FILED
02-08-2024
CLERK OF WISCONSIN
SUPREME COURT

No. 23AP1399-OA

In the Supreme Court of Wisconsin

REBECCA CLARKE, RUBEN ANTHONY, TERRY DAWSON, DANA GLASSTEIN, ANN GROVES-LLOYD, CARL HUJET, JERRY IVERSON, TIA JOHNSON, ANGIE KIRST, SELIKA LAWTON, FABIAN MALDONADO, ANNEMARIE MCCLELLAN, JAMES MCNETT, BRITTANY MURIELLO, ELA JOOSTEN (PARI) SCHILS, NATHANIEL SLACK, MARY SMITH-JOHNSON, DENISE 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, JOSEPH J. CZARNEZKI, 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, INTERVENORS-RESPONDENTS.

BRIEF OF INTERVENORS-RESPONDENTS BILLIE JOHNSON, CHRIS GOEBEL, ED PERKINS, ERIC O'KEEFE, JOE SANFELIPPO, TERRY MOULTON, ROBERT JENSEN, RON ZAHN, RUTH ELMER, AND RUTH STRECK IN RESPONSE TO CONSULTANTS' REPORT

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

RICHARD M. ESENBERG
LUKE N. BERG
NATHALIE E. BURMEISTER
330 E. Kilbourn Ave., Ste. 725
Milwaukee, WI 53202
Phone: (414) 727-9455
Facsimile: (414) 727-6385

TABLE OF CONTENTS

INTRODUCTION 5

ARGUMENT 6

I. The Consultants' Theory of "Neutrality" Is Inconsistent With Wisconsin's Constitution. 7

II. The Consultants Entirely Disregard Wisconsin's Political Geography, as Well as Most of the Johnson Intervenors' Arguments and Evidence. 9

A. Courts Recognize the Importance of Political Geography. 12

B. The Report Is Inconsistent With The Consultants' Prior Writings. 14

C. This Court Should Not Ignore the Rest of the Evidence the Johnson Intervenors Submitted. 17

III. Accepting the Consultants' Theory of "Partisan Gerrymandering" Now, After Declining to Consider Such Claims, Without Affording Any Discovery, Fact-Finding, Trial, or Meaningful Opportunity to Respond, Would Violate Due Process. 18

IV. Ward Splits and the "Bounded By" Argument Are No Reason to Reject the Johnson Maps 22

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Adams v. DeWine,
167 Ohio St. 3d 499, 195 N.E.2d 74 (2022) 13

Benisek v. Lamone,
348 F. Supp. 3d 493 (D. Md. 2018) 13

Clarke v. WEC,
2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370 ..... 17, 19, 22

Common Cause v. Rucho,
318 F. Supp. 3d 777 (M.D.N.C. 2018) 13

Edgar v. K.L.,
93 F.3d 256 (7th Cir. 1996) 21

Graham v. Sec'y of State Michael Adams,
No. 2022-SC-0522-TG, 2023 WL 8640825 (Ky. Dec. 14, 2023) 13

In re Murchison,
349 U.S. 133 (1955) 20

Jenkins v. McKeithen,
395 U.S. 411 (1969) 20, 21

Jensen v. Wisconsin Elections Bd.,
2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537 19

Johnson v. WEC,
2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 23

League of Women Voters of Michigan v. Benson,
373 F. Supp. 3d 867 (E.D. Mich. 2019) 13

Ohio A. Philip Randolph Inst. v. Householder,
373 F. Supp. 3d 978 (S.D. Ohio 2019) 13

Prosser v. Elections Bd.,
793 F. Supp. 859 (W.D. Wis. 1992) 19

Rogers v. Tennessee,
532 U.S. 451 (2001) 20

Rucho v. Common Cause,
139 S. Ct. 2484 (2019) 7, 8, 9, 13

United States v. Craven,
239 F.3d 91 (1st Cir. 2001) 21

Whitford v. Gill,
218 F. Supp. 3d 837 (W.D. Wis. 2016) 20

Other Authorities

29 Fed. Prac. & Proc. Evid. § 6305 (2d ed.) 21

Cervas & Grofman, *Tools for identifying partisan gerrymandering with an application to congressional districting in Pennsylvania*, (Aug. 16, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248713 14

Grofman & Cervas, *Partisan Gerrymandering*, (Sept 19, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4619617 15

Grofman & Cervas, *The Terminology of Districting*, (March 30, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3540444 15

Grofman, Koetzle, & Brunell, *An Integrated Perspective on the Three Potential Sources of Partisan Bias: Malapportionment, Turnout Differences, and the Geographic Distribution of Party Vote Shares*, 16(4) Electoral Studies 457–70, (1997) 15

Jonathan Cervas, Report of the Special Master, *Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct., May 20, 2022), https://jonathancervas.com/2022/NY/CERVAS-SM-NY-2022.pdf 15

THE FEDERALIST PAPERS No. 56 8

Rules

S.C.R. 60.04 22

INTRODUCTION

The Court's consultants admit that, of all submissions, the Johnson maps perform "the best … on traditional redistricting criteria." Report 24. Yet they urge this Court to reject both them and the simple fix—the only two not from parties associated with Democrats—as "partisan gerrymanders," the very claim this Court said it would not consider. The consultants do not assert, nor could they, that the Johnson maps were drawn *intentionally* to favor any party. Indeed, the Johnson Intervenors "did not take partisan breakdown into account when creating their map," which no party has disputed or refuted. Johnson 1/12/24 Br. 27; *id*. 9–11 (describing what they prioritized). The Legislature's expert concluded repeatedly, based on a variety of analyses, that the Johnson map "looks like a map drawn without respect to partisanship." Leg. 1/22/24 App'x 54a, 46a (same), 71a (same). So have outside observers: "The WILL submission looks a lot like the modal value in the party-blind algorithmically-generated ensembles that I've seen."[1] That is because it was drawn solely to "hew[ ] closely to the underlying political geography of the state." *Id*. 77a.

None of the Petitioner Parties claim such neutrality; instead, they criticize the Johnson Intervors for *not* taking partisanship into account. Gov. 1/22/24 Br. 13. Although the Johnson maps "score very well on traditional good government criteria—in fact, score the best on various measures of splits of political subdivisions," Report 23, the Court's supposedly-neutral consultants nevertheless label them a "stealth gerrymander," *id*., without any evidence of gerrymandering, stealth or otherwise. The only basis for this pronouncement is that the maps do not achieve the political outcome they deem fair: a correlation between the projected outcome of 132 local races and support for statewide candidates

[1] John D. Johnson tweet (Feb. 4, 2024), https://twitter.com/jdjmke/status/1754215053157405187

running for different offices that is sufficiently close such that Democrats will win a majority of legislative seats anytime their statewide candidates win a bare majority. Nevermind the political geography of Wisconsin, or the unrefuted fact that all four Petitioner Parties' maps are *extreme* outliers compared to neutral and randomly generated maps; they simply ignore all of that. Call it what you will, this is a form of proportionality.

