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SUPREME COURT

No. 2023AP001399-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 (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 JOSEPH J. CZARNEZKI, 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.

RESPONSE TO CONSULTANTS' REPORT AND RECOMMENDED REMEDY BY INTERVENOR-RESPONDENT WISCONSIN LEGISLATURE AND RESPONDENTS SENATORS CABRAL-GUEVARA, HUTTON, JACQUE, JAGLER, JAMES, KAPENGA, LEMAHIEU, MARKLEIN, NASS, QUINN, TOMCZYK, AND WANGGAARD

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INTRODUCTION

This Court has found only a contiguity violation. No one disputes that contiguity violation affects fewer than 10,000 people. But the Court-appointed Consultants have endorsed four remedies, all submitted by Democrats, that move millions of Wisconsinites to new districts. No one has explained how these remedies are contiguity remedies. Because there is no explanation. And there is no judicial power, only political will, to impose any of the Democrats' sweeping redraws as a judicial remedy.

The Consultants have only added to the procedural irregularities that have come to define this case. They have given this Court a "partisan gerrymandering" report, not a contiguity report. They make only passing reference to contiguity—so brief that they even endorse a plan that is not contiguous. Report 8-9. They train their sights on their "social science" views of "partisan gerrymandering" in proposed maps. Report 13. They exclude the Legislature and Johnson Intervenors' remedies on that ground. And yet they refuse to engage with evidence showing how Democrats' proposals are partisan gerrymanders—saying "[i]t is for the Court to resolve the legal issue of what metrics of gerrymandering provide information relevant to Wisconsin specific adjudication," Report 13 n.23—and endorse those Democrats' proposals to boost Democrats' electoral prospects.

What's forgotten in the Consultants' report is that this case began with the Court's promise that it *would not* wade into the political

thicket of "partisan gerrymandering." *Clarke v. Wis. Elections Comm'n*, 2023 WI 70, --- Wis. 2d ---, 995 N.W.2d 779, 781. "The people," after all, "have never consented to the Wisconsin judiciary deciding what constitutes a 'fair' partisan divide." *Johnson v. Wis. Elections Comm'n* (*Johnson I*), 2021 WI 87, ¶45, 399 Wis. 2d 623, 967 N.W.2d 469.

As this Court acknowledged, assertions of "gerrymandering" would entail "extensive fact-finding (if not full-scale trial)." *Clarke*, 995 N.W.2d at 781. The parties have not had that opportunity. Material questions of fact abound, yet the Court has forbidden further discovery and will not conduct an evidentiary hearing. Scheduling Order 3-4. The Consultants' *ipse dixit* that "there are no significant factual disputes concerning the comparison of the submitted remedial maps that require resolution," Report 4 n.7, cannot make those fact disputes disappear. The Consultants' own report puts the lie to that statement. *See, e.g.*, Report 13 n.23.

If the Court wished to invite further appellate review, there would be no better way than to stay the course, deny the parties discovery and a hearing, adopt the Consultants' report, and move millions of Wisconsinites because of "social science" and supposed "gerrymandering" on the eve of 2024 election deadlines. That would eliminate any pretense that the remedy will be the result of lawful judicial process. Decline to consider partisan-gerrymandering claims because they'd take too much time and "extensive fact-finding," *Clarke*, 995 N.W.2d at 781, then select a remedy based on assertions of

"gerrymandering" and "neutrality" never tried. Delegate remedial issues to out-of-state Consultants who opine on what's "normatively desirable" in the field of "social science." Report 16, 20. Disregard legal arguments about how remedies should redress the violation found, then allow political arguments about what's more fair for Democrats. And deliver on campaign promises to take a "fresh look" at redistricting and change the "outcome of the 2024 election" for Democrats.[1]

The Consultants' report does not grapple with the Court's judicial role. But this Court must. For all the reasons that the Legislature explained in its October 2023 briefs, its December 2023 motion for reconsideration, and its January 2024 briefs and accompanying expert reports, the only permissible remedy is a contiguity remedy. Contiguity remedies need only move a few thousand people statewide, as the Legislature's remedy proves. Democrats' alternatives move millions of people. Selecting such a remedy would be an exercise in policymaking, not judging. Only the Legislature's remedy or something like it is acceptable.

[1] Jessie Opoien & Jack Kelly, *Protasiewicz would 'enjoy taking a fresh look' at Wisconsin voting maps*, Cap Times (Mar. 2, 2023), https://perma.cc/THH2-VH3Q; @janetforjustice, Twitter (Mar. 27, 2023, 12:47 PM), https://perma.cc/YAL9-JR8R; Janet for Justice, Facebook (Apr. 3, 2023), https://perma.cc/HVD7-PXD5.

ARGUMENT

I. The Court cannot outsource choosing a contiguity remedy to the Consultants.

In December, the Court appointed "consultants" to help decide this contiguity case. Scheduling Order 1. They have returned with a "partisan gerrymandering" report.

A. The Consultants add to procedural irregularities.

The Consultants' unexplained appointment and resulting report raise serious questions about the fundamental fairness of these proceedings in the following ways.

1. The Court said it "contacted all of the persons identified by one or more of the parties as potential consultants." Scheduling Order 1. That is not true. At argument, the Legislature identified the Legislative Technology and Services Bureau—Wisconsin's nonpartisan redistricting experts—but they were never contacted. *See* Leg. Opening Remedial App.5a, Ylvisaker Aff. ¶4 ("No one at LTSB has been contacted by the Wisconsin Supreme Court regarding this case."); *Baumgart v. Wendleberger*, 2002 WL 34127473, *1 (E.D. Wis. July 11, 2002) (three-judge court) (LTSB serving as the court's "technical advisor"). From that, it appears the Court considered only potential consultants proffered by counsel for Democrats.

2. The Court has not identified the basis for appointing the Consultants. If they are Court-appointed experts, the parties are entitled to cross-examine them. Wis. Stat. §907.06(1). If they are Court-appointed referees, the parties were entitled to a hearing and to call

witnesses before them. *Id.* §805.06(4)(a)-(b). Neither has been allowed. The Court has denied the parties those "procedural safeguards that ensure litigants due process of law." *Ehlinger v. Hauser*, 2010 WI 54, ¶¶204-05, 325 Wis. 2d 287, 785 N.W.2d 328 (Ziegler, J., concurring in part, dissenting in part).

3. The Court has said "[n]o further discovery of Dr. Grofman and Dr. Cervas shall be permitted." Scheduling Order 4. But their report, which is by all appearances an expert report, opines on "social science" and raises numerous questions that warrant discovery. For a few examples:

- Why endorse remedies redrawing districts (or whole regions) without any contiguity violations?
- Why, in a contiguity case, endorse a plan that isn't even contiguous but exclude a contiguous plan as a "stealth gerrymander"? *Compare* Report 8-9 (observing Senate Democrats' proposal still isn't contiguous), *with* Report 23.
- Did the Consultants understand that this is not a "partisan gerrymandering" case and that parties have not had time for the "extensive fact-finding" required to prove and disprove claims of "partisan gerrymandering"? *Compare* Report 22-24, *with Clarke*, 995 N.W.2d at 780-81.
- Why make no attempt to find whether any contiguity violations had any impermissible "partisan impact"? Because the answer is so obviously "no"?

- Why focus on only "three measures" for "political neutrality"? Report 13. The Consultants do not claim they're the best measures and agree there are others, including in the record here. Report 13 & n.23.
- Why measure "political neutrality" of the Legislature with statewide races for offices like governor but not legislative races themselves? *See* Report 13.
- Why ignore the real-world "partisan impact" of targeting actual Republican legislators (but next to no Democrats who will run again[2]) by removing them from their district and pairing them against other incumbents? *See* Report 21.
- Were the Consultants instructed to say "there are no significant factual disputes" even though their own report identifies significant factual disputes, as well as "judgment call[s]" and "confusion" about partisan fairness measures? *Compare* Report 4 n.7, *with* Report 12 n.22, 13 n.23, 13 n.25, 16 n.28, 24 n.34?
- Did they simply overlook the Legislature's primary argument—that a 10,000-person contiguity problem cannot justify a 3 million-person redraw that disenfranchises hundreds of thousands of Wisconsinites?

[2] *See, e.g.*, Allison Garfield & Andrew Bahl, *State Sen. Melissa Agard announces run for Dane County executive*, Cap Times (Nov. 30, 2023), https://perma.cc/73VA-U8RY.

