 U.S. at 806.

4. The equities also weigh decisively against disenfranchising hundreds of thousands of voters to resolve noncontiguities involving fewer than 10,000 Wisconsinites. *See Pure Milk Prod. Co-op v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 280 N.W.2d 691 (1979). Moving hundreds of thousands into new senate districts could prematurely sever relationships between constituents and senators. And Democrats' redraws could require some senators to run for re-election after only two years, effectively cutting short their four-year term. *But see Trump*, 2020 WI 91, ¶11 (cannot "allow persons to gamble on the outcome of an election contest and then challenge it when dissatisfied with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process"). Are senators moved to new odd-numbered

[16] This Court has already acknowledged that partisan impact or proportionality "will not supersede constitutionally mandated criteria such as equal apportionment or contiguity." *Clarke*, 2023 WI 79, ¶71.

districts and paired now out of office for two years? For example, Democrats' proposals pair Senator Andre Jacque (SD1) in a three-way Republican race in redrawn SD30; Petitioners and Wright Intervenors pair Senator Van Waangard (SD21) in SD22; and the Governor pairs Senator Cabral-Guevera (SD19) in SD22. Response-App.245a-267a. Must these incumbents move or primary fellow Republicans in the coming months, despite being elected to a four-year term in 2022? And how about even-numbered senators, such as Senators Joan Ballweg (SD14) and Julian Bradley (SD28) in some plans, moved to odd-numbered districts and paired with odd-numbered senators who will serve until 2026? See Response-App.252a-267a. Similarly, the Governor moves Republican Senator Howard Marklein from SD17 to SD14. Response-App.245a. Must he run for re-election in that newly numbered district in 2024, despite being elected in 2022?

Uncertainties abound. Voting is already "a costly activity," "continuity is recognized as a benefit for voters," and "changes in electoral districts can … increase the costs of voting." Response-App.22a (Gaines). The equities compel remedying noncontiguity while avoiding unnecessary senate disenfranchisement, severed constituent relationships, and confusion on the eve of election deadlines.

B. Adopting Democrats' proposals would confirm the *Caperton* violation.

Adopting a proposed remedy moving millions of Wisconsinites to achieve a political goal confirms "actual bias or prejudgment" infects these proceedings. *Caperton v. A.T. Massey Coal Co.*, 556 U.S.

868, 884 (2009). Democrats' proposals overwhelmingly target Republican incumbents and disenfranchise Republican voters. *Supra* Part II.A.2 & tbls. 4-5.

If all noncontiguities can be resolved without pairing incumbents and *de minimis* senate disenfranchisement, why pair 35 or more Republican incumbents, including in areas unaffected by noncontiguities? For example, the Governor pairs incumbents in AD4/AD89, AD7/AD84, and AD13/AD14, while Petitioners pair incumbents in AD13/AD14, AD21/84, AD55/AD56, and AD73/AD74—all already contiguous. *See* Response-App.240a-258a. Similarly, plans pair veteran legislators Duey Stroebel (SD20) and Dan Knodl (SD8), serving in senate districts where contiguity can be achieved by moving *4 people*. Response-App.245a, 259a, 266a; Opening-App.47a-48a. The incumbent pairings evidence intent to target members of one political party over another. *See, e.g.*, *Baumgart*, 2002 WL 34127471, *4 ("partisan origins" of plans "evident" because "they pair a substantial number of Democratic incumbents"); *Prosser*, 793 F. Supp. at 867, 871 (proposal "pair[ing] 12 Democrats and 4 Republicans" betrayed "partisan … design[]"). And it is no defense to say that more Republicans will be paired because there are more Republicans. *See* Corrected Mayer Rpt.29. Remedying contiguity does not require pairing *any* incumbents.

