

FILED
01-22-2024
CLERK OF WISCONSIN
SUPREME COURT

IN THE SUPREME COURT OF WISCONSIN
NO. 2023AP1399-OA

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
Theffeault, 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 Carrie
Riepl, 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 Steck,
Intervenors-Respondents.

**IN AN ORIGINAL ACTION TO THE
SUPREME COURT OF WISCONSIN**

**RESPONSE BRIEF OF SENATORS CARPENTER, LARSON,
SPREITZER, HESSELBEIN, AND SMITH TO OTHER PARTIES'
PROPOSED REMEDIAL MAPS**

PINES BACH LLP
Tamara B. Packard, SBN 1023111
Eduardo E. Castro, SBN 1117805
122 West Washington Ave., Suite 900
Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
tpackard@pinesbach.com
ecastro@pinesbach.com

*Attorneys for Respondents Senators
Carpenter, Larson, Spreitzer, Hesselbein,
and Smith*

January 22, 2024

TABLE OF CONTENTS

| | |
|--|-----------|
| INTRODUCTION..... | 6 |
| ARGUMENT..... | 6 |
| I. The Court’s authority to order nonpartisan maps is established..... | 6 |
| II. The Court should reject the Legislature’s and Johnson maps because they provide an unfair partisan advantage and disrupt communities of interest..... | 9 |
| A. The Legislature’s map and the Johnson map both fail to meet the Court’s nonpartisan criteria. | 9 |
| B. The political geography of Wisconsin does not support the Legislature’s and Johnson maps’ extreme Republican advantages.. | 13 |
| C. Restoration and preservation of communities of interest is a beneficial goal, which the Legislature’s and Johnson maps fail to advance. | 14 |
| 1. Preserving communities of interest is important. | 14 |
| 2. The Legislature and Johnson Respondents divide communities of interest..... | 16 |
| a. Milwaukee suburbs (Figure 1) | 17 |
| b. Green Bay (Figure 2)..... | 18 |
| c. Fox River/Lake Winnebago Shore (Figure 3) | 18 |
| d. Eau Claire/Chippewa Falls (Figure 4) | 19 |
| e. Wausau, Stevens Point, Wisconsin Rapids (Figure 5) | 19 |
| f. Central/Northern Wisconsin Rural Counties (Figure 6) | 20 |
| g. Sheboygan, Manitowoc, and Two Rivers (Figure 7)..... | 20 |
| h. Beloit and surrounding municipalities (Figure 8)..... | 21 |
| i. Southwestern Wisconsin and Driftless Area (Figure 9)..... | 21 |
| III. The Court should select the Democratic Senator Respondents’ map..... | 22 |
| CONCLUSION | 27 |
| Figure 1-Figure 9..... | 29 |
| CERTIFICATION..... | 41 |

TABLE OF AUTHORITIES

| | Page(s) |
|---|---------------|
| Cases | |
| <i>Abrams v. Johnson</i> , 521 U.S. 74 (1997) | 15 |
| <i>Att’y Gen. v. Chi. & Northwestern Ry. Co.</i> , 35 Wis. 425 (1874)..... | 7, 8, 16 |
| <i>Att’y Gen. v. City of Eau Claire</i> , 37 Wis. 400 (1875)..... | 8 |
| <i>State ex rel. Att’y Gen. v. Cunningham</i> , 81 Wis. 440, 51 N.W. 724 (1892) | 8 |
| <i>Baldus v. Members of the Wis. Gov’t Accountability Bd.</i> , 849 F. Supp. 2d 840 (E.D. Wis. 2012) | 6, 15 |
| <i>Carter v. Chapman</i> , 270 A.3d 444 (Pa. 2022), <i>cert. denied sub nom. Costello v. Carter</i> , 143 S. Ct. 102, 214 L. Ed. 2d 22 (2022) | 24 |
| <i>Clarke v. WEC</i> , 2023 WI 79 | <i>passim</i> |
| <i>Gaffney v. Cummings</i> , 412 U.S. 735 (1973) | 10 |
| <i>Hall v. Moreno</i> , 270 P.3d 961 (Colo. 2012) (en banc) | 24 |
| <i>Harper v. Hall</i> , 868 S.E.2d 499 (N.C. 2022), <i>superseded on other grounds</i> , 886 S.E.2d 393 (N.C. 2023) | 12, 13, 24 |
| <i>Johnson v. WEC</i> , 2021 WI 87, 399 Wis. 2d 623, <i>overruled on other grounds by Clarke</i> , 2023 WI 79. | 14, 15 |
| <i>Maestas v. Hall</i> , 274 P.3d 66 (N.M. 2012) | 15 |

| | |
|--|----------------|
| <i>Prosser v. Elections Bd,</i> 793 F. Supp. 859 (W.D. Wis. 1992) | 9, 15 |
| <i>Reynolds v. Sims,</i> 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) | 23 |
| <i>Whitford v. Gill,</i> 218 F. Supp. 3d 837 (W.D. Wis. 2016), <i>vacated on other</i> <i>grounds</i> , 138 S. Ct. 1916 (2018) | 6, 12, 13 |
| <i>Wisconsin State AFL-CIO v. Elections Bd.,</i> 543 F. Supp. 630 (W.D. Wis. 1982) | 15, 17, 18, 20 |

Other Authorities

| | |
|---|--------|
| <i>The Impact of Political Geography on Wisconsin Redistricting: An</i> <i>Analysis of Wisconsin's Act 43 Assembly Districting Plan</i> , 16:4 ELECTION L. J. 443, 447 (2017) | 13, 14 |
| Voting Rights Act | 14 |
| Wisconsin Constitution Article 7, section 3 | 7 |

INTRODUCTION

The Court found the existing state legislative maps unconstitutional and enjoined their further use. In this remedial phase, it invited the parties to submit proposed remedial maps that conform to specific criteria. Most parties complied. Two did not. As shown below, for such failure, the proposals from the Legislature and Johnson Respondents should be rejected. As further shown below, the plan offered by Senators Carpenter, Larson, Spreitzer, Hesselbein, and Smith (The “Democratic Senator Respondents”) does comply with the Court’s criteria. The Court should select it as the remedial plan.

ARGUMENT

I. The Court’s authority to order nonpartisan maps is established.

There can be no dispute that the 2011 Wisconsin legislative map was an extreme partisan gerrymander, designed with the “aggressive” intent to create an advantage to elect Republicans to the Assembly and Senate.

Baldus v. Members of the Wis. Gov’t Accountability Bd., 849 F. Supp. 2d 840, 844-46 (E.D. Wis. 2012); *Whitford v. Gill*, 218 F. Supp. 3d 837, 849 (W.D. Wis. 2016), *vacated on other grounds*, 138 S. Ct. 1916 (2018). It “reduced markedly the possibility that Democrats could regain control of the Assembly even with a majority of the statewide vote...” *Whitford*, 218 F. Supp. 3d at 895. The map chosen by the *Johnson* Court, vetoed SB 621, continued that aim through a court-endorsed “least change” approach, even strengthening the degree of Republican advantage. *1/16/24 Corrected Expert Report of Kenneth R. Mayer (“Mayer Report”) at 5 n.1*. Whether such design is legal or illegal is a question for another day. The fact of the design, however, is unassailable.

This Court made the right decision to overrule the *Johnson* least-change approach for a court-selected remedial map following a finding of unconstitutionality. *Clarke v. WEC*, 2023 WI 79, ¶ 63. In light of its judicial independence and as the only nonpartisan branch of state government, it made the honorable choice to decline any map that creates an advantage for one political party. Instead, the Court intends to remedy the unconstitutional map by replacing it with a nonpartisan one: one that meets all legal requirements, considers traditional districting criteria, and avoids advantaging one political party over another. *Id.* at ¶¶ 64-71. The Republican-controlled Legislature and the Republican Senator Respondents (hereinafter “the Legislature”), as well as the Johnson Respondents, object to this approach, claiming that the Court’s remedial power is limited to only narrowly redressing the constitutional violation of non-contiguity. *Leg. Br.*¹ at 15, 25; *Johnson Br.*² at 7-10.

Although there has been no determination that extreme partisan gerrymandering is unconstitutional, that is beside the point. The Court has every ability to select the remedy that it has outlined. Not only is this approach legally available; it is endorsed by Wisconsin Supreme Court decisions going back 150 years. The Constitutional authority of this Court to provide the appropriate remedy in matters of *publici juris*, such as the present one, is uniquely broad.

In *Att’y Gen. v. Chi. & Northwestern Ry. Co.*, 35 Wis. 425 (1874), this Court found that one purpose of original jurisdiction authority provided in Article 7, section 3 of the Wisconsin Constitution is to “nerve [the Court’s]

¹ Formally, “Opening Remedial Brief of Intervenor-Respondent Wisconsin Legislature” et. al., filed 1/12/24.

² Formally, “Brief of Intervenor-Respondents Billie Johnson” et al., filed 1/12/24.

arm to protect its citizens in their liberties and to guard...against usurpation.” *Id.* at 518. The Constitution’s grant of original jurisdiction is “to protect the general interests and welfare of the state and its people, which it would not do...to dissipate and scatter among many inferior courts,” making it “a court of first resort on all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people.” *Id.* The very next year, the Court noted that when ordinary remedies are inadequate, the exercise of original jurisdiction may provide the appropriate remedy. *Att’y Gen. v. City of Eau Claire*, 37 Wis. 400, 444 (1875).

There can be no higher or better use of the Supreme Court’s remedial powers than the preservation of democracy and judicial independence through adoption of a nonpartisan remedial map.³ As Justice Pinney put it, it is the Court’s duty “to protect and preserve the government against maladministration and the struggles of partisan strife and factional fury which might otherwise overthrow it.” *State ex rel. Att’y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 735 (1892). Left unrestrained, these “perversions” may come to “work the destruction and overthrow of the system of popular representative government itself.” *Id.* Thus, it is entirely within the Court’s authority to choose a remedial plan that will “produce a legislative composition that reflects the respective voting

³ The Legislature’s concern over senate disenfranchisement, *Leg. Br. at 20-21, 43-44*, is misplaced. Any map that complies with the Court’s directives is necessarily not a “least change” modification from the existing map--an extreme partisan gerrymander. As such, it will necessarily move a significant number of voters from even- to odd-numbered senate districts. Should the Court be concerned with the level of senate disenfranchisement in the proposed maps that meet the Court’s criteria, it could revisit its decision on *quo warranto* relief.

strengths of the parties in the state..." just as the federal court did in 1992. *Prosser v. Elections Bd*, 793 F. Supp. 859, 867 (W.D. Wis. 1992).