4. The Consultants admit to *ex parte* "communications with members of the Court." Report 2. The Consultants say they will *not* "disclose the contents of *any discussion* with members of the Court." *Id*. (emphasis added). If these *ex parte* communications concerned "substantive matters or issues on the merits," this Court's rules prohibit them. SCR 60.04(1)(g)1. And if the communications "may affect the substance of the action," the Court was required to notify parties "of the substance of the ex parte communication" and give parties "an opportunity to respond." SCR 60.04(1)(g)1.b. The Consultants disclaim that they are "expert[s] on the law." SCR 60.04(1)(g)2; *see* Report 3-4. Nor are they "court personnel." SCR 60.04(1)(g)3.

5. The Court ordered the Consultants to stick to the record in this case: "Dr. Grofman and Dr. Cervas shall not consider any fact outside the record in this case." Scheduling Order 4. Their report violates that requirement directly. *See* Report 14 nn.25-26, 23 nn.31-32, 24 n.33. And it violates that requirement indirectly, failing to identify the basis for assertions. *See, e.g.*, Report 9 (cannot "differentiate among the submitted maps in terms of compliance with equal protection"); Report 22 n.30 ("our numbers"); Report 23 ("stealth gerrymander").

For the most egregious example, to side-swipe the Legislature's expert's use of simulations to understand what's "neutral" in Wisconsin, the consultants rely on an expert report *submitted in another lawsuit*

on behalf of Democrats. Report 23 n.32.[3] The Consultants then cite an article by Jowei Chen, Democrats' expert in the *Whitford* litigation, for the highly disputed assumption that equates "neutral" with what's "possible," even if a gerrymandered outlier. Report 23-24 & n.33.[4] The Legislature has disputed these assertions with actual evidence by actual experts in this case showing what the Consultants call a "politically neutral" map can be achieved only by gerrymandering. *See infra* Part III.B. That evidence cannot go ignored (as it has so far) based on extra-record evidence, in violation of this Court's order, and without any factfinding by a neutral arbiter, in violation of due process.

6. As for the record the parties actually developed? The Consultants relegate material factual disputes to footnotes. *See, e.g.*, Report 6 n.11, 12 n.22, 13 n.23, 13 n.25, 16 n.28, 24 n.34. They simply declare the Legislature's splits are "excessive," Report 21, even though they mirror what this Court said was okay in *Johnson II* and *Johnson*

[3] The Consultants omit that the state supreme court in that lawsuit eventually declared that the same tests the Consultants deploy here are not "judicially discoverable or manageable standard[s]" and "no one" can apply them "to achieve consistent results." *Harper v. Hall*, 886 S.E.2d 393, 426 (N.C. 2023).

[4] In the *Whitford* litigation, what Dr. Chen deemed a neutral map was "clearly an outlier," as the Wisconsin Assembly's expert showed using Dr. Chen's own simulations. *See* Gimpel Report 43-44, *Whitford v. Gill*, No. 3:15-cv-421 (W.D. Wis. Feb. 4, 2019), ECF 249. And the Court ultimately dismissed the *Whitford* gerrymandering claims in light of *Rucho*'s holding that "[t]here are no legal standards discernable in the [U.S.] Constitution for making such judgments" about gerrymandering. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019); *see* Judgment, *Whitford v. Gill*, No. 3:15-cv-421 (W.D. Wis. July 3, 2019), ECF 319.

III. See Leg. Resp. Remedial Br. 13 n.9.[5] They simply "recreate[]" an unexplained and unexamined table purporting to summarize splits, even though that table was shoehorned into an appendix by Wright Intervenors' *lawyers*, not admissible expert evidence. Report 21-22 tbl. 11. And while they acknowledge the Legislature's evidence that Democrats' plans are themselves gerrymanders, they punt that evidence to the Court to resolve. Report 13 n.23. But the Republicans' plans? Disqualified by the Consultants as "partisan gerrymanders," at least from their "social science perspective." Report 23-24.

B. The Consultants answered the wrong question.

This Court promised this was not a partisan-gerrymandering case. It declined to exercise jurisdiction over partisan-gerrymandering claims because there was no time for the "extensive fact-finding (if not full-scale trial)" required to adjudicate them. *Clarke*, 995 N.W.2d at 781. As a result, the Court has not adopted any legal standard of "political neutrality," "partisan impact," or "partisan gerrymandering." That leaves *Johnson* as the controlling statement of Wisconsin law: "The people have never consented to the Wisconsin judiciary deciding what constitutes a 'fair' partisan divide … ." *Johnson I*, 2021 WI 87, ¶45. As Dr. Cervas already acknowledged on the eve of

[5] The Legislature explained that its proposed remedy would have increased splits because Wisconsin's town and ward lines are not themselves continuous. *See* Leg. Opening Remedial Br. 38-43. The Consultants' report is silent on that score. Worse, the Legislature explained that the Consultants could adjust its proposal to reduce splits but under no circumstances was a multimillion-person redraw warranted. Leg. Resp. Remedial Br. 15. They say nothing about that either.

Justice Protasiewicz's election: "There are no provisions in the WI constitution prohibiting partisan gerrymandering, and the WI constitution does not include language about 'free and open' elections."[6]

Nevertheless, the Consultants freely admit that their analysis focused not on correcting contiguity but on "correcting" alleged (and unproven) "partisan gerrymandering." They make only passing reference to the contiguity violation. Indeed, they conclude that all proposals satisfy the contiguity requirement, even the one that didn't. Report 8-9 (describing "contiguity issues in the Democratic Senators' plan" as curable with "technical corrections").

The Consultants devote most of their attention to judging "deviation from political neutrality" based on "partisan gerrymandering" in proposed maps, Report 13, from their "social science perspective," Report 24-25. They measure gerrymandering based on "majoritarian concordance"—a novel metric that does not appear in the Court's opinion or in any parties' remedial proposals. Report 18. They describe this standard as "normatively desirable," Report 20, but the only source of that normative judgment is "social science," and that "social science" view is hotly contested. Report 20, 24-25; *see* Report 13 n.23; Leg. Resp. Remedial App.4a-107a (Gaines and Trende reports).

The Consultants' report leaves no doubt that the goal here is to shift power to Democrats. They conclude that only Democrats'

[6] @CERVASJ, Twitter (Feb. 22, 2023, 3:12 PM), https://perma.cc/PF6Z-MPKQ.

remedies warrant further consideration. Report 24-25. The others are excluded as "partisan gerrymanders" or "stealth gerrymanders," even though they admit that Johnson Intervenors' proposed maps "score very well on traditional good government criteria—in fact score the best on various measures of splits of political subdivisions." Report 23. One would think such maps would be good candidates for a politically neutral court-ordered remedy. Apparently not, because they don't sufficiently improve Democratic prospects.

Worse, the Consultants' methodology is programmed to favor Democrats. According to the Consultants, the vast majority of neutrally drawn, randomly generated maps should be rejected as Republican "gerrymanders" because they do not resemble the politics of Wisconsin statewide. *See* Report 11-21; Leg. Resp. Remedial App.41a-107a (Trende); Johnson Intervenors' Blunt Report ¶¶22-35. That leaves only the "out-out-out-outlier[s]," *Rucho*, 139 S. Ct. at 2518 (Kagan, J., dissenting), drawn by Democrats to intentionally favor Democrats by "fighting Wisconsin's political geography," Leg. Resp. Remedial App.48a (Trende). Detailed below in Part III, there's an obvious problem with "social science" metrics that would endorse gerrymanders as "neutral" and reject neutrally drawn maps as "gerrymandered."

Worse still, the Consultants dismiss that evidence of Democrat gerrymandering offered by the Legislature and Johnson Intervenors. *See* Report 13 n.23. They make no mention of the Legislature's experts'

quantitative and qualitative analysis showing how Democrats gerrymandered their proposals and then used unreliable methodologies to support them. The Consultants simply say "[i]t is for the Court to resolve the legal issue of what metrics of gerrymandering provide information relevant to Wisconsin specific adjudication." *Id.* But not before excluding the Legislature's actual contiguity remedy as a "partisan gerrymander." Report 22.

The Court cannot adopt the Consultants' "social science." The Wisconsin Constitution does not contain a "majoritarian concordance" standard or others. *See Johnson I*, 2021 WI 87, ¶¶40-52. And to impose a remedy for an unadjudicated claim based on a nonlegal "social science" metric, which cannot be reviewed under any legal principle, is to engage in arbitrary governmental action in violation of the Due Process Clause. *See County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998).

