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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 THE REPORT OF COURT CONSULTANTS GROFMAN AND CERVAS

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INTRODUCTION

This litigation is ripe for the Court's remedial decision: it is time for the Court to select a remedial map. Pursuant to the Court's December 22, 2023 Order, the parties stipulated to the redistricting data to be used in this case. Using that data as their foundation, they have presented six different remedial maps, with additional underlying data and expert reports, for the Court's consideration. Each of those maps, along with the underlying data and expert reports, has been subjected to analysis and criticism by the other parties and their experts. Moreover, the Court's independent consultants, nationally recognized and respected political scientists Professors Bernard Grofman and Jonathan Cervas, have carefully reviewed the six proposals and provided their evaluation of each. *Report of the Court-Appointed Co-Consultants in re* Clarke v. Wisconsin Elections Commission *(Case Number 2023AP1399-OA, 2023 WI 79)*, filed 2/1/24 ("*Report"*). The Consultants identified two maps that constitute partisan gerrymanders (the Legislature's and Johnson Respondents'), and that the Legislature's plan, at least, "does not deserve further consideration." *Report at 24-25.* They found that the four remaining maps are, from a social science standpoint, "nearly indistinguishable." *Report at 25.* The Consultants also confirmed that there are no factual disputes that require resolution to appropriately evaluate the parties' proposals. *Report at 4 n.7.*

As shown below, the Court should adopt the map proposed by the Democratic Senators. It meets all legal criteria, follows traditional districting methods, and is the most politically neutral: it offers the highest probability that the number of Democratic and Republican candidates elected in each state legislative election will match the statewide proportion of partisan votes. That is, the Democratic Senators' map best

allows a majority of the people of the State of Wisconsin to elect a majority of Wisconsin's legislators. *See Reynolds v. Sims,* 377 U.S. 533, 565, 84 S.Ct. 1362 (1964). In a state as evenly politically divided as Wisconsin (*see Report at 12 and at 13, Table 4)*, that is the hallmark of a nonpartisan map.

ARGUMENT

I. The Legislature's and Johnson plans must be rejected.

A. The Legislature's and Johnson plans do not satisfy the Court's partisan neutrality criteria.

The Consultants confirmed that the Legislature's plan[1] and the Johnson plan[2] are partisan gerrymanders that contravene the Court's directive that proposed maps not "advantage one political party over another." *Clarke v. Wisconsin Elections Comm'n,* 2023 WI 79, ¶71, 410 Wis. 2d 1, 998 N.W.2d 370; *see Report at 11-23.* Each of these maps scored poorly on the three metrics of political neutrality analyzed by the Consultants, demonstrating instead pro-Republican partisan gerrymanders. *Report at 22-23.*

Most revealingly, the Legislature's and Johnson maps both failed the Consultants' evaluation of "majoritarian concordance," which measures whether the party that wins the majority of votes is likely to win the majority of seats. *See Report at 16-21*; *Reynolds,* 377 U.S. at 565. Of the

[1] The plan referred to herein as the Legislature's plan was submitted jointly by Intervenor-Respondent the Wisconsin Legislature and the 12 Republican Senator Respondents: Senators Jacque, Hutton, LeMahieu, Nass, Jagler, Marklein, Cabral-Guevara, Wanggaard, James, Quinn, Tomczyk, and Kapenga, in their official capacities as members of the Wisconsin Senate.

[2] The plan referred to herein as the Johnson plan was submitted by Intervenor-Respondents Billie Johnson, Chris Goebel, Ed Perkins, Eric O'Keefe, Joe Sanfelippo, Terry Moulton, Robert Jensen, Ron Zahn, Ruth Elmer, and Ruth Streck.

thirteen past elections examined by the Consultants to evaluate political neutrality of proposed maps, both maps "violated the majoritarian criterion," satisfying it in only five of 13 instances--four of which aligned with the four past Republican statewide victories. *Report at 18 and Table 8*. Under these maps, even "when Democrats receive most of the votes, only once do they receive the majority of legislative seats." That instance is in the 2018 U.S. Senate race, where Democratic Senator Tammy Baldwin won in a Wisconsin landslide victory with more than 55% of the vote. *Id*.

