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IN SUPREME COURT

No. 2023AP1399-OA

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

Petitioners,

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

Intervenors-Petitioners,

v.

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

Respondents,

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

Intervenor-Respondents.

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TABLE OF CONTENTS

INTRODUCTION 6

BACKGROUND 7

ARGUMENT 9

I. The consultants' report confirms that the Governor's proposals perform better than Respondents' maps on traditional and constitutional criteria. 10

A. Respondents' proposals repeatedly fail the "bounded by" constitutional requirement. 10

B. The Governor's proposals perform comparably to Respondents' proposals on several constitutional and traditional criteria and outperform on communities of interest. 11

II. The consultants' political neutrality conclusions show that Respondents' plans are not viable and that the Governor's plans closely adhere to the Courts' neutrality principle. 16

A. Respondents' plans do not approach neutrality and instead privilege one political party over another. 17

B. The plans submitted by the Governor, Petitioners, Wright Intervenors, and Senate Democrats all minimize partisan bias. 22

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Adams v. DeWine,
195 N.E.3d 74 (Ohio Sup. Ct. 2022) 18

Baldus v. Members of Wis. Gov't Accountability Bd.,
849 F. Supp. 2d 840 (E.D. Wis. 2012) 15

Carter v. Chapman,
270 A.3d 444 (Pa.) 20, 23

Clarke v. WEC,
2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370.....7, *passim*

Clarno v. Fagan,
No. 21CV40180, 2021 WL 8972043
(Or. Cir. Ct. Nov. 05, 2021) 18

Donatelli v. Mitchell,
2 F.3d 508 (3d Cir. 1993)..... 15

League of Women Voters v. Commonwealth,
178 A.3d 737 (Penn. Sup. Ct. 2018) 18

Maestas v. Hall,
274 P.3d 66 (N.M. Sup. Ct. 2012) 18, 23

Reynolds v. Sims,
377 U.S. 533 (1964) 6, 19, 20

Constitutional Provisions

Wis. Const. art. IV, § 4..... 10

Other Authorities

Federalist No. 22 (Alexander Hamilton)
(Clinton Rossiter ed., 1961..... 20

Federalist No. 58 (James Madison)
(Clinton Rossiter ed., 1961) 21

Grofman & King,
The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after LULAC v. Perry,
6 Election Law Journal 2 (2007)..... 18

Robin Best & Michael McDonald,
Unfair Partisan Gerrymanders in Politics and Law: Politics and Law: A Diagnostic Applied to Six Cases,
14 Election L.J. 312 (2015) 17–18

INTRODUCTION

The report from this Court's neutral consultants reaffirms the clear divide in this case. It is between proposals like the Governor's, which comply with constitutional and traditional districting criteria, reduce partisan bias, and promote responsiveness to the vote, and Respondents' proposals,[1] which are extremely biased and promote entrenchment. As the Governor's proposals and multiple others demonstrate, it is perfectly possible to draw maps in Wisconsin that both promote democracy and adhere to mandatory and traditional redistricting principles. This alone should be determinative.

But Respondents' maps also have other dispositive flaws. As the consultants point out, Respondents have ignored the Wisconsin Constitution's "bounded by" requirement by failing in many instances to draw districts bounded by ward, town, or county lines. And, beyond the report, previous briefing has shown that Respondents' maps fail in many instances to account for communities of interest.

These circumstances should remove Respondents' proposed maps from consideration. Rather, the Court should either select the Governor's proposals or proposals that perform similarly well on this Court's criteria. Only that path complies with this Court's order and advances the overarching goal of redistricting—to achieve fair and effective representation for all citizens. *See Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

[1] The use of "Respondents" in this brief does not include the Democratic Senator Respondents.

BACKGROUND

From start to finish, all parties to this litigation have had opportunities to be meaningfully heard. After Petitioners Rebecca Clarke, et. al., filed an original action petition challenging the constitutionality of Wisconsin's Assembly and Senate maps on August 2, 2023, a group of Republican Senators filed a lengthy brief in opposition. At the same time, those Senators joined by the Legislature filed a motion to recuse Justice Protasiewicz. On October 6, Justice Protasiewicz filed an order with a detailed memorandum denying the motion to recuse, and the Court granted the petition for an original action with respect to two legal issues: whether the maps violated the Wisconsin Constitution's requirement for contiguous legislative districts and whether they violated separation of powers principles. (Oct. 6, 2023, Court Order 2.) Multiple parties moved to intervene—all were granted leave to do so—and the Court instructed the parties and proposed intervenors to answer four questions related to contiguity, separation of powers, and potential remedies. (*Id.*)

The parties then submitted opening briefs on these questions and filed responses two weeks later, and seven non-parties also filed amicus briefs.