If this Court adopts the consultants' "partisan gerrymandering" rationale for rejecting the Johnson maps, it would fundamentally transform the Wisconsin's Constitution's theory of representation. And it will also be the ultimate bait-and-switch. This Court declined to take the partisan gerrymandering claims given "the need for extensive fact-finding (if not a full-scale trial)." 10/6/23 Order p.3. To reverse course at the last minute without any fact-finding or trial and with severely truncated briefing—and in a way that departs from how virtually every other court willing to assess partisan fairness has approached the issue—would be an egregious due process violation, quite apart from any question of recusal. This Court should reject the consultants' report.

ARGUMENT

The Johnson Intervenors maintain that claims of partisan unfairness or gerrymandering are nonjusticiable. This Court should fix the constitutional problem it found and do no more. But, as it appears that is not what this Court intends to do, the Johnson Intervenors reiterate that any measure of partisan neutrality must be consistent with the system we have. The question is not—as the consultants would have it—whether a set of maps produces results that correspond in some way to the aggregate vote for statewide offices, but instead whether whatever partisan "tilt" results is a product of artifice and not geography.

I. The Consultants' Theory of "Neutrality" Is Inconsistent With Wisconsin's Constitution.

"Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2515 (2019) (Kagan, J., dissenting). The Wisconsin Constitution mandates that legislators are chosen by single-member districts. While other democracies have different systems, such as proportional representation and multi-member districts, Wisconsin's single-member, "first-past-the-post" system follows Congress and most state legislatures.

This has implications for the very idea of "political neutrality." Even where such districts are drawn without regard to—or even knowledge of—their partisan impact, the party affiliations of the 132 single-member districts may not match the vote for a statewide office. Even if ticket splitting is uncommon, the outcome will be impacted by where voters live. The state may elect Democrats on a statewide level, but Republicans may still control the legislature. This possibility has been repeatedly recognized by courts and scholars.[2] *Infra* Parts II.A, B.

For this reason, even those jurists who believe that claims of partisan gerrymandering are justiciable understand that a partisan tilt caused by a state's natural political geography is not unfair. In *Rucho*, for example, Justices Kagan, Ginsburg, Breyer, and Sotomayor expressly endorsed using "the State's physical … and political geography" as "the comparator (or baseline or touchstone)" to assess the neutrality of a map. 139 S. Ct. at 2520.

[2] This can happen in both directions. For example, in 1986 and 1990, the top-of-the-ticket vote was decisively for Republican candidates. The Democratic candidates got 46.22% (Earl 1986), 47.44% (Garvey 1986), and 41.77% (Loftus 1990). Yet the Democrats held 52 seats in the Assembly in 1987–88 and 55 seats in 1991–92.

They also argued that courts should *not* attempt to balance partisan representation by deliberately counteracting a state's natural political geography. They emphasized, for example, that in a North Carolina redistricting litigation, "the State's political landscape" was the "neutral baseline" to compare maps to, rather than the judge's "own view of electoral fairness." *Id*. And they noted that in a Maryland redistricting litigation, the Court invalidated a congressional district drawn to remove Republican voters and add Democratic voters in an area where Republicans were heavily concentrated, not "because a judicial ideal of proportional representation commanded another Republican seat," but "because the quest for partisan gain made the State override *its own* political geography and districting criteria." *Id.* 2521 (emphasis in original).

Wisconsin's political geography, therefore, cannot be overridden by this Court. If the current partisan concentration of voters for one party differs sufficiently from that of the other, drawing districts that track this geography without regard to partisan outcome may result in legislative majorities that differ from the partisan majorities for statewide offices. This is not, as the consultants would have it, a result to be overcome. It is a necessary implication of a constitutional choice that must be respected. For a court to do otherwise is to do exactly what Justice Kagan said courts should not do—apportion political power based on one's "own vision of electoral fairness." *Id*. 2515.

Whether one supports or opposes Wisconsin's theory of single-seat representation, it is the one Wisconsin has chosen. It is not for this Court, the Court's consultants, or any social scientists to seek to undo or modify. There is a reason for this constitutional choice. Local concerns differ, and one function of legislators is to represent those concerns. THE FEDERALIST PAPERS No. 56 ("Divide the largest State into ten or twelve districts, and it will be found that there will be no peculiar local interests

in either, which will not be within the knowledge of the representative of the district.") Such a system, moreover, promotes consensus by introducing an incentive for parties to have a breadth, rather than merely a depth, of support. While it may be possible for a party to win by running up the vote in a handful of densely populated areas, contiguous and compact districts restrain that possibility. Each party must run at least some candidates that can appeal to disparate geographic areas.

If this Court is critical of partisan gerrymandering by legislatures, the answer is not for this Court to commit the same wrong in the other direction by attempting to gerrymander away Wisconsin's natural political geography—in essence, gerrymandering away the standards set forth in the Wisconsin Constitution. That itself is a constitutional violation.