The Consultants also discredited the Legislature's and Johnson Respondents' purported defenses of their partisan gerrymanders. First, the Consultants rejected that the Johnson maps are somehow more partisan neutral because they are the product of a "neutral computer-driven map-drawing process." *Johnson Br. at 28*.[3] This conclusion, the Consultants stated, is "highly misleading." *Report at 23 n.32*. A modal or median plan is just as capable of creating a partisan gerrymander as a human-designed map. *Report at 23 n.32*. As the Consultants found, this Court need not look further than the Johnson proposed map for an example of this. While the Johnson plan appears to perform well on traditional good government criteria, this does not negate the Johnson map's partisan impact. In fact, the Consultants went so far as to characterize the Johnson map as a "stealth gerrymander." *Report at 23.*

Second, the Consultants rebuffed the idea that these partisan gerrymanders are the product of Wisconsin's "political geography." From a social science perspective, both "theoretically and empirically, even in

[3] Formally, "Brief of Intervenors-Respondents Billie Johnson, Chris Goebel, Ed Perkins, Eric O'Keefe, Joe Sanfelippo, Terry Moulton, Robert Jense, Ron Zahn, Ruth Elmer, and Ruth Streck in Support of Proposed Map," filed 1/12/24.

states where the electoral geography favors one party," it is possible to achieve a nonpartisan map. *Report at 23-24*. Indeed, the Consultants pointed to the maps submitted by the other parties as "compelling evidence that the geography of Wisconsin does not preclude the creation of good government maps that also seek to satisfy the goals of majority rule representation and avoiding political gerrymandering." *Report at 24.* As the Consultants eloquently concluded: "in Wisconsin, geography is not destiny." *Report at 24*.

That the Legislature's and Johnson maps fail the Court's political neutrality criterion is unsurprising. Neither party believed this was a legitimate criterion for the Court's consideration nor appears to have made a meaningful attempt to put forth a map that does not greatly favor Republicans. *See Leg. Br. at 46-53*[4] (proclaiming "partisan neutrality" because the proposed map only addresses noncontinuities); *Johnson Br. at 22-24.* Creating a politically neutral map was not a Herculean task. As has already been briefed, courts and social scientists have developed workable frameworks to evaluate the partisan impact of a proposed map. *See Dem. Sen. Resp. Br. at 9-12;*[5] *Harper v. Hall*, 868 S.E.2d 499, 548 (N.C. 2022) ("Those who deny such standards exist ignore what the public sees and experiences and what political scientists have demonstrated."), *superseded on other grounds*, 886 S.E.2d (N.C. 2023). The failure to adhere to the criterion of partisan neutrality, as confirmed by the Consultants, alone

[4] Formally, "Opening Remedial Brief of Intervenor-Respondent Wisconsin Legislature and Respondents Senators Cabral-Guevara, Hutton, Jacque, Jagler, James, Kapenga, LeMathieu, Marklein, Nass, Quinn, Tomczyk, and Wanggaard," filed 1/12/24.

[5] Formally, "Response Brief of Senators Carpenter, Larson, Spreitzer, Hesselbein, and Smith to Other Parties' Proposed Remedial Maps," filed 1/22/24.

should disqualify the Legislature's and Johnson plans from further consideration.

B. The Legislature's and Johnson maps fail to minimize ward splits.

The Wisconsin Constitution requires that each assembly district be "bounded by county…town or ward lines." Wis. Const. Art. IV, § 4. While this does not absolutely prohibit splits of these political subdivisions, the Court "considers the extent to which assembly districts split counties, towns and wards," *Clarke,* 2023 WI 79, ¶ 66, and "the smaller the political subdivision, the easier it may be to preserve its boundaries." *Johnson v. Wisconsin Elections Comm'n*, 2021 WI 87, ¶ 35, 399 Wis. 2d 623 (citation omitted) ("*Johnson I*"). Accordingly, with wards as the smallest subdivision, primacy is placed on preserving them.

Both the Legislature's and Johnson maps are plagued with high ward splits. The Legislature splits 105 wards a total of 107 times in its assembly map, which is nearly 900% more than the next closest party. *Report at 7.* In its senate map, there are almost 600% more ward splits than the next closest party. *Report at 7*. Notably, the Consultants found that the Johnson plan fared only better than the Legislature's in terms of ward splits, with 12 ward splits in the assembly plan and 9 in the senate plan. *Report at 7*. This high number of ward splits led the Consultants to conclude that "the Johnson plan appears to have a substantial number of fails of the 'bounded by' constitutional criteria." *Report at 25*.

