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IN SUPREME COURT

No. 2023AP1399-OA

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REBECCA CLARKE, RUBEN ANTHONY, TERRY  
DAWSON, DANA GLASSTEIN, ANN GROVES-LLOYD,  
CARL HUJET, JERRY IVERSON, TIA JOHNSON, ANGIE  
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BRITTANY MURIELLO, ELA JOOSTEN (PARD) SCHILS,  
NATHANIEL SLACK, MARY SMITH-JOHNSON, DENISE  
SWEET, and GABRIELLE YOUNG,

Petitioners,

GOVERNOR TONY EVERS, in his official capacity;  
NATHAN ATKINSON, STEPHEN JOSEPH WRIGHT,  
GARY KRENZ, SARAH J. HAMILTON, JEAN-LUC  
THIFFEAULT, SOMESH JHA, JOANNE KANE and LEAH  
DUDLEY,

Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION; DON MILLIS,  
ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S.  
JACOBS, MARGE BOSTELMANN, CARRIE RIEPL, in  
their official capacities as Members of the Wisconsin  
Election Commission; MEAGAN WOLFE, in her official  
capacity as the Administrator of the Wisconsin Elections  
Commission; ANDRE JACQUE, TIM CARPENTER, ROB  
HUTTON, CHRIS LARSON, DEVIN LEMAHIEU,  
STEPHEN L. NASS, JOHN JAGLER, MARK SPREITZER,  
HOWARD MARKLEIN, RACHAEL CABRAL-GUEVARA,  
VAN H. WANGGAARD, JESSE L. JAMES, ROMAINE  
ROBERT QUINN, DIANNE H. HESSELBEIN, CORY  
TOMCZYK, JEFF SMITH and CHRIS KAPENGA, in their  
official capacities as Members of the Wisconsin Senate.

Respondents,

WISCONSIN LEGISLATURE; BILLIE JOHNSON,  
CHRIS GOEBEL, ED PERKINS, ERIC O'KEEFE,  
JOE SANFELIPPO, TERRY MOULTON, ROBERT  
JENSEN, RON ZAHN, RUTH ELMER  
and RUTH STRECK,

Intervenor-Respondents.

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**GOVERNOR TONY EVERS' RESPONSE BRIEF ON  
PROPOSED REMEDIAL MAPS**

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## INTRODUCTION

The parties' submissions reflect a clear divide. There are maps that satisfy the redistricting criteria, reduce partisan bias, and promote communities of interest—like the Governor's plans. And then there are the Legislature's and Johnson Intervenors' ("Respondents"<sup>1</sup>) proposed plans. They might satisfy traditional criteria to a certain extent, but they plainly fail under partisan fairness and cohesive communities considerations. That is, adopting Respondents' plans would mean intentionally ignoring marked partisan bias and "selecting remedial maps designed to advantage one political party over another," which this Court said it would not do. *Clarke*, 2023 WI 79, ¶ 71. The Court cannot embrace Respondents' methodology.

In contrast, the Governor's proposal takes seriously the role of representing "the people as a whole," *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 558, 126 N.W.2d 551 (1964), and the obligation to propose maps that achieve "fair and effective representation for all citizens." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

First, the Governor's plans perform well on the constitutional and traditional redistricting criteria: they satisfy equal population, are contiguous and compact, appropriately maintain municipal boundaries, and promote communities of interest. Second, using every established metric of partisan fairness, the Governor's proposed plans are in the top tier. They promote partisan neutrality and reduce partisan bias. The Governor's plans thus are among those that "best abide[] by the traditional core criteria with attention paid to the subordinate historical considerations and awareness of partisan fairness," *Carter v. Chapman*,

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<sup>1</sup> The term "Respondents" does not include the Senate Democrats.

270 A.3d 444, 471 (Pa.), *cert. denied sub nom. Costello v. Carter*, 143 S. Ct. 102 (2022), while Respondents' plans are among the worst—scoring poorly on partisan fairness metrics, especially when compared to maps like the Governor's, which demonstrate that neutral maps can be readily drawn. The people of Wisconsin therefore would be well-served by adoption of the Governor's proposals.

## ARGUMENT

### **I. The Governor's proposed maps, which properly balance the redistricting criteria, are in the top tier of proposals and outperform the Respondents' maps.**

The Governor's proposed maps are in the top tier overall when it comes to balancing the many considerations for map-drawing. They satisfy all redistricting criteria. Further, and importantly, the proposed maps do all this while minimizing partisan bias and respecting communities of interest—things that the Respondents' proposals fail to do. Because the Governor's proposals properly balance these factors, they are in the top tier and outperform the proposals from Respondents.

#### **A. The Governor's proposed maps perform as well or better than the Legislature's and the Johnson Intervenors' proposals on traditional criteria.**

Regarding traditional districting criteria, the Governor's maps surpass the Respondents' proposed maps as a whole.

*First*, the Governor's proposed maps perform well on splits. They are either better than or on par with Respondents' proposals.

Unsurprisingly, the Governor's proposals outstrip the Legislature's on splits, as the Legislature's remedial maps



cleave very closely to the existing maps. The Governor’s Assembly proposal bests the Legislature on having fewer county splits (45 versus 53); city splits (23 versus 43); town splits (22 versus 51); and village splits (10 versus 20). (Fairfax Suppl. Chart 3.) The same is true in the Senate; the Governor’s proposed map has fewer splits than the Legislature’s under all metrics: county splits (33 versus 42); city splits (13 versus 29); town splits (12 versus 25); and village splits (8 versus 11) (*Id.* at 5)

It is true that the Johnson Intervenors split fewer counties and municipalities than the Governor. However, that comes at a cost. The Johnson Intervenors split more than double the wards in the Assembly—13 to the Governor’s five.<sup>2</sup> (Johnson Br. 14; Fairfax Rep. ¶ 59.) Although wards will change post-redistricting, ward splits should not be ignored. The Court stated in its recent decision that it would take into consideration splits, “particularly towns and wards.” *Clarke*, 2023 WI 79, ¶ 66. That makes sense; it is disruptive to force local governmental units to rejigger their ward boundaries more than necessary.

In all, the Governor’s proposals are notably better than the Legislature’s on splits and on par with the Johnson Intervenors on the most important split-related metrics—towns and wards.

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<sup>2</sup> The number of ward splits in the Fairfax Supplemental Chart are higher because those figures do not account for the parties’ stipulated ward splits. Further, as explained in the opening brief, several of the ward splits in the Governor’s map are not bona fide splits for other reasons. For instance, a ward split of former Town of Madison Ward 2 does not split any wards on the ground. The Town of Madison was dissolved and two new wards were created—Madison Wards 145 and 147. The Governor’s district line does not split either of those current wards.