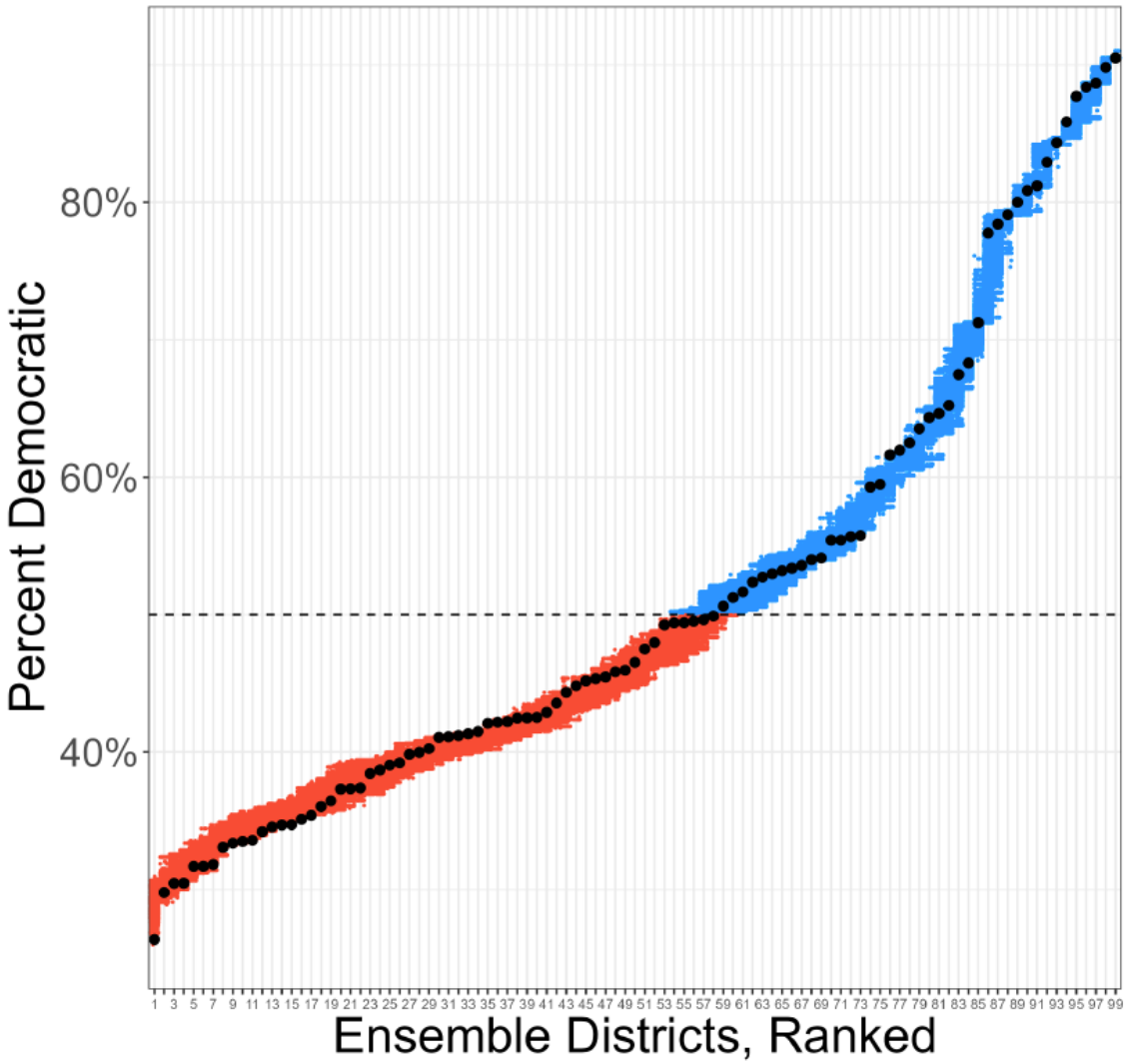
II. The Consultants Entirely Disregard Wisconsin's Political Geography, as Well as Most of the Johnson Intervenors' Arguments and Evidence.

The Johnson Intervenors demonstrated that their maps are not the product of a gerrymander, but of Wisconsin's natural political geography. Their ensemble analysis—something frequently relied on by courts and scholars, *e.g. Rucho*, 139 S. Ct. at 2520 (Kagan, J., dissenting)—shows that their maps produce a partisan outcome "smack dab in the center" of that produced by 20,000 random maps. *Id*. 2518.

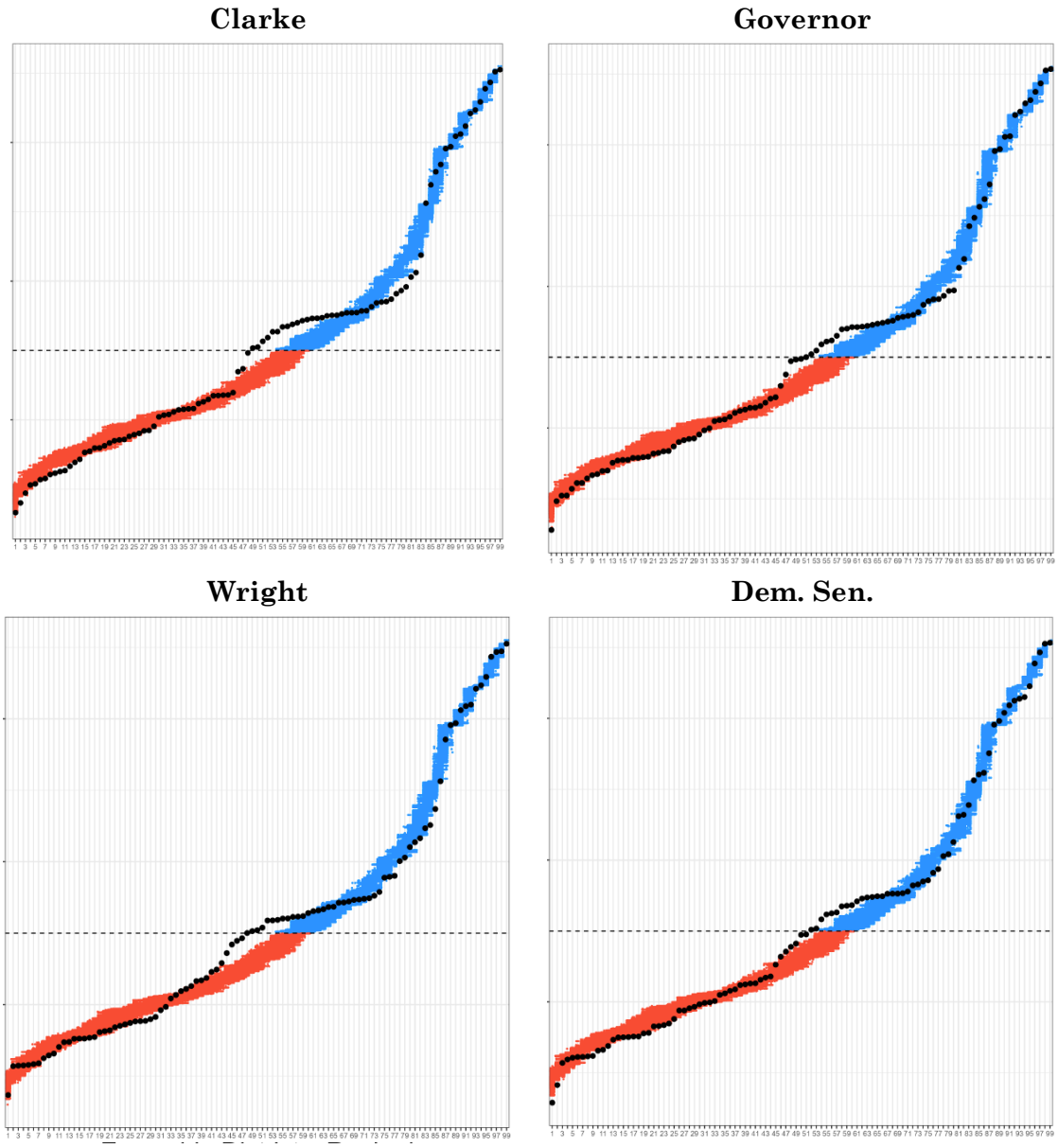
Sean Trende's (the Legislature's expert) ensemble analysis—50,000 maps—shows the same. Johnson 1/22/24 Br. 9–10. And his follow-up report on January 22, analyzing all of the maps, is just as stark. The charts below are ranked-district graphs, which plot all districts in a map from least to most Democratic. The red and blue bars represent the range of outcomes for such graphs for all 50,000 maps Trende generated. The black dots represent the ranked-district graph for a particular map. Here

