IN THE SUPREME COURT OF WISCONSIN

No. 2021AP001450 OA

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS and RONALD ZAHN,

Petitioners,

BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, REBECCA ALWIN, CONGRESSMAN GLENN GROTHMAN, CONGRESSMAN MIKE GALLAGHER, CONGRESSMAN BRYAN STEIL, CONGRESSMAN TOM TIFFANY, CONGRESSMAN SCOTT FITZGERALD, LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA, GERALDINE SCHERTZ, KATHLEEN QUALHEIM, GARY KRENZ, SARAH J. HAMILTON, STEPHEN JOSEPH WRIGHT, JEAN-LUC THIFFEAULT, and SOMESH JHA,

Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN in her official capacity as a member of the Wisconsin Elections Commission, JULIE GLANCEY in her official capacity as a member of the Wisconsin Elections Commission, ANN JACOBS in her official capacity as a member of the Wisconsin Elections Commission, DEAN KNUDSON in his official capacity as a member of the Wisconsin Elections Commission, ROBERT SPINDELL, JR. in his official capacity as a member of the Wisconsin Elections Commission and MARK THOMSEN in his official capacity as a member of the Wisconsin Elections Commission,

Respondents,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, in his official capacity, and JANET BEWLEY SENATE DEMOCRATIC MINORITY LEADER, on behalf of the Senate Democratic Caucus,

Intervenors-Respondents.

REPLY BRIEF OF INTERVENORS-PETITIONERS CITIZEN MATHEMATICIANS AND SCIENTISTS

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Intervenors-Petitioners Citizen Mathematicians and Scientists respectfully submit this reply brief in support of the MathSci Maps.

ARGUMENT

I. THE MATHSCI MAPS IMPLEMENT A "LEAST CHANGE" APPROACH.

Unable to explain why their maps have not fully complied with all applicable legal requirements as well as the MathSci Maps do, several parties instead ask the Court to simply ignore the MathSci Maps for not being "least change" enough. *See*, *e.g.*, Legislature Resp. Br. 7; BLOC Resp. Br. 23. That is the wrong reading of this Court's Order. Least change does not and cannot mean that minimizing changes to the enacted map takes precedence over compliance with the mandates of the U.S. and Wisconsin Constitutions. *See* MathSci Resp. Br. 4 (citing Order ¶¶8, 72).

To be clear, the MathSci Congressional Maps are almost indistinguishable from all other parties' maps with respect to the core-retention least-change metric used by all parties (the range among the parties' maps runs from 91.5% to 94.5%), so that is not a valid criticism of the MathSci Congressional Maps at all. DeFord Report 11. And although the MathSci Senate and Assembly Maps admittedly move more people than other parties' maps,[1] these changes were made to conform the existing district boundaries to the law in strict compliance

[1] The MathSci Maps outperform some parties' maps on other metrics of least change, including preserved internal edges and area displacement. DeFord Report 11, 16. And contrary to the Congressmen's critique (Congressmen's Resp. Br. 17–18), these types of least-change metrics are grounded in both the Order, *see* Order ¶83 (Hagedorn, J., concurring), and common sense, as they show that mapmakers have minimized modification to district boundaries.

with this Court's Order. Order ¶78.[2] Thus, the MathSci Maps do exactly what this Court prescribed, using the existing maps as a template and modifying them to remedy constitutional or statutory deficiencies. *Id.*

Indeed, the U.S. Supreme Court has counseled that strict compliance with applicable legal requirements is even *more* important for a court-ordered plan than for one enacted by a legislature. Pursuant to the U.S. Supreme Court's guidance in *Chapman v. Meier*, 420 U.S. 1, 26 (1975), a court drawing legislative maps must minimize population deviation first and then justify any remaining deviations by specific reference to state-law mandates. 420 U.S. at 26; *see also* Order ¶28 ("[T]here should be as close an approximation to exactness [in population] as possible" (quoting *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 484, 51 N.W. 724 (1892)); Order ¶¶35–37 (describing the mandates of the Wisconsin Constitution that may justify less than perfect population equality in legislative maps). Likewise, a court drawing congressional maps first must achieve perfect population equality before applying any other state policies.