The Court heard oral argument on contiguity, separation-of-powers, and remedial issues on November 21. In total, six parties and intervenors participated in several hours of oral argument.

On December 22, the Court ruled that the current legislative maps violated Wisconsin's constitutional requirement for physically contiguous legislative districts; the Court enjoined the current legislative maps and concluded that new maps must be adopted prior to the next election. *Clarke v. WEC*, 2023 WI 79, ¶ 3, 410 Wis. 2d 1, 998 N.W.2d 370.

In an accompanying remedial and scheduling order, the Court appointed two experts in redistricting, Dr. Bernard Grofman and Dr. Jonathan Cervas, to serve as the Court's consultants in the remedy phase. (Dec. 22, 2023, Order re Post-Decision Matters.) Both Drs. Grofman and Cervas have served as special masters or court consultants in numerous state and federal court redistricting cases. (Report 1 n.1.) Pursuant to the Court's December 22 order, on December 26, Drs. Grofman and Cervas issued a letter to guide the parties on what technical specifications and data requirements they would use to analyze proposed remedial maps. (Technical Specifications Memo 1–3.)

Two days later, Respondents moved for reconsideration of the Court's order enjoining the legislative maps, primarily contending that the Court improperly expedited the case and failed to respond to its arguments (Resp'ts' Mot. for Reconsideration 4–5.) Following responses, the Court denied reconsideration. (Jan. 11, 2024, Court Order 1.)

On January 12, 2024, the parties submitted a total of six proposed remedial maps with accompanying expert reports. The parties responded to the other parties' maps on January 22, and the Legislature sought and was granted leave to submit two responsive expert reports. At the same time, six amici submitted briefs discussing the parties' map submissions. Respondents also moved for reconsideration again, similarly asserting that the Court's expedited process resulted in unresolved factual issues. (Resp'ts' Second Mot. for Reconsideration 4–6.) The Court ordered responses to the second reconsideration motion, which have been filed, and the motion remains pending.

Pursuant to the Court's schedule, on February 1, Drs. Grofman and Cervas issued a report analyzing the six proposed remedial maps' performance on constitutional and traditional districting criteria and three measures of partisan fairness. (Report 4.) In undertaking their analysis, the

consultants make clear that no material factual disputes arose from the parties' submissions. (Report 4 n.7.) Rather, at most, there are "negligible variations in assessment of certain metrics" in the various expert reports, none of which are consequential for the evaluation of the maps. (Report 4 n.7.) Based on their comparison, Drs. Grofman and Cervas have determined that Respondents' maps contain considerable flaws, especially when it came to partisan bias. On the other hand, they conclude that Petitioner-aligned maps—from the Governor, Petitioners, Wright Intervenors, and Senate Democrats (the "Viable Plans")—perform well and are nearly indistinguishable from each other on the relevant criteria. (Report 24–25.) Because several proposed maps meet the relevant criteria, Drs. Grofman and Cervas did not submit their own proposed map with their report.

ARGUMENT

The consultants' report confirms that the Governor's proposals satisfy traditional and constitutional criteria while significantly reducing political bias. In contrast, Respondents' maps cannot be considered as the remedy. On traditional and constitutional criteria, Respondents create districts that do not meet the "bounded by" requirement in the Wisconsin Constitution, and they fall short on preserving communities of interest. And most glaring, Respondents' maps perform very poorly on partisan metrics—in fact, the report has good reason to label their proposals "gerrymanders." (Report 25.) Gerrymandering aside, however, it is enough to point out how biased those maps are in comparison to the Viable Plans, which far outperform Respondents' submissions when it comes to measurements of partisan fairness. Respondents' maps therefore should be removed from consideration.

I. The consultants' report confirms that the Governor's proposals perform better than Respondents' maps on traditional and constitutional criteria.