* * *

The Consultants cannot resolve the questions that this Court must. The Consultants have not shown any connection between contiguity violations affecting fewer than 10,000 people and their endorsement of remedies moving millions. This Court must. The Consultants have not justified disenfranchising hundreds of thousands of voters, severing constituent relationships, and foisting massive confusion upon the electorate on the eve of election deadlines. This Court must. The Consultants have neither resolved material factual disputes

nor stuck to the record before them. This Court must. All the Consultants have done is give their "social science" view of "partisan gerrymandering" in a Court that has declared it has no "competence" and no power and no time to entertain such arguments. *See Johnson I*, 2021 WI 87, ¶¶40, 45; *Clarke*, 995 N.W.2d at 781; *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶71, 410 Wis. 2d 1, 998 N.W.2d 370 ("consideration of partisan impact will not supersede constitutionally mandated criteria"). There is no laundering a desired political outcome through the Consultants. They only highlight the absence of due process in these proceedings.

II. No judicial remedy should move millions of Wisconsinites into new districts.

A. Contiguity does not require moving millions of people.

The Consultants never acknowledge the Legislature's principal argument: there is no basis for moving millions of people to correct the contiguity violation found by the Court. No party has offered a response. Noncontiguity affects fewer than 10,000 people statewide. Leg. Opening Remedial App.25a-40a. It can be fixed by moving even fewer people. *See* Leg. Opening Remedial Br. 24-34. Yet every plan endorsed by the Consultants moves millions of people to new districts:

Table 1. Population moved into new districts[7]

	LEGIS.	GOV	SEN DEM	CLARKE	WRIGHT	JOHNSON
Senate	606	2,218,816	2,195,184	2,332,996	2,696,137	1,477,384
Assembly	4,691	3,323,685	3,155,446	3,627,733	3,598,929	2,786,271

[7] Leg. Resp. Remedial App.109a-224a.

And proving the point that Democrats' remedies are not contiguity remedies, they move more than 1 million people into districts with no contiguity violations:

Table 2. Population moved into districts with no contiguity violation[8]

AD	LEGIS.	GOV	SEN DEM	CLARKE	WRIGHT	JOHNSON
AD1	0	0	0	0	0	3,970
AD4	0	41,630	56,640	59,676	59,258	49,492
AD7	0	13,415	36,610	0	0	35,457
AD8	0	0	0	0	0	0
AD9	0	0	1,753	27	0	27
AD10	0	0	17,008	0	0	0
AD11	0	0	15,923	0	0	0
AD12	0	0	9,360	0	0	4,513
AD13	0	28,878	17,658	39,921	54,536	11,434
AD14	0	28,732	34,135	59,424	31,082	28,242
AD16	0	0	3,310	0	0	0
AD17	0	0	12,167	0	0	4,740
AD18	0	0	12,412	0	0	14,195
AD19	0	0	5,053	0	0	0
AD20	0	20,795	9,541	38,545	0	6,246
AD21	0	22,846	59,859	38,807	0	2,542
AD22	0	59,167	32,022	35,297	35,297	26,807
AD23	0	2,076	19,721	4,131	2,989	3,647
AD34	0	0	3,231	0	34,272	1,372
AD35	0	6,008	19,509	9,363	31,341	35,402
AD36	0	25,562	27,304	26,606	59,001	23,863
AD49	0	16,339	6,160	5,758	59,218	7,451
AD50	0	59,024	59,447	59,568	41,561	40,861
AD51	0	60,100	17,621	29,598	59,498	21,877
AD55	0	33,902	27,868	48,066	41,921	48,194
AD56	0	27,824	60,082	59,784	39,809	59,432
AD57	0	59,642	28,927	59,645	59,603	41,290
AD62	0	38,272	43,323	59,340	60,001	22,054
AD64	96	16,897	20,695	14,813	19,147	19,531
AD65	0	14,593	12,592	59,523	6,212	11,587
AD69	0	37,633	21,597	33,561	14,302	59,272
AD71	0	5,275	6,238	59,532	59,999	9,095
AD73	0	23,294	14,512	20,384	38,600	20,689
AD74	0	36,729	28,187	20,502	38,970	34,723
AD75	9	59,980	8,566	1,866	32,262	3,971
AD77	88	28,338	15,696	28,449	53,627	32,603
AD78	44	59,825	28,038	37,560	47,864	59,527
AD82	0	58,981	33,177	59,799	17,710	57,886
AD84	0	59,218	59,637	23,177	11,882	48,316
AD85	33	16,298	59,535	8,876	8,580	14,974
AD87	0	59,487	26,548	59,383	59,383	38,268
AD89	0	57,709	59,793	57,692	59,059	40,596
AD90	0	25,738	32,431	59,505	16,302	27,265
AD92	0	58,946	59,361	59,419	59,384	12,453
AD96	0	32,274	17,564	17,564	58,992	23,625
TOTALS:	**270**	**1,195,427**	**1,140,811**	**1,255,161**	**1,271,662**	**1,007,489**

[8] Leg. Opening Remedial App.25a-40a; Leg. Resp. Remedial App.107a-222a. The Legislature's 270-person change, dissolving islands from adjacent districts, are explained in Leg. Opening Remedial App.41a-52a.

The Consultants' report confirms that contiguity does not require this mass reorganization. They do not dispute that contiguity affects fewer than 10,000 people. Leg. Opening Remedial App.25a-40a. They acknowledge that the Legislature's proposal is contiguous. Report 8-9. And the only basis for moving millions more appears to be "gerrymandering." Report 23-24.

B. Massive population shifts unnecessarily disenfranchise Wisconsin voters.

Democrats' remedial plans also disenfranchise record numbers of people, disproportionately affecting Republicans and severing hundreds of thousands of constituent relationships unnecessarily.

1. Democrats' plans will move an unprecedented 600,000 to 750,000 people from even- to odd-numbered senate districts. Affected voters will have voted for senate in 2020 and will not do so again until 2026.

Table 3. Senate Disenfranchisement[9]

LEGIS.	GOV	SEN DEM	CLARKE	WRIGHT	JOHNSON
141	671,543	600,979	697,154	750,208	431,396

The Legislature made this argument in its January briefs, but the Consultants don't acknowledge it, let alone attempt to justify such mass disenfranchisement. Nor could they. There is no possible justification to impose a remedy that disenfranchises hundreds of thousands of Wisconsinites for a 10,000-person contiguity problem.

[9] Leg. Resp. Remedial App.223a-237a. Numbers could fluctuate depending on how incumbents and election officials resolve uncertainties with respect to incumbent pairings affecting odd-numbered districts.

For the same reason, the "drastic remedy" of special elections in odd-numbered senate districts must remain off the table. *Clarke*, 2023 WI 79, ¶74. That would cut lawfully elected senators' four-year terms short, contravening *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568, exacerbating federal constitutional violations, and denying the results of the 2022 election. And there is no justification when, again, the noncontiguity is a 10,000-person problem.

The senate disenfranchisement numbers are staggering compared to those in recent malapportionment cases. There were roughly 140,000 disenfranchised people in *Johnson*, 171,613 disenfranchised voters in *Baumgart*, and 257,000 disenfranchised voters in *Prosser*. Leg. Resp. Remedial Br. 21 & n.14. And in those cases, the required malapportionment remedy made some disenfranchisement "unavoidabl[e]" and "inevitable." *Prosser v. Elections Bd.*, 793 F. Supp. 859, 864-66 (W.D. Wis. 1992) (three-judge court).

But there is *nothing* inevitable about senate disenfranchisement in this case, where the Court's single finding of liability can be remedied by moving fewer than 1,000 people to new senate districts. *See* Leg. Opening Remedial App.41a-52a. The Court has a duty to minimize the impact of its remedy, as "a redistricting plan cannot unnecessarily disenfranchise voters." *Baldus v. Brennan*, 2011 WL 5040666, *3 (E.D. Wis. Oct. 21, 2011) (three-judge court). Ignoring that duty will cause "a real and appreciable impact on the exercise of the franchise." *Bullock v. Carter*, 405 U.S. 134, 144 (1972).

2. Adding to those harms, if the Court adopts any of the Democrats' plans, the impact of disenfranchisement will fall disproportionately on likely Republican voters:

Movement of WI Residents, Even to Odd Senate Districts

by map

Proposed Map	Population Shifted	Trump Vote Shifted	Biden vote shifted	R Voters, 2022 Gov., Shifted	D Voters, 2022 Gov., Shifted	Trump %	R Gov. 22 %
Clarke	697,154	233,064	170,944	186,910	144,666	57.69%	56.37%
Governor	671,543	209,801	172,467	167,775	146,013	54.88%	53.47%
Johnson	431,396	110,220	119,143	85,840	100,414	48.05%	46.09%
Senate Dems	600,979	168,089	159,983	131,665	133,303	51.24%	49.69%
Wright	750,208	270,360	162,907	218,319	137,984	62.40%	61.27%
Legislature	141	24	57	24	64	29.86%	27.30%

Leg. Resp. Remedial App.44a (Trende). The Wright proposal, for instance, would disenfranchise 100,000 more Trump voters than Biden voters. *Id.* That is not "neutral" by any definition.