In short, selecting a remedy designed to shrink Republican majorities, pair Republican incumbents, and disenfranchise likely

Republican voters would confirm the case has been prejudged from the start.[17] This Court refused to take up Petitioners' partisan-gerrymandering claims because there was no time to conduct the "extensive fact-finding (if not a full-scale trial)" necessary to resolve them. *Clarke*, 995 N.W.2d at 781. So too in this remedial phase. But parties have misinterpreted this Court's concerns about "partisan impact," *Clarke*, 2023 WI 79, ¶¶69-71, as an invitation to do just that: make a "partisan impact" with no connection to contiguity. There's been no meaningful opportunity to respond to that "bait and switch." *Reich v. Collins*, 513 U.S. 106, 111 (1994). The Court prohibited "further discovery" for proposed remedies beyond expert reports insulated from cross-examination. Scheduling Order 3. This sharp "depart[ure] from the accepted and usual course of judicial proceedings," *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010) (per curiam), deprives Respondents of "the procedural protections that due process and the right to be heard require," *Jensen*, 2002 WI 13, ¶22; *see* Memo. ISO Reconsideration 42-58.

C. Additional factfinding is necessary regarding possible racial gerrymandering.

Most proposed remedies leave the Milwaukee VRA districts intact given that they are already contiguous and have been the subject of repeated federal litigation. But Senate Democrats would move the Village of Shorewood from AD10 to AD23 "to preserve a community

[17] Reconsideration-App.002 ("anybody with any sense knows our maps are rigged").

of interest" in an area with no contiguity violations. Sen.-Dems. Br.15-17; *see* Corrected Mayer Rpt.11-15. If race predominated that move, or any other changes to district lines by any party, the Court cannot accept such a remedy. *See Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 401 (2022) (per curiam) ("districting maps that sort voters on the basis of race … 'cannot be upheld unless they are narrowly tailored to achiev[e] a compelling state interest'").

III. The Court Cannot Choose a Remedy Without Additional Factfinding.

Parties' proposed statewide redraws raise countless factual disputes. Unlike the Legislature, which logged every contiguity change, Opening-App.41a-52a, other parties hardly explain how their proposals were drawn, why certain changes were made, and how those changes relate to contiguity. If the Court entertains those remedies, then it must wait until after the 2024 elections. Only after the opportunity for the "extensive fact-finding (if not a full-scale trial)," *Clarke*, 995 N.W.2d at 781, could the Court possibly begin to resolve questions raised by such sweeping proposals, including: What is a "gerrymander"? Do the Court-imposed districts in *Johnson* qualify? What makes a proposed remedy "neutral"? Why redraw Milwaukee-area districts? Who is right about "communities of interest" and does it matter?

These questions (and others) cannot be resolved on the papers, as this Court seemingly acknowledged when it refused Petitioners' partisan-gerrymandering claims. Selecting a remedy "in compliance

with the requirements of equal protection and due process" requires "substantial additional work"—"not only the adoption (*after opportunity for argument*)" of a remedy that avoids all federal constitutional problems "but also orderly judicial review of any disputed matters that might arise." *Bush*, 531 U.S. at 110 (emphasis added).

A. Parties' "gerrymandering" assertions raise numerous fact questions.

Parties, predictably, assert that existing districts are gerrymandered. While relevant to Petitioners' rejected partisan-gerrymandering claims, those assertions are irrelevant to remedying noncontiguity. Even if "gerrymandering" assertions were relevant, the Court cannot accept them without factfinding. Parties cannot simply assume existing lines are "an extreme gerrymander." *Contra* Corrected Mayer Rpt.5 n.1 (relying on *Whitford v. Gill*, 218 F. Supp. 3d 837, 883 (W.D. Wis. 2016), which was vacated by the U.S. Supreme Court for lack of jurisdiction, 138 S. Ct. 1916 (2018)). The Governor, for example, assumes plans must "reduc[e] the Republican advantage in the previous maps." Gov. Br.18. But the Legislature has countered with extensive evidence in Dr. Trende's opening and response reports that "Republican advantage" in a single-member districting scheme is to be expected given Wisconsin's political geography.

