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No. 2023AP1399

REBECCA CLARKE, RUBEN ANTHONY, TERRY DAWSON, DANA GLASSTEIN, ANN GROVES-LLOYD, CARL HUJET, JERRY IVERSON, TIA JOHNSON, ANGIE KIRST, SELIKA LAWTON, FABIAN MALDONADO, ANNEMARIE MCCLELLAN, JAMES MCNETT, BRITTANY MURIELLO, ELA JOOSTEN (PARI) SCHILS, NATHANIEL SLACK, MARY SMITH-JOHNSON, DENISE (DEE) SWEET, AND GABRIELLE YOUNG,

Petitioners,

GOVERNOR TONY EVERS, IN HIS OFFICIAL CAPACITY; NATHAN ATKINSON, STEPHEN JOSEPH WRIGHT, GARY KRENZ, SARAH J. HAMILTON, JEAN-LUC THIFFEAULT, SOMESH JHA, JOANNE KANE, AND LEAH DUDLEY,

Intervenors-Petitioners

v.

WISCONSIN ELECTIONS COMMISSION; DON MILLIS, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, AND CARRIE RIEPL, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS COMMISSION; MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION; SENATOR ANDRÉ JACQUE, SENATOR TIM CARPENTER, SENATOR ROB HUTTON, SENATOR CHRIS LARSON, SENATOR DEVIN LEMAHIEU, SENATOR STEPHEN L. NASS, SENATOR JOHN JAGLER, SENATOR MARK SPREITZER, SENATOR HOWARD L. MARKLEIN, SENATOR RACHAEL CABRAL-GUEVARA, SENATOR VAN H. WANGGAARD, SENATOR JESSE L. JAMES, SENATOR ROMAINE ROBERT QUINN, SENATOR DIANNE H. HESSELBEIN, SENATOR CORY TOMCZYK, SENATOR JEFF SMITH, AND SENATOR CHRIS KAPENGA, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN SENATE,

Respondents,

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

Intervenors-Respondents.

PETITIONERS' RESPONSE BRIEF IN SUPPORT OF REMEDIAL MAPS

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INTRODUCTION

The Clarke maps have population deviations below 1% and outperform nearly every Wisconsin map over the past 30 years on minimizing political subdivision splits while satisfying compactness standards. They likewise best satisfy the mandatory and traditional districting criteria compared holistically to the submissions in this case. The Clarke maps also comply with the Voting Rights Act and Equal Protection Clause by adhering to the relevant district configurations this Court approved on those grounds in *Johnson III*—an approach adopted in exactly or substantially the same way by all parties in this case. And the Clarke maps likewise are politically neutral.

The Clarke maps stand in stark contrast to the Legislature and Johnson maps. Both violate Article IV’s express requirement that assembly districts be “bounded” by county, town, or ward lines. The Legislature’s maps vastly increase municipal and ward splits, and both its and the Johnson Intervenors’ maps are substantially politically biased.

ARGUMENT

I. The Legislature and Johnson maps violate the Wisconsin Constitution because they contain assembly districts unbounded by county, town, or ward lines.

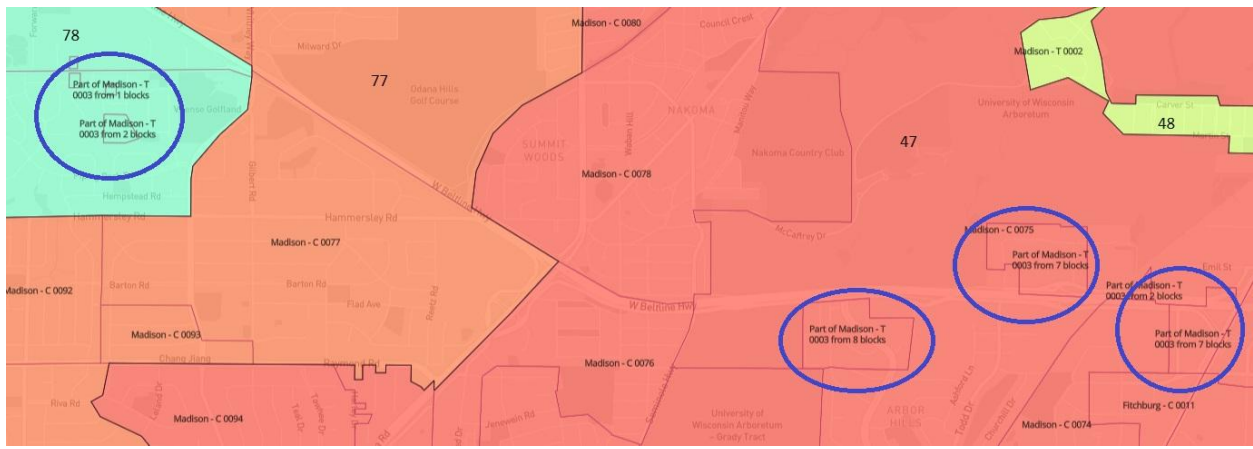
The Legislature and Johnson maps violate the requirement that assembly districts be “bounded by county, [] town, or ward lines.” Wis. Const. art. IV, § 4. This Court “no longer interpret[s] the [‘bounded’] requirement to entirely prohibit any splitting of the enumerated political subdivisions,” *Clarke v. Wis. Elections*

Comm'n, 2023 WI 79, ¶66, ___ Wis. 2d ___, 998 N.W.2d 370. But this does not mean that the Constitution's mandate that assembly districts be bounded by county, town, *or* ward lines allows a district to be bounded by *none* of them.

Once Wisconsin began permitting wards to be noncontiguous, the meaning of Article IV's "bounded" provision no longer was synonymous with having zero ward splits. That is because a noncontiguous ward can be split such that the boundary lines of its separate pieces either fall in the interior area or along the boundary of a district. Either way, the resulting districts are still bounded by ward lines. When a contiguous ward is split, however, the resulting district line will cut *through* the ward, resulting in a district that is unbounded by any county, town, or ward line.