The choice to disenfranchise hundreds of thousands of voters takes away the opportunity to vote and thus affects constitutional rights. If challenged, Democrats' plans would face heightened scrutiny, which requires a reviewing court to consider whether "the precise interests" offered to justify the burden on voters "make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). A plan will not survive constitutional review if "a less drastic way of satisfying … legitimate interests" is available. *Id.* at 806.

3. Even if needlessly disenfranchising hundreds of thousands of people could pass federal constitutional scrutiny, the equities foreclose such a sweeping mandatory injunction. *See Pure Milk Prod. Co-op v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 280 N.W.2d 691 (1979). Contiguity does not require disenfranchising voters, uprooting them from

their current districts, increasing costs of political mobilization, and severing constituent relationships. *See* Leg. Resp. Remedial App.21a-22a (Gaines Report). There is *no* evidence that noncontiguity has caused a political harm; nor has the Consultants' report identified Wisconsin's sparsely populated areas of noncontiguity as a cause of political imbalance. The balance of equities plainly weighs in favor of dislocated voters.

* * *

If the Court believes there is some shortcoming in the Legislature's proposal, it can be modified to meet legal requirements. But no party can justify moving more than half the State's population, severing millions of constituent relationships, and disenfranchising hundreds of thousands of Wisconsinites.

III. The Consultant-approved remedies have an impermissible "partisan impact."

A. No "partisan impact" cannot mean "definite partisan impact."

The Court still has not told the parties what "partisan impact" means, *see Clarke*, 2023 WI 79, ¶¶69-71, depriving them of any full and fair opportunity to litigate that issue before the 2024 elections. *See* Leg. Memo. ISO Reconsideration 51-58. The Consultants themselves agree that their "social science" views cannot provide that answer. Report 13 n.23 ("It is for the Court to resolve the legal issue of what metrics of gerrymandering provide information relevant to Wisconsin specific adjudication."). Indeed, they make no mention of the "partisan

impact" consideration, *see Clarke*, 2023 WI 79, ¶69, and instead equate "neutrality" with redrawing districts to be more "majoritarian." Report 11-12. *But see Prosser*, 793 F. Supp. at 871 ("Judges should not select a plan that seeks partisan advantage—that seeks to change the ground rules … .").

But one thing must be true of the Court's pursuit of "neutrality": requiring proposals with *no* partisan impact cannot be redefined to endorse only those proposals with *definite* partisan impact. But that is exactly what Democrats' proposals do: redraw districts statewide for reasons having nothing to do with contiguity and everything to do with politics. Senate Democrats said it best:

> In 2023, we sent Justice Protasiewicz to the Supreme Court.
>
> And in 2024, we're going to elect an historic number of Democrats up and down the ballot here in Wisconsin!
>
> Elections have consequences.[10]

For all the reasons already briefed, the Court cannot adopt that backwards view of "neutrality." It would confirm the case has been predecided from the start, where contiguity was the Trojan horse for new districts gerrymandered to favor Democrats. *See Clarke*, 995 N.W.2d at 798-99 (Grassl Bradley, J., dissenting) (predicting as much). The only "neutral" remedy is one that remedies the contiguity violation found, which affects fewer than 10,000 people, not the "partisan

[10] @WISenateDems, Twitter (Jan. 29, 2024, 4:04 PM), https://perma.cc/LL4E-YZCE.

gerrymandering" claims that this Court assured all parties it was *not* considering. *See* Leg. Opening Remedial Br. 50-58; Leg. Resp. Remedial Br. 7-20, 25-27.

B. The Consultants have ignored evidence, but this Court cannot.

The Consultants' "political neutrality" analysis begins with the assumption that "the party with the higher share of the vote" in *statewide* elections "should be expected to win more seats" in the *legislature*. Report 13. Simply put, if there's a Democrat in the Governor's office, there should be Democrat in the Assembly Speaker's office.

1. The Legislature's experts have contested that simplistic assumption with actual evidence of Wisconsin election behavior and political geography. *See* Leg. Opening Remedial App.183a-228a (Trende); Leg. Resp. Remedial App.11a-20a (Gaines); *id.* at 43a-106a (Trende). The Court cannot simply choose its Consultants' "social science" view over that contrary evidence. *See* Leg. Memo. ISO Reconsideration 42-58; Leg. Opening Remedial Br. 58-60; Leg. Resp. Remedial Br. 15-21, 28-37. Even if the Court's social scientists are acting as referees, a "hearing" is required. Wis. Stat. §805.06(4).

2. The Consultants' preferred "political neutrality" measures assume everyone is a Republican or a Democrat. *See, e.g.*, Report 13 n.24 ("We focus on the top two leading candidates/party and convert all election percentages to a two-party vote."). They ignore that candidates matter, not simply the two major parties, especially for the one-third of Wisconsinites who are independents. *See, e.g.*, Leg. Resp.

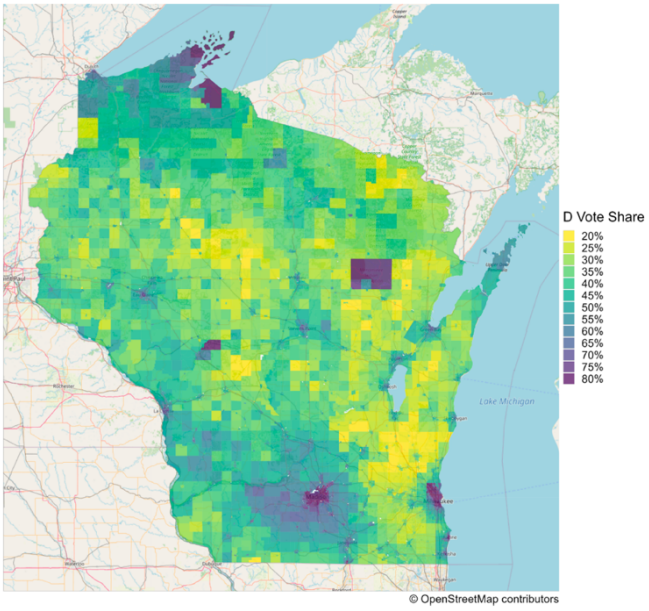
Remedial App.5a-11a, 18a-19a (Gaines); *id.* at 99a-100a (Trende); *see also Johnson I*, 2021 WI 87, ¶43. The Consultants "acknowledge the inherent fluidity of political affiliations," but they don't do anything about it except combine statewide election results (for *only* Republicans and Democrats) while entirely ignoring elections in the Legislature itself. Report 12 n.22; *see also* Report 21 (ignoring actual legislative incumbent pairings).

The Legislature's experts have contested the Consultants' methodology. *See* Leg. Resp. Remedial App.5a-11a, 18a-19a (Gaines); *id.* at 97a-106a (Trende). They have shown it's entirely unreliable, at best, and entirely unfair, at worst. *See, e.g.*, *id.* at 44a-96a (Trende) (Democrats' proposals are gerrymanders). The "claims of extreme precision, stability and insensitivity to assumptions such as which data to use should not be taken seriously," especially with "only a few days to examine so many lengthy reports," as the Consultants did, "in haste." *Id.* at 15 n.5 (Gaines). As Dr. Trende showed, what races are chosen will load the dice and can lead to wildly different outcomes. *Id.* at 99a-100a; *see also id.* at 18a (Gaines) (discussing Mayer's "corrected report"). That might be good enough for pollsters, but it is not good enough for a Court in the quixotic quest for "what is fair."

3. Even if everyone was simply a loyal Republican or Democrat, the Consultants' "political neutrality" measures ignore where people actually live. They assume a "mythical State with voters of every political identity distributed in an absolutely gray uniformity." *Vieth v.*

Jubelirer, 541 U.S. 267, 343 (2004) (Souter, J., dissenting). Nice prose—that "geography is not destiny," Report 24—can't substitute for the factual record. The Legislature's evidence remains unrebutted: in recent statewide elections, more than *one-third* of the total Democratic votes cast came from Milwaukee and Dane Counties *alone*. *See* Leg. Opening Remedial App.184a (Trende). And outside of Milwaukee and Dane Counties, Democrats are too dispersed to make up a majority in most:

Figure 4: Democratic voting strength in Wisconsin's VTDs, using a political index of statewide non-judicial state and federal elections from 2016 - 2022



Id. at 185a-186a ("even though Democrats have won a majority of the votes in Wisconsin," "the median precinct [or ward] gave them just 43% of the vote").