is the chart comparing the Johnson Assembly map to the 50,000-map ensemble:

Figure 24: Johnson Assembly Map, vs. Ensemble, SMC



Note how *every* district falls within the expected range. As the Trende put it, the Johnson map "districts follow[ ] the expected results from a politics-free map closely." Leg. 1/22/24 App'x 71a–72a. By dramatic contrast, the Petitioner Parties' maps are all extreme outliers, especially for districts near the 50-50 line:



As one can see, each of these maps "deviate substantially from what we would expect from politics-free maps. They do so generally by pushing the Democratic vote share downward in heavily Republican areas and moderately Democratic areas, freeing up Democratic voters to push into otherwise-swing or modestly Republican districts." *Id.* 73a–77a.

Notably, no other party ran an ensemble analysis—at least not one that they are willing to share with the Court.

The Johnson Intervenors also showed that their maps closely track the nonpartisan "geographic seats" metric, and are responsive to shifts in partisan appeal using that metric—moreso than any other map—further proving that they are not the product of partisan manipulation. Johnson 1/22/24 Br. 11–13. If the Democrats run a set of candidates that have the statewide appeal of Senator Baldwin (who garnered 55% of the statewide vote and had broad geographic appeal), they would win overwhelming majorities under the Johnson maps. While slim victories for statewide Democratic candidates do not project legislative majorities (a projection that is hypothetical and omits things like candidate selection and the impact of the top of the ballot on down-ballot races), nothing in the consultants' report demonstrates that this departure from proportionality is the product of artifice, rather than the differing geographic concentration of Democratic and Republican voters.

The consultants did not even try to address geography. The reason is simple: they don't think it matters. Their measures of political neutrality—every one of them—reduce to different ways of stating their preferred conception of "fairness": that the winner of a statewide race should also win a majority of the Legislature. The consultants are entitled to advocate for this as a policy change. They can call for a constitutional amendment. But that is not the application of "expertise." It is a value judgment and the people of Wisconsin have already made that judgment in their Constitution.

A. Courts Recognize the Importance of Political Geography.

Moreover, the value judgment the consultants urge this Court to make is inconsistent with what even the dissenters in *Rucho* supported.

As Justice Kagan noted, prior to *Rucho*, courts had "largely converged" on applying the natural political geography of a state as a baseline for assessing partisan fairness. 139 S. Ct. at 2516 (Kagan, J., dissenting).[3] After *Rucho*, Courts that have adjudicated partisan gerrymandering claims have also considered natural political geography.[4]

As Justice Kagan further explained in *Rucho*, comparing proposed maps against the state's natural physical and political geography—typically achieved by comparing proposals to thousands of simulated maps (i.e., ensemble analysis)—is proper because it "does not use any judge-made conception of electoral fairness—either proportional representation or any other." *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting). By contrast, judge-made conceptions of fairness are a "danger[ ] everyone should want to avoid." *Id*. 2515. But rather than avoiding this danger, the consultants urge this Court to jump in.

As noted above, the Court's consultants largely, and inexplicably, ignore the ensemble analyses presented in this case, as well as the "geographic seats" metric. In what they surely intended as a clarion call for action, they say that, in Wisconsin, "geography is not destiny," Report 24, which really means, "we can rig the maps to overcome it." What they seek is no different than what Republican legislators have been accused of doing.

The maps on the petitioner side are all attempts to take partisanship into account to maximize the support for Democratic

---

[3] *See e.g.*, *Common Cause v. Rucho,* 318 F. Supp. 3d 777 (M.D.N.C. 2018); *Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018); *League of Women Voters of Michigan v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978 (S.D. Ohio 2019).

[4] *See e.g., Adams v. DeWine,* 167 Ohio St. 3d 499, 195 N.E.3d 74 (2022); *Graham v. Sec'y of State Michael Adams*, No. 2022-SC-0522-TG, 2023 WL 8640825 (Ky. Dec. 14, 2023).

candidates. This type of involvement in partisan decision-making is exactly what this Court rightly said it would not do. The Johnson maps don't do that. They were intentionally drawn without regard to partisan impact, relying only on those factors that our Constitution commands. Anything more is partisan manipulation—a "rig job." This Court must avoid that.

B. The Report Is Inconsistent With The Consultants' Prior Writings.

Even the consultants themselves—at least before this case—have previously defined "[n]eutral plans" as "those that are drawn entirely with respect to traditional good government criteria, with no attention paid to partisan considerations."[5] They even "contrast[ed]" "neutral" plans with those drawn intentionally to "compensate for the difference in partisan concentration" to "achieve" something like "proportional representation." *Id*.

They take precisely the opposite approach to neutrality here. They contend that the Johnson maps, drawn to maximize scores on traditional redistricting criteria without any political considerations, are *not* neutral, but are instead "stealth gerrymanders," while the Petitioner Parties' maps, which were obviously drawn to obtain a particular partisan result, *are* neutral because the result is what the consultants deem "fair."