Consider the single ward split in the Clarke maps, Town of Madison Ward 3. That ward (and town) no longer exists, but at the time the 2021 LTSB data set was published, it was a noncontiguous ward with six separate pieces. In the Clarke assembly map, four of the pieces are in the interior of AD47, while two are in the interior of AD78, as shown below.

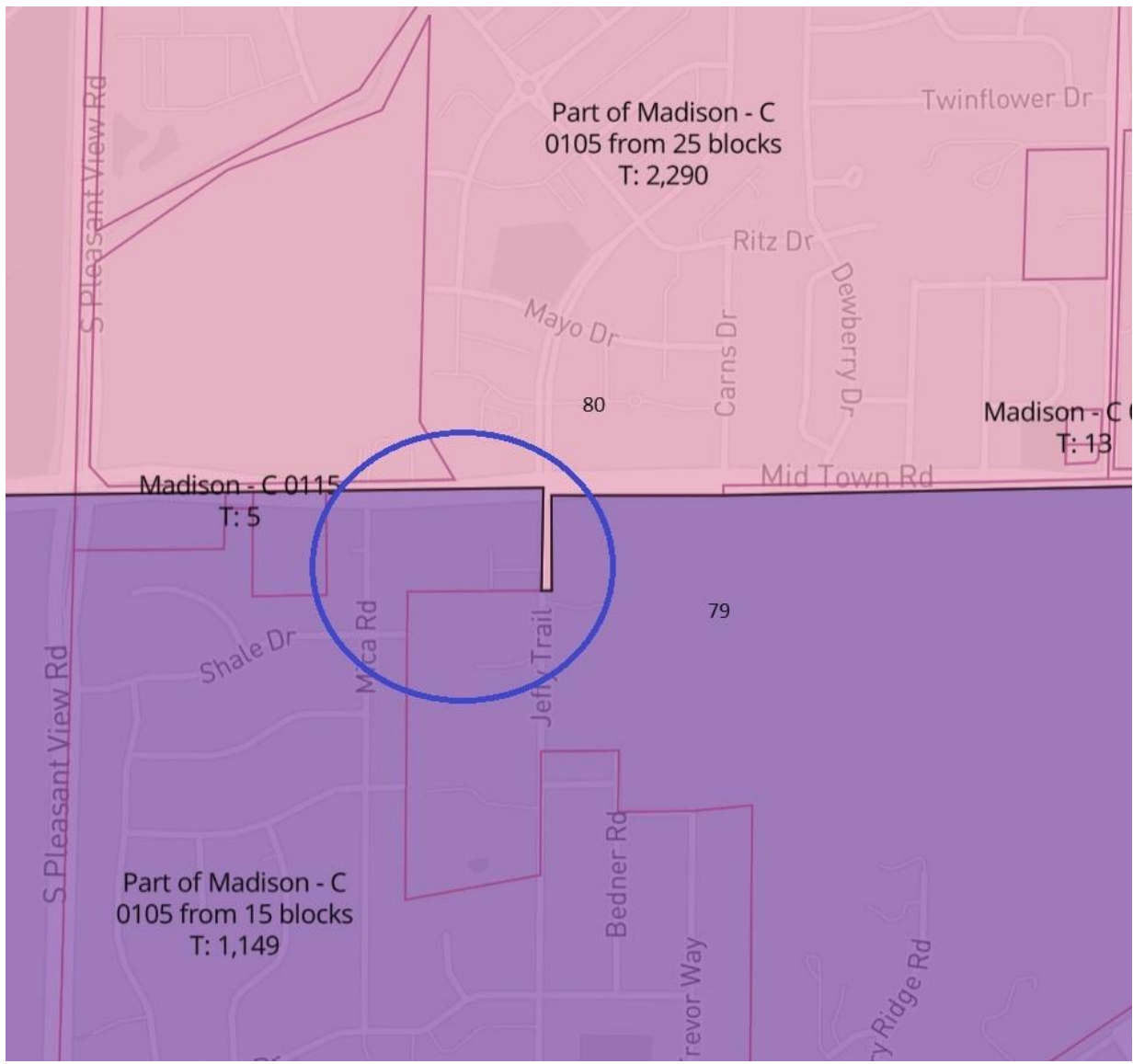
Single Clarke Ward Split of former Madison Town Ward 3



The resulting districts are completely bounded by ward lines, as Article IV, § 4 requires. Moreover, following the dissolution of the Town of Madison in October 2022, each of those six pieces is today a separate, contiguous City of Madison ward and is thus maintained whole in the Clarke map.¹

The Clarke map's complete adherence to the text of Article IV's "bounded" provision stands in stark contrast to the Legislature and Johnson maps, which split many contiguous wards, creating districts unbounded by county, town, or ward lines. For example, Johnson AD79 and AD80 split through the middle of City of Madison Wards 105 and 106, and are not bounded by either a county, town, or ward line. Below is the split of Ward 105, with the blue circle highlighting the "unbounded" district line.

¹ See Clarke Opening App. 017. The Clarke map thus wisely "split" this now-defunct ward because doing so palpably improved compactness without affecting any present ward. *Id.* Similarly, the Governor's assembly map splits former Town of Madison Ward 2 precisely as the City of Madison has subsequently divided it into new City of Madison Wards 145 and 147. See LTSB, WI Municipal Wards (Jan. 2023), https://data-ltsb.opendata.arcgis.com/datasets/ad64ffa2a53e4d7d931dc432db224118_0/explore (City of Madison Wards 145 and 147).

Johnson assembly AD79 and AD80

App. 010. Correcting this is no small fix. Conforming Johnson AD79 and AD80 to the “bounded” requirement would require shifting either 1,149 people from AD79 to AD80, or 2,290 people from AD80 to AD79. But that would raise the map’s overall population deviation above 2%. Moreover, the pink shapes within AD80 above are noncontiguous pieces of Middleton Town Ward 8, and the pink shapes within AD79 below are noncontiguous pieces of Verona Town Ward 2. Depending

on how Madison Ward 105 is made whole, one of those town wards would need to shift districts as well to maintain contiguity. That would further exacerbate the population deviation and split additional towns. Indeed, the Johnson Intervenors were able to split just a single town (former Town of Madison) only by sacrificing compliance with the Constitution’s “bounded” requirement. In total, **19** assembly districts in the Johnson map have segments that are *not* “bounded by county, [] town, or ward lines.” Wis. Const. art. IV, § 4.² Similarly, the Legislature’s map splits 120 wards with at least **46** assembly districts not bounded by ward lines.