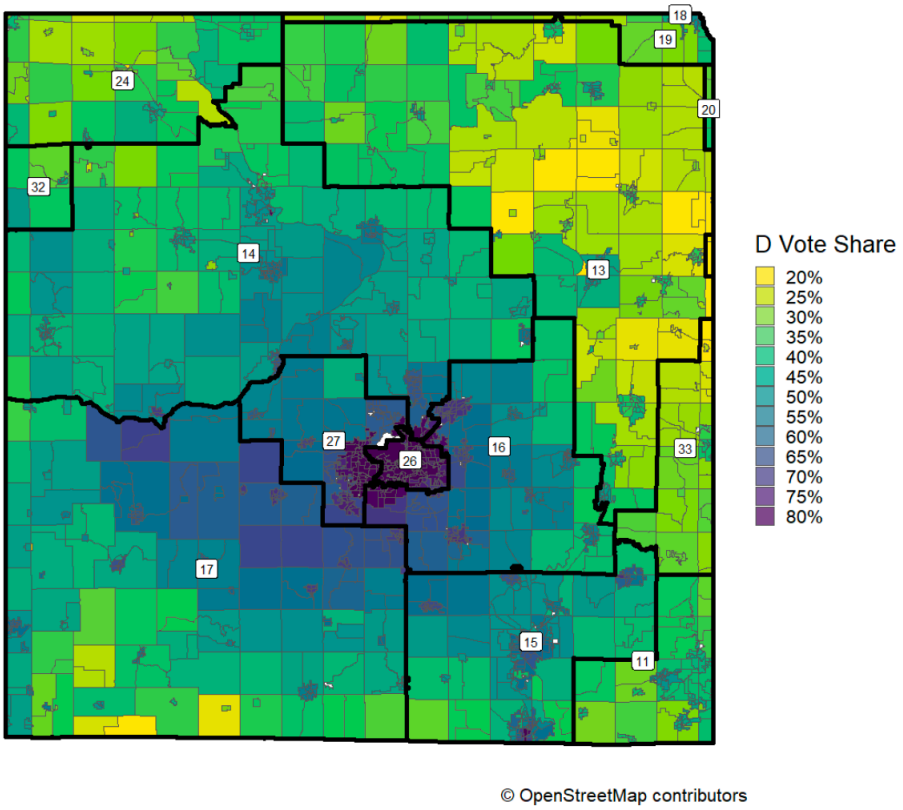
The Consultants are *silent* on this evidence. They simply declare—without resolving disputed facts—that Democrats' "maps submitted to this court" show that Democrats can get more seats despite

Wisconsin's "political geography." Report 24. How? By gerrymandering.

Here's what the Consultants haven't shown the Court. Every Democratic proposal reaches into Wisconsin's urban areas, "employing a 'pinwheel' concept" to turn Republican-leaning districts to Democratic-leaning districts. Leg. Resp. Remedial App.91a (Trende).

The Governor's SD14 starts as far west as Minnesota-bordering Vernon County and reaches into Madison, turning it from a district that would have been carried by Trump to one carried by Biden:

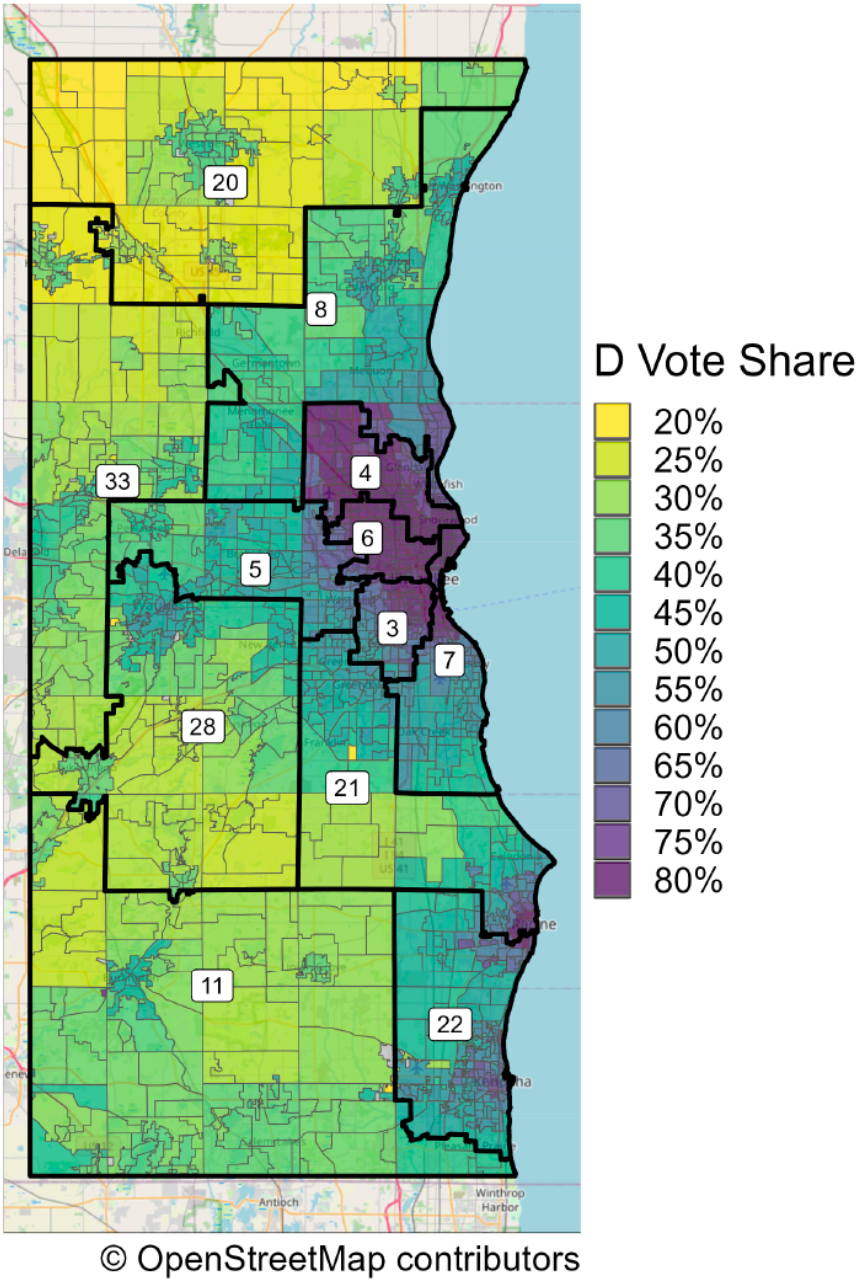
Figure 19: Governor's Sen. Map, Madison Area



Id. at 64a-66a.

The Governor's SD21 stretches from Racine to Milwaukee, inexplicably severing portions of Racine from nearby Kenosha:

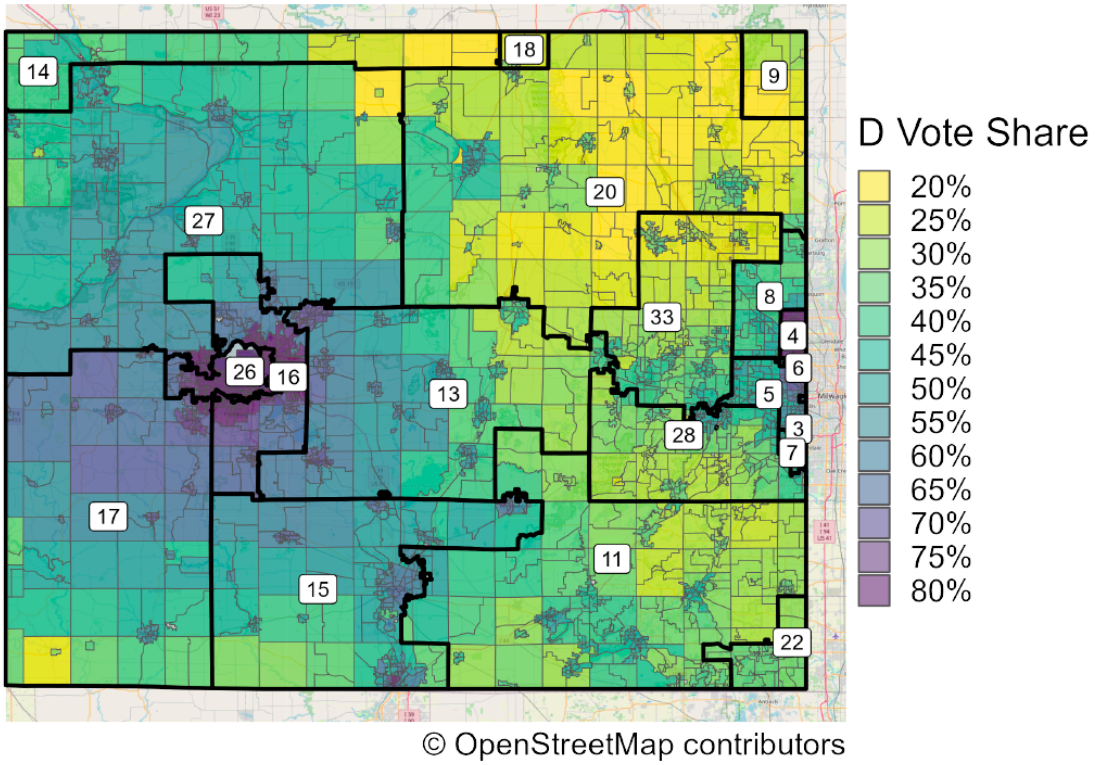
Figure 20: Governor's Sen. Map, Milwaukee Area



Id. at 67a.