Other parties attempt to score existing lines using their preferred fairness metrics. For example, Wright Intervenors' expert concludes that existing districts fail "the majoritarian principle," because the party that wins a majority of votes in statewide elections does not

win the majority of state legislative seats. DeFord Rpt.28-29. The Legislature has contested the assumption that single-member districts will reflect statewide votes—so has the U.S. Supreme Court for decades—and it must be subject to cross-examination. *See* Response-App.12a (Gaines); Response-App.47a, 72a (Trende) (showing Legislature's districts do "not excessively benefit one party or another" and "hew[] closely to what we would expect from a politics-free map" with only "some benefit" for Republicans); *Davis v. Bandemer*, 478 U.S. 109, 159 (1986) (O'Connor, J., concurring); *Vieth*, 541 U.S. at 290 (plurality op.). Similarly, Petitioners' expert compares existing lines to "previous plans across the country from 1972-2022." Clarke App.25-26. Parties are entitled to question what plans exactly, why other States' decades-old plans, and what "neutrality" or "0%" bias means in Wisconsin today. *See* Response-App.17a-20a (Gaines).

The Court cannot assume the answers to these untried factual questions. Cross-examination would show that votes cast in past statewide elections cannot reliably predict future legislatures. Response-App.18a (Gaines); Response-App.98a-99a (Trende). It would test simplistic notions that all are loyally Republican or Democrat, never supporting candidates from different parties on the same ballot. Response-App.7a-11a. And it would challenge flawed "majoritarian" or "proportionality" rules for "partisan neutrality" in single-member districts. Response-App.11a-12a; Response-App.105a (Trende).

B. Parties' assessments of "partisan impact" entail disputed factual questions.

Similar factual questions pervade experts' attempts to score their proposed remedies. The only certain thing is Democrats' proposals have major "partisan impact" statewide, *contra Clarke*, 2023 WI 79, ¶71. *See* Response-App.47a-48a (Trende) (Democrats' proposals "show significant deviations from what we would expect from maps drawn free of partisanship," with "Republican vote shares pushed down toward the bottom of their expected ranges").

Democrats' experts cannot even agree on an approach. Petitioners rely on a "composite" of 17 statewide elections from 2014 to 2022; Wright Intervenors rely on a 19-race composite. Petitioners' expert assures the Court statewide races "are an excellent predictor" and are "nearly perfectly correlated with legislative results." Clarke-App.25. But the cited correlation is with *U.S. House elections*, not statehouse elections. Response-App.18a-19a (Gaines). In reality, "it turns out, the elections selected are very important in determining how the partisanship of the underlying map appears." Response-App.98a (Trende). Using the Governor's proposal as an example, different combinations of statewide races yield vastly different results:

Metric	Minimum Value	Lower 95%	Upper 95%	Maximum Value
D Seats	13	15	17	18
D Seats @ 50%	14	15	15	17
D % Needed for Majority	46.8%	49.5%	52.9%	54.3%
Competitive Seats	5	7	13	18
Efficiency Gap	−0.142	−0.097	−0.028	0.019
Mean-Median	−0.038	−0.032	−0.003	0.008
Declination	−0.205	−0.166	−0.035	0.047

Response-App.99a. Senate Democrats brought the point to life with their expert's "correction" last week. *See* Response-App.98a (comparing tables); Response-App.18a ("seemingly innocuous change of choice of input data alters estimates a good deal").

As for what is neutral, Petitioners' expert relies on "previous plans across the country from 1972-2022." Clarke App.24-26. That is contested. Decades-old maps from other States "should not be confused with distributions of possible values for present-day Wisconsin." Response-App.19a. Similarly, Wright Intervenors' expert's votes-to-seats analysis assumes the party receiving statewide majorities should have a legislative majority. DeFord Rpt.23-35. Also contested. Response-App.17a-19a (Gaines) (noting absence of "confidence intervals" and observing use of "uniform swing … is not, of course, the only way to model swings"). Parties' efficiency-gap and declination analyses are contested too. *E.g.*, Fairfax Rpt.37-38; Response-App.16a-17a (declination is "insensitive to whether partisan asymmetry arises by willful manipulation (gerrymandering) or from

some other source, such as geographic clustering or compliance with contemporary interpretation of Voting Rights Act requirements" and "efficiency gap is essentially blind to geography"); Response-App.102a (Trende) (metrics have a "history of overpromising what they can deliver to courts").