The Legislature thus gets U.S. Supreme Court precedent partly right when it states that the way for a Court to avoid the "taint of arbitrariness" is to select the plan with the absolute lowest population deviation. Legislative Resp. Br. 8–9 (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)). But the Legislature is wrong to suggest that minimizing changes from the enacted maps can justify deviations from

[2] The MathSci proposed Senate and Assembly Maps perform similarly to the other parties on alignment of district boundaries with either a county boundary or a boundary in the 2011 plan, demonstrating that the MathSci plans made only those moves that were necessary to comply with constitutional requirements. DeFord Reply Report 27.

perfect population equality. *Id.*[3] As the Congressmen explain in their recent motion, this Court should not rely so heavily on least change that it fails to improve upon the 2011 enacted map's performance on applicable redistricting criteria, where improvement is possible. Congressmen Motion to Submit Modified Map 4–5. And contrary to the Governor's suggestion (Governor Resp. Br. 21), the metrics in the 2011 enacted map provide a floor, not a ceiling, for use in evaluating the proposed maps.

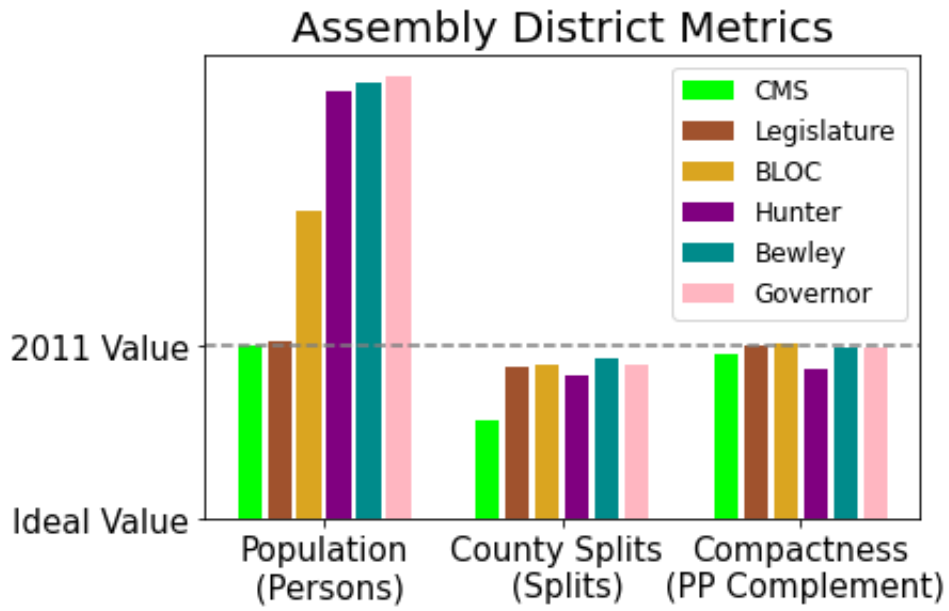
The MathSci Maps followed this Court's instructions. They modified the enacted maps to remedy malapportionment first and, in so doing, achieved lower population deviation than all other parties' maps. *See infra* section II. Other changes in the MathSci Legislative Maps effectuated the State's legal requirements, *see Chapman*, 420 U.S. at 26, namely, the Wisconsin Constitution's command that assembly (and thus senate) districts respect county, town, and ward lines, in that order, and be as compact and convenient as practicable. Wis. Const. art. IV, §§ 4–5. In fact, the MathSci Legislative Maps split markedly fewer counties and are as compact or nearly as compact as any other party's maps, while the MathSci Congressional Maps outperform all contenders on both county splits and compactness. *See infra* sections III and IV.