The Johnson Intervenors and Legislature contend that the Court should disregard ward splits—including those that occur along the boundaries of districts—because 2011 Act 39 required ward lines to be redrawn *after* legislative redistricting if the legislature “establishes a district boundary within a municipality that does not coincide with the boundary of a ward.” 2011 Wisconsin Act 39, § 9, codified at Wis. Stat. § 5.15(4)(a); *see* Johnson Br. 13-14; Legislature Br. 40-42. But just as the Legislature cannot by statute redefine “contiguous” in Article IV to also mean “not contiguous,” *see* 1971 Wisconsin Act 304, § 1, it likewise cannot invert Article IV’s “bounded” requirement to instead provide that local officials must redraw *wards* so that they are bounded by *assembly districts*. Such an expansive interpretation of Act 39 would render it unconstitutional as applied³ because Article IV plainly envisions

² These are Johnson AD4, 7, 15, 20, 24, 26, 27, 33, 46, 47, 48, 58, 78, 79, 80, 81, 82, 83, and 89. App. 005-017.

³ Act 39 properly allows the subsequent redrawing of ward lines where, *e.g.*, the federal law one-person, one-vote requirement makes it necessary to divide wards.

legislative districts that respect preexisting ward lines, not the reverse. The Court need not wade into this constitutional issue, however, because while the Legislature and Johnson maps are indisputably *not* bounded by ward lines, the Clarke maps indisputably *are*.

The Legislature also highlights Oshkosh’s disconnected wards as evidence that it “cannot” both (1) create contiguous districts and (2) avoid splitting those wards. Legislature Br. 41-42. But the Clarke maps do just that in Oshkosh and *everywhere else*. It is not the case that the Legislature *cannot* also do so, but rather that it *will not* do so—because creating contiguous districts while respecting ward boundaries requires focusing on the constitutional criteria, not “least change” or other extraconstitutional goals.⁴ The Legislature, like the Johnson Intervenors, traded one constitutional violation (noncontiguity) for another (failure to bound its districts).

⁴ The Johnson Intervenors note that there have been changes to ward boundaries since 2021, but those are few given the parties’ use of the same 2020 wards in *Johnson*. Moreover, the Legislature incorrectly contends that the voter privacy concerns its proposal creates could be addressed by municipalities combining wards for reporting election results. Not so. The Legislature has moved small numbers of residents into *different* legislative districts from the rest of the municipality. Those results must by law be reported by each municipality, and the results for different legislative districts cannot be combined. *See* Wis. Stat. § 7.53(2)(d).

II. The Clarke maps best comply with the mandatory constitutional criteria.

The Clarke maps best comply with the mandatory constitutional criteria. These include (1) population deviation, (2) “the extent to which assembly districts split counties, towns, and wards (particularly towns and wards as the smaller political subdivisions),” *Clarke*, 2023 WI 79, ¶66, (3) compactness, and (4) federal law compliance.⁵

A. The Clarke maps have the lowest assembly and second-lowest senate population deviations.

The Clarke maps have the lowest population deviation among assembly map submissions and the second lowest among senate maps, as shown below.

Map	Assembly Deviation	Total	Senate Total Deviation
Current Maps	0.76%		0.57%
<i>Clarke Maps</i>	<i>0.92%</i>		<i>0.65%</i>
Wright Maps	1.83%		1.19%
Governor Maps	1.96%		1.46%
Senate Democrats Maps	1.86%		1.36%
Legislature Maps	1.11%		0.49%
Johnson Maps	0.98%		0.65%

B. The Clarke maps perform best holistically on the constitutional criteria of minimizing county, town, and ward splits.

This Court has emphasized that the smaller the political subdivision, the greater the importance of adhering to its boundaries. *See, e.g., Clarke*, 2023 WI 79, ¶66; *Johnson v. Wis. Elections Comm’n*, 2021 WI 87, ¶35, 399 Wis. 2d 87, 967

⁵ All proposals have properly nested assembly districts. All parties have proposed contiguous districts, save for some minor, correctable contiguity technical errors in the Senate Democrats’ proposals.

N.W.2d 469 (“*Johnson I*”); *Johnson v. Wis. Elections Comm’n*, 2022 WI 19, ¶66, 401 Wis. 2d 198, 972 N.W.2d 559 (“*Johnson III*”) (“In particular, ‘gratuitously break[ing] up wards,’ the smallest political unit in the state, makes little sense because they are ‘the basic unit of Wisconsin state government for voting purposes. You vote by ward.’” (quoting *Prosser v. Elections Bd.*, 793 F. Supp. 859, 866 (W.D. Wis. 1992))).

A holistic comparison—prioritizing minimizing, in order, (1) ward, (2) town, and (3) county splits—reveals that the Clarke maps perform best across all submissions, in sum, as illustrated below.

Assembly Map County, Town, and Ward Split Comparison⁶

Map	County	Town	Ward
Current Assembly	53	16	0
<i>Clarke Assembly</i>	<i>44</i>	<i>10</i>	<i>1</i>
Wright Assembly	47	15	0
Governor Assembly	45	22	5
Senate Democrats Assembly	51	27	2
Johnson Assembly	37	1	15
Legislature Assembly	53	51	120

⁶ The Johnson Intervenors incorrectly report 13 ward splits in the assembly and 9 in the senate. In both maps, they mistakenly count Town of Madison Ward 3 as subject to the parties’ Stipulation about erroneous ward fragments (presumably confusing it with the *City Ward 3*). Compare Brunell Report 7-8 with Dec. 30, 2023 Stipulation, App. A. Moreover, the Johnson assembly map splits City of Madison Ward 1 in a way not covered by the Stipulation. Likewise, the Legislature’s maps do the same with respect to Union Town Ward 4, Jefferson City Ward 2, and Buchanan Town Ward 2.