Use of statistical models to judge the political "fairness" or "neutrality" of proposals raises distinct factual issues, including the quality of data, the validity of the model, error rates, and the reliability of its application to a particular map. Response-App.17a. In *Prosser*, for example, parties' political assumptions were "destroyed in cross-examination." 793 F. Supp. at 868. Cross-examination revealed "another expert, who while a reputable political scientist at the University of Wisconsin [wa]s also a high-level Republican activist" who cherry-picked elections "driven by special factors" that were ultimately no indicator of party politics. *Id.* Here too, Petitioners and the Governor rely on Petitioners' expert's PlanScore, a "black-box, but open-source, model." Response-App.19a (Gaines). The reliability of its outputs is disputed, Response-App.18a-19a, and its inputs aren't even certain. PlanScore's "model is *mostly* sourced from the Voting and Election Science Team at University of Florida and Wichita State University."[18] "Mostly" is not good enough for a court-ordered remedy; nor is a tool operated by Petitioners' attorneys and their expert, Clarke Br.44 n.14.

[18] PlanScore, https://perma.cc/H4C5-8Y64 (emphasis added).

These are but a few examples. Without cross-examination, parties have no meaningful opportunity to determine whether partisan analyses are sound or biased, reliable or speculative. Parties' assertions cannot be blindly accepted. They must be tried.

C. Other facets of proposed remedies present additional fact questions.

Other facets of proposed remedies raise still more fact questions. For instance, proposals to redraw Milwaukee-area districts claim they did so "to preserve a community of interest" and "did not consider race." Sen.-Dems. Br.15-16. Those are factual claims that must be examined. *Supra* Part II.C.

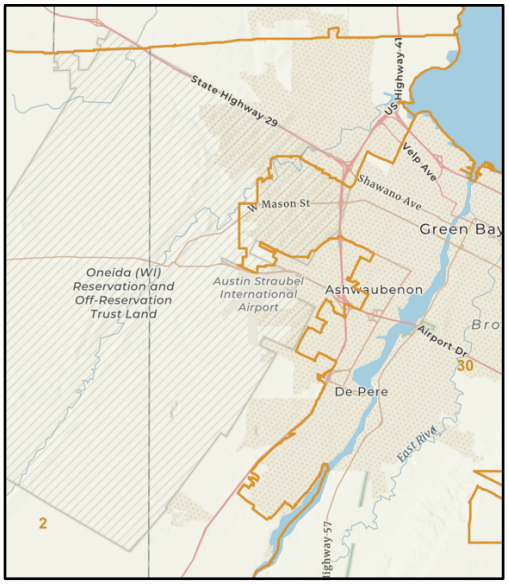
More broadly, claimed efforts to maintain "communities of interest" raise factual questions about how parties identified such communities and, more importantly, why they reached such disparate results. Their assertions reflect either an impressionistic, ad hoc approach or post-hoc justification. Either way, maintaining communities of interest cannot provide the "principled, rational, and … reasoned distinctions" necessary to support a judicial remedy. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

The Court cannot simply declare that one party's approach to communities of interest is correct while another's is not. *See* Corrected Mayer Rpt.13 (conceding "'communities of interest' are subjective"). Johnson Intervenors, for example, prioritized maintaining the integrity of counties and municipalities. Johnson Br.21-22. Wright Intervenors prioritized public-school districts, television markets, and