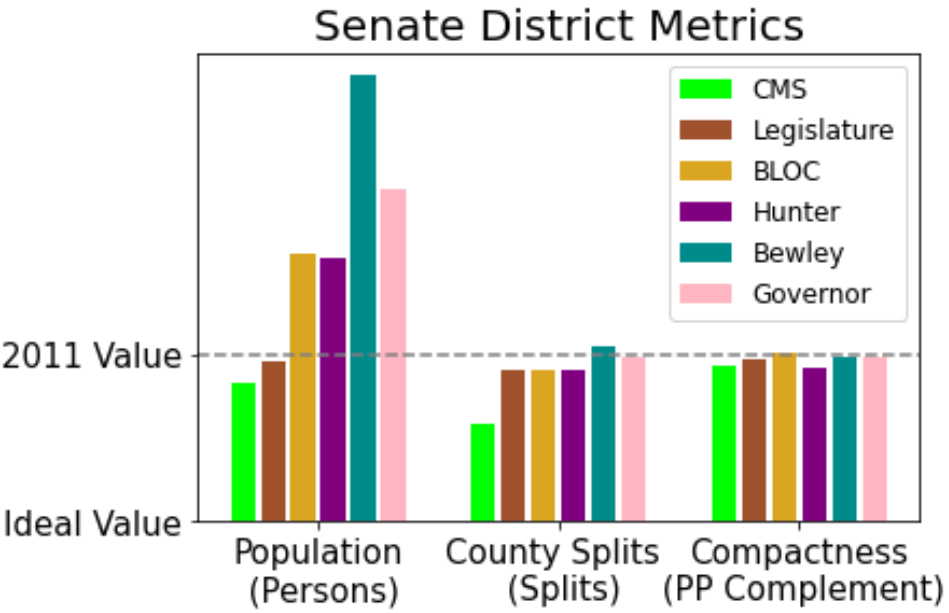
The parties that achieved "better" least-change scores on their legislative maps did so by failing to adhere strictly to one or more of these constitutional requirements. No party matched the MathSci Legislative Maps' level of population equality, DeFord Report 13, 17;

[3] Oddly, the Legislature relies on least change to eliminate the only maps—the MathSci Maps—that outperform it on population equality, *see* Legislature Resp. Br. 6–7, but then criticizes the Governor on least change, despite the fact that the Governor moved fewer people, less area, and preserved more internal edges than the Legislature. DeFord Report 12, 16, 19.

and the only maps that came close to the MathSci Maps on population equality—the Legislature's—failed to rigorously implement other Wisconsin constitutional requirements, *id.* at 15–19.

This can be seen by comparing the different legislative maps on normalized metrics of population equality, county splits, and compactness—where the Citizen Mathematician and Scientists' MathSci Maps (labeled "CMS" maps in the graphics) systematically outperform their competitors:





DeFord Reply Report 17–18, 35. The consequences on a district level can be seen in the different maps' approach to specific counties, such as Dodge County, where the changes made by the MathSci Maps

(unlike changes made by other parties) eliminated unnecessary county splits in the 2011 enacted maps.[4]

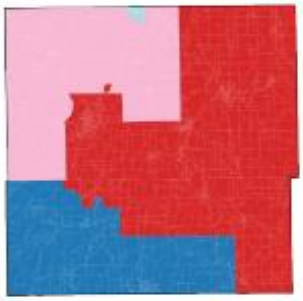
[4] The splits counted by the figure are "unnecessary" because they exceed those required by county population. DeFord Reply Rep. 9–11.