They have also both frequently recognized the importance of political geography. In September, 2023, they wrote: "In *most states* the electoral geography … creates a bias against the Democrats because

[5] Cervas & Grofman, *Tools for identifying partisan gerrymandering with an application to congressional districting in Pennsylvania*, p.20 (Aug. 16, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248713.

their votes tend to be disproportionately concentrated in urban areas...."[6] When Cervas served as a court-appointed special master in New York (with Grofman assisting him), he called this "common sense": "[W]e find pro-Republican bias in New York even in maps drawn by Democrats … because of highly concentrated Democratic voting strength in almost all of New York City … Common sense tells us that this lopsided difference will necessarily penalize Democrats in their translations of votes into seats."[7] Grofman, likewise, has been writing for over 30 years that partisan bias "may arise by the chance effects of geography."[8]

They even have a term for it. In their paper entitled, "Terminology of Districting," they define "[n]atural gerrymander" as a "plan drawn according to traditional districting principles" that favors one party "due simply to the differences in geographic concentration of party support."[9] They "regard [the term] as somewhat of a misnomer," however, because the "natural bias" results not from gerrymandering, but from "differences in the geographic concentration of electoral support between the parties." *Id*. n.35. They completely abandon that terminology here.

They also abandon metrics they have previously endorsed. They have written before that the best way to determine the effects of political

---

[6] Grofman & Cervas, *Partisan Gerrymandering*, p.9 (Sept 19, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4619617.

[7] Jonathan Cervas, Report of the Special Master, *Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct., May 20, 2022), https://jonathancervas.com/2022/NY/CERVAS-SM-NY-2022.pdf

[8] Grofman, Koetzle, & Brunell, *An Integrated Perspective on the Three Potential Sources of Partisan Bias: Malapportionment, Turnout Differences, and the Geographic Distribution of Party Vote Shares*, 16(4) Electoral Studies 457–70, 461 (1997), https://www.researchgate.net/publication/222304380_An_Integrated_Perspective_on_the_Three_Potential_Sources_of_Partisan_Bias_Malapportionment_Turnout_Differences_and_the_Geographic_Distribution_of_Party_Vote_Shares.

[9] Grofman & Cervas, *The Terminology of Districting*, p.13 (March 30, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3540444.

geography is an ensemble analysis (or random map generation), the very evidence they ignore in this case. According to them, just a few months ago, "[e]nsembles are particularly useful to demonstrating *intent* [to gerrymander] because a computer programmer can deny the algorithm information about partisanship (or race), and then an enacted or proposed plan can be compared to the distribution of resulting plans in the ensemble. While ensembles cannot alone prove intention, they can provide powerful circumstantial evidence." *Supra* n.6 at p.6 (Emphasis in original). Indeed, this was their explanation for why "natural gerrymander" is a "misnomer": "If we define gerrymandering with respect to neutral plans created by computer simulation … *only the partisan bias that is above and beyond the natural bias is treated as evidence for gerrymandering*." *Supra* n.9 at p.13 n.35 (Emphasis added). "This way of defining gerrymanders has become common in the academic literature." *Id*. p.16 (listing citations).

Contrary to all of the above, they now sweep aside any consideration of Wisconsin's political geography, writing dismissively that "geography is not destiny." Report 24. No one disputes that "it is possible to draw plans" that gerrymander in favor of Democrats, overcome Wisconsin's geography, and achieve 50 (or more) seats in the Assembly for Democrats. Report 23. As expected, such maps will underperform on traditional criteria (which the consultants excuse as "good enough") and result in bizarrely shaped districts. Johnson 1/22/24 Br. 13–21. But that is not "neutrality," even by Grofman's and Cervas's own definition. Neutrality must take geography as the "baseline," the "common [approach] in the academic literature." *Supra* n.9 p.16.

The consultants had to abandon any consideration of geography in this case because the Petitioner Parties' maps are all extreme outliers with respect to partisan effect, as shown by the Blunt and Trende ensemble analyses, as well as the "geographic seats" measure. Johnson

1/22/24 Br. 9–13. Just months before taking this case, Grofman and Cervas would have described that kind of evidence as "powerful circumstantial evidence" of an "intent" to gerrymander. *Supra* n.6, p.6. Here, however, it is suddenly irrelevant. Report 23 n.32.

The consultants' new definition of "gerrymander" is not only inconsistent with their own prior work, it is also incoherent. According to their definition, a map drawn randomly by a computer, or by neutral judges, without any consideration of politics, would also be a "stealth gerrymander."

C. This Court Should Not Ignore the Rest of the Evidence the Johnson Intervenors Submitted.

In addition to Wisconsin's geography, the Johnson Intervenors also highlighted a variety of other evidence illustrating that the Petitioner Parties' maps are not politically neutral, but designed to achieve a particular result for Democrats. This evidence included images of "pinwheel" districts to split apart Dane County and other Democratic strongholds to create more Democratic-leaning districts, Johnson 1/22/24 Br. 13–21, rank-votes graphs showing anomalies and few seats near the competitive range (45–55%), *id.* 21–26; incumbent analysis, showing that the Petitioner Parties targeted Republican incumbents and protected Democratic incumbents far more than the current ratio of Republican to Democrat incumbents would suggest in a neutrally drawn map, *id.* 26–29, and data showing that the Johnson maps move and disenfranchise far fewer voters than any other submission (other than the simple fix), *id.* 6–7. The Court's consultants disregarded all of this in their report. This Court should not.

III. Accepting the Consultants' Theory of "Partisan Gerrymandering" Now, After Declining to Consider Such Claims, Without Affording Any Discovery, Fact-Finding, Trial, or Meaningful Opportunity to Respond, Would Violate Due Process.

In its December 22 decision, this Court held that it would consider only the "political neutrality" of the remedial maps submitted. *Clarke v. WEC*, 2023 WI 79, ¶¶70–71, 410 Wis. 2d 1, 998 N.W.2d 370. It had previously ruled that it would *not* consider the so-called partisan gerrymandering claims because they present "the need for extensive fact-finding (if not a full-scale trial)." 10/6/23 Order p.3. But what was barred at the front door is now battering down the back. Despite their recognition that the Johnson maps score "the best [ ] on traditional redistricting criteria," Report 24, including "on various measures of splits of political subdivisions," *id.* 23, the consultants recommend rejecting the Johnson maps as a "partisan gerrymander"—the very claim this Court said it would not consider. *Id.* 25. What is wrong with the Johnson maps? The consultants can't say. But they assure us that what they can't point to is still there. It's just "stealth," by which they mean "we don't know." The sole "criteria" is what they deem to be insufficient proximity to a handful of statewide elections.