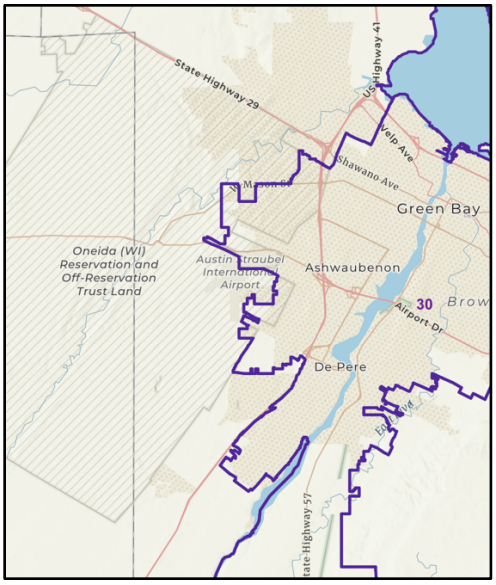
communities of interest identified by the Governor's failed People's Maps Commission. Wright Br.34. No other proposal (including the Governor's) treated these as communities of interest.

The results of parties' efforts are strikingly inconsistent. Take the parties' treatment of Native American tribes. Existing lines, undisturbed by the Legislature, and Wright Intervenors aim to unify tribal reservations. Wright Br.32-33; *see* Vos, *supra*, note 11 (Legislature's lines "ensure[] all these tribal lands are incorporated into the same district"). The Governor (at 10) says he prioritizes them, but then splits the Oneida Nation between two senate districts, as do Petitioners, Senate Democrats, Johnson Intervenors, and seemingly Wright Intervenors, while the Legislature does not:[19]

Petitioners (SD2/SD30)

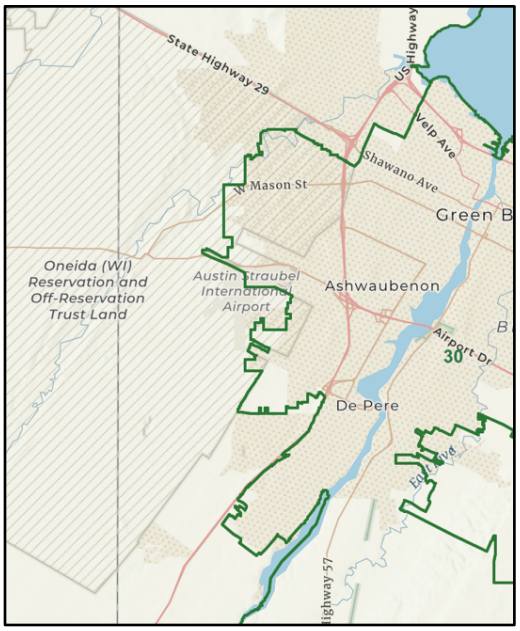


Governor (SD2/SD30)

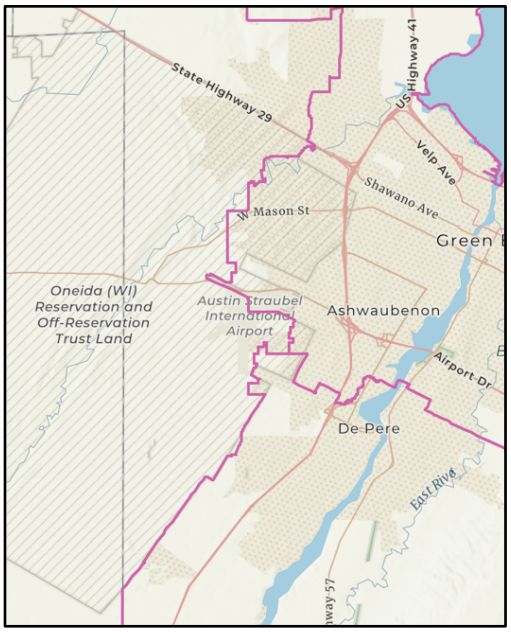


[19] *See Proposed Districts*, LTSB, https://bit.ly/3SmHJ1f.