Senate Map County, Town, and Ward Split Comparison

Map	County	Town	Ward
Current Senate	42	8	0
<i>Clarke Senate</i>	<i>34</i>	<i>6</i>	<i>1</i>
Wright Senate	37	8	0
Governor Senate	33	12	2
Senate Democrats Senate	42	16	1
Johnson Senate	29	1	10
Legislature Senate	42	25	61

Although the Johnson map splits fewer counties and towns, it splits 15 wards. Unlike the single Clarke ward split, all but one of the Johnson ward splits are of existing municipal wards. Brunell Rpt. 7-8; *supra* n.6. The Johnson Intervenors' approach of splitting wards instead of towns gets this Court's precedent backwards. To the extent the Johnson maps are not disqualified by failing to follow the bounding requirement, *see supra* Part I, the Clarke maps nevertheless better adhere to this Court's precedent.

Even worse are the Legislature's maps, which defy this Court's decision. The Legislature elevated the extraconstitutional aim of least change above the Constitution's requirements, submitting a map with magnitudes more town and ward splits than the current map or any other proposal. This Court already rejected this blinkered devotion to least change over the Constitution's express requirements. *See Clarke*, 2023 WI 79, ¶¶60-63. And it was the *Legislature* that previously rejected the idea that core retention was more important than reducing population deviation, municipal splits, and ward splits—a position that garnered the votes of several justices. *See, e.g., Johnson v. Wis. Elections Comm'n*, (“*Johnson II*”), 2022 WI 14,

¶¶134-137, 152, 400 Wis. 2d 626, 971 N.W.2d 402 (Ziegler, C.J., dissenting) (criticizing Governor’s proposal for having highest core retention but more municipal splits, and asserting that it “has a higher core retention number” “by sacrificing other constitutional considerations”); *id.* ¶¶218-219, 233 (Grassl Bradley, J., dissenting) (characterizing map that has higher core retention and more county, town, and ward splits as “unlawful”).

Viewed holistically and with due weight for each category, the Clarke maps perform best on county, town, and ward splits.

C. The parties’ compactness scores are similar and exceed the current assembly scores.

The parties’ compactness scores are similar. This Court “has never adopted a particular measure of compactness,” *Clarke*, 2023 WI 79, ¶66, and compactness is “required only when it is practicable,” *id.* ¶20; *See also Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 634 (E.D. Wis. 1982) (noting that compactness is “secondary” and “subservient” to both “population equality” and “political subdivision boundaries” and thus assembly districts “should be reasonably, though not perfectly, compact”). There is no compactness requirement for senate districts. *See Wis. Const. art. IV, § 5.*

Assembly Map Compactness Comparison

Map	Reock	Polsby-Popper
Current Assembly	.382	.243
Johnson Assembly	.439	.348
<i>Clarke Assembly</i>	.406	.302
Wright Assembly	.423	.314
Governor Assembly	.420	.354
Senate Democrats Assembly	.419	.316
Legislature Assembly	.385	.248

Given the similarity of these scores, and the precedence minimizing county, town, and ward splits take over compactness, little can be gleaned from comparing the parties' compactness scores. They all exceed those of the current maps, which satisfied the compactness requirement. *See Johnson III*, 2022 WI 19, ¶70.

D. The Clarke maps comply with federal law.

The Clarke maps comply with both the Voting Rights Act and the Equal Protection Clause by adopting without change the districts previously subject to Voting Rights Act litigation or claims of racial gerrymandering, whose configuration (drawn by the Legislature) this Court approved as compliant with federal law in *Johnson III*. 2022 WI 19, ¶¶48, 59.⁷ The Legislature agrees with this approach, specifying the same districts. *See* Legislature Br. 44 (identifying “AD8, AD9, AD10, AD11, AD12, AD16, AD17, and AD18, and corresponding SD3, SD4, and SD6” and noting that maintaining their existing boundaries “creates no risk of violating the VRA or the Equal Protection Clause”); *see also* Johnson Br. 21 (“[L]eaving those

⁷ Several additional districts in the Clarke assembly map are likewise unchanged from their current configuration, including AD1, AD9, AD19, and AD34.

districts largely ‘as is,’ as the Johnson Intervenors have done, creates no federal law compliance issues”); Legislature Opening Br. 57-58 (Oct. 16, 2023). Precedent supports this approach. *See Abbott v. Perez*, 138 S. Ct. 2305, 2328 (2018) (approving the re-adoption of districts motivated by prior court approval of those districts as complying with federal law). The Clarke maps are race neutral and comply with both the Equal Protection Clause and the Voting Rights Act.

III. The Clarke maps split the fewest municipalities among eligible submissions.

The Clarke maps split the fewest municipalities among the submissions not disqualified for failing to be bounded by wards, *see supra* Part I, and for failing political neutrality, *see infra* Part V (*i.e.*, the Legislature and Johnson maps). Though not enumerated in the Constitution, “this court has still considered the number of municipal splits when evaluating maps.” *Clarke*, 2023 WI 79, ¶68 n.29. As shown below, the Clarke maps perform best on this metric among the eligible submissions and outperform the current maps.⁸

Assembly Map Municipal Splits

Map	City	Village	Towns	Total
Current Assembly	25	11	16	52
Johnson Assembly	22	14	1	37
<i>Clarke Assembly</i>	22	13	10	45
Wright Assembly	23	14	15	52
Governor Assembly	23	10	22	55
Senate Democrats Assembly	25	20	27	72
Legislature Assembly	43	20	51	114

⁸ The Johnson Intervenors exclude county, city, village, and town splits affecting zero population. Because the Clarke Petitioners included those instances in their own counts, and to ensure that all maps are standardized for comparison, we report all splits—regardless of population—here.