Dodge County Assembly Splits

Ideal Piece Counts: 2

CMS - 2 pieces

2011 - 4 pieces



Legislature - 5 pieces

Bewley - 5 pieces

Governor - 6 pieces

BLOC - 6 pieces

Hunter - 4 pieces

Dodge County Senate Splits
Ideal Piece Counts: 1

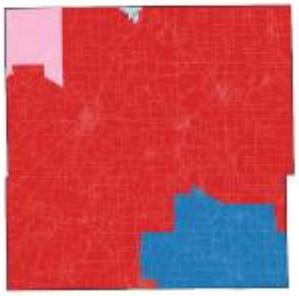
CMS - 1 piece

2011 - 3 pieces

Legislature - 4 pieces

Bewley - 4 pieces

Governor - 4 pieces

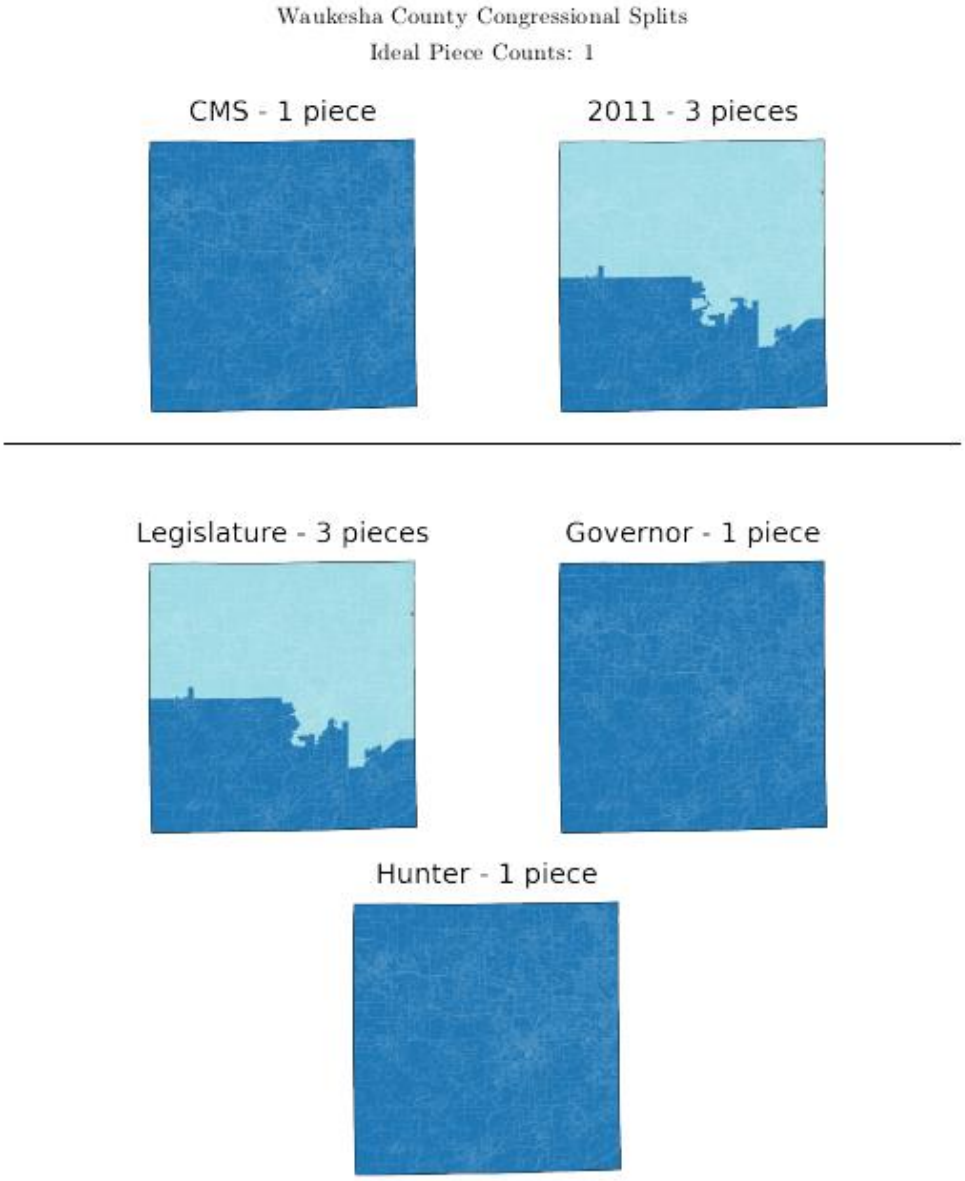


BLOC - 4 pieces

Hunter - 3 pieces

DeFord Reply Report 10–11.

Similarly, the MathSci Congressional Map eliminated unnecessary county splits, such as those in Waukesha County.