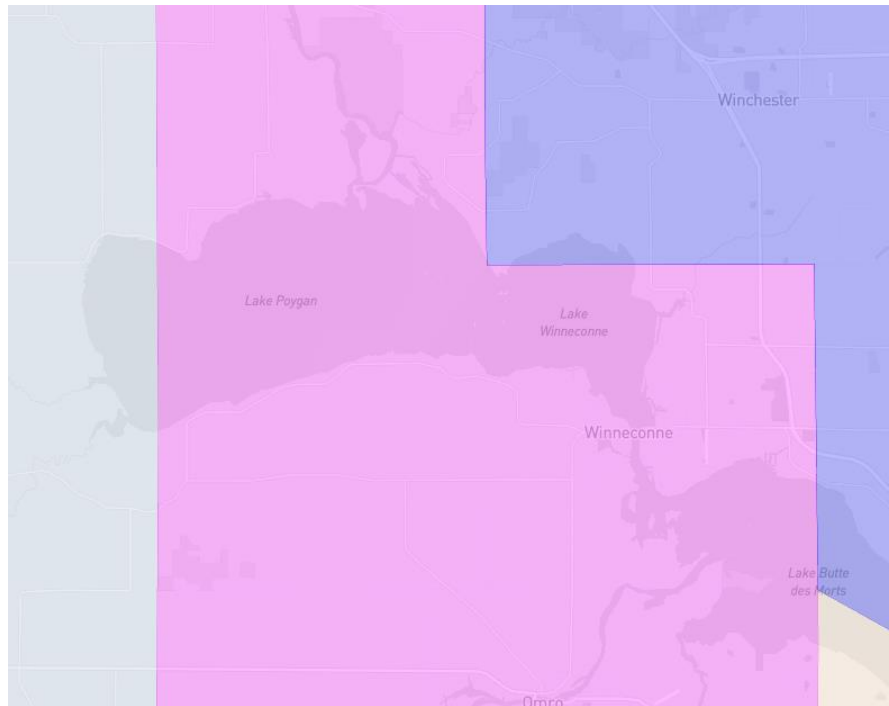
*Second*, regarding compactness, the Governor's proposals again are either better than or on par with Respondents.

Compared to the Legislature's proposals, the Governor's proposed maps excel. On the Reock scale, the Governor's Assembly score is .42 (with higher being more compact) versus the Legislature's .38. (Fairfax Suppl. Chart 3.) The Polsby-Popper scale is similar: the Governor's Assembly map scores a .35 versus the Legislature's .25. (*Id.*) The same dynamic exists in the Senate: the Governor's map has a Reock score of .42 and a Polsby-Popper score of .32, compared to a Reock score of .39 and a Polsby-Popper score of .23 for the Legislature's map. (*Id.* at 5.)

As for the Johnson Intervenors, their Assembly map scores only slightly better on the Reock scale than the Governor's map: .44 for Johnson compared to .42 for the Governor. (Fairfax Suppl. Chart 3.) However, on Polsby-Popper, the scores are identical: .35. And the Senate maps' compactness favors the Governor's proposal: the Johnson Intervenors score .41 on Reock and .28 on Polsby-Popper, compared to the Governor's .42 on Reock and .32 on Polsby-Popper (notably more compact). (*Id.* at 5.)

These compactness scores are especially notable given Respondents' "political geography" argument, which incorrectly posits that mapmakers would have to gerrymander to neutralize Wisconsin's "natural" pro-Republican bias because of voters' distribution throughout the state. The Governor's maps refute this idea by drawing appropriately compact districts with minimal political bias.

*Third*, although the Johnson Intervenors' maps may be technically contiguous, the community around Lake Poygan is split into three Assembly districts, unnecessarily creating a rowboat district out of Assembly District 53 (shown in pink below). Specifically, a boat is the only way to connect the portions of the district north and south of the lake; otherwise, one would have to travel by land through another district.



While it makes sense to allow for water contiguity when there is no other choice, it is another matter to unnecessarily rely on water contiguity. The Governor's maps connect these communities by land. Because it is unnecessary, the Johnson Intervenors' Lake Poygan configuration should weigh against adopting their map.

*Fourth*, regarding population deviation, the Governor's proposals are commensurate with the Respondents' proposals. All are within the safe harbor, where districts' populations are within 2% of each other. In particular, the Governor's proposed Assembly map has a range of 1.96% and the Senate map has a range of 1.46%.

It is established that a court-drawn plan with a total deviation of less than 2% satisfies constitutional concerns. *Wis. State AFL-CIO v. Elections Board*, 543 F. Supp. 630, 634 (E.D. Wis. 1982); *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471, at \*7 (E.D. Wis. May 30, 2002) (discussing “de minimis 2% threshold”). And within that 2% safe harbor, a court is not obligated to select the plan with the lowest deviation. *See, e.g., Fletcher v. Golder*, 959 F.2d 106, 109 (8th Cir. 1992) (rejecting argument that district court erred by not accepting lowest deviation plan). In other words, and as the Legislature concedes, for population deviation purposes, the Court may treat as identical any plan that is within the 2% safe harbor. (Leg. Br. 35–36.) The Johnson Intervenors likewise acknowledge that landing below the threshold is what matters. (Johnson Br. 5.)

The fact that 2% deviation is considered de minimis is tied to two considerations.

First, population equality is “not the only goal of redistricting,” so courts must consider performance on other factors. *Prosser v. Elections Bd.*, 793 F. Supp. 859, 864 (W.D. Wis. 1992). In *Prosser*, for example, the court developed its own remedial map even when presented with plans that achieved 0% deviation. The court explained that these plans sacrificed other factors. *Id.* at 865–66. And as the Minnesota Supreme Court put it: “requirements of both substantial population equality and respect for political subdivisions are better met by . . . creating a house district with a deviation that—although it could be made smaller—is well within the two-percent maximum.” *Hippert v. Ritchie*, 813 N.W.2d 374, 383 (Minn. 2012). Here, for example, the Governor’s proposed maps focus on, among other things, other constitutional criteria and maintaining communities of interest.

Second, *Prosser* explained that population equality is an imperfect measure of voting power, so it is appropriate to allow deviation. *Prosser*, 793 F. Supp. at 865. Census counts

are estimates, represent a snapshot in time, and quickly become outdated. *Id.* Further, not all residents of a district are eligible to vote, and many eligible electors do not vote. *Id.* Therefore, small deviations in population equality are too “trivial to register in the most sensitive analysis of political power.” *Id.*

The Governor’s plans fall below the 2% safe harbor for population deviation and therefore meet population equality requirements. They are on equal footing with all other proposals on this measure.

\* \* \* \*

In sum, if the foregoing traditional criteria were at issue, the Governor’s proposals would prevail over the Respondents’. However, there is more. Discussed next, the Governor’s maps outperform Respondents’ on partisan neutrality metrics and better serve communities of interest. With these factors taken into account, there should be no serious question about the high performance of the Governor’s maps, particularly relative to Respondents’ proposals.

**B. The Governor’s proposed maps outperform the Respondents’ maps on measures of partisan neutrality.**

The Court clearly stated that its remedial maps will *not* “ignore partisan impact.” *Clarke*, 2023 WI 79, ¶ 70. Respondents’ proposed maps, however, have done precisely that. “The Johnson Intervenors did not take partisan breakdown into account when creating their map.” (Johnson Br. 27.) Likewise, “[t]he Legislature’s proposed remedy resolves all noncontiguities *without going beyond that constitutional violation.*” (Legislature Br. 1 (emphasis added).) Respondents thus disregarded this Court’s mandate that “it is not possible to remain neutral and independent by failing to consider partisan impact entirely.” *Clarke*, 2023 WI 79, ¶ 71.

Three conclusions follow from this. First, the Governor’s maps and other Petitioner-aligned plans respect the call for partisan neutrality when evaluated with established partisanship metrics, while the Respondents’ maps are extremely biased. Second, Respondents’ reliance on “political geography” to explain their plans’ bias is nothing more than an attempt to distract from their stealth gerrymandering. Third and finally, Respondents’ argument concerning partisan proportionality is a red herring, confusing proportionality—which no one has advocated for—with neutrality.