Senate Map Municipal Splits

Map	City	Village	Towns	Total
Current Senate	17	6	8	31
Johnson Senate	14	10	1	25
<i>Clarke Senate</i>	16	7	6	29
Wright Senate	15	11	8	34
Governor Senate	13	8	12	33
Senate Democrats Senate	20	12	16	48
Legislature Senate	29	11	25	65

IV. The Legislature and Johnson maps disrupt communities of interest across Wisconsin.

Neither the Johnson Intervenors nor the Legislature seriously address whether, or how, their maps preserve communities of interest. *Clarke*, 2023 WI 79, ¶68. The Johnson Intervenors wrongly equate respecting communities of interest with the constitutional criteria of reducing county and town splits and the traditional criteria of reducing municipal splits. Johnson Br. 21-22. The Legislature did something similar, while conceding that its approach ignores communities of interest. Leg. Br. 45-46. Consequently, both the Johnson and Legislature maps divide communities across the state, as demonstrated by a few key examples.⁹

A. Assembly districts

Southeast Wisconsin: The shoreline cities of Cudahy, St. Francis, and South Milwaukee form a community of interest in Milwaukee County. Orig. Br. App. 068 (Weinschenk). The Clarke assembly map keeps these cities together, but the Johnson

⁹ This list is not intended to be exhaustive, but to identify communities of interest that the Johnson and Legislature maps divide.

and Legislature assembly maps divide South Milwaukee from its neighboring municipalities.

Sheboygan: The City of Sheboygan is a historic community on the shore of Lake Michigan. *Id.* 070. The Johnson and Legislature maps, like the current map, fracture it in two.

The Fox Valley: Neenah-Menasha: The cities of Neenah and Menasha are deeply connected, share an identity, and collaborate on municipal services. *Id.* 077. The Johnson and Legislature assembly maps divide the cities into separate districts.

Central Wisconsin: Stevens Point. The City of Stevens Point anchors a community of interest in Portage County. *Id.* 079. The Johnson and Legislature maps divide that community. For example, the Johnson assembly map separates Stevens Point from surrounding areas like Amherst Junction and Nelsonville. Similarly, the Legislature's assembly map divides the city from Junction City and cuts it off from any territory to the north, which is connected instead to western communities like Sparta and Tomah.

B. Senate districts

Northeast Wisconsin: The Fox Valley. Municipalities like the City of Kaukauna and the Village of Little Chute are linked to the Fox Valley and City of Green Bay, not the rural northern areas to which they are attached in the current senate map. *Id.* 091. The Johnson and Legislature maps repeat this error, connecting these cities (and Green Bay-area communities like the villages of Allouez and

Ashwaubenon in the Legislature map) with municipalities like Wittenberg, Shawano, and Gresham to the north.

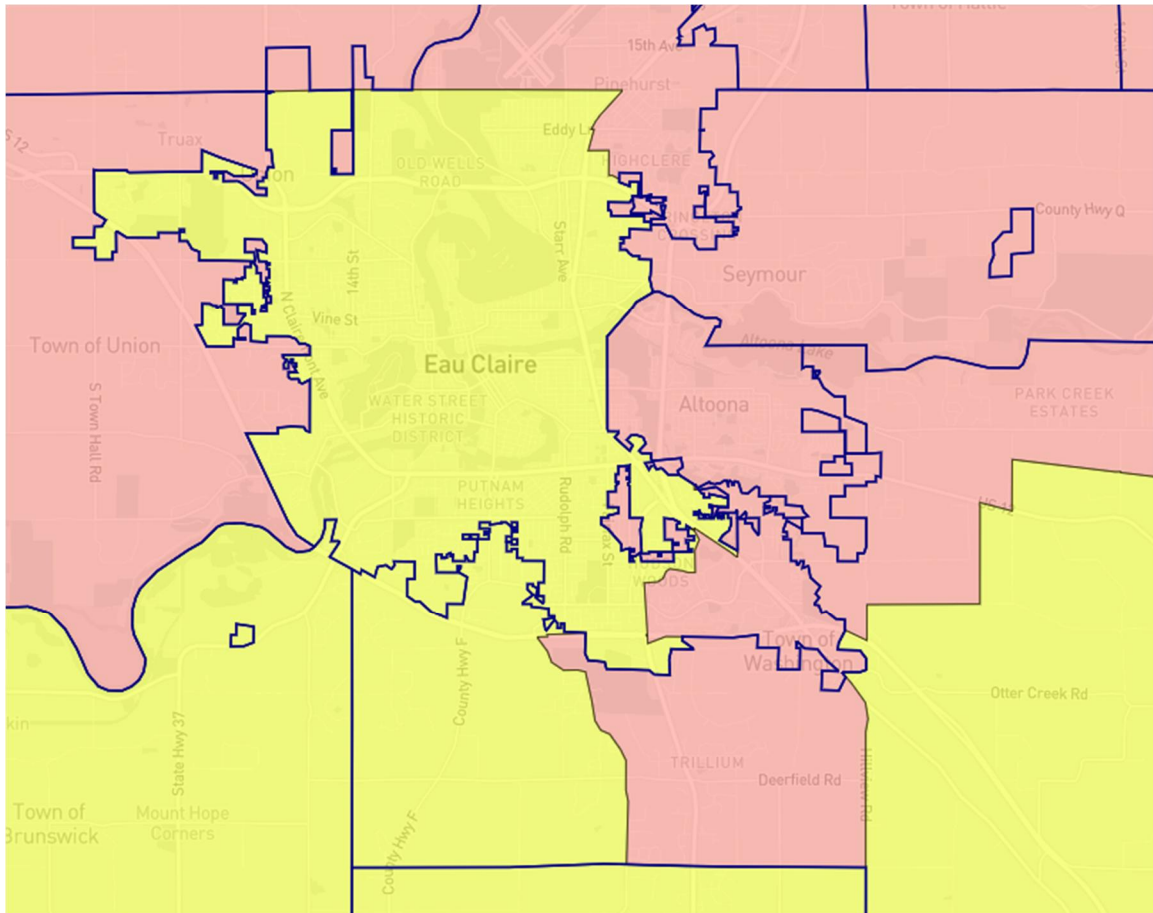
Southeast Wisconsin: Western Milwaukee Suburbs: The Clarke senate map unifies shoreline communities like Grafton, Port Washington, and Whitefish Bay, which share ties and interests, into a compact senate district north of the City of Milwaukee. *Id.* 093-094. The Johnson senate map, however, stretches from the lakefront to western communities like the City of West Bend, Rubicon, and part of the City of Hartford. The Legislature senate map, similarly, extends from Grafton to municipalities like the Town of Erin far to the west.