II. The Court should reject the Legislature's and Johnson maps because they provide an unfair partisan advantage and disrupt communities of interest.

A. The Legislature's map and the Johnson map both fail to meet the Court's nonpartisan criteria.

This Court clearly outlined the principles it would use to guide the selection of remedial legislative maps, *Clarke*, 2023 WI 79, ¶¶ 64-71, including that it will "consider partisan impact when evaluating remedial maps;" not ignore it. *Id.* ¶¶ 69-70. It explained, "as a politically neutral and independent institution, we will take care to avoid selecting remedial maps designed to advantage one political party over another." *Id.* ¶ 71. The Court invited the parties to submit proposed remedial maps that "comport with the principles laid out in this opinion." *Id.* ¶ 75. Thus, the direction to propose a remedial map that does not advantage one political party over another was clear. The Legislature patently disregarded it and, while the Johnson Respondents have addressed some of the Court's other criteria, their map also fails this one. The failures of each map on the nonpartisan criterion are discussed below.

First, the Legislature's proposal: despite the established social science methodologies for evaluating maps for political neutrality adopted by courts around the country and discussed thoroughly in the parties' January 12, 2024 filings, and the nonpartisan principle clearly stated by the Court, the Legislature complains that the Court did not define metrics for measuring political neutrality, so does not make even a passing attempt to offer a map that is nonpartisan. Rather, it maintains that it has offered a

“neutral” map by “moving less than 0.1% of Wisconsinites with no conceivable ‘partisan impact.’” *Leg. Br. at 46*. This is not the standard that the Court ordered. Rather, it is nothing more than a “least-change” approach, which this Court has overruled. *Clarke*, 2023 WI 79, ¶ 63. Applying it maintains the undeniable extreme partisan gerrymander that was instituted in 2011 and furthered with the *Johnson* “least change” map in 2022, advantaging Republicans. *Mayer Report at 5 n.1*. As this Court warned, taking a “politically mindless approach” will produce the “most grossly gerrymandered results.” *Clarke*, 2023 WI 79, ¶ 71 (citing *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)). This is precisely what the Legislature proposes. For blatantly disregarding this Court’s instruction, the Legislature’s map should be excluded from further consideration.

Moreover, as shown in the summaries below, derived from each party’s proposed plans and data generated in Dave’s Redistricting App, utilizing the composite election results for 2016-2022, the Legislature’s map greatly advantages Republicans. It ranks dead-last among party proposals in each metric of partisan fairness for both its assembly and senate map.

Assembly Plan Comparison

| | Dem Seats at 50- 50 vote | Dem Seats at Base (51.2%) | Dem Vote Share to Maj. | Comp Seats | Seats Bias | Votes Bias | Global Symm | Eff.- Gap | Mean- Median | Decl. |
|--------------------------|---|--|---|-----------------------|-----------------------|-----------------------|------------------------|----------------------|-------------------------|--------------|
| Dem. Senator Resp. | 45 | 47 | 52.0% | 16 | 4.1% | 2.0% | 3.2% | 4.0% | 2.3% | 10.2° |
| Clarke Pet. | 47 | 51 | 51.26% | 15 | 2.62% | 1.26% | 3.0% | 2.5% | 1.54% | 7.5° |
| Governor | 45 | 50 | 51.60% | 14 | 3.27% | 1.60% | 3.13% | 3.18% | 1.79% | 8.74° |
| Wright Pet. | 46 | 51 | 51.3% | 25 | 3.15% | 1.26% | 3.04% | 2.55% | 0.03% | 7.59° |
| Johnson Resp. | 42 | 43 | 53.04% | 23 | 7.78% | 3.04% | 3.86% | 7.39% | 4.89% | 16.4° |
| Legis. | 38 | 41 | 54.32% | 26 | 11.42% | 4.32% | 4.77% | 11.67% | 7.32% | 24.46° |

Senate Plan Comparison

| | Dem Seats at 50- 50 vote | Dem Seats at Base (51.2%) | Dem Vote Share to Maj. | Comp. Seats | Seats Bias | Votes Bias | Global Symm | Eff.- Gap | Mean- Median | Decl. |
|--------------------------|---|--|---|------------------------|-----------------------|-----------------------|------------------------|----------------------|-------------------------|--------------|
| Dem. Senator Resp. | 16 | 18 | 50.6% | 9 | 1.8% | 0.6% | 2.6% | 0.8% | -0.52% | 4.5° |
| Clarke Pet. | 15 | 16 | 51.6% | 7 | 4.10% | 1.62% | 3.06% | 3.5% | 2.12% | 8.87° |
| Governor | 15 | 17 | 51.76% | 11 | 4.89% | 1.76% | 3.2% | 3.95% | 1.26% | 9.59° |
| Wright Pet. | 15 | 17 | 51.6% | 8 | 4.31% | 1.60% | 2.75% | 3.51% | 1.01% | 9.02° |
| Johnson Resp. | 12 | 13 | 53.58% | 10 | 12.43% | 3.58% | 4.9% | 11.4% | 4.95% | 21.89° |
| Legis. | 12 | 13 | 54.25% | 10 | 14.75% | 4.25% | 5.3% | 14.46% | 5.91% | 28.26° |

While courts have not established specific benchmarks for all of these partisan neutrality factors, some courts have found efficiency gap scores greater than 7% to be problematic. *Harper v. Hall*, 868 S.E.2d 499, 548 (N.C. 2022), *superseded on other grounds*, 886 S.E.2d 393 (N.C. 2023) (citing *Whitford*, 218 F. Supp. 3d at 905). The Legislature's assembly map has an efficiency gap score of 11.67% and its senate map has an efficiency gap score of 14.46%.

As to seat bias, the Legislature's assembly plan locks in a 11-seat Republican advantage at 50% of the vote share, such that Republicans can obtain the majority of seats with just 45.7% of the statewide vote share. The Legislature's senate map similarly favors Republicans: it builds in a 5-seat bias at 50% of the vote share and allows Republicans to win the majority with just 45.8% of the statewide vote share. The Legislature's map is not by any stretch of the imagination politically neutral and should not be selected.

The Johnson map also fails to pass muster when it comes to partisan fairness. The Johnson Respondents frankly admit that they ignored the Court's directive to propose a nonpartisan map (they "did not take partisan breakdown into account when creating their map", *Johnson Br. at* 27) but instead addressed only the Court's other criteria. As shown in the summaries above, it scores *second to last* on each metric of partisan fairness for both maps. The Johnson assembly map has an efficiency gap score of 7.9% and its senate map has an efficiency gap score of 11.4%. These both also exceed the efficiency gap 7% outside benchmark adopted by other courts, discussed above. Finally, the Johnson map similarly creates unfair advantages for Republicans. In the assembly, the map has an eight-seat advantage at 50% of the statewide vote and permits Republicans to win

the majority with just 47% of the statewide vote share. In the senate, the map has a five-seat advantage at 50% of the statewide vote share and allows Republicans to win the majority with 46.4% of the statewide vote share.

Neither the Legislature's nor the Johnson Respondents' plan is partisan neutral. Accordingly, this Court should not select either plan.

B. The political geography of Wisconsin does not support the Legislature's and Johnson maps' extreme Republican advantages.

Both the Legislature and Johnson Respondents attribute their plans' drastic partisan skews to the political geography of Wisconsin. *Leg. Br. at 55-58; Johnson Br. at 27-30*. True, courts have recognized "a natural, *but modest*, advantage" for Republicans in Wisconsin's electoral system. *Whitford*, 218 F. Supp. at 921 (emphasis added). So have social scientists studying Wisconsin's political geography. Jowei Chen, *The Impact of Political Geography on Wisconsin Redistricting: An Analysis of Wisconsin's Act 43 Assembly Districting Plan*, 16:4 ELECTION L. J. 443, 447 (2017) ("[I]t is not extraordinary for Wisconsin's political geography, combined with traditional redistricting criteria, to naturally produce a districting plan that *somewhat* favors Republicans.") (emphasis added). Partisan fairness metrics help determine whether a skew in a proposed map "necessarily results from...unique political geography," *Harper*, 868 S.E.2d at 547-48, or whether the skew is by design to gain partisan advantage.

Dr. Chen's simulation of Wisconsin districting determined that "a nonpartisan districting process following traditional districting principles generally produces a state assembly plan with *minimal bias*." That bias *modestly* favors Republicans. Chen, *supra*, at 444. Seventy-two percent of

Dr. Chen's simulated plans exhibited an efficiency gap within 3% of zero. *Id.* at 447. He explained that "an efficiency gap of within 3% of zero" indicates "no substantial favoring of either Democrats or Republicans." *Id.* at 444. Chen concluded, "These patterns illustrate that a nonpartisan districting process following traditional criteria very commonly produces a neutral Assembly plan in Wisconsin with minimal electoral bias." *Id.* at 447.

The level of Republican advantage in the Legislature's and Johnson maps (with correspondingly high efficiency gaps) is not supported by political geography.⁴ Revealingly, all other parties were able to produce compliant maps that recognize the "natural, but modest" Republican advantage, while still achieving partisan fairness.⁵ The partisan tilts of the Legislature's and Johnson maps are not "natural" but rather appear to be manufactured.

C. Restoration and preservation of communities of interest is a beneficial goal, which the Legislature's and Johnson maps fail to advance.

1. Preserving communities of interest is important.

The Legislature and Johnson Respondents also fail to properly consider the "universally recognized redistricting criterion" of preserving communities of interest. *Clarke*, 2023 WI 79, ¶ 68; *Johnson v. WEC*, 2021 WI

⁴ A full review and rebuttal of the reports of Drs. Trende (Legislature) and Blunt (Johnson) is beyond the scope of this brief, but neither appear to use communities of interest in their simulations. Blunt did not account for Voting Rights Act compliance in his, and Trende appeared to do so in only one set of simulations. *Trende Report* at 14-15, 26, 36, 46-47; *Blunt Report* at ¶ 16. Hence their data is of questionable use here.