There is a clear divide between the proposals when it comes to partisan neutrality, which is discussed below. However, before even reaching that consideration, there is good reason to select the Governor's plans over Respondents' based on other criteria.

A. Respondents' proposals repeatedly fail the "bounded by" constitutional requirement.

The Wisconsin Constitution requires that Assembly districts be "bounded by county, precinct, town or ward lines." Wis. Const. art. IV, § 4. As the consultants' report reflects, Respondents repeatedly violate that requirement.

The Johnson Respondents' Assembly map districts are bounded by county, town, or ward lines only 81% of the time, while the Legislature's proposed Assembly map is bounded by county, town, or ward lines only 54% of the time.[2] (Report 21, Table 11.) Thus, the report explains, the Johnson Intervenors' plan has "a substantial number of fails of the 'bounded by' constitutional criteria" (Report 25) and the Legislature's proposal has even more instances.

Contrast that to the other parties: the report explains that nearly all districts are properly bounded. (Report 21, Table 11.) Of note, the report states that the Governor's Assembly map is 98% compliant, and the Senate map is 100% compliant. However, that 98% does not reflect an actual issue on the ground. Rather, the 98% figure relates to the no-longer-existing Town of Madison Ward 2. That previous ward is now

[2] The report also explains that the Johnson Intervenors' Senate map is bounded by county, town, or ward lines only 64% of the time, and the Legislature's Senate map is bounded only 48% of the time.

divided into Madison Wards 145 and 147 (*see* Clarke Resp. Br. 8 nt.1), and the Governor's Assembly proposal follows those new ward lines with its Assembly Districts 77 and 78.[3] So the Governor's Assembly plan *is* completely bounded by county, precinct, town, or ward lines; it is 100% compliant, not 98% compliant.

In all, the repeated failure of Respondents' plans to conform to the "bounded by" constitutional requirement is disqualifying. The Legislature's plans' extremely poor performance on this metric is particularly telling. Their refusal to change the *Johnson III* maps in any way except to remedy non-contiguity, (*see* Legislature Opening Br. 10), and the Legislature's plans' substantial violation of the "bounded by" requirement demonstrates the validity of the Court's warning that "a remedy modifying the boundaries of the non-contiguous districts will cause a ripple effect across other areas of the state as populations are shifted throughout." *Clarke*, 410 Wis. 2d 1, ¶ 56. This constitutional shortcoming is reason enough to reject Respondents' maps, as fixing their multiple failures goes beyond mere technical corrections.

B. The Governor's proposals perform comparably to Respondents' proposals on several constitutional and traditional criteria and outperform on communities of interest.

The consultants' report reflects that the Governor's maps perform equivalently to Respondents' proposals on several constitutional and traditional criteria. And the Governor's proposals outperform Respondents' on preserving communities of interest.

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[3] The Wright Response brief suggested that the Governor's Assembly Districts 77 and 78 do not sit on ward lines (Wright Resp. Br. 16 n.4), but as the forgoing explains, that is not the case when the dissolving of the Town of Madison's ward and the current City of Madison's wards are taken into account.

Population equality. All maps fall within the 2% safe harbor, meaning all maps satisfy the population equality requirement. (Report 4–5.)

Subdivision splits. The parties made different trade-offs when it comes to political subdivision splits. For example, the Governor's Assembly proposal splits the fewest villages (Report 6), and it splits fewer wards than Respondents' proposals (Report 7). As the report points out, splitting wards over other subdivisions likely enabled the Johnson Respondents to split fewer counties and towns. (Report 8.) In all, the mixed results on splits generally favor no party, although the Legislature is clearly behind the pack, as it split more political subdivisions in every category as compared to the Governor's proposals.

Compactness. The consultants observed that the plans "have very similar compactness scores" and all "appear to satisfy the compactness requirement." (Report 9.) Compact districts were a priority in the Governor's proposals. Thus, the Governor's proposed Senate map performs best on compactness and the proposed Assembly map is tied for the most compact on the Polsby-Popper measure.[4] (Fairfax Supp. Chart 5, Jan. 22, 2024.) As noted in the Governor's response brief, the Governor's compactness scores are especially notable given Respondents' flawed "political geography" argument, which incorrectly posits that mapmakers would have to gerrymander to neutralize Wisconsin's "natural" pro-Republican bias because of voters' distribution throughout the state. The Governor's maps rebut this idea by drawing appropriately compact districts with minimal political bias.