In so doing, the consultants conflate "neutrality" with "partisan gerrymander" and use the terms interchangeably. And they conflate both with the failure to achieve a particular outcome. Worse yet, the particular theory they spend the majority of their report advocating for and relying on is one that even they openly acknowledge is "not yet as well known." Report 14. They argue that this not-yet-well-known theory "has origins in the academic literature … as far back as 1981"—citing only *Grofman's own prior writing*. *Id.* Perhaps the reason Grofman's idiosyncratic, 30-year-old theory is "not yet [ ] well known" is that it has not been adopted or accepted by other courts or social scientists.

Whatever it might be called, the consultants' theory is nothing more than an assertion that, to the extent possible, maps should be drawn to distribute partisan voters in a way that overcomes their natural geographic distribution to correlate more closely with state wide results[10]—so close that the slim winner of a single statewide race will also win a majority of legislative seats. There is no logical reason that neutrally-drawn contiguous and compact districts that miminize county and town splits will do this. It depends on how voters are concentrated. And as the Johnson Intervenors—and virtually everyone else who has ever looked at the question—have demonstrated, it is not the case in Wisconsin. Johnson 1/12/24 Br. 22–30; Johnson 1/22/24 Br. 9–13;

This novel theory also substantially moves the goalposts from this Court's December 22 decision—and at the eleventh hour no less. This Court explained that "neutrality" means that "judges should not select a plan that … [allows] one party [to] do better than it would do under a plan drawn up by persons having no political agenda." 2023 WI 79, ¶70 (quoting *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶12, 249 Wis. 2d 706, 639 N.W.2d 537 (in turn quoting *Prosser v. Elections Bd.*, 793 F. Supp. 859, 867 (W.D. Wis. 1992)). The Johnson Intervenors took this Court at its word and have submitted a map that was drawn with no political agenda, and the evidence proves it—it "looks like a map drawn without respect to partisanship," Leg. 1/22/24 App'x 54a. It was drawn solely to track Wisconsin's political geography as closely as possible, which is why it beats all other maps on county, town, and municipal splits. Johnson 1/22/24 Br. 4–8.

[10] The notion that there is some stable partisan make-up that allows for this fine-tuning is risible. Wisconsin is a state that has recently given majorities to such disparate candidates as Donald Trump and Joe Biden, Scott Walker and Tony Evers, Ron Johnson and Tammy Baldwin.

The consultants' theory flips neutrality on its head. In their view, to be "neutral," a map *must* allow Democrats to "do better than [they] would do under a plan drawn up by persons having no political agenda." *See* Report 11–25. For them, the point is not to remove bias from the maps; but to inject it to achieve a correlation that our Constitution does not call for and implicitly rejects. Nor is it an answer to say that partisan manipulation is fine as long as the resulting maps—while not the best—are within "hailing" distance on traditional criteria. The Legislature, whose maps the consultants reject, could say the same thing. It is the partisan manipulation that this Court must avoid.

The Court's consultants, and this Court, if it accepts their recommendations, will have magically transmogrified this case into one not about contiguity or remedying municipal islands, but instead into a test case for their own novel, pet theory of gerrymandering. And they did it without giving the party accused of gerrymandering (the Johnson Intervenors) any meaningful opportunity to respond, to litigate the proper definition of "partisan neutrality," to conduct any fact-finding on this new theory or its application to the Johnson maps, or to cross-examine the consultants—which, by the way, would likely be highly productive given the inconsistencies with their prior writings. *See supra* Part II.B. This bizarre chain of events is yet another serious due process violation in this case. *Jenkins v. McKeithen*, 395 U.S. 411, 428 (1969) ("We have frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process.").

Whitford v. Gill illustrates how deeply unfair the process here has been. 218 F. Supp. 3d 837 (W.D. Wis. 2016). In *Whitford*, each party was able to submit expert reports and depose the other side's experts. There was a full trial with witnesses, exhibits and cross-examination. *Id*. 857–62, 903–10, 912–27. That is how litigation works because basic fairness requires disclosure of experts, expert discovery, the right to present

witnesses and evidence, and the opportunity to cross-examine opposing witnesses and experts. Credibility determinations can be made by the trier of fact only *after* that full process has been granted to the parties. None of that has happened here.

The U.S. Supreme Court has held that "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955); *see also Rogers v. Tennessee*, 532 U.S. 451, 462, 467 (2001) (the due process clause requires "fundamental fairness" and protects against "unfair and arbitrary judicial action."). The abbreviated process this Court has imposed has already been problematic, but to then close this case by rejecting maps from only one side, based on a theory the Court said it would not consider and that is inconsistent with how it defined "neutrality" on December 22, 2023, without any real opportunity to litigate that novel theory, would be deeply unfair.

Finally, the consultants' report indicates that they may have had ex parte communications with members of this Court. Report 2 ("We agree that we will keep any communications with members of the Court confidential and never disclose the contents of any discussion with members of the Court unless and until given permission by the Court."). To the extent that any members of this Court have had substantive ex parte communications with the consultants, it should disclose them. Federal courts around the country have recognized that ex parte communications between a judge and court-appointed expert are inappropriate due to the potential for bias. *See*, *e.g.*, *United States v. Craven*, 239 F.3d 91, 102 (1st Cir. 2001); *Edgar v. K.L.*, 93 F.3d 256, 257–58 (7th Cir. 1996); 29 Fed. Prac. & Proc. Evid. § 6305 (2d ed.) ("ex parte communications between the judge and the expert … are discouraged" and "may pose ethical issues" or "justify disqualification"). Wisconsin law also reflects this principle, requiring a court-appointed expert witness's duties to be "in writing" and "filed with the clerk," or set forth "at a

conference in which the parties shall have opportunity to participate," Wis. Stat. §907.06(1), and the judicial ethics rules prohibit ex parte communications, S.C.R. 60.04(1)(g). The inability to conduct discovery into any ex parte communications only further reinforces the due process problems here. *See Jenkins*, 395 U.S. at 428.

IV. Ward Splits and the "Bounded By" Argument Are No Reason to Reject the Johnson Maps.

As previously explained, ward splits should be irrelevant for two reasons: the ward boundaries being used for this case are not the current, existing ward boundaries; and regardless, wards will be redrawn after this Court selects a map, such that any ward splits will be eliminated. Johnson 1/12/24 Br. 13–14 and n.4.

In their January 22 brief, the Clarke Petitioners argue that this Court should rigidly interpret the "bounded by" clause to strictly prohibit *any* ward splits that "cut *through* [a] ward." Clarke 1/22/24 Br. 6–11. Earlier in this case they argued that the "bounded by" clause is "not an inflexible requirement." Clarke 10/16/23 Br. 37.