⁵ In fact, Republicans can win the majority of seats without winning the majority of votes under every proposed map.

87, ¶ 83, 399 Wis. 2d 623, 673, (Hagedorn, J., concurring), *overruled on other grounds by Clarke*, 2023 WI 79, ¶ 83. (“*Johnson I*”). Indeed, considering how a map preserves communities of interest is an “appropriate, useful, and neutral factor” to consider when selecting a map among legally compliant maps. *Johnson I*, 2021 WI 87, ¶ 83 (Hagedorn, J., concurring). Both parties claim that they have complied with this consideration merely by minimizing political subdivision splits.⁶ *Leg. Br. at 45-46; Johnson Br. at 21-22*. But such claims are unsupported in redistricting jurisprudence and the role of this court.

Numerous courts have recognized that preserving communities of interest is a valid and important redistricting consideration. *Prosser*, 793 F. Supp. at 863 (“To be an effective representative, a legislator must represent a district that has a reasonable homogeneity of needs and interests; otherwise the policies he supports will not represent the preferences of most of his constituents.”); *Baldus*, 849 F. Supp. 2d at 857 (considering whether district lines would disrupt communities of interest); *Abrams v. Johnson*, 521 U.S. 74, 92 (1997); *see also Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 637-38 (W.D. Wis. 1982).

Contrary to the Legislature’s and Johnson Respondents’ assertions, a “community of interest” may extend beyond a political boundary. *Prosser*, 793 F. Supp. at 863 (“There is some although of course not a complete correlation between geographical propinquity and community of interests.”); *Maestas v. Hall*, 274 P.3d 66, 78 (N.M. 2012) (“We interpret communities of interest to include a contiguous population that shares

⁶ The Legislature’s map contains far more political subdivision splits than any other map before the Court.

common economic, social, and cultural interests which should be included within a single district for purposes of its effective and fair representation.”). Political scientists who study redistricting define a community of interest as “a geographically bounded set of people who live in a reasonably compact and generally cognizable area, and are a politically cohesive group of people that share similar social, cultural or economic interests.” *Mayer Report at 13* (citing Grofman and Cervas). As shown below, the Legislature’s and Johnson maps ignore and split communities of interest and instead merge distinctly different groups with disparate interests – usually urban and rural communities – into single districts to achieve maps that create a strong Republican advantage.

As discussed in Section I, in matters *publici juris*, this Court *must* “protect the general interests and welfare of the state and its people.” *Chi. & Northwestern Ry. Co.*, 35 Wis. at 518. Failing to consider and preserve communities of interest in a remedial map would be an abdication of its role. This Court is empowered to, and must, consider whether proposed maps provide fair and effective representation to communities of interest.

2. The Legislature and Johnson Respondents divide communities of interest.

Many communities of interest were identified by the petitioning parties and the Democratic Senator Respondents. Both the Legislature and Johnson Respondents divide these communities without legitimate reason.

Because they fail to preserve communities of interest, this Court should reject their maps.⁷

a. Milwaukee suburbs (Figure 1)

City of Milwaukee suburban cities of Wauwatosa and West Allis are recognized communities of interest, as is the cluster of north shore suburbs. *AFL-CIO*, 543 F. Supp. at 638-39; *see also Mayer Report at 14-15*. In these Milwaukee suburban districts, the Democratic Senator Respondents made two minor alterations to minimize municipal boundary splits and preserve these communities of interest: they reunited the Village of Shorewood with the north shore suburbs by moving it to AD 23, and extended the eastern boundary of AD 14 to encompass all wards in the City of Wauwatosa. *Mayer Report at 14-15*.

The Johnson Respondents continue to divide Shorewood from the rest of the north shore suburbs. While they adjust the eastern boundary of AD 14 to encompass all of the City of Wauwatosa, they do so at the expense of creating a municipal split in the City of West Allis. Their proposed AD 18 extends further southwest, making a district that combines parts of the City of Milwaukee with the City of West Allis. This not only results in a municipal split, but trades disruption of one community of interest for another.

The Johnson Respondents further unnecessarily divide West Allis. While all parties split the city to accommodate a municipal island in the neighboring City of Greenfield, West Allis has a population of roughly a

⁷ Beginning at page 28 of this brief are Figures 1-9: images of the areas of the proposed maps of the Democratic Senator Respondents, Johnson Respondents, and Legislature that are discussed below. They were generated from Dave's Redistricting App.

single assembly district. Yet the Johnson Respondents divide the city between *four* assembly districts (AD 15, AD 82, AD 7, and AD 18). Despite being identified as a community of interest in *AFL-CIO*, 543 F. Supp. at 638, it is highly unlikely that under this map the citizens of West Allis could elect an assemblyperson from their community.

The Legislature makes no alterations to the current district boundaries, continuing to divide these suburban communities.

b. Green Bay (Figure 2)

There are four assembly splits and two senate splits made to the City of Green Bay under the previous map. *Mayer Report at 15*. The Democratic Senator Respondents addressed these unnecessary splits in their proposal, placing the entire City of Green Bay within two assembly districts and a single senate district. *Id.* Perhaps most important to the citizens of Green Bay, under this map, a single senator would represent their interests and the interests of Lambeau Field.

By contrast, the Johnson Respondents gratuitously divide Green Bay, splitting the city into three assembly districts. The Legislature maintains all of the current unnecessary splits, dividing the city across four assembly seats and two senate districts.

c. Fox River/Lake Winnebago Shore (Figure 3)

Key municipalities in the Fox River Valley along the shore of Lake Winnebago are united in interest by virtue of being the densest population centers and largest cities along the lake. The Democratic Senator Respondents unite these communities of interest in a single senate district (SD 19), made up of AD 56, AD 55, and AD 57. Both the Legislature and

Johnson Respondents split this community of interest into two separate senate districts.

d. Eau Claire/Chippewa Falls (Figure 4)

The Democratic Senator Respondents unite two bordering municipalities and population centers in northeastern Wisconsin: Eau Claire and Chippewa Falls. The Legislature and Johnson Respondents divide these two municipalities into two senate districts with more rural populations. And, while the City of Eau Claire needs to be split at least once for population reasons, the Johnson Respondents unnecessarily divide this municipality into three different districts.

e. Wausau, Stevens Point, Wisconsin Rapids (Figure 5)

Wausau and Stevens Point are two of the largest cities in central Wisconsin, and are interconnected by virtue of an interstate highway and the Wisconsin River. The Democratic Senator Respondents preserve this community of interest by connecting them and Wisconsin Rapids in a single senate district (SD 24).

In contrast, the Johnson Respondents place Wausau in a different senate district from Stevens Point and Wisconsin Rapids and extend both senate districts west into the rural counties between these cities and Eau Claire, thus combining different communities of interest and advancing a Republican advantage in those districts. In the Assembly, the Johnson map unnecessarily splits the City of Wausau from its suburbs--the City of Schofield and villages of Rothschild and Weston--into two assembly districts. Rather than unite this population center, the Johnson Respondents extend the Wausau assembly district north across the

Marathon County border into Lincoln County. Similarly, the Legislature divides Wausau from Stevens Point and Wisconsin Rapids, choosing instead to combine these cities with disparate rural communities.

f. Central/Northern Wisconsin Rural Counties (Figure 6)

Outside of Wausau, Stevens Point, and Wisconsin Rapids, central and northern Wisconsin has relatively low population densities. *Mayer Report at 20*. The Democratic Senator Respondents' map combines parts or all of eight rural counties across northern and central Wisconsin into a single compact district. *Id.* SD 29 is the most compact district under the Democratic Senator Respondents' plan. *Id.*

As discussed above, both the Legislature and Johnson Respondents disrupt these communities of interest by combining them with population centers. Most troublingly, particularly with the Legislature's map, these disruptions to communities of interest come at the expense of Wisconsin's constitutional districting directive of compactness.

g. Sheboygan, Manitowoc, and Two Rivers (Figure 7)

The City of Sheboygan and the cities of Manitowoc and Two Rivers are also a community of interest. *Mayer Report at 21*. Within that community of interest, the cities of Manitowoc and Two Rivers are particularly interconnected through their joint visitors bureau. *Id.* The Democratic Senator Respondents' map places this community of interest into one senate district (SD 9) made of an assembly district containing all of the City of Sheboygan, Town of Wilson, and most of the Town of Sheboygan (AD 26), an assembly district containing Two Rivers and Manitowoc (AD 25), and an assembly district of the surrounding areas

inland (AD 27). While the Johnson Respondents keep this larger community of interest intact with their senate plan, they split the City of Sheboygan into two assembly districts unnecessarily.

The Legislature drastically disturbs these communities of interest. Its assembly map splits the City of Sheboygan into two assembly seats that extend inland, *and* splits Two Rivers from Manitowoc. It further places Manitowoc and Two Rivers in separate senate districts.

h. Beloit and surrounding municipalities (Figure 8)

The City of Beloit can easily be fit within a single assembly district, along with adjoining municipalities. *Mayer Report at 22*. The Democratic Senator Respondents accomplish this with their assembly map. By contrast, the Legislature unnecessarily divides the City of Beloit among two assembly districts.

i. Southwestern Wisconsin and Driftless Area (Figure 9)

The Democratic Senator Respondents unite Southwestern Wisconsin into a single, compact, and geographically representative senate district (SD 17). *Mayer Report at 23*. This stands in marked contrast to the Legislature's and Johnson maps. Under the Johnson map, SD 17 extends from the southwestern point of the state all the way to Wisconsin Dells. Under the Legislature's map, the northern boundary of SD 17 extends almost to Wisconsin Rapids in the central part of the state. Consequently, both the Legislature's and Johnson maps fail to protect communities of interest in the Driftless area and Southwestern Wisconsin.