Communities of interest. Although this metric is "hard to evaluate" quantitatively (Report 9), the Governor provided with his proposed maps a detailed narrative explaining how

[4] The Johnson Assembly map is slightly more compact on the Reock measure.

the maps prioritize commonsense groupings of Wisconsin's communities, which can be evaluated qualitatively (Gov. Opening Br. 33–42, 45–54). The Governor also provided in response examples where Respondents' maps fail to consider communities of interest. (Gov. Resp. Br. 22–27.) The consultants' report did not emphasize this factor, but this Court stated that it would aim to preserve communities of interest, consistent with good districting practices, so this factor should be taken into account. *Clarke*, 410 Wis. 2d 1, ¶ 68. It is a proper consideration when evaluating whether maps are drawn in sensible ways that provide a voice for communities.

For example, the Governor's proposal newly unites Lake Superior shoreline communities; divides the City of Green Bay in sensible ways keyed to how the community operates on the ground; unites the core of the Fox Valley; creates districts in the Eau Claire metro area that connect the interrelated communities; and likewise creates districts in the Janesville and Beloit region that make sense for those communities. (Gov. Opening Br. 35–40.) In contrast, the Respondents split Eau Claire into separate Senate districts; they unnecessarily split Janesville into two Senate districts and three Assembly districts; the Legislature splits the City of Beloit; and both Respondents split the City of Sheboygan. (Gov. Resp. Br. 22–27.)

Of note, the consultants' report highlights Native American reservations. (Report 10.) The consultants' report correctly identifies that the Governor's Assembly map divides Native American reservations into multiple districts in some instances. In the places where the Governor's maps divide reservations, this is due to balancing these important considerations with criteria like minimizing county and town splits. The Governor's Assembly maps are not an outlier in this regard. While the Wright maps have the fewest divisions of reservation lands, their own "effective splits" metric shows the Governor's maps also perform well—and, notably,

perform better than both Respondents' submissions. (Wright Appendix to Resp. 17, Figure 9.)

Some of the splits in the Governor's Assembly maps, where proposed districts follow county or township lines, put only small pieces of reservation land in a different district. For example, the Forest County Potawatomi Community, where a small parcel (one census block) is outside of Forest County, is split because the Governor's map follows the county line. That parcel is unpopulated and therefore the split is unlikely to impact representation of the tribal community. And there are other tradeoffs. The St. Croix reservation land includes parcels in three different counties. Other maps divide this reservation into three Assembly districts, where the Governor divides it into only two. The Wright maps are the only submission that keep the St. Croix reservation whole, but at the cost of splitting both Barron and Polk Counties, which the Governor's maps avoid.[5]

The Governor's plans unite tribal communities in several other respects. For example, proposed Assembly District 73 keeps together both portions of the Bad River Reservation in Ashland County (which are located both on the mainland and on Madeline Island) (Gov. Opening Br. 35); Assembly District 5 contains the majority of the Oneida Reservation, which is divided only along municipal lines; and Assembly District 6 places the Menominee and Stockbridge-Munsee Reservations in one district (Gov. Opening Br. 45). On the Senate side, Senate District 2 places the Oneida, Menominee, and Stockbridge-Munsee Reservations all in one district. (Gov. Opening Br. 45–46.) The Governor's plans thus

[5] As other examples, the Governor's map splits part of the Bad River Band into a second Assembly district to follow county and municipal lines; and it splits Lac du Flambeau to follow county lines, consistent with most other parties, and that split affects only three people.

gave priority to uniting voters in Native American communities.