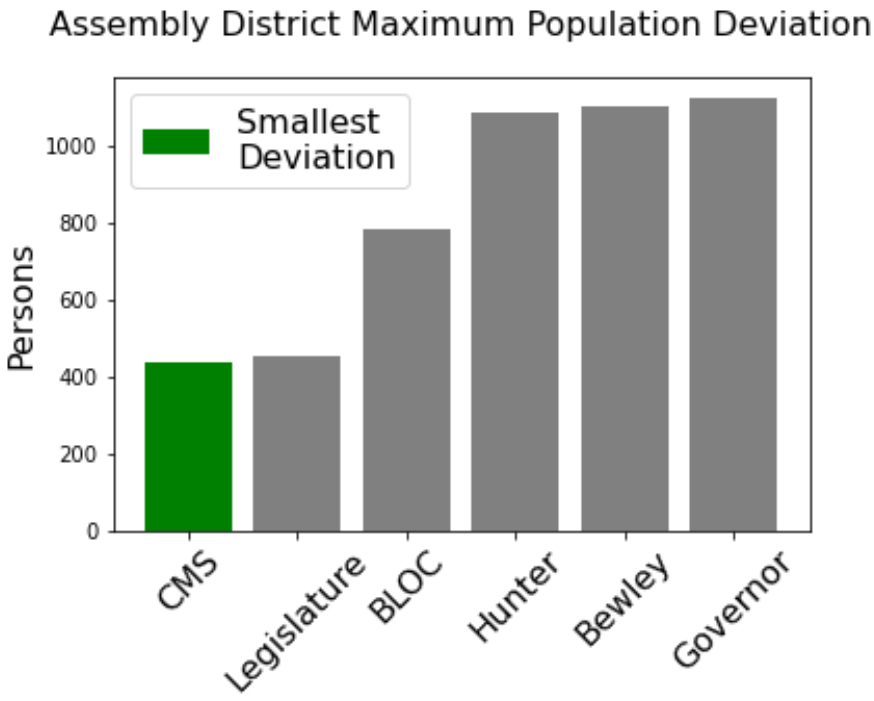


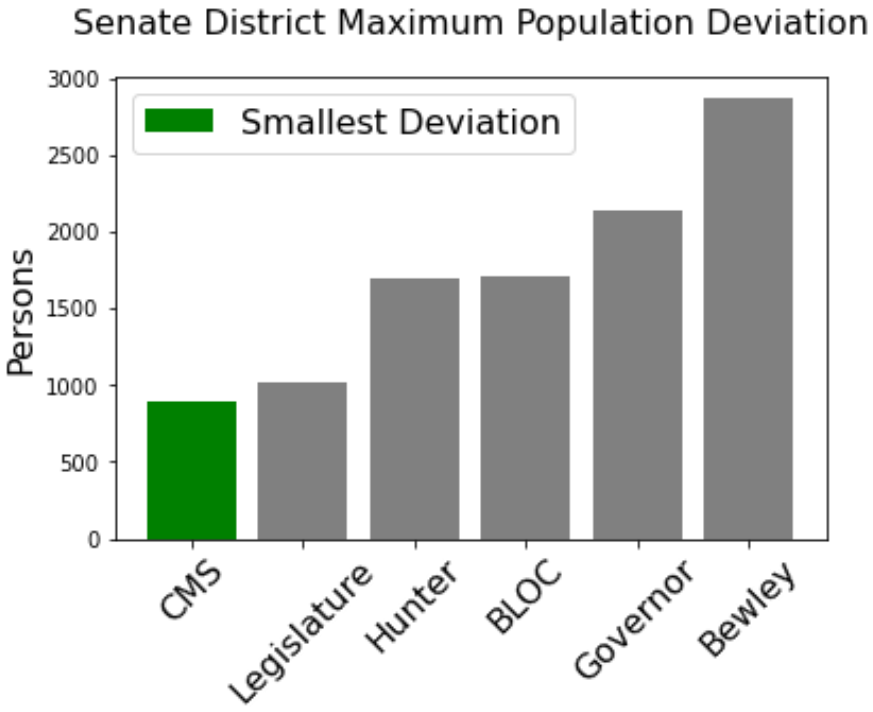
DeFord Reply Report 31.

The MathSci Maps thus best balance a least-change approach with this Court's obligations to satisfy constitutional mandates in redistricting.

II. THE MATHSCI MAPS ARE BEST ON POPULATION EQUALITY.

On the congressional plans, while all parties come close, two parties (Governor and Hunter) fail to achieve perfect population equality as required by Article I, Section 2 of the U.S. Constitution. And on the legislative plans, there is no question that the MathSci Maps best achieve population equality.





DeFord Reply Rep. 1–2.

Population equality is the most important factor to consider in a redistricting case. *See Chapman*, 420 U.S. at 26–27. Choosing the MathSci Maps would thus avoid the "taint of arbitrariness" that would arise if the Court chose any of the maps with higher deviations. *Connor v. Finch*, 431 U.S. 407, 415 (1977).

III. THE MATHSCI MAPS RESPECT THE MANDATE TO AVOID SPLITTING COUNTIES UNNECESSARILY.

Likewise, the MathSci Legislative Maps most rigorously implement the Wisconsin Constitution's command that district boundaries follow county, town, and ward lines wherever possible—and in that order of priority. MathSci Resp. Br. 8–10 (citing Wis. Const. art. IV, § 4). And although preserving political subdivisions applies less strictly to congressional maps, the MathSci Congressional Map is hands-down the best on these criteria, splitting fewer counties,

towns, and wards than any other congressional plan. MathSci Resp. Br. 14.