III. The Court should select the Democratic Senator Respondents' map.

Unlike the Legislature's and Johnson maps, the Democratic Senator Respondents' map complies with the criteria laid out by this Court. *Clarke*, 2023 WI 79, ¶¶ 64-71; *Dem. Sen. Resp. Br.*⁸ at 8-26 (summarizing compliance with the Court's criteria); *Mayer Report* at 5-30 (analysis of the Democratic Senator Respondents' map). It also fares just as well – and in ways better – than the remaining maps proposed. As to the Wisconsin constitutional districting directives, the Democratic Senator Respondents' map scores commensurate with the Clarke, Wright, and Governor's maps:

Assembly Plan Comparison

| | Population Deviation | County Splits | Municipal Splits | Ward Splits | Compactness (Mean Reock) |
|--------------------------------|----------------------|---------------|------------------|-------------|--------------------------|
| Democratic Senator Respondents | 1.86% | 51 | 72 | 2 | 0.419 |
| Clarke Petitioners | 0.92% | 44 | 45 | 1 | 0.406 |
| Governor | 1.96% | 45 | 55 | 5 | 0.420 |
| Wright Petitioners | 1.83% | 47 | 52 | 0 | 0.423 |
| Johnson Respondents | 0.98% | 37 | 37 | 15 | 0.439 |
| Legislature | 1.10% | 53 | 114 | 120 | 0.385 |

⁸ Formally, "Corrected Brief in Support of Senators Carpenter, Larson, Spreitzer, Hesselbein, and Smith's Proposed Remedial Map," filed 1/16/24.

Senate Plan Comparison

| | Population Deviation | County Splits | Municipal Splits | Ward Splits | Compactness (Mean Reock) |
|--------------------------------|----------------------|---------------|------------------|-------------|--------------------------|
| Democratic Senator Respondents | 1.35% | 42 | 48 | 1 | 0.388 |
| Clarke Petitioners | 0.65% | 34 | 29 | 1 | 0.404 |
| Governor | 1.46% | 33 | 33 | 2 | 0.42 |
| Wright Petitioners | 1.20% | 37 | 34 | 0 | 0.407 |
| Johnson Respondents | 0.65% | 29 | 25 | 10 | 0.408 |
| Legislature | 0.49% | 42 | 65 | 61 | 0.397 |

Where the Democratic Senator Respondents' map distinguishes itself is on partisan neutrality. This Court has ordered that "[a]s a politically neutral and independent institution, [it] will take care to avoid selecting remedial maps designed to advantage one political party over another." *Clarke*, 2023 WI 79, ¶ 71; *see also Reynolds v. Sims*, 377 U.S. 533, 565-66, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) ("[T]he achieving of fair and effective representation for all citizens is concededly the basic aim of legislative reapportionment."). The Court should select the Democratic Senator Respondent's map because it complies with the constitutional and traditional redistricting ordered by the Court and presents the most politically neutral senate map, which is premised upon a similarly politically neutral assembly map.

The parties' maps were analyzed to measure partisan impact according to competitive seats,⁹ seat bias, votes bias, global symmetry, efficiency gap, mean-median, and declination. These are all metrics utilized by other courts to measure partisan impact of maps. *See Carter v. Chapman*, 270 A.3d 444, 458-59, (Pa. 2022), *cert. denied sub nom. Costello v. Carter*, 143 S. Ct. 102, 214 L. Ed. 2d 22 (2022) (endorsing efficiency gap and mean-median metrics and considering partisan fairness metrics "wholistically"); *Carter*, 270 A.3d at 475 (Donohue, J., concurring) (noting declination score); *Harper*, 868 S.E.2d at 548 (endorsing mean-median difference analysis, efficiency analysis, close-votes, close-seats analysis, and partisan symmetry); *Hall v. Moreno*, 270 P.3d 961, 972-73 (Colo. 2012) ("[C]onsideration of competitiveness is consistent with the ultimate goal of maximizing fair and effective representation.") (en banc). A summary of the partisan impact metrics for each proposed senate map, derived from each party's plans and data generated in Dave's Redistricting App, utilizing the composite election results for 2016-2022, follows:

⁹ A competitive district is one with a less than 10% difference in baseline vote shares between Democrats and Republicans. *Mayer Report at 24*.

Senate Plan Comparison

| | Dem Seats at 50- 50 vote | Dem Seats at Base (51.2%) | Dem Vote Share to Maj. | Comp Seats | Seats Bias | Votes Bias | Global Symm | Eff. Gap | Mean- Median | Decl. |
|--------------------------|--------------------------------------|------------------------------------|---------------------------------|---------------|---------------|---------------|----------------|-------------|-----------------|--------|
| Dem. Senator Resp. | 16 | 18 | 50.6% | 9 | 1.8% | 0.6% | 2.6% | 0.8% | -0.52% | 4.5° |
| Clarke Pet. | 15 | 16 | 51.6% | 7 | 4.10% | 1.62% | 3.06% | 3.5% | 2.12% | 8.87° |
| Governor | 15 | 17 | 51.76% | 11 | 4.89% | 1.76% | 3.2% | 3.95% | 1.26% | 9.59° |
| Wright Pet. | 15 | 17 | 51.6% | 8 | 4.31% | 1.60% | 2.75% | 3.51% | 1.01% | 9.02° |
| Johnson Resp. | 12 | 13 | 53.58% | 10 | 12.43% | 3.58% | 4.9% | 11.4% | 4.95% | 21.89° |
| Legis. | 12 | 11* | 54.25% | 10 | 14.75% | 4.25% | 5.3% | 14.46% | 5.91% | 28.26° |

Global symmetry, efficiency gap, mean-median vote, and declination are all metrics that evaluate whether all voters have an equal opportunity to translate votes into representation.¹⁰ The Democratic Senator Respondents' map consistently scores the highest on all of these measures of partisan fairness. As to measures of competitiveness, the tipping point for control of the senate occurs at almost exactly 50% of vote share: Republicans can secure the majority with 49.4% of the vote share; Democrats can secure the majority with 50.6% of the vote.

Due to Wisconsin's "nesting" requirement, senate district boundaries are necessarily dependent on the boundaries of assembly districts. Even so, the Democratic Senator Respondents' assembly map is

¹⁰ The closer to "0.0" on each of these metrics, the more neutral the map. *Mayer Report at 26-29.*

equally neutral as, and within fractions of percentages on partisan neutrality scores of, the various Petitioners' maps.

Assembly Plan Comparison

| | Dem Seats at 50- 50 vote | Dem Seats at Base (51.2%) | Dem Vote Share to Maj. | Comp Seats | Seats Bias | Votes Bias | Global Symm | Eff. Gap | Mean- Median | Decl. |
|--------------------------|--------------------------------------|------------------------------------|---------------------------------|---------------|---------------|---------------|----------------|-------------|-----------------|--------|
| Dem. Senator Resp. | 45 | 47 | 52.0% | 16 | 4.1% | 2.0% | 3.2% | 4.0% | 2.3% | 10.2° |
| Clarke Pet. | 47 | 51 | 51.26% | 15 | 2.62% | 1.26% | 3.0% | 2.5% | 1.54% | 7.5° |
| Governor | 45 | 50 | 51.60% | 14 | 3.27% | 1.60% | 3.13% | 3.18% | 1.79% | 8.74° |
| Wright Pet. | 46 | 51 | 51.3% | 25 | 3.15% | 1.26% | 3.04% | 2.55% | 0.03% | 7.59° |
| Johnson Resp. | 42 | 43 | 53.04% | 23 | 7.78% | 3.04% | 3.86% | 7.39% | 4.89% | 16.4° |
| Legislature | 38 | 38 | 54.32% | 26 | 11.42% | 4.32% | 4.77% | 11.67% | 7.32% | 24.46° |

Finally, the Democratic Senator Respondents' plan corrects every instance of noncontiguity that was present under the *Johnson* map and contains no non-contiguous territory. We are aware that there has been public commentary expressing concern that there appear to be noncontiguous ward fragments in this plan. However, as recognized in the parties' Joint Stipulation as to the Redistricting Data, With Appendix A (hereinafter "*Jt. Stip.*"), there are ward fragments with erroneous municipal-ward identifiers, which may be considered under the corrected ward labels outlined therein. *See Jt. Stip.* ¶¶ 8-12 and Appendix A. This was

also noted in Dr. Mayer's report. *Mayer Report at 7 n.5.*¹¹ All apparent noncontiguous territories in the map are either actual land islands surrounded by water, or fragments identified in the Joint Stipulation, and therefore should not be considered noncontiguous. To the extent the Court does not accept the Joint Stipulation as addressing this concern, it can be addressed with a simple technical adjustment.¹²

In sum, the Democratic Senator Respondents have proposed a remedial map that complies with this Court's redistricting criteria and ensures its role as a "politically neutral and independent institution." *Clarke*, 2023 WI 79, ¶ 71. Under this map, it is the people of Wisconsin—not the parties in this litigation or this Court—that will determine which party obtains a majority in the assembly and senate. The Court should adopt the Democratic Senator Respondents' map.

CONCLUSION

For the reasons discussed in this response brief and their brief in support of their proposed remedial map, the Democratic Senator Respondents respectfully request that the Court adopt their map to remedy the previous finding of unconstitutionality of the current state legislative map.

¹¹ Indeed, when manually reassigned to the "corrected" locations listed in the appendix, all of the apparent noncontiguities disappear, as shown in the maps at these links:

Assembly:

<https://davesredistricting.org/maps#viewmap::f340d615-8591-4a11-8891-a8e297034293>

Senate:

<https://davesredistricting.org/maps#viewmap::9593154f-7190-4775-bf0b-95558954a6b4>

¹² All but two of the fragments are unpopulated. The two with population—550250008001000 (88 people) and 550350008021018 (14 people)—could be incorporated into the appropriate district without causing population deviation concerns.

Respectfully submitted this 22nd day of January 2024.