**1. Metrics of partisanship and competitiveness show that the Governor’s plans are much more neutral than Respondents’ plans.**

Respondents’ submissions—both the Legislature’s and Johnson Intervenors’—perform the worst on commonly accepted partisanship metrics. On the other hand, the Governor’s plans—along with other Petitioner-aligned parties—score in the top tier across all measures of partisan bias and district competitiveness. That is a dispositive reason to eliminate Respondents’ proposed maps from contention.

<b>Political Neutrality (PlanScore)</b>						
	Gov.	Clarke	Johnson	Sen. Dems	WI Leg.	Wright
Efficiency Gap	6.4%	5.9%	9.3%	6.5%	11.0%	6.6%
Declination	0.37	0.34	0.53	0.37	0.63	0.37
Partisan Bias	6.0%	5.4%	9.3%	6.3%	11.7%	5.9%
Mean-Median	2.9%	2.5%	4.0%	3.0%	5.2%	2.5%
Competitive (#Districts)	32	34	23	31	19	34

Respondents' maps do not just perform poorly—they are undemocratic outliers. The authoritative literature on the efficiency gap confirms that state legislative plans with an efficiency gap of 8% or higher, like Respondents' maps, are partisan gerrymanders and should be “deemed presumptively unconstitutional.” Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 884–95 (2015). Although this Court need not decide if any map would be an unconstitutional gerrymander, the efficiency gaps in Respondents' proposed plans underscore their disqualifying bias.<sup>3</sup>

Additionally, the Governor's maps eclipse Respondents' maps on other partisan metrics across the board: declination, partisan bias, and mean-median scores. And the Governor's maps lead in the creation of competitive districts—43 in all compared to the Legislature's 22 and the Johnson Intervenors' 31.

In sum, there is a clear hierarchy among the parties' proposed remedial plans. The Petitioner-aligned plans are the most neutral, the most responsive, and perform the best. Respondents' plans are the most biased, the most politically entrenching, and perform the worst.

## **2. Respondents' political geography arguments do not save their proposed maps.**

Respondents ignored this Court's instruction to create politically neutral proposed maps, instead relying on

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<sup>3</sup> Respondents argue that there is no reliable measure of partisan neutrality but that is belied by the many established measures discussed in the submissions. Further, this Court need not draw a bright line of how much partisanship is too much but rather may use “look wholistically to a plan's performance across the assessments.” See *Carter v. Chapman*, 270 A.3d 444, 470 (Pa.), cert. denied sub nom. *Costello v. Carter*, 143 S. Ct. 102 (2022).

Wisconsin’s alleged “political geography” to explain their submissions’ partisan bias and to criticize the other parties’ neutral approach. (See Legislature Br. 53–57; Johnson Br. 22–30.) These efforts should be rejected.

As a threshold issue, Respondents’ two expert ensembles regarding Wisconsin’s political geography (in the reports of Dr. Sean Trende and Dr. Christopher Blunt) are unhelpful because they are based on a flawed starting point: they were drawn “without . . . any political information.” (Trende Rep. 8; see also Blunt Rep. ¶ 16.) Neither is there any reason to believe that Respondents checked their work on the back end; and if they did, they ignored the results. That is not neutrality. It is willful blindness, and the opposite of what the Court directed. See *Clarke*, 2023 WI 79, ¶ 71. And, making matters worse, the ensembles also ignore Wisconsin’s many communities of interest, another important criterion that the Court made clear it would consider. *Id.* ¶ 68.

The Court’s instructions about partisan neutrality and impact were well-founded. They guard against the risk of “stealth” gerrymandering and the use of flawed political geography arguments. Specifically, in a state where “Democratic voting strength is more concentrated than Republican voting strength,” map-drawers—like Respondents—can engage in “stealth gerrymandering” by purporting to prioritize other criteria over considerations of “political fairness.” Jonathan Cervas and Bernard Grofman, *Can State Courts Cure Partisan Gerrymandering: Lessons from League of Women Voters v. Commonwealth of Pennsylvania (2018)*, 17 Election L. J. 264, 270, 282 (2018). That is precisely what Respondents attempt, by cloaking their plans’ extreme partisan bias in the justifications of political geography and traditional redistricting criteria.

Other scholars have noted that Wisconsin is particularly susceptible to this risk. Although Wisconsin’s “natural political geography . . . could plausibly produce a



plan with a modest amount of Republican-favoring electoral bias,” this “natural electoral bias” is *not* an explanation for the “extreme electoral bias” reflected in plans like Respondents’. Jowei Chen, *The Impact of Political Geography on Wisconsin Redistricting: An Analysis of Wisconsin’s Act 43 Assembly Districting Plan*, 16 Election L. J. 443, 444 (2017). Thus, contrary to Respondents’ position that political geography explains their plans’ extreme Republican bias, “drawing a minimally biased Assembly map is reasonably possible” in Wisconsin. *Id.* at 452.<sup>4</sup> t

Statistical analysis of the parties’ submissions underscores that Respondents’ proposed plans are unreasonably biased to favor Republicans, even considering Wisconsin’s political geography. Although Respondents’ experts conspicuously failed to assess the efficiency gap, partisan bias, and declination scores for their ensembles—possibly because Respondents’ proposed plans perform poorly by comparison—Dr. Trende did evaluate (1) predictive performance of the ensemble relative to an index of election data,<sup>5</sup> and (2) the mean-median score for his ensemble. (See *generally* Trende Report.) And a comparison of Respondents’ proposed plans to Dr. Trende’s ensemble still shows the bias of Respondents’ plans.

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<sup>4</sup> See also John Johnson, *The balance of power in Wisconsin’s Assembly under alternative maps*, Marquette University Law School Redistricting Blog (Mar. 27, 2023), <https://law.marquette.edu/assets/community/lubar/posts/WI-Nov-2022-In-Selected-Assembly-Scenarios-3-27-2023.html> (“Much has been written (including by me) about how Wisconsin’s political geography disfavors Democrats at the legislative level. Evers’ strong performance in the hypothetical districts drawn ... is a demonstration of how this need not necessarily be the case.”).

<sup>5</sup> Dr. Blunt also conducted a similar analysis of his ensemble’s performance relative to indexed election data. Because that analysis is largely consistent with Dr. Trende’s, this brief compares the parties’ proposals to Dr. Trende’s only.

First, the predictive performance of the parties' submissions (generated by PlanScore) shows that Respondents' maps are outliers *and* the Governor's map is consistent with Dr. Trende's ensemble. Dr. Trende's Report shows that in the ensemble, Democrats win between 39 and 47 Assembly seats. (*See* Trende Rep. 50.)<sup>6</sup> As shown in the chart below, using PlanScore, the Respondents' plans are predicted to result in fewer Democratic seats in the Assembly.

<b>PlanScore District Data</b>	
<u>Proposed Assembly Plan</u>	<u>Number of Seats with 50+% Chance Democratic Win</u>
Governor's Plan <sup>7</sup>	43
Clarke Petitioners' Plan <sup>8</sup>	47
Wright Plan <sup>9</sup>	39
Senate Democrats' Plan <sup>10</sup>	43
Legislature's Plan <sup>11</sup>	36
Johnson Plan <sup>12</sup>	34

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<sup>6</sup> The most comparable projected Democratic seat totals appear to be those which Dr. Trende developed for simulations with constraints that were "under conditions as close to those under which a map drawer would work." (Trende Rep. 46.)

<sup>7</sup> PlanScore, <https://planscore.org/plan.html?20240119T212807.036832973Z>.

<sup>8</sup> PlanScore, <https://planscore.org/plan.html?20240119T213120.791098782Z>.