In all, just considering the traditional criteria, the Governor's proposed maps generally perform comparably to the Johnson Intervenors' proposals, better than the Legislature's, and outstrip them both when it comes to communities of interest.[6]

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[6] In its January 22 response brief, the Legislature inaccurately suggests that there is a temporary disenfranchisement legal problem in this case. (Leg. Resp. 23.) There is not. The Legislature relies on *Baldus v. Members of Wisconsin Government Accountability Board*, 849 F. Supp. 2d 840 (E.D. Wis. 2012), for its "temporary disenfranchisement" argument, but *Baldus* itself agreed that "[s]ome degree of temporary disenfranchisement in the wake of redistricting is seen as inevitable, and thus as presumptively constitutional, so long as no particular group is uniquely burdened." *Id.* at 852. Moreover, one of the key cases on which the *Baldus* court relied was *Donatelli v. Mitchell*, 2 F.3d 508, 515–16 (3d Cir. 1993). And as *Donatelli* states, "[n]umerous courts have concluded that temporary disenfranchisement resulting from the combined effect of reapportionment and a staggered election system" is legal, and it denies no one the right to vote in a regularly scheduled election. *Id.* at 515 (collecting cases). In fact, the Legislature itself recently passed redistricting legislation purportedly drawn using the Governor's plans—but with revisions to protect more incumbents—which, according to the Legislative Reference Bureau, would have temporarily disenfranchised 665,968 people in the Senate plan, only 6,000 people fewer than the Governor's proposed Senate Plan. *See* Memorandum: Evers *Clarke* Submissions and Senate Substitute Amendment 1 to Assembly Bill 415, Wisconsin Legislative Reference Bureau (Jan. 23, 2024). This demonstrates that the Legislature's argument here is merely a strawman. *See Senate Republicans pass last-ditch effort to institute maps that protect incumbents*, Wisconsin Examiner (Jan. 23, 2024, 5:55 PM), https://wisconsinexaminer.com/2024/01/23/senate-republicans-pass-last-ditch-effort-to-institute-maps-that-protect-incumbents/.

II. The consultants' political neutrality conclusions show that Respondents' plans are not viable and that the Governor's plans closely adhere to the Courts' neutrality principle.

The consultants deploy three independent measures based on a uniform dataset of thirteen Wisconsin elections to evaluate whether the parties' proposed redistricting plans demonstrate political bias. There are two clear takeaways from the consultants' conclusions.[7]

First, the consultants reaffirm that the plans submitted by Respondents are extremely biased and fail the Court's neutrality principle. Respondents' plans "privilege one political party over another," *Clarke*, 410 Wis. 2d 1, ¶ 70, and exhibit "extreme" levels of partisan bias. (*See* Report 15–16, 22–23.) The Court should accept the consultants' recommendation and eliminate Respondents' plans from further consideration. (Report 24–25).

Second, the consultants also confirm that the Viable Plans (those submitted by the Governor, Petitioners, Wright Intervenors, and Senate Democrats) are consistent with the Court's political neutrality principle. The Viable Plans "are markedly more politically neutral than the Current plan, and both the Legislature and Johnson plans." (Report 21.) While they "remain tilted toward the Republicans on all three of [the consultants'] metrics," they "create a competitive environment such that most of the time, the party that wins the most votes will win the most seats." (Report 21.) And among the Viable

[7] As noted above, the consultants make clear that "there are no significant factual disputes concerning the comparison of the submitted remedial maps that require resolution." (Report 4 n.7.) The consultants' uniform approach to analyzing the parties' plans only reinforces that conclusion.

Plans, the Governor's plans are consistently one of the best, if not the best, performing.[8]

A. Respondents' plans do not approach neutrality and instead privilege one political party over another.

Each of the consultants' three calculations confirms that adopting Respondents' plans would violate this Court's holding that it must "remain politically neutral" and must not "enact maps that privilege one political party over another." *Clarke*, 410 Wis. 2d 1, ¶ 70. The impartial, statistical evaluations by the consultants each reveal that Respondents' plans have "significant" biases, are "extreme" in their partiality, and make it "unlikely" that Democrats *ever* win the most districts, even when they win the most votes.

First, the consultants measure the plans' "mean-median gap." The bigger the gap, the bigger the "asymmetry between the parties in translating their vote into seats," (Report 14), meaning plans with a high mean-median gap demonstrate greater bias favoring one party over another.