PINES BACH LLP

By: Electronically signed by Tamara B. Packard

Tamara B. Packard, SBN 1023111

Eduardo E. Castro, SBN 1117805

*Attorneys for Respondents Senators Carpenter,
Larson, Spreitzer, Hesselbein, and Smith*

Mailing Address:

122 West Washington Ave., Suite 900

Madison, WI 53703

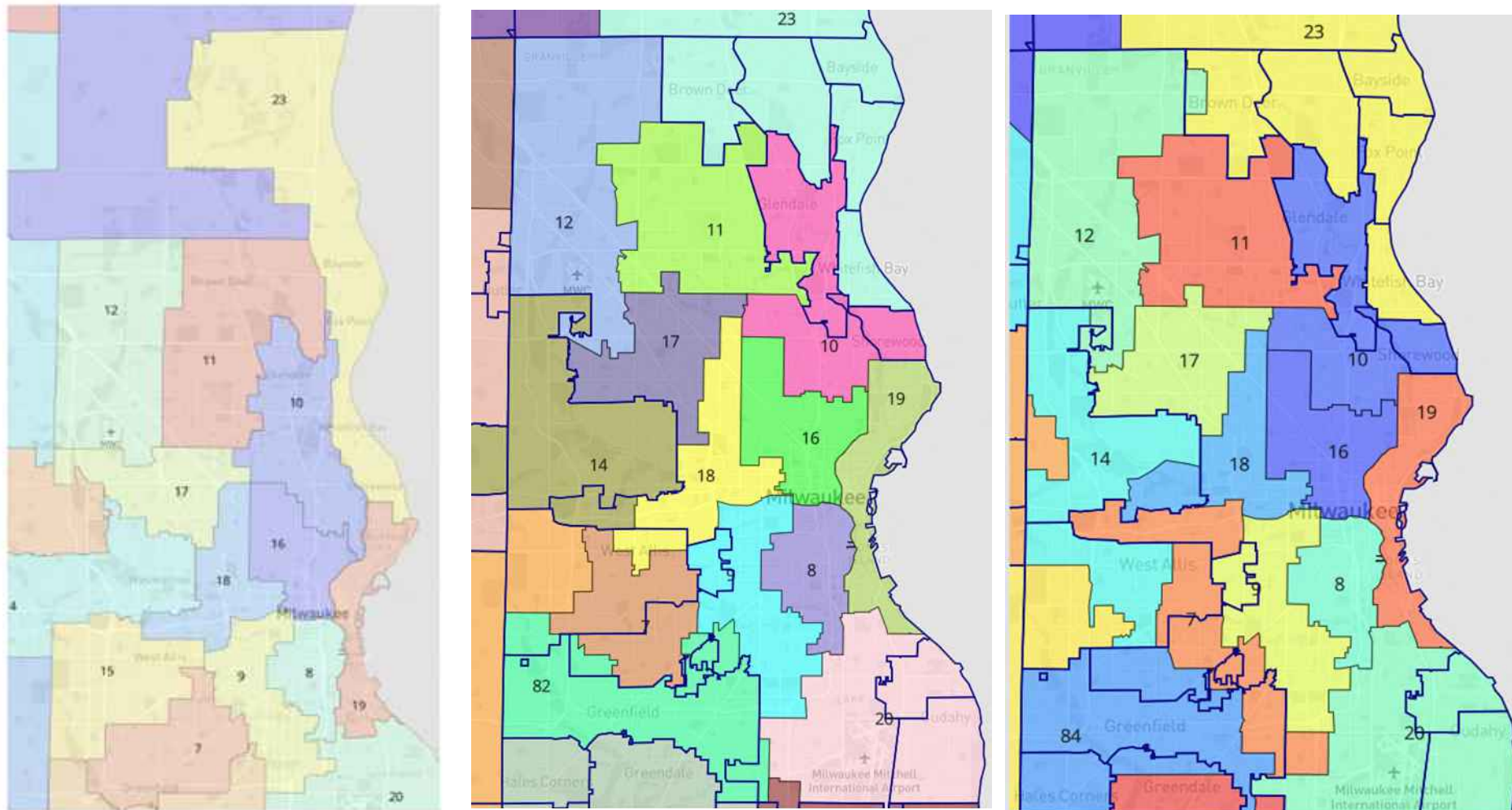
(608) 251-0101 (telephone)

(608) 251-2883 (facsimile)

tpackard@pinesbach.com

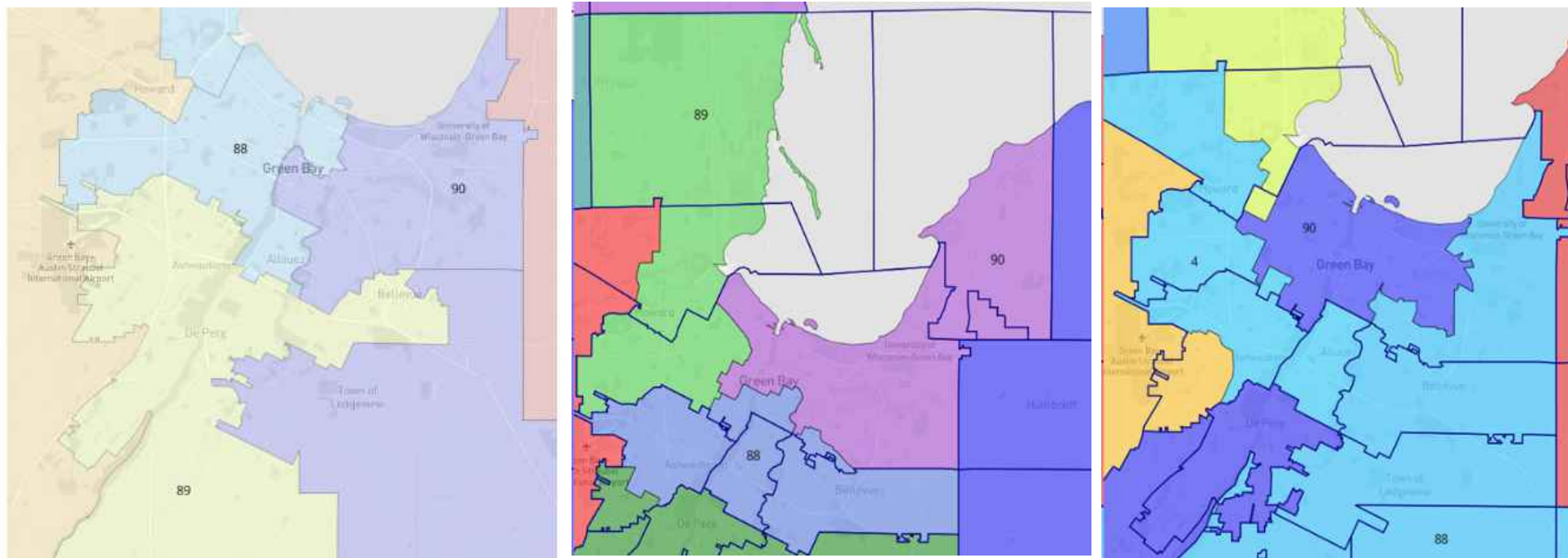
ecastro@pinesbach.com

Figure 1. Milwaukee Suburban Assembly Districts



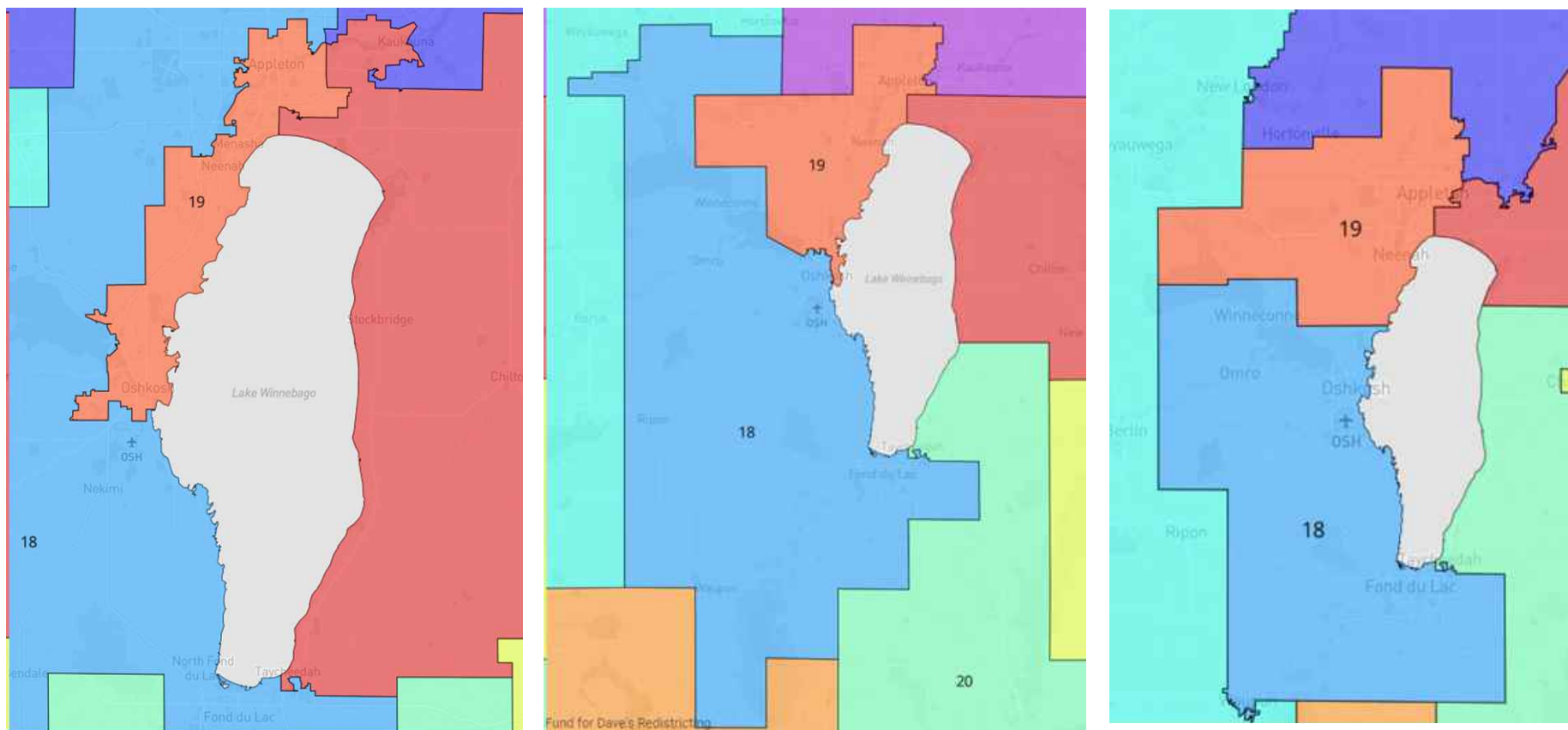
L to R: Democratic Senator Respondents, Johnson Respondents, Legislature