<sup>9</sup> PlanScore, <https://planscore.org/plan.html?20240119T213239.073078931Z>.

<sup>10</sup> PlanScore, <https://planscore.org/plan.html?20240119T213501.189713205Z>.

<sup>11</sup> PlanScore, <https://planscore.org/plan.html?20240119T213844.675221463Z>.

<sup>12</sup> PlanScore, <https://planscore.org/plan.html?20240119T213711.923544213Z>.

The Assembly results predicted by PlanScore for the Governor's proposed plan are directly in the middle of Dr. Trende's expected outcomes. The Assembly results predicted by PlanScore for the Legislature's and Johnson Intervenors' Plans, however, are outliers beyond even the tails of Dr. Trende's expected outcomes.

Next, comparing Respondents' plans to Dr. Trende's ensemble using the mean-median score—the only partisanship metric that Dr. Trende included—shows similar results. Based on the analysis of the Governor's expert, the Legislature's proposed Assembly plan has a mean-median score of 5.2%, and its proposed Senate plan has a mean-median score of 5%. The Johnson Intervenors' proposed Assembly plan has a mean-median score of 4%, and their proposed Senate plan has a mean-median score of 4.3%. (*See* Fairfax Suppl. Chart 1–2.)

When comparing those measurements to the mean-median scores for Dr. Trende's ensemble, Respondents' plans perform poorly, landing toward or outside the most biased, left-most edge of the ensemble. (*See* Trende Rep. 46–53.)<sup>13</sup> And the Legislature's proposed plans are outliers even compared to Dr. Trende's ensemble. “When the median-mean difference of a chosen plan lies outside the plausible bounds of expectations using neutral procedures, a prima facie conclusion of intent has been shown to reach into the realm of not wanting to count votes fairly.” Robin Best & Michael McDonald, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 Election L.J. 312, 320 (2015).

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<sup>13</sup> The most comparable mean-median scores appear to be those which Dr. Trende developed for simulations with constraints that were “under conditions as close to those under which a mapdrawer would work.” (Trende Rep. 46.)

Lastly, using partisanship metrics, Respondents' proposed plans can be compared with enacted state legislative districts in states with political geography similar to Wisconsin's. See Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, *Quarterly Journal of Political Science* 239, 243 (2013) (identifying states with similar political geography). In that comparison, Respondents' plans stand out as outliers—suggesting their bias is not merely attributable to Wisconsin's political geography. The efficiency gap, mean-median, partisan bias, and declination scores of the Respondents' proposed maps are far worse than the corresponding scores of enacted plans in Florida, Texas, Georgia, and Pennsylvania, for example.<sup>14</sup>

<u>Plan</u>	<u>Assembly Efficiency Gap</u>	<u>Senate Efficiency Gap</u>
Johnson Intervenors (WI)	9.3%	13.2%
Legislature (WI)	11%	13.7%
Florida Enacted	6.9%	7.8%
Texas Enacted	.8%	6.4%
Georgia Enacted	3%	5.9%
Pennsylvania Enacted	2.3%	3.7%

<sup>14</sup> Compare Fairfax Suppl. Chart, with Florida PlanScore, <https://planscore.org/plan.html?20220307T034240.648099908Z> (Florida State House), <https://planscore.org/plan.html?20220307T034146.954571338Z> (Florida Senate); Texas PlanScore, <https://planscore.org/plan.html?20211118T213240.366466045Z> (Texas State House), <https://planscore.org/plan.html?20211118T205320.621400869Z> (Texas Senate); Georgia PlanScore, <https://planscore.org/plan.html?20211118T204745.053628224Z> (Georgia State House), <https://planscore.org/plan.html?20211104T210547.015568168Z> (Georgia Senate); Pennsylvania PlanScore, <https://planscore.org/plan.html?20220207T162001.827086135Z> (Pennsylvania State House), <https://planscore.org/plan.html?20220207T161907.945950188Z> (Pennsylvania Senate).

If those states, even given their political geography, can enact legislative maps that are less biased than Respondents' proposals, so should this Court.

**3. Respondents' discussions of proportionality improperly conflate it with neutrality.**

Respondents' submissions also suffer from another flaw: they conflate partisan *neutrality* with partisan *proportionality*. The Legislature, for example, attributes to the Petitioner-aligned parties the argument that “the test for a ‘neutral’ remedy should be proportionality, whereby the number of Democratic districts is proportionate to the number of statewide votes for Democrats (which would mean about half the districts using some statewide races).” (Legislature Br. 53; *see also* Trende Rep. 1.) The Johnson Intervenors make essentially the same argument. (*See* Johnson Br. 22–24.)

But no one has argued—and the Court has not held—that because Governor Evers won with 51% of the vote in 2022, any remedial maps must ensure that Democrats win 51% of state legislative races. For example, analyzing the proposed plans of the Governor, Petitioners, and the Wright Intervenors using Governor Evers' election results from 2022, Democrats would win fewer than half of the seats in the Assembly and Senate.<sup>15</sup> Respondents' argument about proportionality should have no bearing on this Court's proper mandate to adhere to partisan neutrality and reject partisan bias.

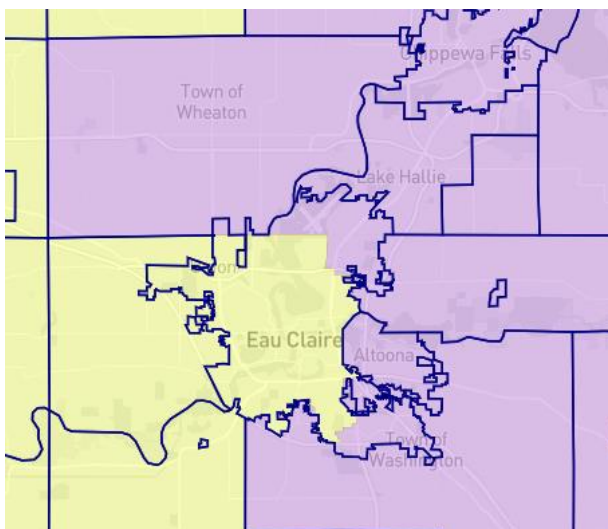
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<sup>15</sup> *See* John Johnson, *Analysis of Proposed Legislative Redistricting Plans submitted to the Wisconsin Supreme Court*, Marquette University Law School Redistricting Blog (Jan. 13, 2023) <https://law.marquette.edu/facultyblog/2024/01/analysis-of-proposed-legislative-redistricting-plans-submitted-to-the-wisconsin-supreme-court/>.

**C. The Governor’s proposed maps consider communities of interest in ways the Respondents’ maps fail to do.**

As detailed in the opening brief, the Governor’s proposed maps take great care to join coherent communities when drawing district lines. That should be unsurprising. As the cases explain, the Governor represents the people as a whole when redistricting. That is consistent with the nature of his office and the fact that the Governor has visited all 72 Wisconsin counties four times over during his tenure.<sup>16</sup> In contrast, Respondents’ maps give short shrift to this important communities-of-interest consideration.