The Consultants noted that the Legislature and Johnson Respondents advanced legal arguments that ward splits are "irrelevant" because municipalities now draw ward lines after legislative maps are adopted. *Report at 8* (citing *Leg. Br. at 40-42; Johnson Br. at 13-14*). While the

Consultants correctly declined to weigh in on such legal arguments, the Court should dismiss them outright. Nothing about a Wisconsin constitutional directive is "irrelevant." As this very case affirms, neither legislative enactments nor past practice creates exceptions to Art. IV, § 4 districting requirements. *Clarke*, 2023 WI 79, ¶¶ 18-19 (declining to read in a "political contiguity" exception into Article IV's contiguity districting requirement). The Legislature and Johnson Respondents were not free to disregard the Wisconsin Constitution's command, interpreted by courts to minimize ward splits, in designing their proposals.

This decision by the Legislature and Johnson Respondents to eschew minimizing ward splits should be accounted for by this Court. Because the other parties prioritized preserving existing wards—as required by the Wisconsin Constitution—the likely trade-off was higher county and municipal splits. *Report at 8*. This Court should consider this fact in selecting a map and exclude the Legislature and Johnson maps for failing to adhere to the "bounded by" requirement of Art. IV, § 4.

II. The Democratic Senators' map meets all legal requirements and respects traditional districting criteria.

A. Population equality.

The Consultants confirm that the map proposed by the Democratic Senators meets the legal requirement of population equality as previously defined by the Court, i.e., it has less than 2% population deviation between districts. *Report at 4; see also Dem. Sen. Br.*[6] *at 8-9.*

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

B. Contiguity.

The Consultants also confirm that with technical corrections, the Democratic Senators' map satisfies the Wisconsin Constitution's contiguity requirement as previously defined by the Court. *Report at 8-9; see also Dem. Sen. Resp. Br. at 26-27.* The technical corrections are reflected in the maps shown at the links in footnote 11 on page 27 of that response brief.

C. Compactness.

The Consultants further conclude that from a social science standpoint, there is no substantive difference in compactness of the districts proposed in the parties' maps and thus all of the plans before the Court, including the Democratic Senators' plan, "appear to satisfy the compactness requirement." *Report at 9.* Legally, there is no bright-line standard for the compactness required by Article IV, §§ 4 and 5 of the Wisconsin Constitution. Rather, assembly compactness has been generally defined by courts as containing "closely united" territory. *Clarke,* 2023 WI 79 ¶ 66 (citing *Wisconsin State AFL-CIO v. Elections Bd.,* 543 F. Supp. 630, 634 (E.D. Wis. 1982). Senate districts, comprised of three assembly districts, must consist of "convenient contiguous territory." No party has asserted that the map proposed by the Democratic Senators fails the Wisconsin Constitution's compactness requirement. The compactness of the districts in the Democratic Senators' map is better than or comparable to the compactness of prior Wisconsin maps this century, including those that were court-approved: the Democratic Senators' proposed assembly map has a Reock score of 0.419, which is comparable to and slightly better than the 2002 assembly map (0.41), the 2011 assembly map (0.392) and the current map (0.382). Their proposed senate map has a Reock score of 0.388,

which is likewise comparable to prior maps: the 2011 senate map Reock is 0.403 and the current senate map Reock is 0.397.[7]

D. Equal Protection and Voting Rights Act.

The Consultants review of the parties' maps, including the one proposed by the Democratic Senators, revealed that there are no Equal Protection or Voting Rights Act concerns. *Report at 9, 22; see also Dem. Sen. Br. at 13-18.*