Figure 2. Green Bay Assembly Districts



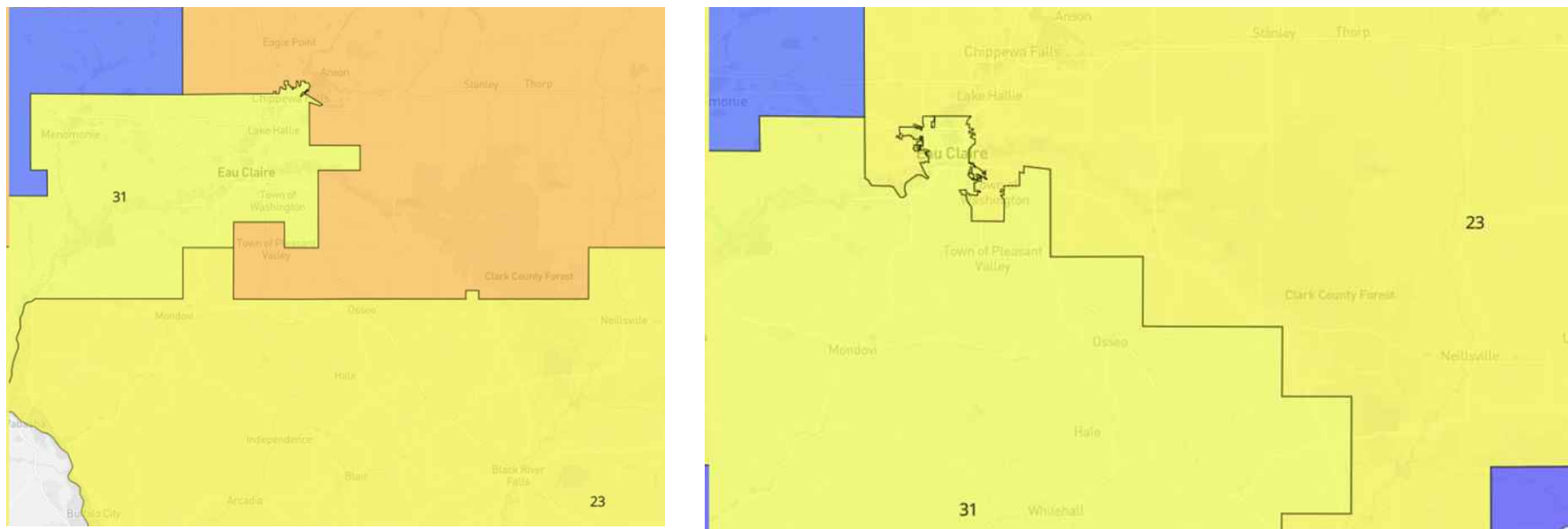
L to R: Democratic Senator Respondents, Johnson Respondents, Legislature

Figure 3. Fox River/Lake Winnebago Shore Senate Districts

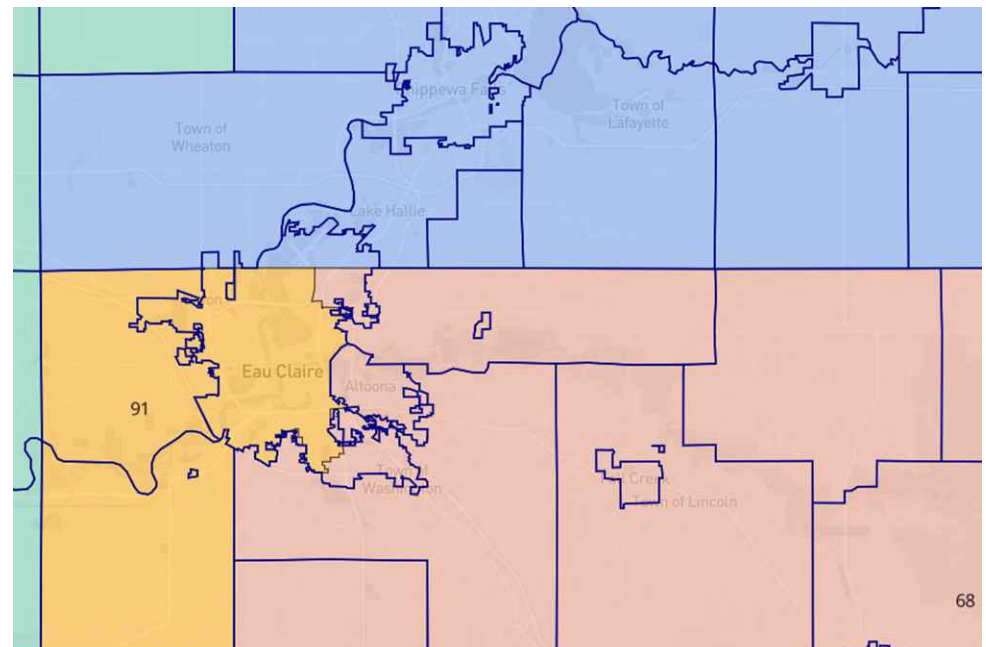
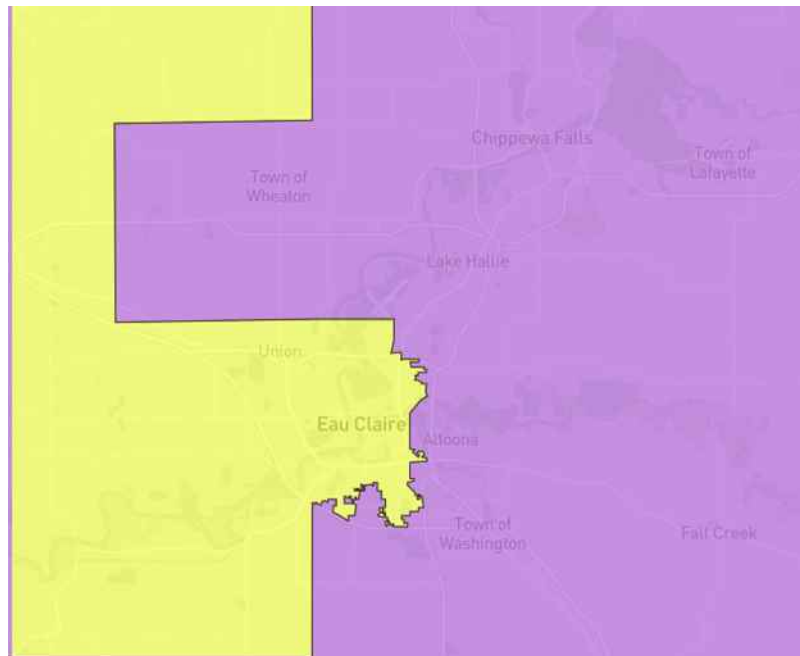


L to R: Democratic Senator Respondents, Johnson Respondents, Legislature

Figure 4. Eau Claire/Chippewa Falls Districts

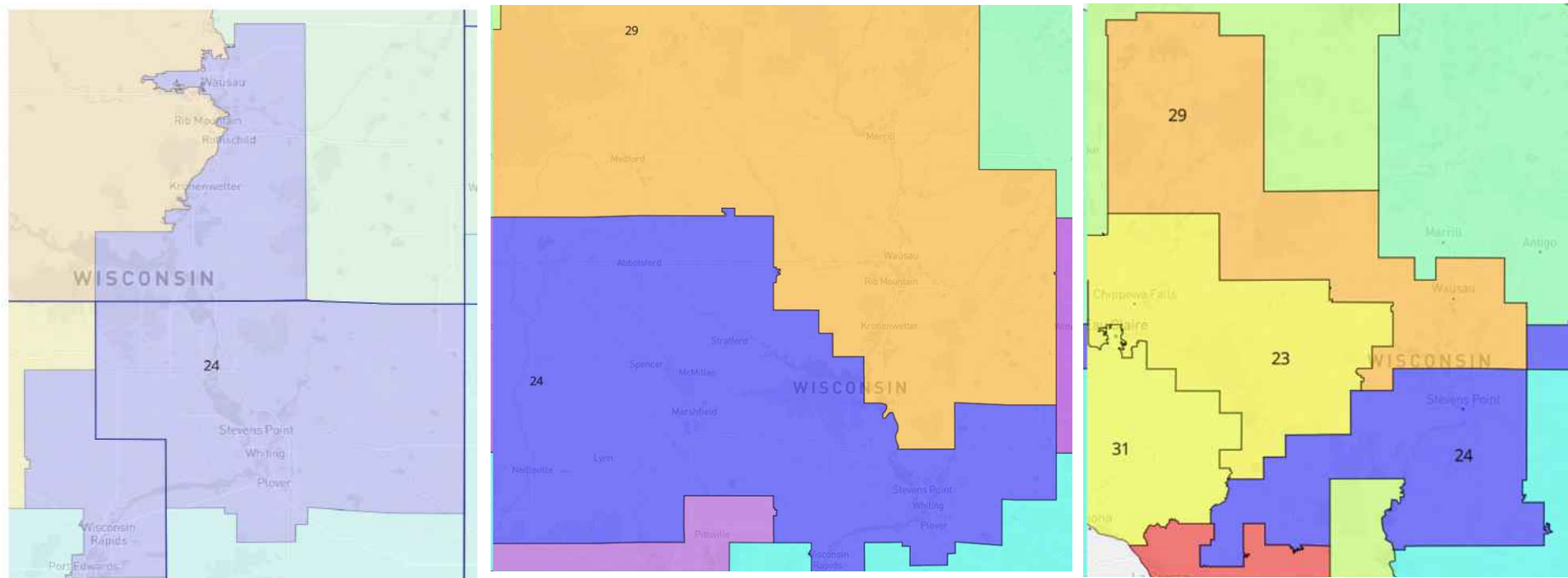


L to R: Democratic Senator Respondents (Senate), Legislature (Senate).