Senate Democrats' SD13 and SD27 reach into "heavily Democratic places like Sun Prairie and Stoughton" and "overwhelmingly Democratic Middleton" and "into Democratic portions of northeastern Dane":

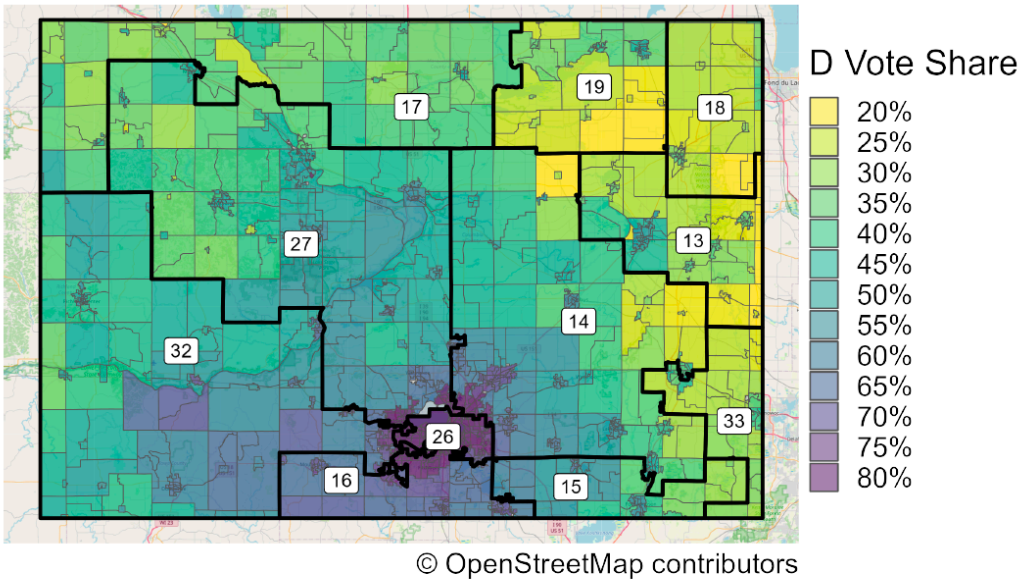
Figure 21: Senate Democrats' Sen. Map, Milwaukee



Id. at 67a-68a.

Wright Intervenors' SD14, SD27, and SD32 are particularly "extreme," all reaching into Madison and extending well into the countryside:

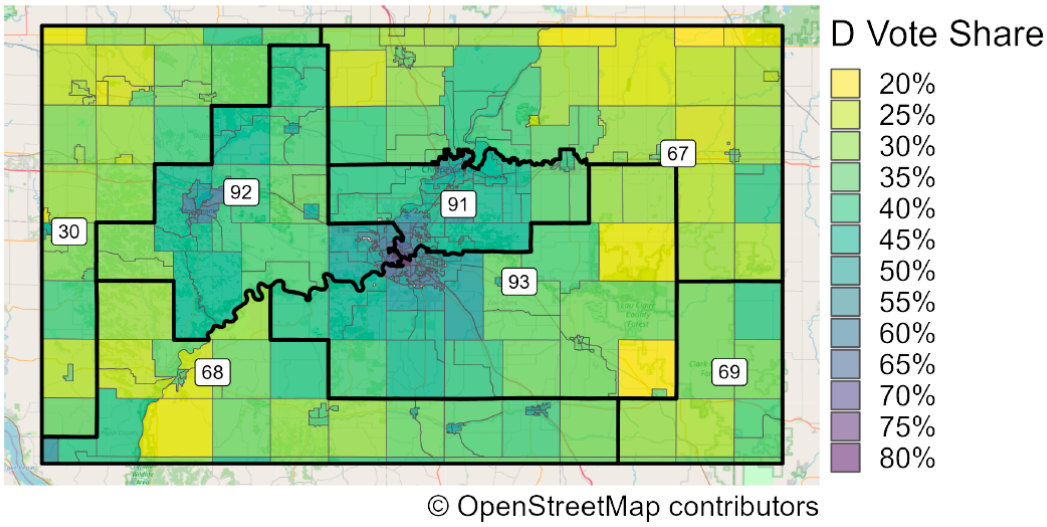
Figure 22: Wright Sen. Map, Milwaukee



Id. at 68a-67a.

In Eau Claire, Wright Intervenors split the city three ways, creating three Democratic-leaning districts:

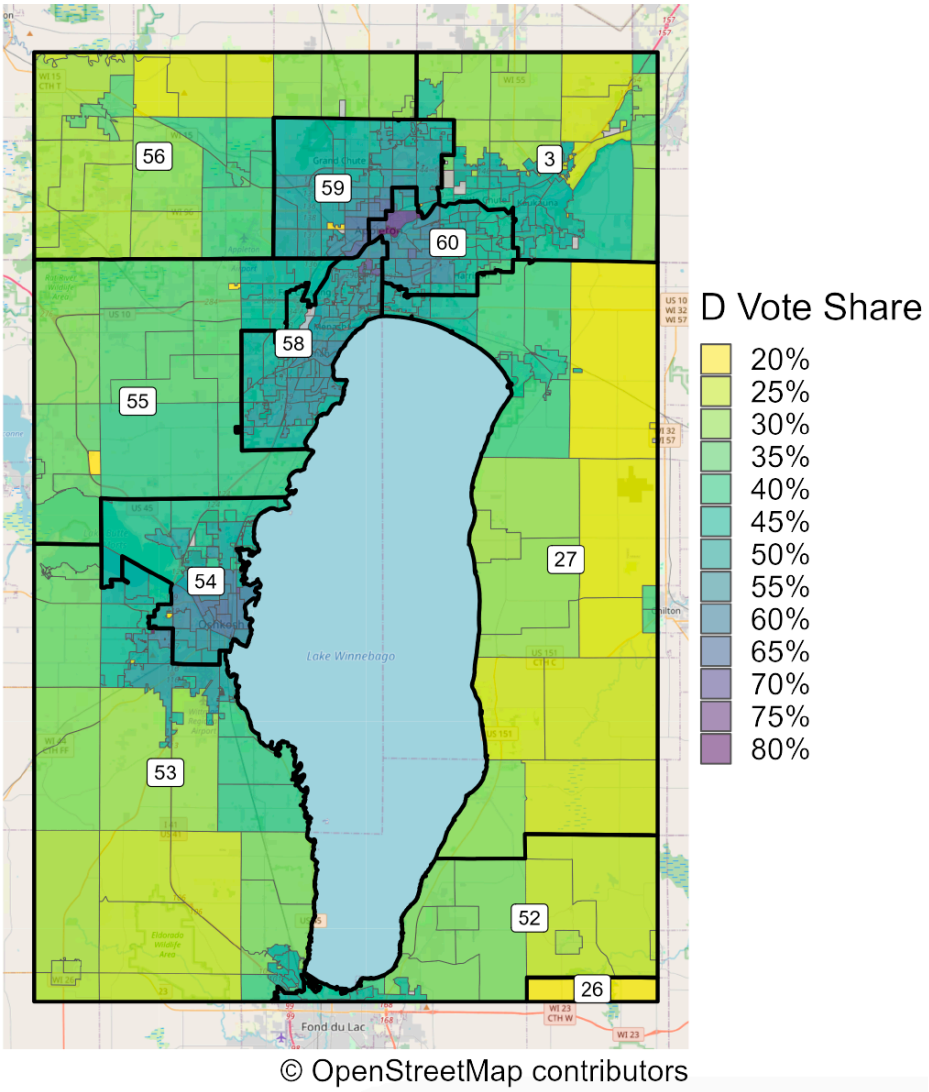
Figure 40: Wright Assembly Map, Eau Claire Area



Id. at 87a-88a.