Southwest Wisconsin: the Driftless region. The Clarke senate map creates a compact senate district in the southwest that contains much of the Driftless, a geographically and economically linked area. *Id.* 095-097. The Johnson map, however, stretches SD17 from the Iowa border to communities as far north as the Wisconsin Dells, and divides Green County from the rest of the district. The Legislature's map is similarly egregious, stretching SD17 from the Iowa and Illinois borders well into the center of the state and as far north as Necedah.

The Fox Valley: Oshkosh, Neenah-Menasha, and Appleton: The cities of Oshkosh, Neenah-Menasha, and Appleton form a community of interest in the Fox Valley. The Clarke senate map unites almost all this community into a senate district. *Id.* 098-09. The Johnson and Legislature maps, however, divide these cities across senate districts.

Western Wisconsin: Eau Claire, Menomonie, and Chippewa Falls: The cities of Eau Claire, Menomonie, and Chippewa Falls—the “Golden Triangle”—share deep ties and belong in a single senate district. *Id.* 109-110. The Johnson and Legislature senate maps, however, not only split Eau Claire, but also divide Chippewa Falls (SD23) from Menomonie (SD31). Both maps keep Eau Claire in a different district than adjoining Altoona, with the Legislature map including a bizarre configuration that would put part of SD23 in the middle of Eau Claire.¹⁰

Legislature’s Eau-Claire Area Configuration



¹⁰ Certain district configurations in both the Johnson and Legislature maps, including their treatment of Eau Claire/Altoona, are explainable as seeking political advantage for Republicans.

V. All submissions other than the Legislature and Johnson maps are politically neutral.

Four parties—the Clarke Petitioners, Governor, Senate Democrats, and Wright Intervenors—submitted maps satisfying the Court’s requirement that maps not “privilege one political party over another,” *Clarke*, 2023 WI 79, ¶70, permitting the Court to maintain “political neutrality,” *id.* The Legislature and Johnson Intervenors did not. For this additional reason, these two submissions should be disqualified.

In an analogous case, *Carter v. Chapman*, the Pennsylvania Supreme Court evaluated proposed maps for political neutrality using several metrics. 270 A.3d 444, 470 (Pa. 2022). The court assessed maps using metrics capturing responsiveness, majoritarian outcomes, and partisan skew. *Id.* In particular, the court examined whether prevailing statewide candidates won a majority of seats and the efficiency gap and mean-median difference scores for the proposals. *Id.* at 470 n.30.

The Clarke, Governor, Senate Democrats, and Wright submissions all score well on these measures of political neutrality, as evidenced by their expert reports. The Johnson Intervenors’ expert relied upon Dave’s Redistricting App (“DRA”)—a transparent, publicly accessible redistricting website—to describe their maps’ political characteristics. *See* Brunell Report 11-12. Below are the DRA assessments for all submissions on the efficiency gap and partisan bias metrics to illustrate the divide between (1) the four politically-neutral submissions and (2) the two politically-biased submissions. On both scores, a map is more politically neutral as

its score approaches 0 and, on the DRA dashboard, positive values favor Republicans while negative values favor Democrats.¹¹ An efficiency gap above +/- 7% generally represents a durable and severe bias in favor of one political party. *See, e.g., Whitford v. Nichol*, 151 F. Supp. 3d 918, 922 (W.D. Wis. 2015) (“A 7 percent efficiency gap is ... indicative of uncommon severe gerrymandering” which is “likely to be unusually durable.”).

DRA Efficiency Gap Score Comparison for Assembly Maps

Map	DRA Efficiency Gap	DRA Partisan Bias
<i>Clarke Assembly</i>	2.51%	2.83%
Governor Assembly	3.18%	3.45%
Senate Democrats Assembly	4.02%	4.23%
Wright Assembly	2.55%	3.33%
Johnson Assembly	7.39%	8.11%
Legislature Assembly	11.67%	11.07%

DRA Efficiency Gap Score Comparison for Senate Maps

Map	DRA Efficiency Gap	DRA Partisan Bias
<i>Clarke Senate</i>	3.46%	4.25%
Governor Senate	3.95%	5.02%
Senate Democrats Senate	0.82%	2.00%
Wright Senate	3.51%	4.40%
Johnson Senate	11.38%	12.30%
Legislature Senate	14.46%	14.51%

All parties except the Legislature and Johnson Intervenors submitted maps exhibiting political neutrality, with a modest advantage for the Republican Party.

¹¹ These and other metrics can be viewed by visiting the “Advanced” tab for each party’s DRA links. To ensure a standardized comparison, we report here the results from DRA using the “Composite 2016-2022” election result setting.

The Legislature and Johnson Intervenors, however, submitted maps with an extreme and durable advantage for Republicans, contravening this Court's requirement that maps not "privilege one political party over another." *Clarke*, 2023 WI 79, ¶170.

Aware of their submissions' substantial skew, the Legislature and Johnson Intervenors assert that maps cannot be "politically neutral" unless they "favor Republicans at a level substantially disproportionate with their statewide vote share." Legislature Br. 57. In support of this oxymoronic contention, they produce expert reports purporting to analyze "ensembles" of thousands of computer-drawn maps, contending that they demonstrate Wisconsin's political geography substantially favors Republicans. The Court should reject this argument for several reasons.