For example, both Respondents split the City of Eau Claire into two Senate districts. The Johnson Intervenors’ Senate map is as follows:

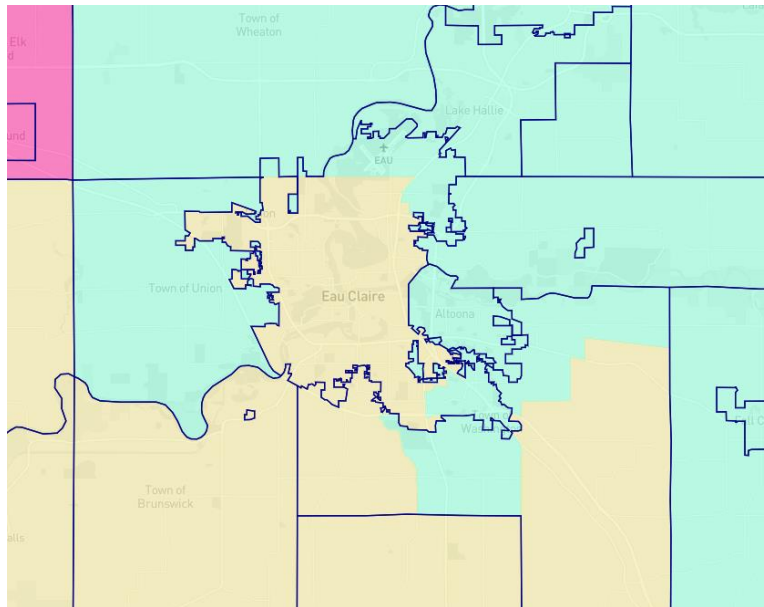


This not only splits the City of Eau Claire between Senate districts, but it also splits related metro-area communities, like Chippewa Falls, from the core of Eau Claire.

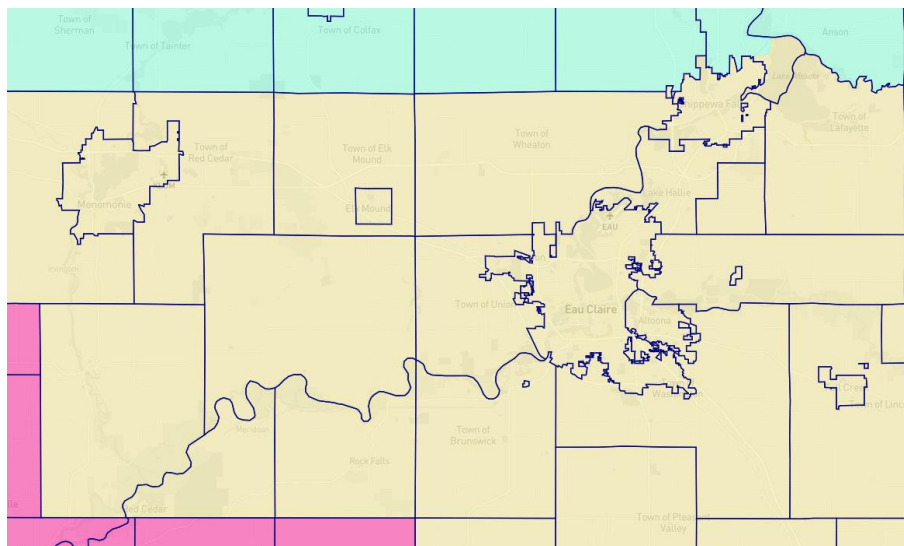
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<sup>16</sup> This includes communities of all sizes—from small communities like Jim Falls and Shell Lake to larger municipalities.

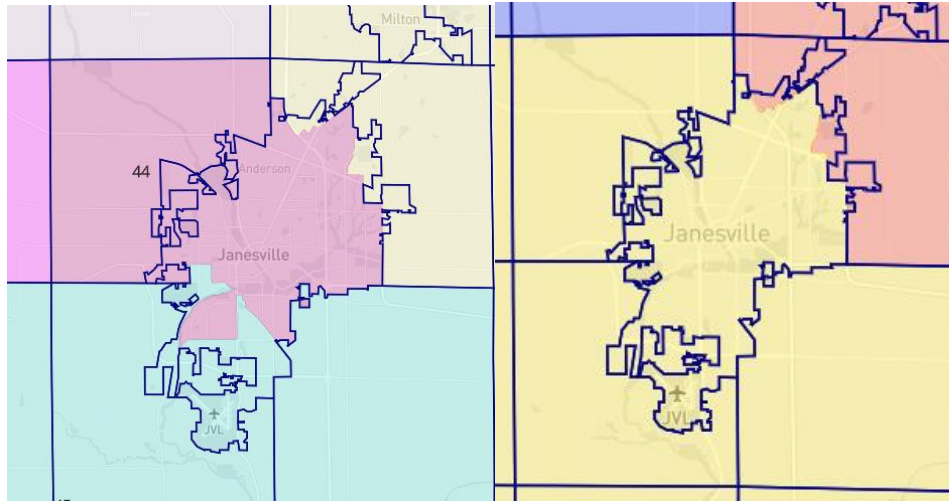
Although drawn somewhat differently, the Legislature’s map has a similar split:



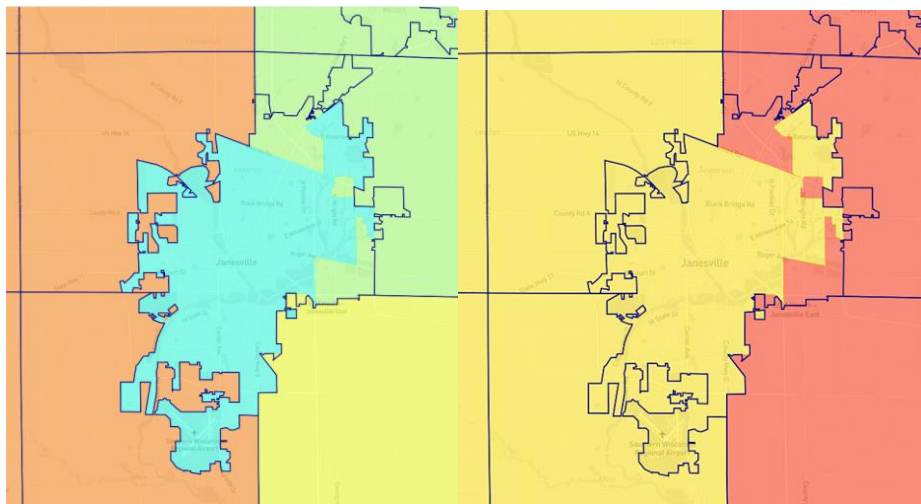
In contrast, the Governor’s proposal joins together in proposed Senate District 31 the Eau Claire metro area, including the cities of Chippewa Falls and Menomonie. (See Gov. Opening Br. 38–39.)



Another example is the Janesville and Beloit area. Respondents split Janesville into two Senate districts and three Assembly districts. The Johnson Intervenors' proposed Assembly districts (on the left) and Senate districts (on the right) appear as follows:

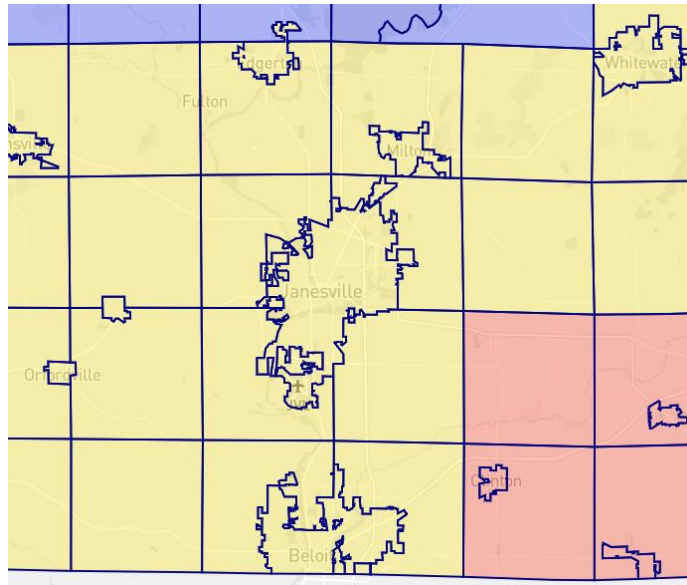


The Legislature's maps similarly split Janesville into three Assembly districts (on the left) and two Senate districts (on the right).