The academic literature on the mean-median gap is clear: "When the median-mean difference of a chosen plan lies outside the plausible bounds of expectations using neutral procedures, a prima facie conclusion of intent has been shown to reach into the realm of not wanting to count

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[8] The consultants' analysis focuses on "addressing the majoritarian criterion that, in a two-party competition, the party with the higher share of the vote should be expected to win more seats than the party with a lower share of the vote." (Report 13.) The briefs and expert reports of the Governor, Petitioners, Wright Intervenors, and Senate Democrats also provide other arguments and analyses of complimentary partisan bias, political neutrality, and responsiveness metrics that further confirm Respondents' plans are biased and the Viable Plans comply with the Court's neutrality principle.

votes fairly." Robin Best & Michael McDonald, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 Election L.J. 312, 320 (2015). Likewise, courts across the country have recognized that the mean-median gap is an effective measure of a districting plan's partisan neutrality or lack thereof. *See*, *e.g.*, *Adams v. DeWine*, 195 N.E.3d 74, 91–92 (Ohio Sup. Ct. 2022); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 820 (Penn. Sup. Ct. 2018); *Clarno v. Fagan*, No. 21CV40180, 2021 WL 8972043, at *47–50 (Or. Cir. Ct. Nov. 05, 2021).

The consultants' calculations for Respondents' plans "reveal *significant* asymmetry with respect to the mean-median gap." (Report 15 (emphasis added).)

Second, the consultants identify the plans' "partisan bias" (also known as "partisan symmetry"). Partisan bias measures the relationship between the percentage of votes a political party receives and how that vote share translates into legislative seats won by the same party. (*See* Report 14.)

Like the mean-median gap, partisan bias is regularly cited in academic literature as a valuable measure of partisan neutrality. *See* Grofman & King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after LULAC v. Perry*, 6 Election Law Journal 2, 25 (2007). Partisan bias is also routinely used by courts for the same purpose. *See*, *e.g.*, *Adams*, 195 N.E.3d at 91–92; *see also Maestas v. Hall*, 274 P.3d 66, 76–77 (N.M. Sup. Ct. 2012) (When "courts are required to draw a redistricting map, they must do so with the appearance of and actual neutrality . . . . To accomplish this goal, partisan symmetry may be one consideration.").

As summarized in the chart below, the consultants determine that Respondents' plans "have *extreme* values with respect to partisan bias." (Report 15 (emphasis added).)

	Legislature Assembly Plan	Johnson Intervenor Assembly Plan	Legislature Senate Plan	Johnson Intervenor Senate Plan
Approx. expected seat advantage	26 more Republican seats than Democrat seats in tied election	16 more Republican seats than Democrat seats in tied election	11 more Republican seats than Democrat seats in tied election	8 more Republican seats than Democrat seats in tied election

(*See* Report 15–16.)

Third, the consultants determine the plans' "majoritarian concordance." Derived from the U.S. Supreme Court's pronouncement in *Reynolds v. Sims* that "in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators," 377 U.S. at 565, majoritarian concordance asks, "how often does the party that wins the most votes win the most legislative districts in elections in each legislative districting plan?" (Report 14–15.) Under the consultants' analysis, the better a plan's majoritarian concordance, the more responsive the plan is to the will of voters. (Report 16.)

The consultants' majoritarian concordance analysis therefore demonstrates how a poorly performing plan contravenes bedrock democratic principles: "[A] fundamental maxim of republican government . . . requires that the sense of the majority should prevail." The Federalist No. 22, at 146 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also*

The Federalist No. 58, at 361 (James Madison) (Clinton Rossiter ed., 1961) (labeling majority rule "the fundamental principle of free government"). "Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will." *Reynolds*, 377 U.S. at 565.

Just two years ago, the Supreme Court of Pennsylvania relied on a similar "Majority Responsiveness Metric, where a responsive map is confirmed by a low number of anti-majoritarian elections," to identify and adopt politically neutral congressional maps. *See Carter v. Chapman*, 270 A.3d 444, 470 & n.30 (Pa.), *cert. denied sub nom. Costello v. Carter*, 143 S. Ct. 102 (2022).

Respondents' plans "violate the majoritarian criterion." (Report 18.) In their plans, "when the Republican candidate wins the most votes, they win most of the legislative districts…, [but] when Democrats win the most votes, … they are *unlikely* to win the most districts." (Report 20 (emphasis in original).) In fact, "in each of [Respondents'] plans, when Democrats receive most of the votes, only *once* [out of *nine* elections] do they receive the majority of legislative seats." (Report 18 (emphasis added).)