The consultants latch onto this argument and suggest it as a reason to reject the Johnson maps. Report 25. Though they claim not to take a position, they nevertheless reproduce a table from the Wright Intervenors' brief purporting to show the extent to which district boundaries lie on "county, town, or ward lines." Report 21–22.

As an initial matter, including this table in their "report" illustrates the bias of the Court's supposedly "neutral" consultants. They did not produce or even verify the data in this table, but simply copied and "recreated" it from the Wright Intervenors' Appendix, while completely ignoring the vast majority of the arguments and data produced by the Johnson Intervenors and the Legislature. Report 22. And the percentages used are deeply misleading—they appear to be the

percentage of *districts* that contain a split ward, not the percentage of the boundaries that lie on county, town, or ward lines, as the header suggests. Even for the few districts that split a ward, the vast majority of the boundaries of those districts lie on county, town, and ward lines. This Court should disregard that portion of the report.

Even setting that point aside, this Court should reject this new "bounded by" argument for multiple reasons. First, this Court, itself, has not interpreted the bounded-by clause so rigidly, including in this very case. *Clarke*, 2023 WI 79, ¶66 ("As to the "bounded" requirement, this court considers the extent to which assembly districts split counties, towns, and wards … although we no longer interpret the requirement to entirely prohibit any splitting of the enumerated political subdivisions, as we once did."). Indeed, the Governor's assembly map that this Court adopted in *Johnson II* split "hundreds" of wards, far more than the *12* split by the Johnson assembly map in this case. *Compare Johnson v. WEC*, 2022 WI 14, ¶232, 400 Wis. 2d 626, 971 N.W.2d 402 (Bradley, J., dissenting) and *id.* ¶152 (Ziegler, C.J., dissenting), *with* Report 7.

Second, every submission splits far more than 12 *actual* wards, *as they exist today*, in the way they argue is prohibited. Here are just four examples, from each of the maps, of districts splitting wards down the middle, including some triple splits[11]:

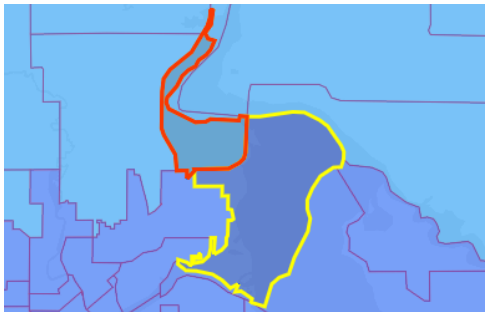
[11] This Court can view splits of *existing* wards in Dave's as follows: for any map, under "map settings" (the gear icon) set the "precincts"' setting to "Wisconsin 2022 Wards (Updated Sept 2023)." (The option from Dec. 2023 is produced by the LTSB for this case, using old ward boundaries). Then, in the "Tools" dropdown, select "Find Split Precincts." Some of the ward splits shown through this tool should be ignored—e.g., water-related splits—but it shows many actual ward splits in all maps.

Evers Assembly Map

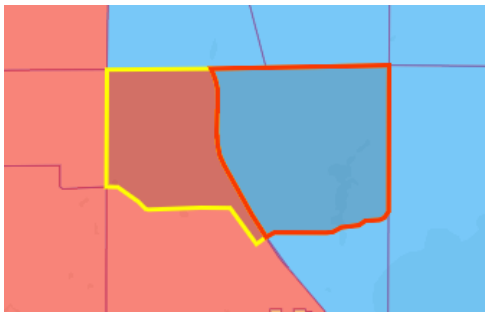
Ledgeview Town, Ward 7



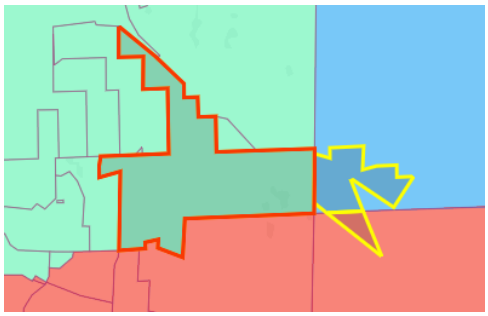
Eagle Point Town, Ward 5



Albion Town, Ward 3

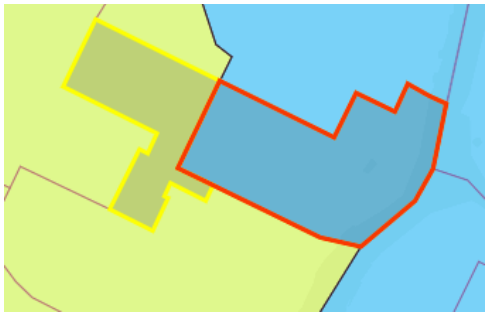


Mcfarland, Ward 5 (**Triple**)