And "most maps create a new Democratic-leaning district between Oshkosh and Appleton." *Id.* at 88a. Here's how Wright Intervenors do it:

Figure 41: Wright Assembly Map, Lake Winnebago Area



Id. at 89a.

Democrats split the City of LaCrosse to squeeze out an additional Democratic-leaning district that flunks the straight-face test:

Figure 42: Wright Assembly Map, LaCrosse Area

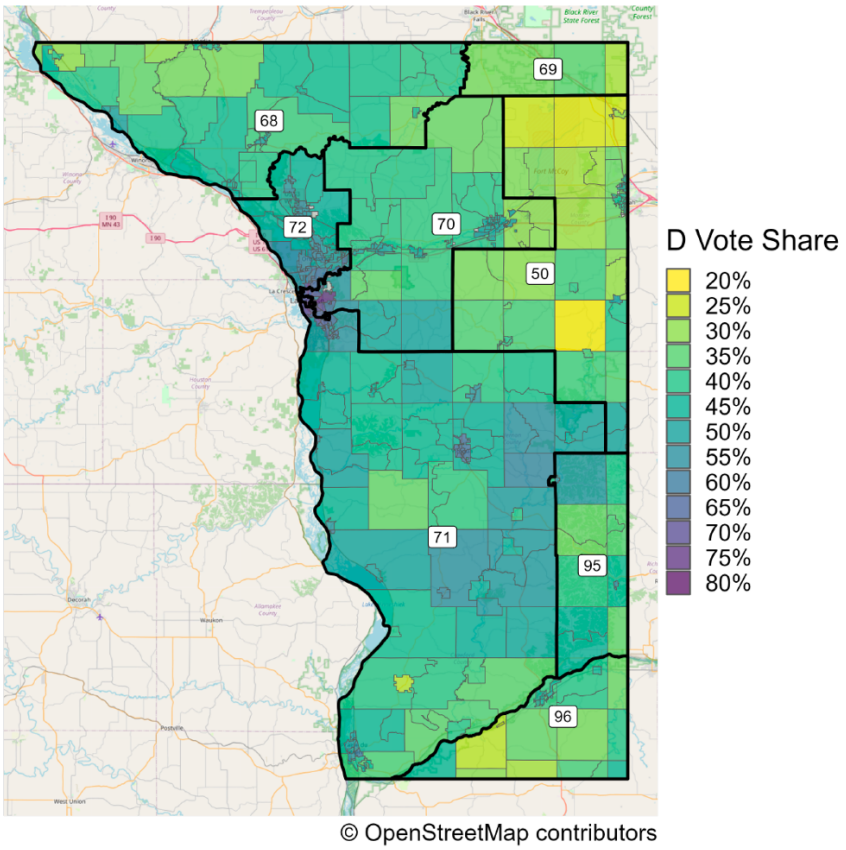
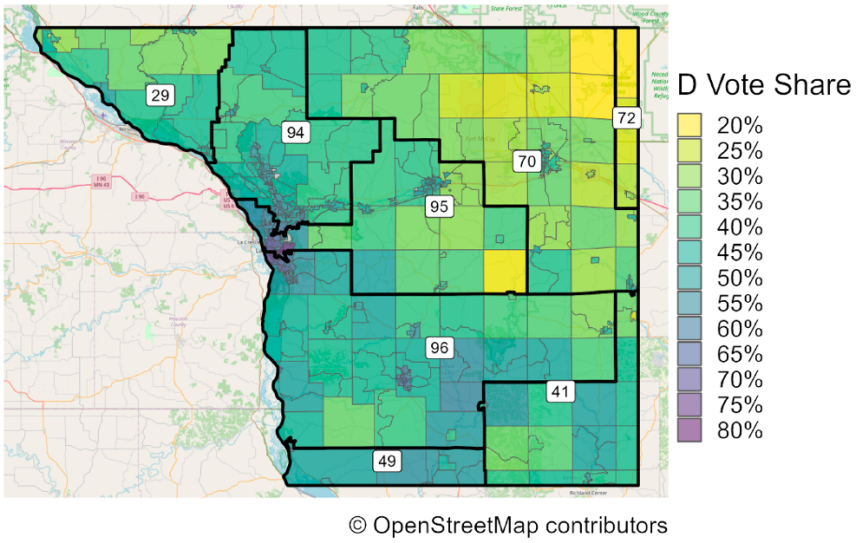


Figure 43: Governor's Assembly Map, LaCrosse Area



Id. at 89a-91a.

In the Assembly, Democrats all add Democratic-leaning districts by reaching into Madison and by splitting Janesville just right, even though it is about the size of one assembly district:

Figure 44: Governor's Assembly Map, Madison Area

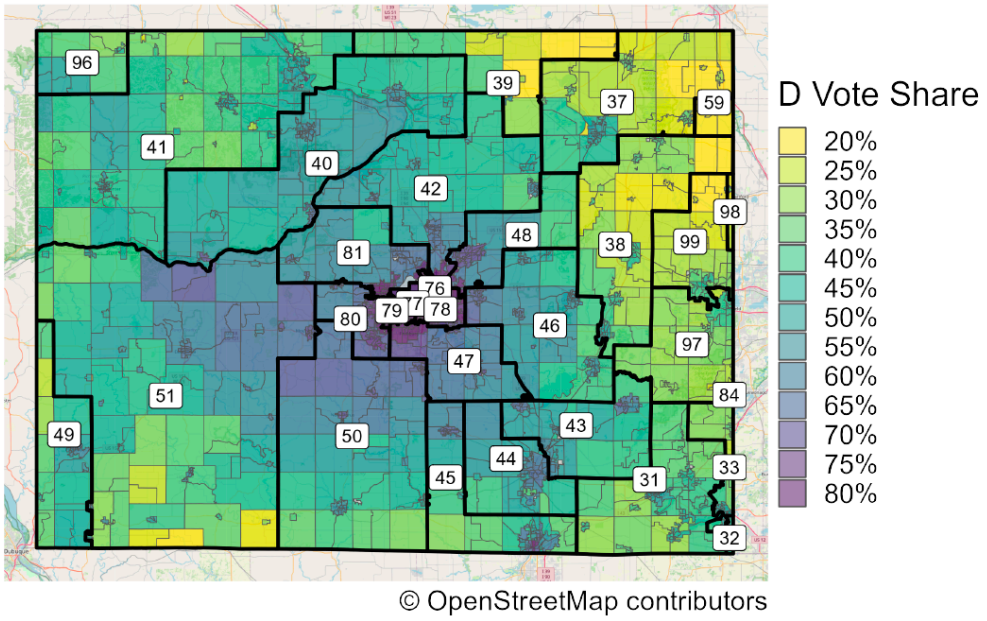


Figure 45: Senate Democrats' Assembly Map, Madison Area

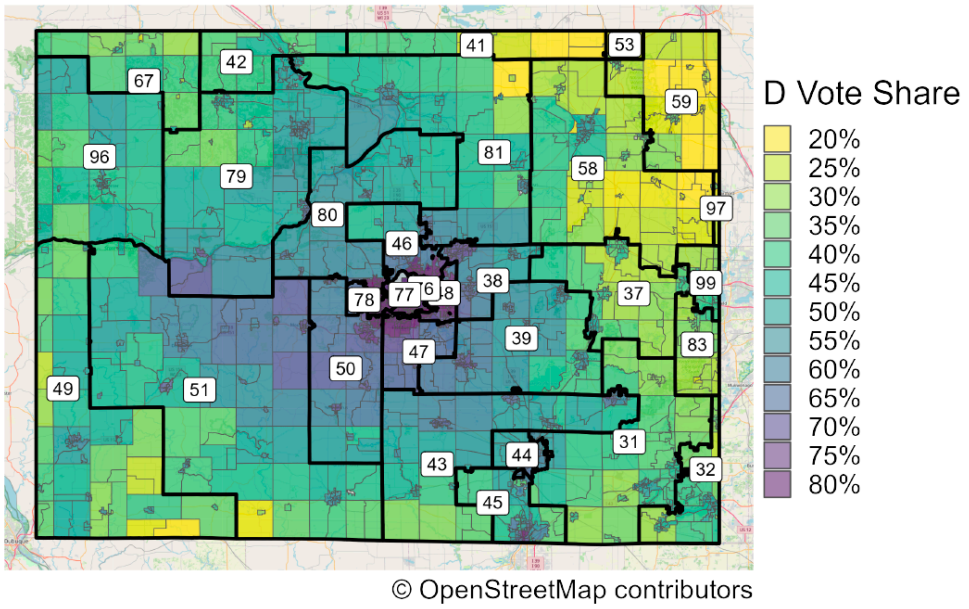


Figure 46: Clarke Assembly Map, Madison Area

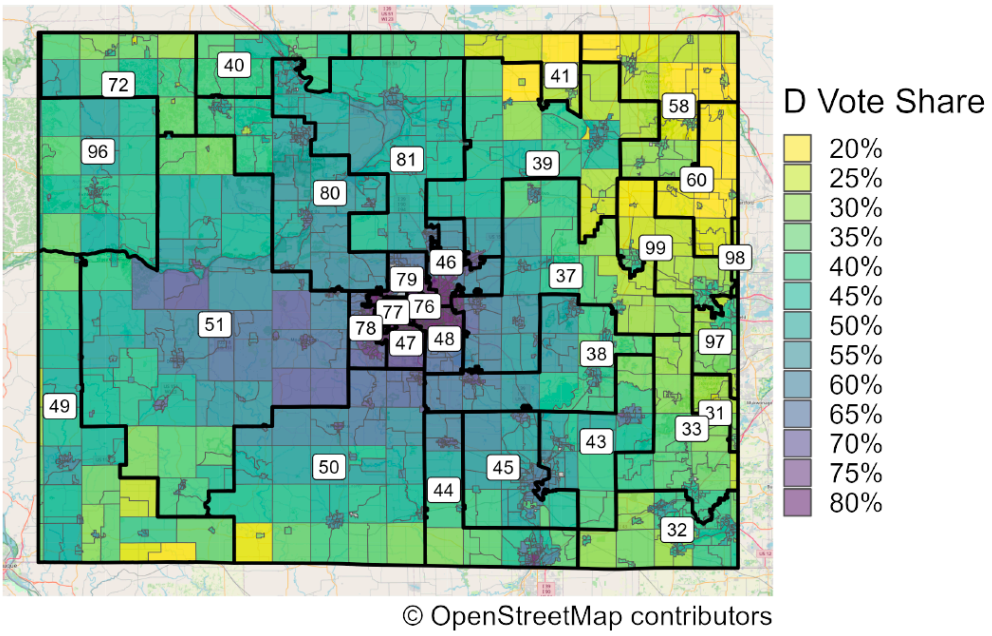
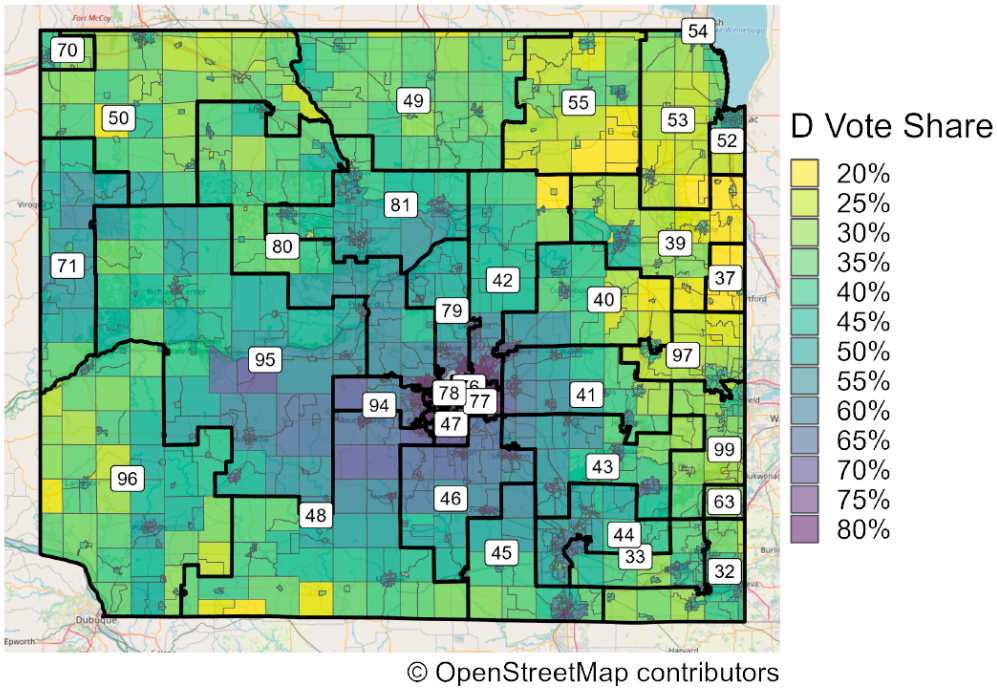


Figure 47: Clarke Assembly Map, Madison Area



Id. at 91a-95a, *see also id.* at 277a, 282a, 289a, 294a. Across the State, Democrats' proposals are "fighting Wisconsin's political geography." *Id.* at 48a.

Remarkably, the Consultants can read minds to determine Johnson Intervenors proposed a "stealth gerrymander," Report 23, but they won't read maps to determine that Democrats proposed in-your-face gerrymanders. The Consultants never account for the Legislature's evidence before applauding Democrats for "avoiding political gerrymandering," Report 24, using "social science" that the Legislature has contested and that this Court has rejected. *See Johnson I*, 2021 WI 87, ¶¶48-49. The Consultants' conclusions have not been subject to cross-examination. They are belied by the record. And they invite the Court to do exactly what it promised it would *not* do: vindicate "partisan gerrymandering" claims with a "partisan gerrymandering" remedy. *Contra Clarke*, 995 N.W.2d at 781.

C. This Court cannot ignore Wisconsin's constitutional structure, even if the Consultants do.

The Consultants say "majoritarianism" and "majority rule representation" are "desirable from a normative and social science perspective." Report 16, 24. But the assumption that statewide races for governor should dictate what is "fair" in the Legislature is at odds with the very reason for single-member legislative districts. They enable district-based representation as a counterweight to majority-rule representation for statewide offices. What Madison Democrats call "unfair" is what the state and federal founders called "checks and balances."

Our very constitutional structure is designed to divide power between the executive and legislative branches and elect them in

different ways. *See, e.g.*, Federalist No. 51 (discussing "divid[ing] the legislature into different branches" and use "different modes of election"). Wisconsin is no exception. The debate over single-member districts was hard fought, so much so that it precipitated the failure of the State's first constitutional convention. In 1846, "the absence of a single-member districting system" for the Legislature, "was one of the reasons which led to the defeat of the proposed Constitution." H. Rupert Theobald, *Equal Representation: A Study of Legislative and Congressional Apportionment in Wisconsin*, Wis. Blue Book 71, 80 (1970). Delegates arrived at the second convention "with a popular mandate to provide for a single-member districting system." *Id.* at 190. In the words of Delegate Kinne, "The people of the territory were generally in favor of the single district system, if it could be adopted." Journal of the Convention to Form a Constitution for the State of Wisconsin 222 (1848). As other delegates explained, "The system of single districts was in accordance with the purest principles of democracy," *id.* at 384 (Delegate Lakin), and "brought the representative immediately home to his constituents," *id.* at 219 (Delegate O. Cole). They were not so convinced, as the Consultants are, that "the majority" statewide could "do no wrong." *Id.* at 384 (Delegate Lakin).

Still today, statewide elections for some and single-member districts for others, staggered terms, bicameralism, and other safeguards are, by design, *intended* to yield different outcomes. What the Consultants deem "desirable" from a "social science perspective,"

Report 16, is entirely at odds with the very form of government that the people of Wisconsin ratified through their Constitution. And in Wisconsin, the people are ruled by that Constitution, not "social science" chosen by two unelected individuals.

CONCLUSION

For the foregoing reasons, and those stated in the Legislature's January 2024 briefs and accompanying expert reports and all preceding briefs, the remedy selected must be a judicial remedy to redress noncontiguity, not a political remedy to rebalance the politics of the Legislature. Moving millions of Wisconsinites for a 10,000-person contiguity problem exceeds this Court's judicial power and raises serious federal constitutional questions. The only conceivable judicial remedy is the Legislature's or something like it.

Dated this 8th day of February, 2024.

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CERTIFICATION REGARDING LENGTH AND FORM

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c) for a brief, as amended by this Court's order of December 22, 2023. Excluding the portions of this brief that may be excluded, the length of this brief is 5,464 words as calculated by Microsoft Word.

Dated this 8th day of February, 2024.

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