In addition to confirming the glaring bias of Respondents' plans, the consultants refute Respondents' already debunked conflation of "political neutrality" with "proportionality." (*See* Report 13–14 n.25; *see also* Governor's Resp. Br. 21.)

Likewise, the consultants correctly reject Respondents' claim that the "political geography" of Wisconsin somehow excuses their plans' extreme partisan bias. The consultants identify many sources showing that Respondents' "political geography" hall pass should not be accepted: "numerous scholars have demonstrated, both theoretically and empirically, [that] even in states where the electoral

geography favors one party, it is possible to draw plans that satisfy traditional good government but that nonetheless provide something close to political neutrality." (Report 23–24 & n.33 (collecting authority).)

The consultants then reject Respondents' "political geography" excuse in practice: in this case, all plans *except those of Respondents* "improve on traditional good government criteria compared to the current map and manage to create plans with modest levels of partisan bias." (Report 24.) "This is compelling evidence that the geography of Wisconsin does not preclude the creation of good government maps that also seek to satisfy the goals of majority rule representation and avoiding political gerrymandering." (Report 24.)

In all, the consultants' report makes clear that there are plans that serve both political neutrality and the other redistricting criteria. Because of the empirically established bias of Respondents' plans, the consultants concluded that "both the Legislature's plan and the Johnson plan, *from a social science perspective*, are partisan gerrymanders." (Report 25 (emphasis added).) Here, the Court need not decide whether, *as a matter of law*, Respondents' plans are partisan gerrymanders. Instead, it is dispositive that, compared to the Viable Plans, Respondents' plans clearly "privilege one political party over another." *Clarke*, 410 Wis. 2d 1, ¶ 70. Because Respondents' plans are biased, the Court should reject them.

B. The plans submitted by the Governor, Petitioners, Wright Intervenors, and Senate Democrats all minimize partisan bias.

The consultants' analysis also shows that the Governor's plans—along with the other Viable Plans—are the only submissions before the Court that minimize political bias. Their adoption thus would be consistent with the Court's appropriate conclusion that its "political neutrality must be maintained." *Id.*

The consultants conclude that the Viable Plans all perform well using measures of partisan bias:

- *Mean-median gap*. The Viable Plans still slightly favor Republicans, but none has a gap exceeding 2.3%, making them much closer to neutral (0) than Respondents' plans, which all have gaps of 4.1% or greater. (Report 15.)

- *Partisan bias*. The Viable Plans' partisan bias scores are all "similar to values that other state courts have viewed as acceptable compliance with their state constitution regarding neither favoring nor disfavoring a particular party." (Report 16.)

- *Majoritarian concordance*. The report observes that the Viable Plans all "perform significantly better on majoritarian concordance than" Respondents' plans, (Report 19), and that the Governor's plans are tied for the best performing using that analysis: "[T]he Clarke plan and Governor Evers plan satisfies the majoritarian criterion to the highest degree, in 20 of 26 instances." (Report 19.)

Thus, like the other Viable Plans, the Governor's plans succeed at "reflecting the will of the electorate." (Report 16; *see also id.* at 24–25 (describing importance of majoritarian concordance as democratic principle).)

* * * *

As courts across the country have recognized, expert analysis of proposed redistricting plans using measures of partisan bias and neutrality helps "ensure that all voters have 'an equal opportunity to translate their votes into representation.'" *Carter*, 270 A.3d at 470 (citation omitted); *see also Maestas*, 274 P.3d at 76–77. The consultants provide such an examination of the parties' plans here. Based on their conclusions, the indisputable facts establish the disqualifying bias of Respondents' plans on the one hand and the high performance of the Governor's plans and the other Viable Plans on the other.

Adopting the Governor's plans or another set of the Viable Plans will ensure that, for the first time in more than a decade, Wisconsinites are able to exercise their fundamental right to vote in districts that are constitutional, fair, and reflect the will of the people.

CONCLUSION

The Court should adopt the remedial maps proposed by the Governor or maps that perform similarly well on the Court's criteria.

Dated this 8th day of February 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the Court's December 22, 2023, Order for the brief due February 8, 2024. The length of this brief is 4708 words.

CERTIFICATE OF EFILE/SERVICE

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

Dated this 8th day of February 2024.

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