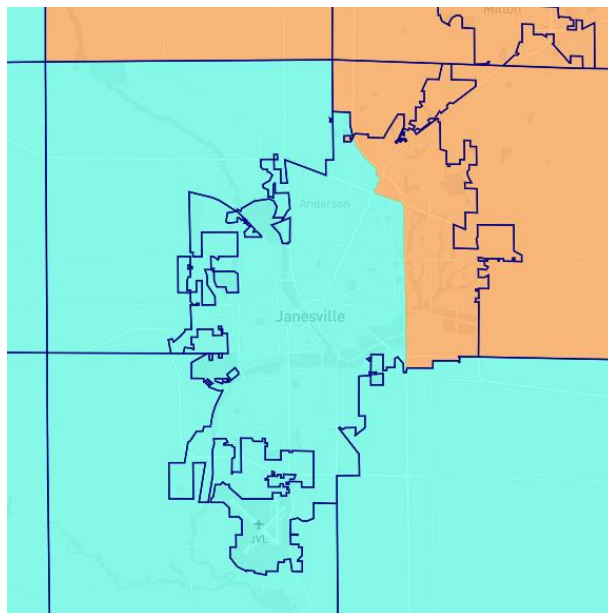




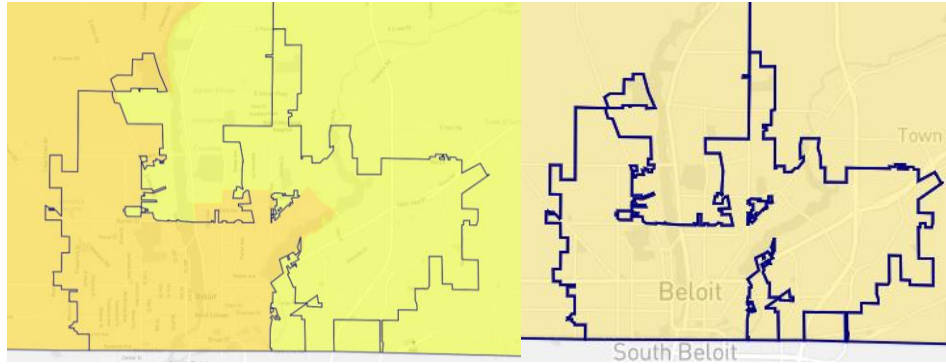
In contrast, the Governor’s proposed Senate District 15 encompasses all of Janesville and also keeps the economically connected cities of Beloit, Edgerton, and Whitewater together:



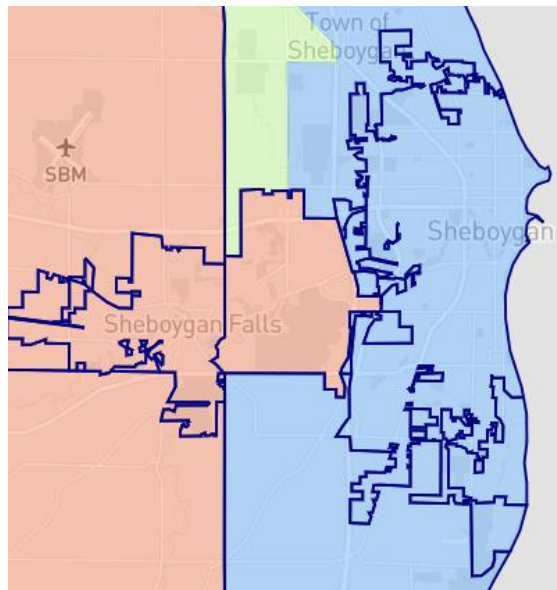
And the Governor only splits Janesville twice (which must happen due to its population) in proposed Assembly Districts 43 and 44. (Gov. Opening Br. 39–40.)



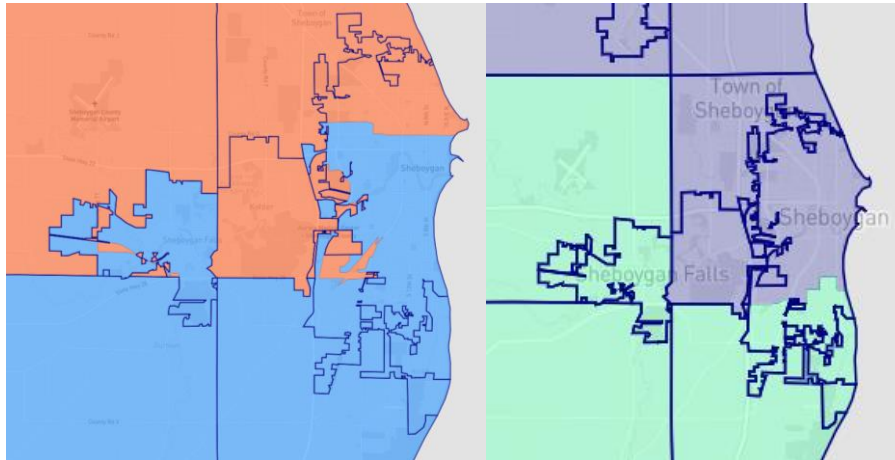
Another example is the Legislature's two-district split in the City of Beloit. The Governor's proposed Assembly map, in contrast, unites Beloit. The picture on the left shows the Legislature's unnecessary split; the picture on the right shows the Governor's single Beloit district:



And yet another example is the City of Sheboygan: both Respondents' maps split it, whereas the Governor's proposed Assembly map unites the city:



The Legislature splits the city (on the left), and the Johnson Intervenors also split it (on the right):



There are many other examples. For instance, the Johnson Intervenors' Assembly map puts Madeline Island in northern Wisconsin in their proposed Assembly District 74. However, access to the island is only via ferry that travels from Bayfield, which is in Assembly District 73. In contrast, the Governor's Lake Superior district avoids this issue by uniting the communities along the lake into one district. (Governor's Opening Br. 35.) And Respondents do not take into account nuance like Wisconsin's cranberry growing region, which the Governor's proposal groups into two Assembly districts and one Senate district (Governor's Opening Br. 52), but which is not kept together in Respondents' maps. The Johnson Intervenors also split the Menomonee and Stockbridge reservations into different Assembly and Senate districts, whereas the Governor's maps join them together. (Governor's Opening Br. 45.)

This is just a sampling of the ways in which the Governor's proposed maps took account of the reality on the ground when proposing districts and the Respondents in many instances did not. That is another reason why the Respondents' maps are not in the top tier.

\* \* \* \*

The Governor's proposals followed the Court's instruction to propose plans that comply with traditional redistricting criteria, minimize partisan bias, and respect communities of interest. Respondents did not. Their plans neither pursue nor come close to achieving partisan neutrality and are instead extremely biased, and they lack the on-the-ground approach to communities taken in the Governor's maps. The Court should reject Respondents' flawed efforts and adopt the Governor's plans or plans that perform similarly well.