E. Preserving communities of interest.

While preservation of communities of interest is not legally required, it is a traditional districting criterion that the Court indicated it would consider in this remedial phase. *Clarke v. WEC,* 2023 WI 79, ¶ 68. The Consultants expressed skepticism about defining communities of interest based on television media markets and school catchment areas, *Report at 9,* but the Democratic Senators' map does not rely on such bases. Rather, the Democratic Senators' map restores unity to communities of interest that courts have previously identified, see., e.g., the north shore suburbs of Milwaukee, the City of Wauwatosa, and the City of West Allis. *Dem. Sen. Resp. Br. at 17*; *Wisconsin State AFL-CIO,* 543 F. Supp. at 638-39. It also unites cities that were unnecessarily fractured under politically gerrymandered maps (*e.g.*, Green Bay; the municipalities along the shore of Lake Winnebago; the cities of central Wisconsin: Wausau, Stevens Point, and Wisconsin Rapids); and unites the rural areas of Northern Wisconsin and Southwestern Wisconsin. *Dem. Sen. Resp. Br. at 18-21.*

[7] Prior and current map Reock scores were reported in the Clarke Petitioners' expert report of Christopher Warshaw, found in the Petitioners' Appendix in Support of Remedial Maps, filed 1/12/24, beginning at App. 007 ("Clarke Exp. Rep."). The data here are at App. 020.

Thus, the communities of interest identified and preserved by the Democratic Senators are centered on local communities and governments, *See Johnson v. WEC,* 2022 WI 14, ¶ 134 n.19, 400 Wis. 2d 626, 971 N.W.2d 402, *overruled onother grounds by Wisconsin Legislature v. WEC,* 595 U.S. 398, 142 S.Ct. 1245 (2022) ("*Johnson II*") (citing *Johnson I,* 2021 WI 87, ¶ 83 (Hagedorn, J., concurring)), that share common economic, social and cultural interests which, contained in a single district, enable effective and fair representation. *See Maestas v. Hall,* 274 P.3d 66, 78 (N.M. 2012). Preserving these interests facilitates effective representation by the elected senator or assemblyperson: "To be an effective representative, a legislator must represent a district that has a reasonable homogeneity of needs and interests…" this allows the representative to "represent the preferences of most of [their] constituents in policy formation." *Prosser v. Elections Bd.,* 793 F. Supp. 859, 863 (W.D. Wis. 1992).

The Consultants discussed splits of Native American tribal reservations and found that the Wright plan "stood out" for having the fewest number of pieces. *Report at 10.* The Democratic Senators agree that it is important to recognize and keep whole tribal communities of interest. Of the 11 federally recognized reservations, four are kept whole in single assembly districts in the Democratic Senators' plan: Red Cliff Reservation in AD 73, Stockbridge Munsee Community in AD 35, Menominee Reservation also in AD 35, and Sokaogon Chippewa Community in AD 36. Three others are preserved in single senate districts but split between neighboring assembly districts: Forest County Potawatomi Community in

SD 12 and ADs 34 and 36,[8] Lac Courte Oreilles Reservation in SD 25 and ADs 74 and 75, and Bad River Reservation in SD 25 and ADs 74 and 73. The remaining four reservations have components in multiple counties and municipalities, and thus containing them within single districts could not be prioritized. For instance, the Ho Chunk Nation Reservation is spread out over at least 11 counties and the St. Croix Reservation has territory in four counties.

Statistically speaking, the Democratic Senators' assembly plan is second only to the Wright plan in the "effective splits" metric, with 3.06 effective splits of tribal reservations, compared to the Wright plan with 2.42 effective splits. *Wright Appx. Table 9, filed 1/22/24.* The Democratic Senators' senate plan is in the middle of the range for effective splits, and the map as a whole reduces such splits substantially from the current map (SB 621, adopted in *Johnson* and identified as the 2022 map in the Wright Appendix Table 9), which has 5.01 effective reservation splits in the assembly map and 3.08 effective reservation splits in the senate map. *Id.*

F. Minimizing Political Subdivision Splits

The Wisconsin Constitution requires assembly districts in state legislative maps to be "bounded by" county, town, or ward lines, though the Court no longer interprets that requirement to entirely prohibit splits of those units. Wis. Const. Art. IV, § 4; *Clarke,* 2023 WI 79, ¶ 66. There has been no argument to revisit that interpretation. Senate districts are comprised of undivided assembly districts. Art. IV, sec. 5. In addition, the Court recognizes that reducing city and village splits is a beneficial

[8] The Forest County Potawatomi Community tribal lands include two properties not in these districts, but instead in the City of Milwaukee. Those properties are primarily commercial, comprised of a casino and a data center.

traditional districting criteria that it will consider, though it is not legally required. *Clarke,* 2023 WI 79, ¶ 68. The Consultants examined the extent to which each party's plan split wards, counties, and municipalities. *Report* at 5-8.