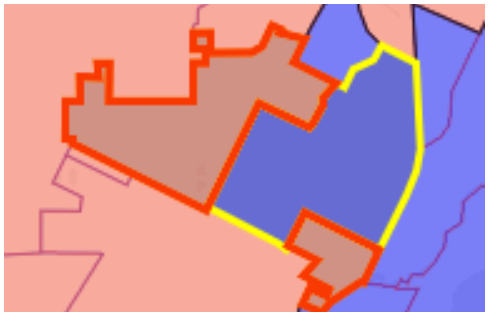


Clarke Assembly Map

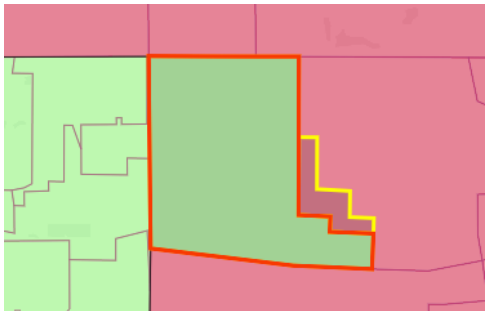
Green Bay, Ward 27



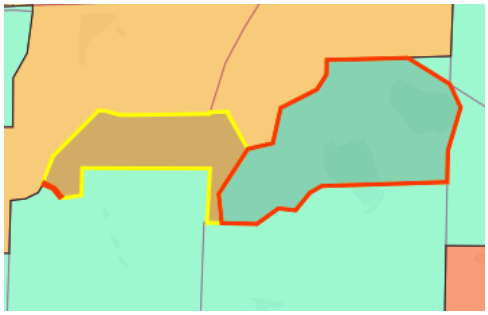
Ashwaubenon, Ward 11



Appleton, Ward 44

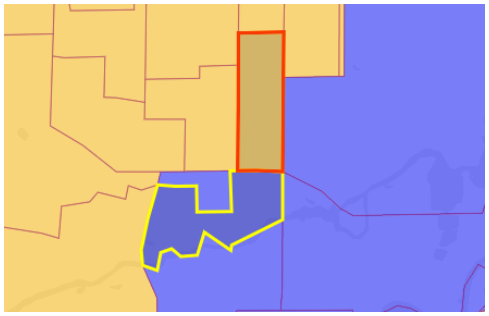


Middleton, Ward 3

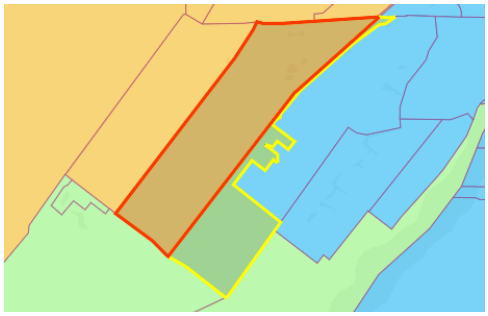


Wright Assembly Map

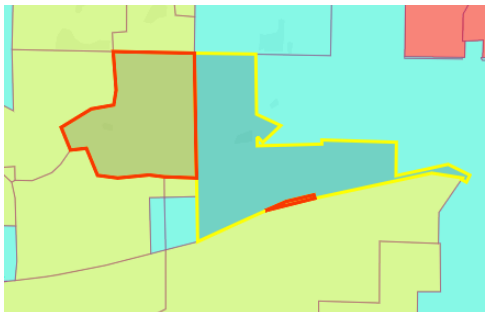
Howard Village, Ward 5



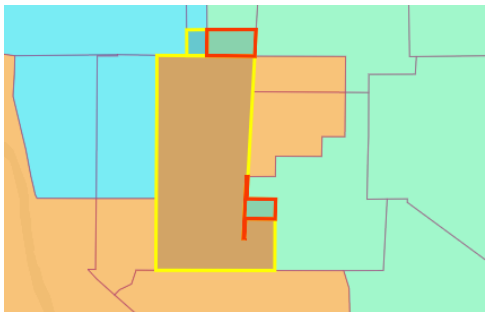
Lawrence Town, Ward 4



Verona, Ward 7

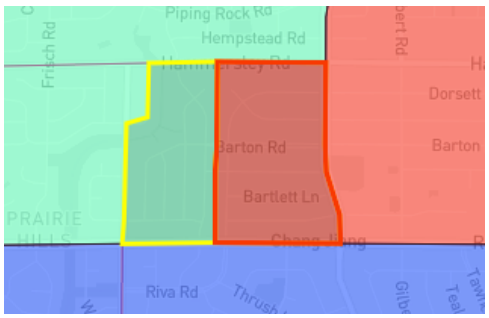


La Crosse, Ward 15 (**Triple**)

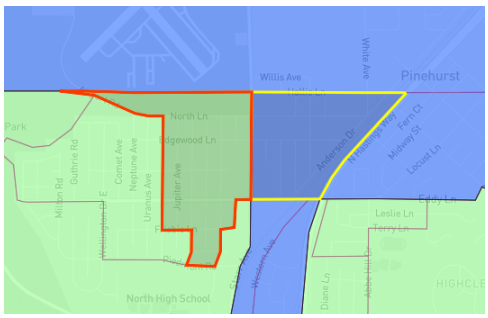


Dem. Sen. Assembly Map

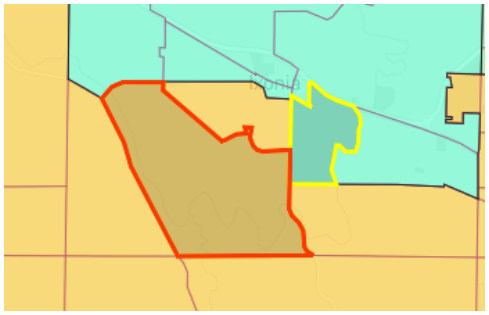
Madison, Ward 84



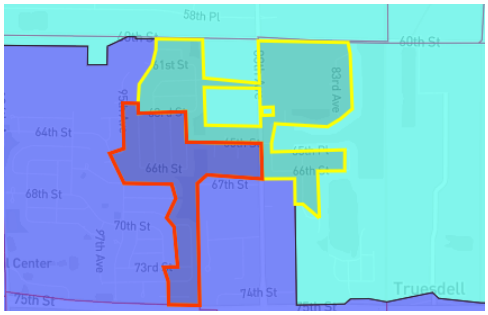
Eau Claire, Ward 13



Ixonia Town, Ward 4



Kenosha, Ward 59



To give a rough sense of the scope of the problem, the Johnson Intervenors counted well over 50 splits of current wards, in each of the Petitioner Parties' Assembly maps, using Dave's as explained above (*supra* n.11) (and excluding splits due to unassigned water blocks). And the map submitted by the Wright Intervenors—who brag about splitting the fewest wards, Wright 1/22/24 Br. 16—is near the worst, splitting well over 100 wards, by a quick count using Dave's.

All that is to say, the consultants' suggestion that the Johnson maps should be disfavored because of ward splits or the "bounded by" argument should be rejected. Any map this Court selects is going to require redrawing wards all over the state, so ward splits provide no legitimate reason to reject any map. If this Court were to reject the Johnson maps on that basis alone, it would appear to be a pre-determined result in search of a rationale.

CONCLUSION

This Court should reject the consultants' report and adopt either the simple fix or the Johnson maps.

Dated: February 8, 2024.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

Electronically signed by Luke N. Berg

Richard M. Esenberg (WI Bar No. 1005622)
Luke N. Berg (WI Bar No. 1095644)
Nathalie E. Burmeister (WI Bar No. 1126820)
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
Telephone: (414) 727-9455
Facsimile: (414) 727-6385

Rick@will-law.org
Luke@will-law.org
Nathalie@will-law.org

Attorneys for Intervenors-Respondents Billie Johnson, Chris Goebel, Ed Perkins, Eric O'Keefe, Joe Sanfelippo, Terry Moulton, Robert Jensen, Ron Zahn, Ruth Elmer, and Ruth Streck

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 5,500 words.

Dated: February 8, 2024.

Electronically Signed by Luke N. Berg

LUKE N. BERG