**II. Respondents' attempts to relitigate whether this Court properly enjoined the previous maps and ordered the drawing of new ones should be rejected.**

Respondents, especially the Legislature, discuss topics that are not at issue in this stage of the proceedings. The arguments should again be rejected.<sup>17</sup>

Most prominently, Respondents again argue that this Court should turn back the clock on issuing an injunction that invalidated the previous maps. (Legislature Br. 15–24.) Respondents assert that something beyond showing that the previous maps were unconstitutional was needed before an injunction could issue, but that position makes little sense. Of course unconstitutional maps should be enjoined. In fact, in the *Johnson* litigation, the Johnson petitioners (who are Respondents here) asked for just that: to “enjoin respondents, the Wisconsin Elections Commission (WEC) . . . from

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<sup>17</sup> For example, Respondents mount yet another attempt to manufacture a federal due process issue. (*See* Mot. for Reconsideration Mem. at 32–58.) Their latest effort is no more successful than their earlier attempts. They still have not even stated the standard for finding a violation of procedural due process, much less shown that it is met here. It is not. (*See* Gov. Opp. Mot. Reconsideration at 17–23.)

administering congressional and state legislative elections.” *Johnson v. WEC (Johnson I)*, 2021 WI 87, ¶ 5, 399 Wis. 2d 623, 967 N.W.2d 469.

That is consistent with what this and other courts do when faced with an unconstitutional map. For example, in the redistricting case *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 572, 126 N.W.2d 551 (1964), this Court “enjoined” the respondent “from calling the 1964 Wisconsin legislative elections.” Likewise, in the redistricting matter *State ex rel. Att’y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1892), the Court “declare[d] the said apportionment act unconstitutional and void, and . . . enjoin[ed] the secretary of state.” Other jurisdictions are in accord. For instance, a court recently “enjoin[ed] the State Board of Elections Defendants from holding elections under the June Redistricting Plan or its predecessors.” *McConchie v. Scholz*, 567 F. Supp. 3d 861, 890 (N.D. Ill. 2021). The argument that it was error to enjoin an unconstitutional map holds no water.

Similarly, Respondents’ argument that the balance of harms weighs against enjoining the maps is baseless. As courts have explained, “individuals in the infirm districts . . . have suffered significant harm. Those citizens are entitled to have their rights vindicated as soon as possible . . .” *Smith v. Beasley*, 946 F. Supp. 1174, 1212 (D.S.C. 1996). That is, the harm that matters is to the voting public, and the harm to be avoided is having elections under an unconstitutional map. *See Reynolds*, 22 Wis. 2d at 553 (explaining that redistricting is a “*parens patriae*” suit). The flipside is that costs associated with holding elections under new maps do not hold sway, and neither does alleged “constituent confusion” or effects on “political careers.” *Knox v. Milwaukee Cnty. Bd. of Election Comm’rs*, 607 F. Supp. 1112, 1118–19 (E.D. Wis. 1985). That is “a necessary consequence of ensuring that the voting rights of” the public “are upheld.” *Id.* at 1119.

Respondents also take issue with the scope of relief, arguing again that any noncontiguous districts should simply be dissolved with no other changes. The Court already properly rejected that argument. Redistricting concerns a balancing of many factors, including population equality, compactness, splits, and communities of interest, all of which have ripple effects. Individually targeting one factor will, as a matter of course, impact the others, requiring a rebalancing of various redistricting considerations. The shortcomings of the Legislature’s proposed plans demonstrate this.

Likewise, Respondents want this Court to put its head in the sand regarding partisanship, but as this Court rightly explained, ignoring partisanship can be akin to participating in it. *Clarke*, 2023 WI 79, ¶ 71 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)). Once a map is ruled unconstitutional, this Court properly takes on its remedial role in full—including the need to be neutral when imposing a remedy. Respondents’ blinkered approach should again be rejected.

Relatedly, Respondents argue that the remedy should be limited in scope because of temporary Senate disenfranchisement (where some voters in shifted districts are temporarily delayed in voting for a new senator because such elections are staggered). But it is established that temporary Senate disenfranchisement that results from redistricting normally violates no rights.

First, no one loses the opportunity to vote: those affected “were able to vote in the regularly scheduled pre-reapportionment senate elections in their old districts, and they will be able to vote in the next regularly scheduled general election for their new district.” *Donatelli v. Mitchell*, 2 F.3d 508, 514–15 (3d Cir. 1993); *see also Republican Party of Oregon v. Keisling*, 959 F.2d 144, 145 (9th Cir. 1992) (same). In turn, although some constituencies may be altered, elected officials’ “interest in re-election and in doing their jobs well,

i.e. representing their districts, remains.” *Donatelli v. Mitchell*, 2 F.3d at 516.

Second, temporary disenfranchisement violates no one’s rights unless a “discrete group of voters based on some personal characteristic” were systematically targeted, as opposed to the disenfranchisement resulting from “the combined effect of reapportionment and a staggered election system.” *Id.* at 514. The latter scenario is what is afoot: redistricting here is occurring because maps were found unconstitutional, and it is based on the objective criteria set out by the Court; that justifies any temporary disenfranchisement that might result. *See also Baldus v. Members of the Wis. Gov’t Accountability Bd.*, 849 F. Supp. 2d 840, 852 (E.D. Wis. 2012) (explaining that temporary disenfranchisement generally does not violate voters’ rights).<sup>18</sup>

In sum, none of the attempted roadblocks Respondents throw up matter. This Court can and should follow through on its December 22, 2023, decision and adopt remedial maps that satisfy this Court’s criteria.<sup>19</sup>

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<sup>18</sup> Wisconsin redistricting courts have discussed, for example, that temporarily disenfranchising 713,225 people would be lawful. *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 659 (E.D. Wis. 1982).

<sup>19</sup> The Court did not provide that incumbency would be a factor, and it should not be. It is simply noted that the Governor’s maps are not outliers if this metric were considered. For example, the Governor’s maps have roughly the same number of pairings as the Johnson Intervenors’ maps. *FRI Report*, WisPolitics, (Jan. 19, 2024) <https://www.wispolitics.com/2024/240119report/#story-1>.

### III. Certain parties' request for oral argument

Certain parties have requested that the Court hold oral argument on the proposed redistricting plans. If the Court determines it would benefit from oral argument, the Governor stands ready to participate.<sup>20</sup>

### CONCLUSION

The Court's task is to choose the plans that are the best across redistricting metrics, including satisfying the constitutional and traditional criteria, protecting communities of interest, and ensuring partisan neutrality. The Court should select the Governor's proposed maps or maps that perform similarly well and reject Respondents' proposals.

Dated this 22nd day of January 2024.

JOSHUA L. KAUL  
Attorney General of Wisconsin

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<sup>20</sup> Likewise, the Governor will provide the Court's consultants with additional information they would find helpful, including providing written responses.



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### **FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) and this court's December 22, 2023, order, for a brief produced with a proportional serif font. The length of this brief is 5464 words.

### **CERTIFICATE OF EFILE/SERVICE**

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 22nd day of January 2024.

Electronically signed by:

Anthony D. Russomanno  
ANTHONY D. RUSSOMANNO  
Assistant Attorney General

**SUPPLEMENTAL CHARTS TO JANUARY 12, 2024, EXPERT REPORT OF  
ANTHONY E. FAIRFAX ON THE DEVELOPMENT OF REMEDIAL STATE  
LEGISLATIVE DISTRICT PLANS FOR THE STATE OF WISCONSIN**

**JANUARY 22, 2024**

## **I. Introduction**

1. As a follow up to my original report prepared for Governor Evers and submitted to the Court on January 12, 2024, I was asked to review all plans submitted by the parties and to evaluate them according to a variety of redistricting criteria metrics.