As detailed below, the Democratic Senators' map satisfies the "bounded by" requirement of Wis. Const. Art IV, § 4 and, consistent with traditional districting criteria, minimizes municipal splits. No party has claimed otherwise, and this conclusion is only bolstered by the findings of the Consultants.

1. Ward Splits.

Avoiding ward splits, as the smallest political subdivision, is the paramount constitutional "bounded by" requirement. *Johnson I*, 2021 WI 87, ¶35 ("[T]he smaller the political subdivision, the easier it may be to preserve its boundaries."). The Consultants confirm that the Democratic Senators' map reflects only one ward split in their senate plan, and two in their assembly plan. *Report at 7*. One of these assembly plan ward splits occurs in the Town of Madison, which no longer exists, and thus should not be counted as a split. *Mayer Report*[9] *at 6*. The other ward split was done to prevent splitting the Town of Middleton. *Id.* Under this most scrutinized category of political subdivision splits, the Democratic Senators' map performs well.

2. Town Splits.

The Democratic Senators' map performs comparably to the other maps as to town splits. *Report* at 7. Further, the number of town splits is

[9] Formally, "Corrected Expert Report of Kenneth R. Mayer, Ph.D in Support of Remedial Maps Proposed by the Democratic Senator Respondents," filed 1/16/2024.

within the range of splits that were found permissible in *Johnson II* and *Johnson III*.

Wisconsin Assembly Maps[10]		
Map	**Number of Town Splits**	**Total Town Splits**
2022 *Johnson II* court-imposed	50	Unavailable
2022 *Johnson III* court-imposed	16	16
Democratic Senators' Map	**27**	**34**
Wisconsin Senate Maps		
Map	**Number of Town Splits**	**Total Town Splits**
2022 *Johnon II* court-imposed	32	Unavailable
2022 *Johnson III* court-imposed	8	8
Democratic Senators' Map	**16**	**17**

There has been no claim that the Democratic Senators' map runs afoul of the Constitution based on the number of town splits in it.

3. County Splits.

While there is a constitutional directive to "bound" districts by county lines, "[a]pplying the one person, one vote principle may make bounding districts by county lines nearly impossible." *Johnson* I, 2021 WI 87, ¶ 35 (citing *AFL-CIO*, F. Supp. at 635). The Consultants noted that the Democratic Senators' map, along with the other maps, "have similar (or identical) total county splits as the current plan." *Report at 6*. Moreover, the number of county splits in the Democratic Senators' plan is commensurate with, or better, than past maps, including maps imposed by previous courts.

[10] Town split data from *Johnson II* assembly and senate maps compiled from Supplemental Report in Support of Governor Evers's Proposed Corrected State Legislative District Plans at 5, filed in *Johnson v. WEC,* 2021AP001450 on 1/5/22. Town split data from *Johnson III* assembly and senate maps compiled from *Report at* 7.

Wisconsin Assembly Maps[11]		
Map	**Number of Counties Split**	**Total County Splits**
1992-*Prosser* court-imposed	47	Unavailable
2002-*Baumgart* court-imposed	51	Unavailable
2011 Act 43	58	177
2022 *Johnson II* court-imposed	53	177
2022 *Johnson III* court-imposed	53	159
Democratic Senators' Map	**51**	**155**
Wisconsin Senate Maps		
Map	**Number of Counties Split**	**Total County Splits**
1992-*Prosser* court-imposed	35	Unavailable
2002-*Baumgart* court-imposed	42	Unavailable
2011 Act 43	47	88
2022 *Johnson II* court-imposed	45	92
2022 *Johnson III* court-imposed	42	73
Democratic Senators' Map	**42**	**76**

There has been no claim that the Democratic Senators' map runs afoul of the Constitution based on its county splits.

4. Other Municipal Splits.

Reducing other municipal splits, i.e., splits of cities and villages, is not constitutionally required, but is a beneficial districting principle. *Clarke*, 2023 WI 79, ¶ 68; *State* ex rel. *Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 742 (1892) (observing that the "lines of cities and villages are not specified" in Art IV, § 4). The Democratic Senators' map is comparable to the other proposed maps in overall municipal splits. *Report at 8*. Moreover, the Democratic Senators' map is well within the historical range of municipal splits in legislatively adopted and court-imposed maps.