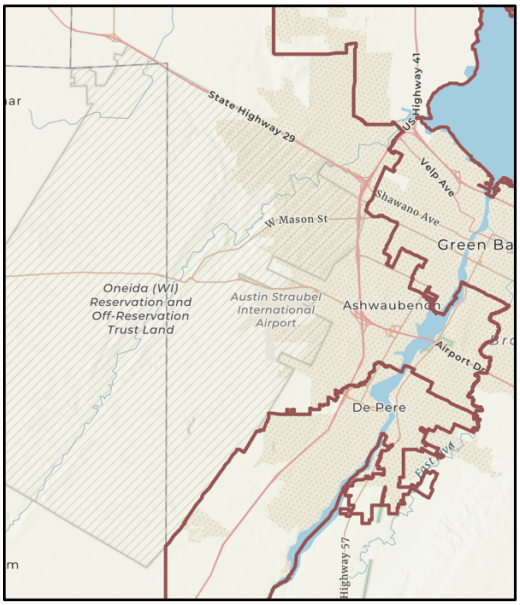
Senate Democrats (SD2/SD30)



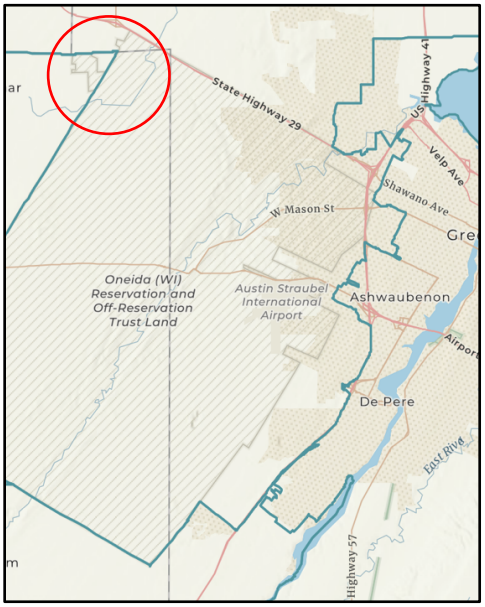
Johnson Intervenors (SD2/SD30)



Legislature (SD1/SD2/SD30)



Wright Intervenors (SD1/SD2/SD30)



Similarly, Senate Democrats split the Bad River Reservation (AD74) from its land on Madeline Island (AD73) without explanation. *Contra* Gov. Br.35.

Elsewhere? Petitioners and Wright Intervenors sever Bayfield from Madeline Island's Town of La Pointe, Clarke App.83-85;

Weichelt Rpt.9-11, even though the only way to La Pointe is *via* Bayfield by ferry or ice roads, as the Governor recognizes, Gov. Br.35. Petitioners separate downtown Green Bay from Lambeau Field, putting the stadium with DePere and Bellevue, while other parties keep them together but take different approaches beyond downtown. *Compare* Clarke App.90-92, *with, e.g.*, Corrected Mayer Rpt.15-16. Petitioners split UW, ostensibly to maintain population equality, Clarke Br.33 & n.11, while others don't, *e.g.*, Gov. Br.41. How is the Court supposed to decide what is best among these approaches—not just in these cities but across the State?

Based on the parties' briefs, preservation of communities of interest does little to explain *why* districts were drawn a certain way. If anything, it appears only to describe *where* district boundaries were drawn. *See* Wright Br.31-35; Sen.-Dems. Br.18-21; Gov. Br.33-42; Clarke Br.31-40. Parties must have the opportunity to question whether "communities of interest" was simply a convenient label for political choices made in their proposals.

CONCLUSION

Any remedy moving Wisconsinites in the millions would exceed this Court's judicial power. It would raise serious constitutional questions that would be the subject of further litigation. The only conceivable judicial remedy is the Legislature's or something like it.

Dated this 22nd day of January, 2024.

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CERTIFICATION REGARDING LENGTH AND FORM

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c) for a brief, as amended by this Court's order of December 22, 2023. Excluding the portions of this brief that may be excluded, the length of this brief is 5,473 words as calculated by Microsoft Word.

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