First, that is precisely what other courts have done. In *Chapman*, the Pennsylvania Supreme Court rejected the position that certain proposals should be removed from consideration based on the argument that they "negat[ed] the natural geographic disadvantage" of Democratic voters in Pennsylvania and lacked a "sufficient 'Republican tilt.'" 270 A.3d at 459. The court observed that "the record does not support the conclusion that [the challenged maps] in fact 'prioritized proportional election outcomes' at the expense of traditional core criteria, given the various maps' exceptional performance on these criteria." *Id.* Rather, the court held that "consideration of partisan fairness, when selecting a plan among several that meet the traditional core criteria, is necessary to ensure that a [map] is reflective of and responsive to the partisan preferences of ... voters." *Id.*

So too here. The Clarke maps meet, and exceed, the current maps, historical maps, and the other parties' submissions on the relevant constitutional and traditional redistricting criteria. As in *Chapman*, the Clarke maps' performance on core criteria—while simultaneously being politically neutral—defeats the contention that the maps contravene some substantial, inherent bias that favors Republicans. If Wisconsin's political geography were so skewed, then a map would have to rack up significant demerits on county splits, municipal splits, and compactness to overcome it. The Clarke maps demonstrate that Wisconsin has no such substantial Republican skew to its political geography. Rather, the Clarke maps (along with the Wright, Governor, and Senate Democrats maps) reflect a modest Republican tilt attributable to Wisconsin's current political geography. The Legislature and Johnson Intervenors ask this Court to multiply that modest tilt into a severe and durable advantage for Republicans. *That* would be inconsistent with both Wisconsin's political geography and this Court's constitutional function.

Second, while ensemble analysis can be relevant to a partisan gerrymandering claim, to ascertain whether mapdrawers had a partisan motivation, it is less useful in this type of remedial proceeding. As Dr. Grofman previously explained, “[i]f a map has lower (absolute) values on metrics such as partisan bias than most of the maps in the ensemble, *ceteris paribus*, that is something to be desired, not condemned.” Bernard Grofman, *Preliminary Report: Proposed Legislative and Congressional Remedial Plans in North Carolina* (Mar. 21, 2022) (revised) App. 018-035.

Third, the ensembles presented by the Legislature's and Johnson Intervenors' experts, Drs. Trende and Blunt, are worthless: their conclusions about Wisconsin's political geography are based on ensemble maps that are noncontiguous and fail to follow Wisconsin's nesting requirement, and that are entirely unreliable. First, the entire premise of generating representative ensembles is that the maps created will follow the applicable legal constraints of the state—but Drs. Blunt and Trende's maps do not. Second, they have not generated the thousands of unique, independent maps they claim, and those maps are not statistically representative of Wisconsin's political geography.

Failure to Follow Legal Constraints

Dr. Blunt. Dr. Blunt purported to draw 20,000 representative senate maps and 20,000 assembly maps. But apparently lacking expertise in this field, Dr. Blunt made basic errors in running the publicly available “redist” code and his maps violate multiple mandatory constitutional requirements. Most notably, *none* of Dr. Blunt's 40,000 maps is *contiguous*. Rather, on average—and counting touchpoint and water contiguity as contiguous—45 districts in each assembly map and 20 districts in each senate map are noncontiguous.

Dr. Blunt's maps also violate the nesting rule. *See* Blunt Rep. 5. He states that “district numbering” required that he generate senate and assembly ensembles independently—which means his assembly districts are not contained within senate districts. *Id.*

Dr. Blunt’s maps flout this Court’s directive to reduce municipal splits. The *single best* map in his 20,000-assembly-map ensemble splits 52 cities, towns, and villages—exceeding the *Clarke* map splits. *See* Blunt Rep. 9.

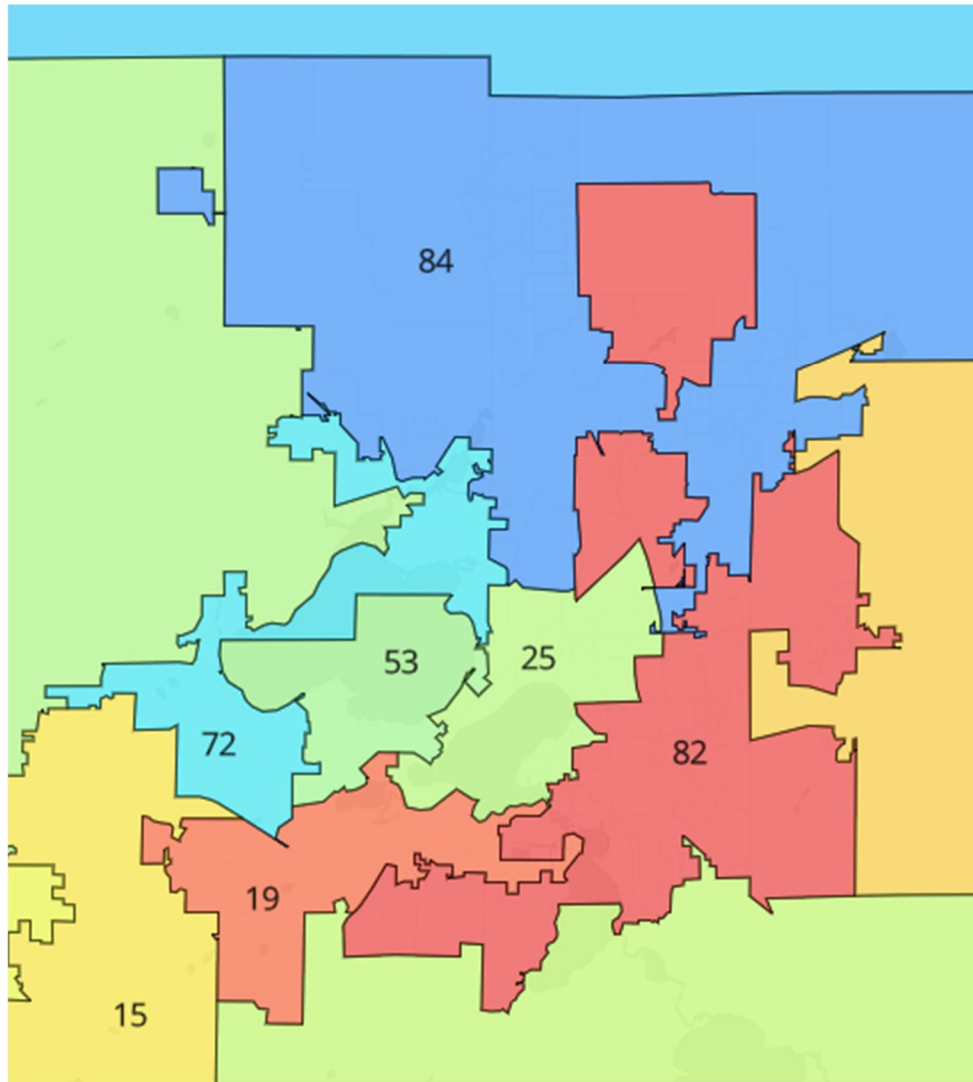
Dr. Trende. Dr. Trende created 4 assembly ensembles and 4 senate ensembles with between 5,000 and 50,000 maps. Some of his ensembles ignored political subdivisions. We focus on his 10,000 senate and 10,000 assembly maps that he describes as “respecting county and town boundaries” by “freezing” towns into place.¹²