[11] County spilt data from previous assembly and senate maps is from Clarke Exp. Rep. at App. 014.

Wisconsin Assembly Maps[12]		
Map	**Number of Municipal Splits**	**Total Municipal Splits**
1992-*Prosser* court-imposed	72	Unavailable
2002-*Baumgart* court-imposed	50	Unavailable
2011 Act 43	62	Unavailable
2022 *Johnson II* court-imposed	115	181
2022 *Johnson III* court-imposed	52	83
Democratic Senators' Map	**72**	**119**
Wisconsin Senate Maps		
Map	**Number of Municipal Splits**	**Total Municipal Splits**
1992-*Prosser* court-imposed	45	Unavailable
2002-*Baumgart* court-imposed	24	Unavailable
2011 Act 43	37	Unavailable
2022 *Johnson II* court-imposed	76	95
2022 *Johnson III* court-imposed	31	38
Democratic Senators' Map	**48**	**60**

5. The Court should consider the splits in the Democratic Senators' map in light of its superior political neutrality.

While well within the constitutional bounds of the "bounded by" Constitutional requirement, and also respecting traditional districting practices for minimizing other municipal splits, the Democratic Senators acknowledge that their proposed map does contain a higher number of political subdivision splits than are present in the other three maps in contention (the Clarke, Governor's, and Wright maps). Yet this fact needs to be considered in terms of how the map performs on the whole, recognizing that for each optimized criterion, there is a trade-off in other

[12] Municipal split data for previous assembly and senate maps is from Clarke Exp. Rep. at App. 015.

areas. The Consultants recognize that increasing the number of subunit pieces may "be used to move closer to political neutrality." *Report at 6.* Consequently, "[political subdivision splits] must be taken in context with how subunit splits were used vis-à-vis the level of partisan bias in the created maps." *Id.* Here, the Court should weigh the Democratic Senators' plan recognizing that, while containing slightly more political subdivision splits than the remaining parties, it meets all legal requirements and, as detailed in the next Section, is superior to all other proposed plans in partisan neutrality.

III. The Democratic Senators' map is most politically neutral.

The Court rightly seeks to select a politically neutral map, *Clarke,* 2023 WI 79, ¶¶ 69-71. Utilizing well-established best practices for evaluating the political neutrality of proposed districts, based on recent past election data to project results, the Consultants provided the Court with a substantial and detailed analysis of the political neutrality of the various proposals before the Court. *Report at 11-21.* They anchored their assessment "in the analysis of majoritarian outcomes" and emphasized that "[e]lectoral plans demonstrating… responsiveness…align with the principle of representing the changing dynamics of voter sentiment. Such responsiveness ensures that electoral maps remain reflective of the electorate's will, adapting to shifts in political landscapes and voter behavior." *Report at 12 n.22.*

The Consultants focused on three measures that address "the majoritarian criterion that, in a two-party competition, the party with the higher share of the vote should be expected to win more seats than the party with a lower share of the vote." *Report at 13.* Those three measures

are the "mean minus median gap," "partisan bias," and "majoritarian concordance." The Consultants explain in their report how each measure is taken, and what it shows; we will not repeat that here. However, as detailed below, the Democratic Senators' map overall offers the best performance in these criteria. That is, the map of the Democratic Senators best allows for majoritarian outcomes in future elections—whether the majority is Republican or Democratic—and thus it is the most politically neutral.

A. Mean minus median gap.

The Consultants' analysis verifies that the Democratic Senators' senate plan is the most symmetric: with a mean minus median gap of only -0.4 it has the smallest skew of all submitted maps, and that skew is in favor of Republicans. All other submitted maps favor Republicans more. The Democratic Senators' assembly plan has a mean minus median gap of -2.3, which, while it still skews in favor of Republicans, is a major improvement from the much larger skew in the current map (-6.6) and is also far better than the skews in the maps submitted by the Legislature (also -6.6) and the Johnson Respondents (-4.0). Averaging the senate and assembly plan mean minus median gaps, the Democratic Senators offer the smallest skew overall of all proposed maps: -1.3%. *Report at 22, Table 12.* Thus, on this measure, the Democratic Senators' plan is the most politically neutral.