L to R: Johnson Respondents (Senate), Johnson Respondents (Assembly)

Figure 5. Wausau, Stevens Point, Wisconsin Rapids Senate Districts



L to R: Democratic Senator Respondents, Johnson Respondents, Legislature

Below: Johnson Respondents (Assembly)

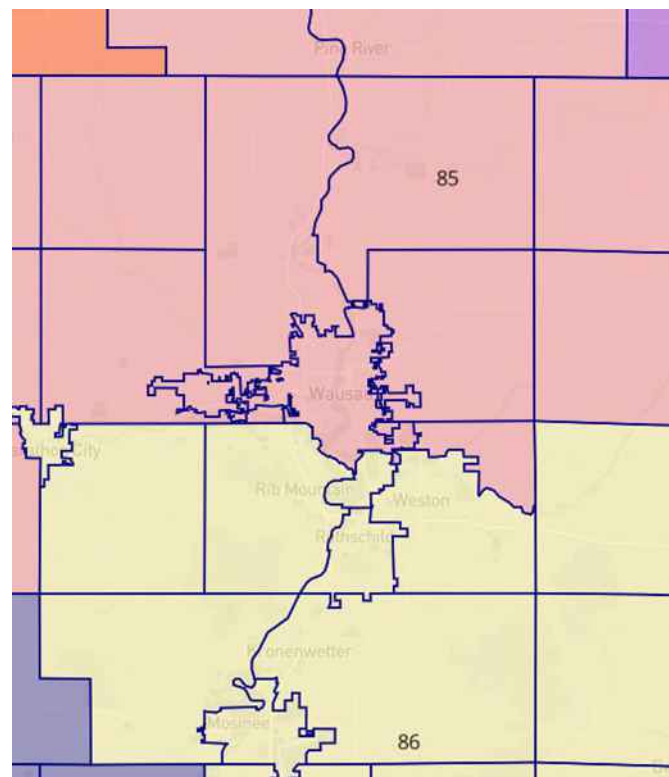
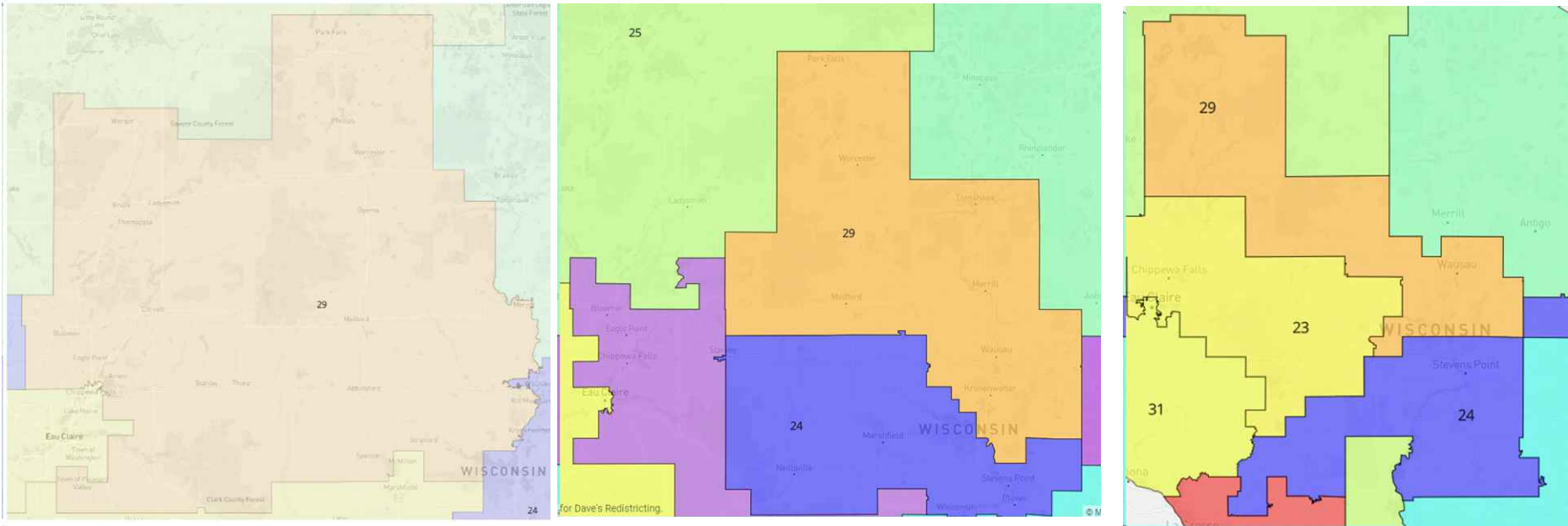
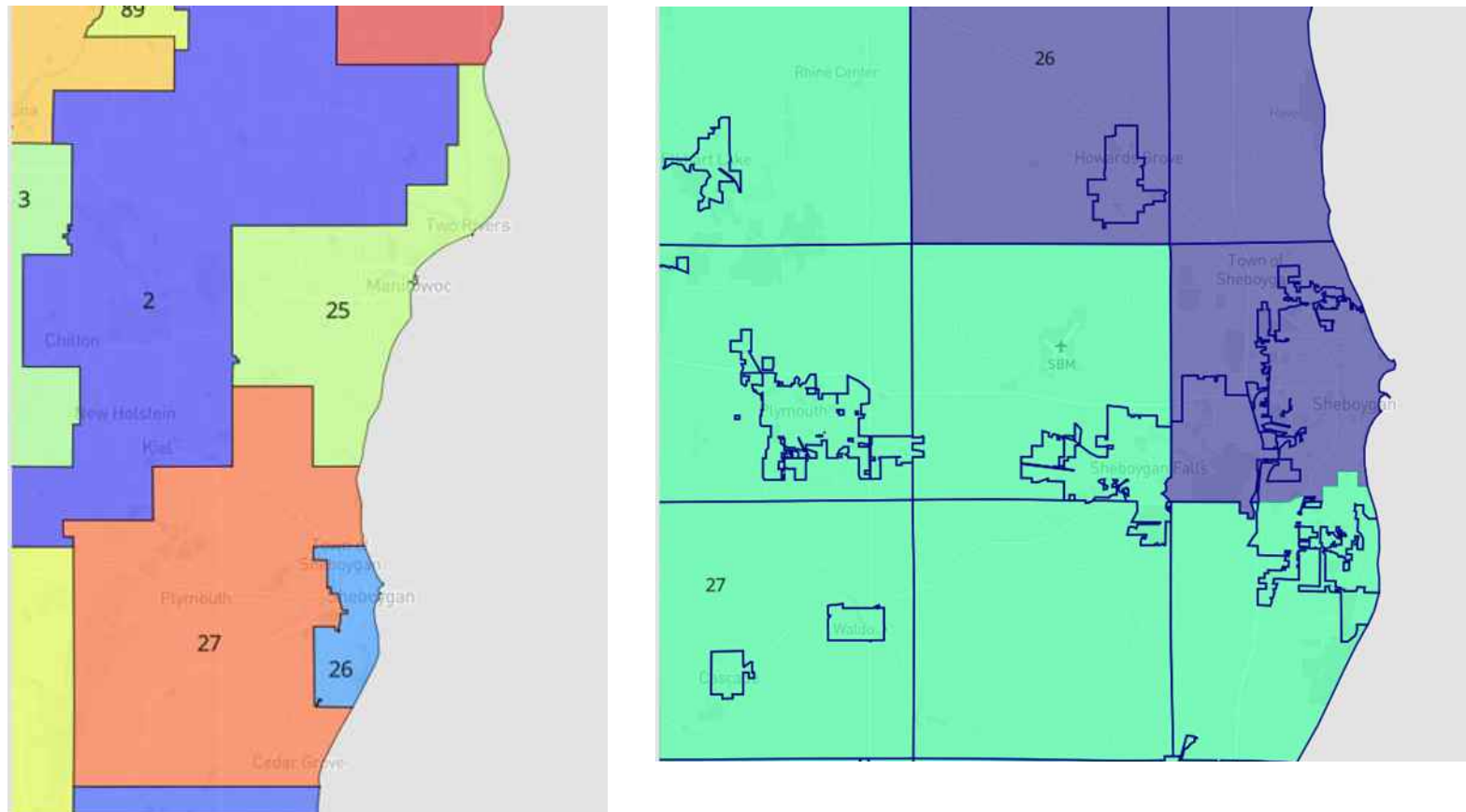