Like Dr. Blunt’s ensembles, Dr. Trende’s ensembles have noncontiguous districts. *None* of his assembly maps has contiguous districts; on average, each contains 11 noncontiguous districts. His Senate maps contain, on average, 3 noncontiguous districts. Consider Trende Map No. 3371, shown below, which draws three detached parts of AD82 and no regard for compactness:¹³

¹² Labeled in his backup data as “towns_sims_assemmb.RDS” and “towns_sims_senate.RDS.”

¹³ <https://davesredistricting.org/join/aed6baf2-d49d-49a5-934c-c46a1a6ccfc2>.

Trende Map 3371



Dr. Trende’s maps also split huge numbers of wards and political subdivisions—figures he does not report. His assembly ensemble splits, on average, 105 wards and 67 towns; his senate ensemble splits, on average, 42 wards and 27 towns.

Finally, some of Dr. Trende’s assembly districts have Polsby-Popper compactness scores as low as 0.058—significantly lower than is reasonably “practicable.” Wis. Const. art. IV, § 4.

Small sample size and lack of statistical representativeness. Neither Dr. Blunt nor Dr. Trende truly generated the tens of thousands of unique maps they claim. Both used the publicly-available “redist” program. But running redist’s “summary” code on Dr. Blunt’s backup files shows that his “effective sample” size—meaning the number of truly different maps he generated—was only **136** for the assembly ensemble and **90** for the senate ensemble—not 20,000 apiece. App. 045, 047 (showing the results in the “resample” row). Dr. Trende’s “effective sample” size was only 957 for the assembly, and 3,514 for the senate—not 10,000. App. 039, 041. The program produced a “**✗** WARNING: Low plan diversity” message for both of Dr. Blunt’s ensembles, and for Dr. Trende’s assembly ensemble. App. 036, 042, 046.

Furthermore, the whole point of ensemble analysis is to generate a statistically *representative* sample of the trillions of possible maps that comply with redistricting rules—but Drs. Blunt and Trende’s maps are not representative. To ensure statistical representativeness, the redist program instructs users to run the code “multiple independent” times, and then to check if the results of each run look like each other.¹⁴ But Drs. Blunt and Trende did not perform the “multiple independent runs” that allow “redist” to determine “whether the algorithm is sampling properly.” App. 058, 063. For each senate and assembly ensemble, they

¹⁴ See <https://alarm-redist.org/redist/articles/redist.html> (explaining that “multiple independent runs” are required and describing use of the “r-hat” function to check for representativeness) App. 063; App. 036, 040, 042, 046 (Drs. Trende and Blunt generate no r-hat values because they did not do multiple runs).

just ran the code once. App. 036, 040, 042, 046 (showing no “r-hat” value, which means no statistical representativeness).¹⁵ That means their maps say nothing about Wisconsin’s political geography.

In sum, the Clarke maps perform exceptionally well on core redistricting criteria—better than most prior Wisconsin maps—while treating Wisconsin’s voters in a politically neutral manner. The Legislature and Johnson maps fall far short on both counts and are unfit for consideration.

VI. The equities favor a mandatory injunction.

The equities favor the Court entering a mandatory injunction. The Legislature repeats the standing arguments this Court has rejected and minimizes the harm flowing from over half the state’s legislative districts violating the plain text of the Constitution. This Court has properly rejected those arguments. *See Clarke*, 2023 WI 79, ¶¶35, 38-39. The Legislature objects that there is no “ripple effect” from the endemic noncontiguity, Legislature Br. 10 & 17, but its own proposal illustrates such an effect. By merely tinkering with each noncontiguity, the Legislature more than doubled the number of split municipalities compared to the current assembly map—from 52 to *114*—and split *120 wards*. Rather than confront the actual effect of endemic noncontiguity, the Legislature simply ignored it—and in so doing, contradicted the position it took in *Johnson* that municipal and ward splits must be minimized for a map to comply with the Constitution. *See, e.g.*,

¹⁵ Although Dr. Trende creates multiple *ensembles* with different characteristics, his backup data reflects that he did not do multiple independent runs of any ensemble to check representativeness.

Response Br. of Wis. Legislature 17, *Johnson v. Wis. Elections Comm’n* (No. 2021AP1450-OA); *Johnson* Oral Arg. at 1:56:08 (Attorney Meehan, arguing that the Legislature’s proposal “better abides by the constitutional prescriptions of equality of population and reducing municipal splits”). By sensibly addressing the ripple effect, the Clarke maps create contiguous districts while *reducing* splits, thus “better abid[ing] by the constitutional prescriptions.” *Id.* Wisconsin voters deserve, and the equities favor, a mandatory injunction imposing a constitutional, politically neutral map.¹⁶

CONCLUSION

The Court should order the Clarke maps as the remedy in this case.

Respectfully submitted this 22nd day of January, 2024.

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¹⁶ The Legislature’s professed concern about delayed senate voting is ironic given its opposition to special elections for the senate—the equitable remedy courts have imposed on the rare occasion they address this issue. *See, e.g., Dollinger v. Jefferson Cnty. Comm’rs Court*, 335 F. Supp. 340, 343-44 (E.D. Tex. 1971) (ordering special elections); *Scott v. Lack*, 332 F. Supp. 220, 222 (E.D. Tex. 1971) (ordering special elections); *In re Khanoyan*, 637 S.W.3d 762, 770 (Tex. 2022) (explaining that if claim of delayed voting was viable the potential remedy would be a special election under the new redistricting maps in affected districts). The Clarke Petitioners have no objection to special elections to address the Legislature’s purported concern.

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,484 words.

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