B. Partisan bias.

The Consultants also determined that the Democratic Senators' senate plan offers the least partisan bias of all submitted plans, at 2.1%, in favor of Democrats. All other submitted maps favor Republicans and in larger percentages. The Democratic Senators' assembly plan includes a

bias in favor of Republicans that is in the same range as those presented in the Governor's, Wright and Clarke maps. All four of those maps are a drastic improvement on the current assembly map which includes a whopping -13.4 partisan bias in favor of Republicans, and also are significantly less biased than the Johnson and Legislature's proposals. Averaging the senate and assembly plan partisan biases, the Democratic Senators offer the smallest bias overall of all proposed maps: -0.4%. *Report at 22, Table 12.* Thus, on this measure, the Democratic Senators' plan is also the most politically neutral.

C. Majoritarian concordance.

The majoritarian concordance metric is rooted in the United States Supreme Court's seminal redistricting case, *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362 (1964), where that Court recognized that "[l]ogically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators." *Reynolds,* 377 U.S. at 565. The Consultants described this metric as "arguably the most straightforward way of examining agreement with majoritarianism." *Report at 14.* The Democratic Senators' proposal also leads the pack in this metric.

A key characteristic of majoritarian concordance is that statewide vote majorities should result in statewide seat majorities. As the Consultants note, this principle has embedded within it the normative principle that the majorities should be obtainable by both parties: Democratic statewide majorities should produce legislative majorities, with the same being true for Republicans.

A third characteristic is how closely the probabilities match: that is, is the probability that a Democratic statewide majority produces a

Democratic legislative majority roughly equal to the probability that a Republican statewide majority produces a Republican legislative majority? On this metric, the Democratic Senators' plan is the most equitable. For Democrats, statewide majorities translate into legislative majorities in 72.2% of races. *Report at 19, Table 10.* For Republicans, the figure is 75%.[13] The difference – 2.8% - is smaller than the difference for any other plan. This demonstrates equivalency of responsiveness for both parties. Moreover, concordance with the will of the majority of the people 72.2% to 75% of the time is excellent responsiveness, and more reliably consistent than in any other plan.

IV. The Court should select the Democratic Senators' map.

The Court has before it four legally compliant maps: those from the Clarke Petitioners, the Governor, the Democratic Senators, and the Wright Petitioners. Each map has its strengths, and for each of those strengths there have been tradeoffs. Yet there are no legal failures in any of these four proposals. All four of these maps also meet the Court's additional criteria, identified in its December 22, 2023 Opinion. This Court's Order of December 22, 2023 committed to selecting one of the parties' proposals (with technical corrections or minor changes if required) that meets those criteria. That is, the Court assured the parties and the voters of the State that "only if no such submission meets the criteria in the court's December 22, 2023 opinion should Dr. Grofman and Dr. Cervas submit their own

[13] There appears to have been two mathematical errors in Table 10. Using the data in tables 7 and 8 of the Report, the Republican concordance in the Democratic Senators' plan is 75% (6 of 8—not 77.8%) and in the Wright plan it is 62.5% (5 of 8—not 66.1%). But even if we misunderstand how those concordances were calculated, the difference between the Republican and Democratic concordances in the Democratic Senators' plan is still smaller than in any other plan based on the percentages in Table 10.

proposed remedial map." *12/22/23 Court Order at 4.* The Consultants have not found that condition to be met, and while they offer to improve on the plans submitted, or devise an entirely new plan, *Report at 24,* that is not necessary.

Instead, the Court should simply adopt the plan offered by the Democratic Senators. It meets all legal requirements and preserves multiple communities of interest which will allow senators and assemblypersons alike to provide effective representation in the statehouse to their constituents. Perhaps most significantly, this plan offers the best chance for the majority of votes to translate into the majority of legislative seats. The people of the State of Wisconsin will once again be able to choose their representatives, not the other way around.

CONCLUSION

The Democratic Senators respectfully request that the Court adopt their map to remedy the previous finding of unconstitutionality of the current state legislative map.

Respectfully submitted this 8th day of February 2024.

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CERTIFICATION

I hereby certify that this brief conforms to the Court's December 22, 2023 Order for the brief due on February 8, 2024. The length of this brief is 4,984 words.

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