Figure 6. Central/Northern Wisconsin Rural County Senate Districts

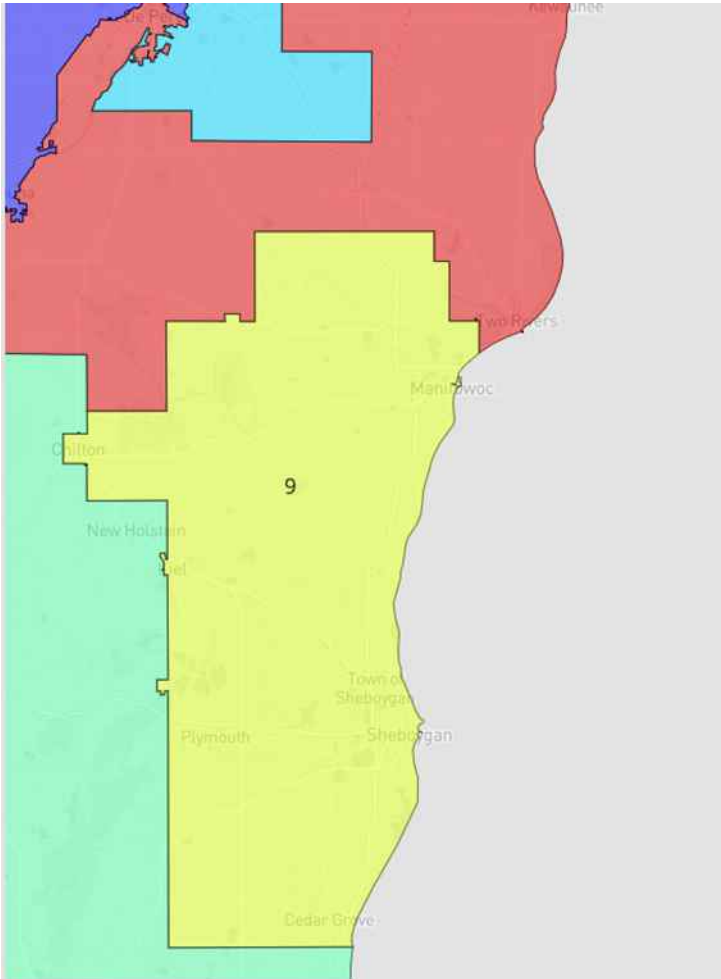
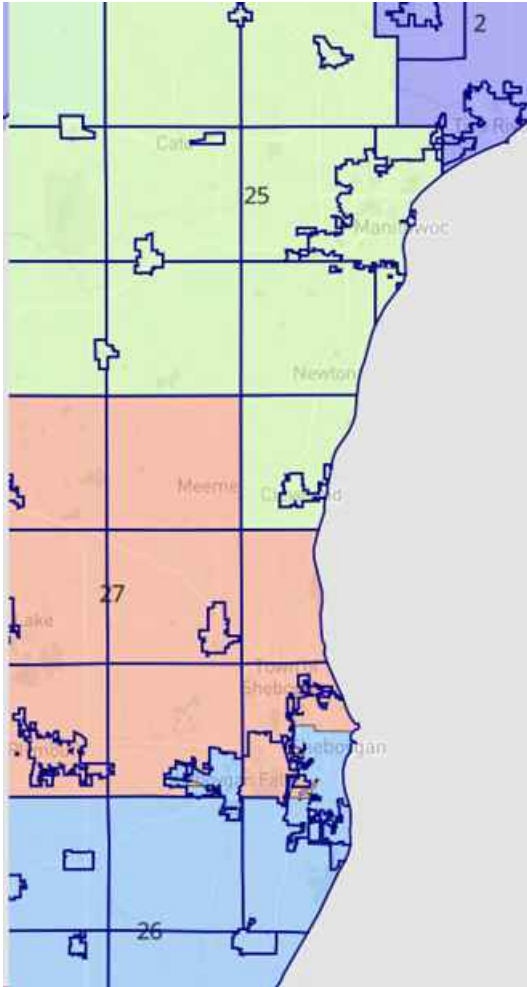


L to R: Democratic Senator Respondents Johnson Respondents, Legislature

Figure 7. Cities of Sheboygan, Manitowoc, and Two Rivers Districts

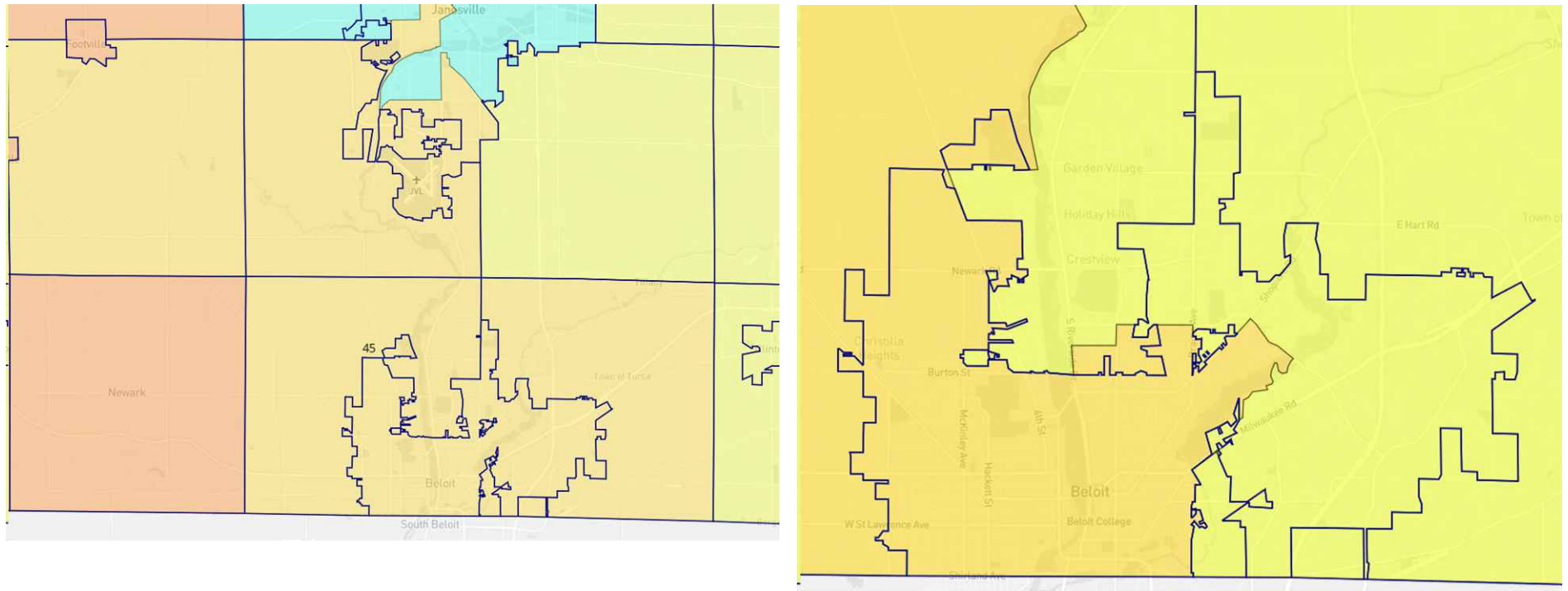


L to R: Democratic Senator Respondents (Senate), Johnson Respondents (Assembly)



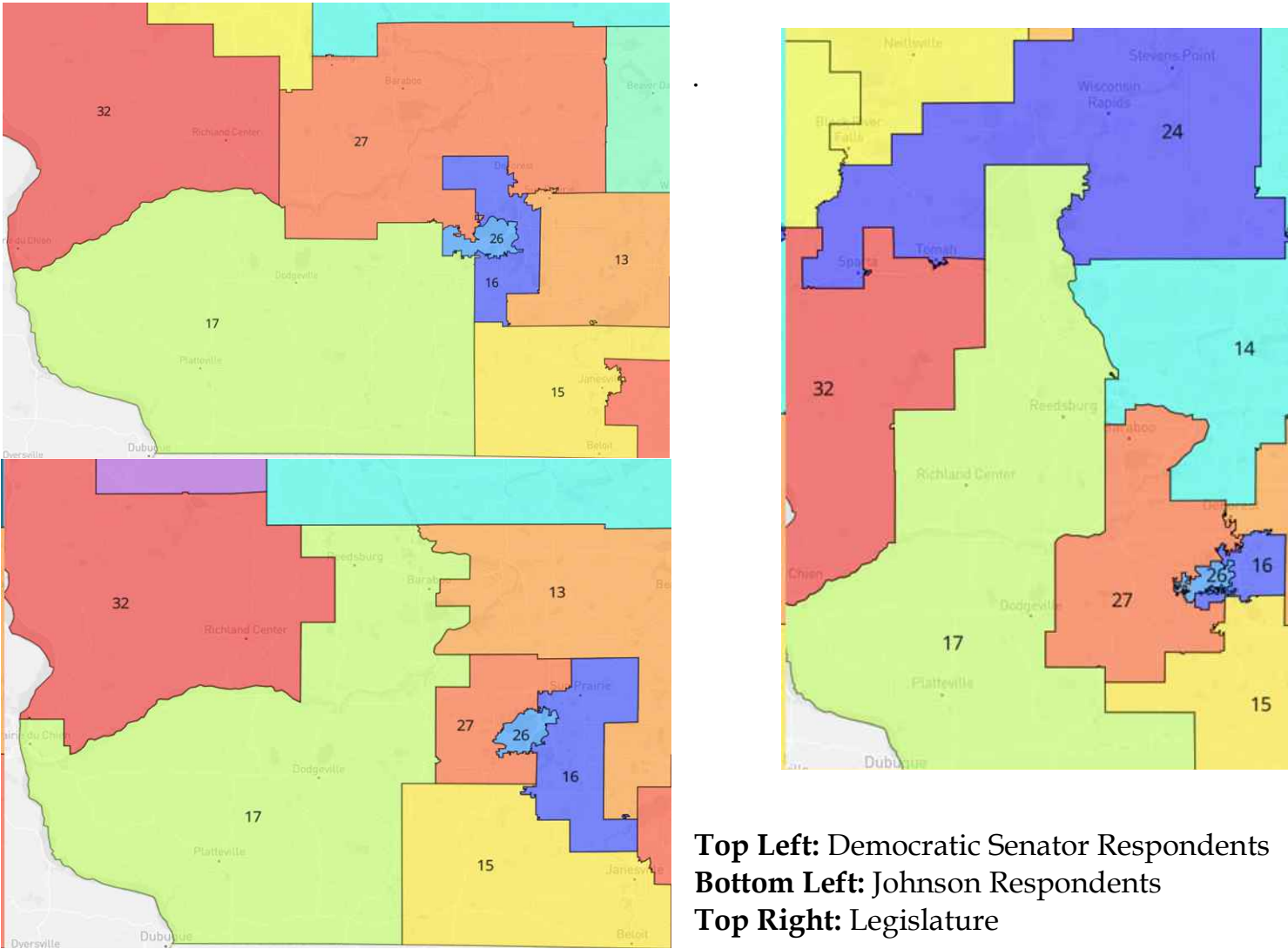
L to R: Legislature (Assembly), Legislature (Senate)

Figure 8. City of Beloit and Surrounding Area Districts



L to R: Democratic Senator Respondents (Assembly), Legislature (Assembly)

Figure 9. Southwestern Wisconsin and Driftless Area Senate Districts



Top Left: Democratic Senator Respondents
Bottom Left: Johnson Respondents
Top Right: Legislature

CERTIFICATION

I hereby certify that this brief conforms to the Court's December 22, 2023 Order for the response brief due on January 22, 2024 and the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a response brief. The length of this brief is 5,499 words.

Electronically signed by: Tamara B. Packard
Tamara B. Packard, SBN 1023111