## **II. Qualifications**

2. See my previous expert report for my qualifications.

## **III. Software, Data, and Technical Process Utilized**

3. As with my previous report, the software utilized to analyze the proposed remedial plans was Maptitude for Redistricting (“Maptitude”) by Caliper Corporation. The baseline population data and geography included the 2020 Census data (“PL94-171 data”). In order to reproduce the appropriate geography, data were obtained from the Wisconsin Legislative Technology Services Bureau (LTSB) website. Specifically, the “Blocks without water” dataset was used to generate the wards, county subdivisions, cities, towns, villages, and counties.
4. Finally, I used the block equivalency files or shapefiles submitted by each of the parties to reproduce and analyze their respective Assembly and Senate plans using the Maptitude application. Geographic files of the proposed plans were also imported into PlanScore’s website to evaluate political neutrality.

## **IV. Results**

5. The following Tables 1 and 3 include the results of my recreation and analysis of the proposed Assembly and Senate remedial plans using a variety of redistricting criteria. Tables 2 and 4 are rankings for each plan and its associated redistricting metrics.

**Table 1 - Wisconsin Assembly District Proposed Plans' Criteria Comparison**

Criteria	Gov	Clarke	Johnson	Sen Dems	WI Leg	Wright
<b>Equal Population (Maptitude Reports)</b>						
Equal Population <sup>1</sup>	1.96%	0.92%	0.98%	1.86%	1.11%	1.83%
<b>Political Subdivision/Communities of Interest Splits (Maptitude Reports)</b>						
Ward Splits*	16	18	34	2	135	16
County Subdivisions Splits	55	45	37	72	114	52
County Splits	45	44	37	51	53	47
City Splits	23	22	22	25	43	23
Town Splits	22	10	1	27	51	15
Village Splits	10	13	14	20	20	14
COI Census Places Splits	37	43	42	50	72	45
COI Landmark Splits (3)	22	21	19	29	23	23
<b>Compactness (Maptitude Reports)</b>						
Reock	0.42	0.40	0.44	0.42	0.38	0.42
Polsby-Popper	0.35	0.30	0.35	0.32	0.25	0.31
<b>Political Neutrality (PlanScore)</b>						
Efficiency Gap	6.4%	5.9%	9.3%	6.5%	11.0%	6.6%
Declination	0.37	0.34	0.53	0.37	0.63	0.37
Partisan Bias	6.0%	5.4%	9.3%	6.3%	11.7%	5.9%
Mean-Median	2.9%	2.5%	4.0%	3.0%	5.2%	2.5%
Competitiveness (#Districts)	32	34	23	31	19	34

Source: Maptitude data reports and PlanScore analysis.

Note: COI is Communities of Interest

\*The ward split numbers do not subtract out the stipulated wards.

<sup>1</sup> All of the plans are within the acceptable 2% overall population deviation and thus this criterion was not included in the ranking.

**Table 2 - Wisconsin Assembly District Plans' Criteria Comparison Ranking**

<b>Criteria</b>	<b>Gov</b>	<b>Clarke</b>	<b>Johnson</b>	<b>Sen Dems</b>	<b>WI Leg</b>	<b>Wright</b>
<b>Political Subdivision/Communities of Interest Splits (Maptitude Reports)</b>						
Ward Splits*	2	4	5	1	6	2
County Subdivisions Splits	4	2	1	5	6	3
County Splits	3	2	1	5	6	4
City Splits	3	1	1	5	6	3
Towns Splits	4	2	1	5	6	3
Villages Splits	1	2	3	5	5	3
COI Census Places Splits	1	3	2	5	6	4
COI Landmark Splits (3)	3	2	1	6	4	4
<b>Compactness (Maptitude Reports)</b>						
Reock	2	5	1	2	6	2
Polsby-Popper	1	5	1	3	6	4
<b>Political Neutrality (PlanScore)</b>						
Efficiency Gap	2	1	5	3	6	4
Declination	2	1	5	2	6	2
Partisan Bias	3	1	5	4	6	2
Mean-Median	3	1	5	4	6	1
Competitiveness (#Districts)	3	1	5	4	6	1

Source: Table 1 data results

Note: Ranking best values as: lower values for splits, higher values for compactness and closest numbers to zero for political neutrality except for competitiveness which uses higher numbers.

**Table 3 - Wisconsin Senate District Proposed Plans' Criteria Comparison**

Criteria	Gov	Clarke	Johnson	Sen Dems	WI Leg	Wright
<b>Equal Population (Maptitude Reports)</b>						
Equal Population	1.46%	0.65%	0.65%	1.36%	0.49%	1.19%
<b>Political Subdivision/Communities of Interest Splits (Maptitude Reports)</b>						
Ward Splits*	2	7	21	1	68	7
County Subdivisions Splits	33	29	25	48	63	34
County Splits	33	34	29	42	42	37
City Splits	13	16	14	20	29	15
Town Splits	12	6	1	16	25	8
Village Splits	8	7	10	12	11	11
COI Census Places Splits	23	25	28	35	48	29
COI Landmark Splits (3)	17	16	12	17	17	16
<b>Compactness (Maptitude Reports)</b>						
Reock	0.42	0.40	0.41	0.39	0.39	0.40
Polsby-Popper	0.32	0.25	0.28	0.26	0.23	0.26
<b>Political Neutrality (PlanScore)</b>						
Efficiency Gap	7.70%	6.7%	13.2%	5.7%	13.7%	6.6%
Declination	0.32	0.28	0.55	0.23	0.57	0.27
Partisan Bias	7.0%	6.1%	12.5%	4.6%	13.9%	5.7%
Mean-Median	2.9%	2.7%	4.3%	1.8%	5.0%	2.3%
Competitiveness (#Districts)	11	10	8	11	3	9

Source: Maptitude data reports and PlanScore analysis.

Note: COI is Communities of Interest

\*The ward split numbers do not subtract out the stipulated wards.

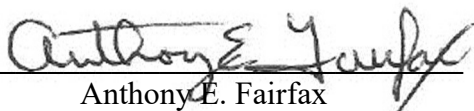
**Table 4 - Wisconsin Senate District Plans' Criteria Comparison Ranking**

Criteria	Gov	Clarke	Johnson	Sen Dems	WI Leg	Wright
<b>Political Subdivision/Communities of Interest Splits (Maptitude Reports)</b>						
Ward Splits*	2	3	5	1	6	3
County Subdivisions Splits	3	2	1	5	6	4
County Splits	2	3	1	5	5	4
City Splits	1	4	2	5	6	3
Towns Splits	4	2	1	5	6	3
Villages Splits	2	1	3	6	4	4
COI Census Places Splits	1	2	3	5	6	4
COI Landmark Splits (3)	4	2	1	4	4	2
<b>Compactness (Reock/Polsby-Popper)</b>						
Reock	1	3	2	5	5	3
Polsby-Popper	1	5	2	3	6	3
<b>Political Neutrality (PlanScore)</b>						
Efficiency Gap	4	3	5	1	6	2
Declination	4	3	5	1	6	2
Partisan Bias	4	3	5	1	6	2
Mean-Median	4	3	5	1	6	2
Competitiveness (#Districts)	1	3	5	1	6	4

Source: Table 3 data results

Note: Ranking best values as: lower values for splits, higher values for compactness and closest numbers to zero for political neutrality except for competitiveness which uses higher numbers.

Per 28 U.S. Code 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.



Anthony E. Fairfax  
January 22, 2024