Three parties—BLOC, the Governor, and Hunter—simply neglect ward lines in their legislative plans. DeFord Report 15, 18. The remaining parties fail to prioritize drawing districts along county lines as the Constitution requires. This is evident from comparing the extent to which the plans split counties more than is required by their populations (since larger counties necessarily must be split into a certain number of pieces):

Figure 3: Percentage of Intact Counties in Assembly Proposals

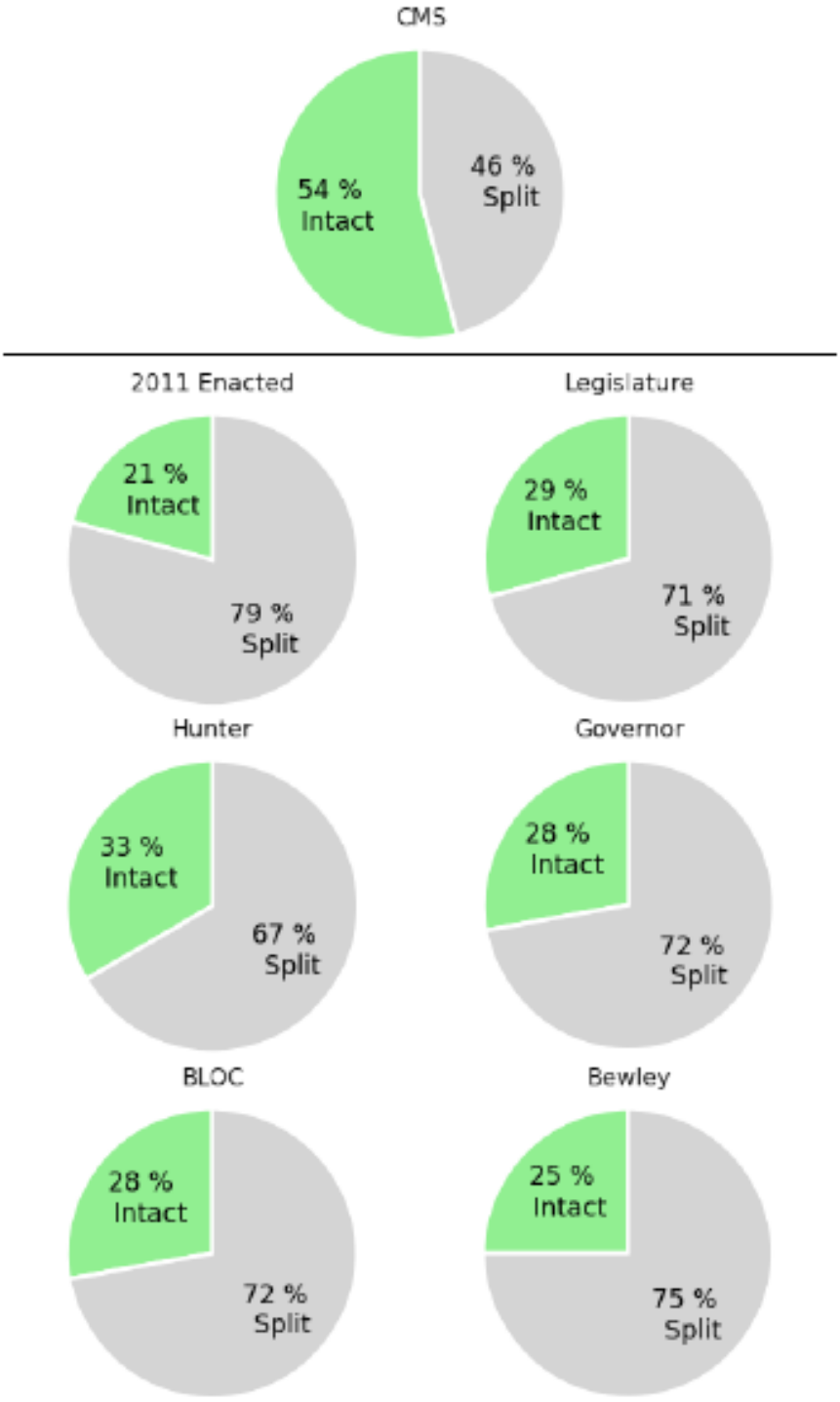
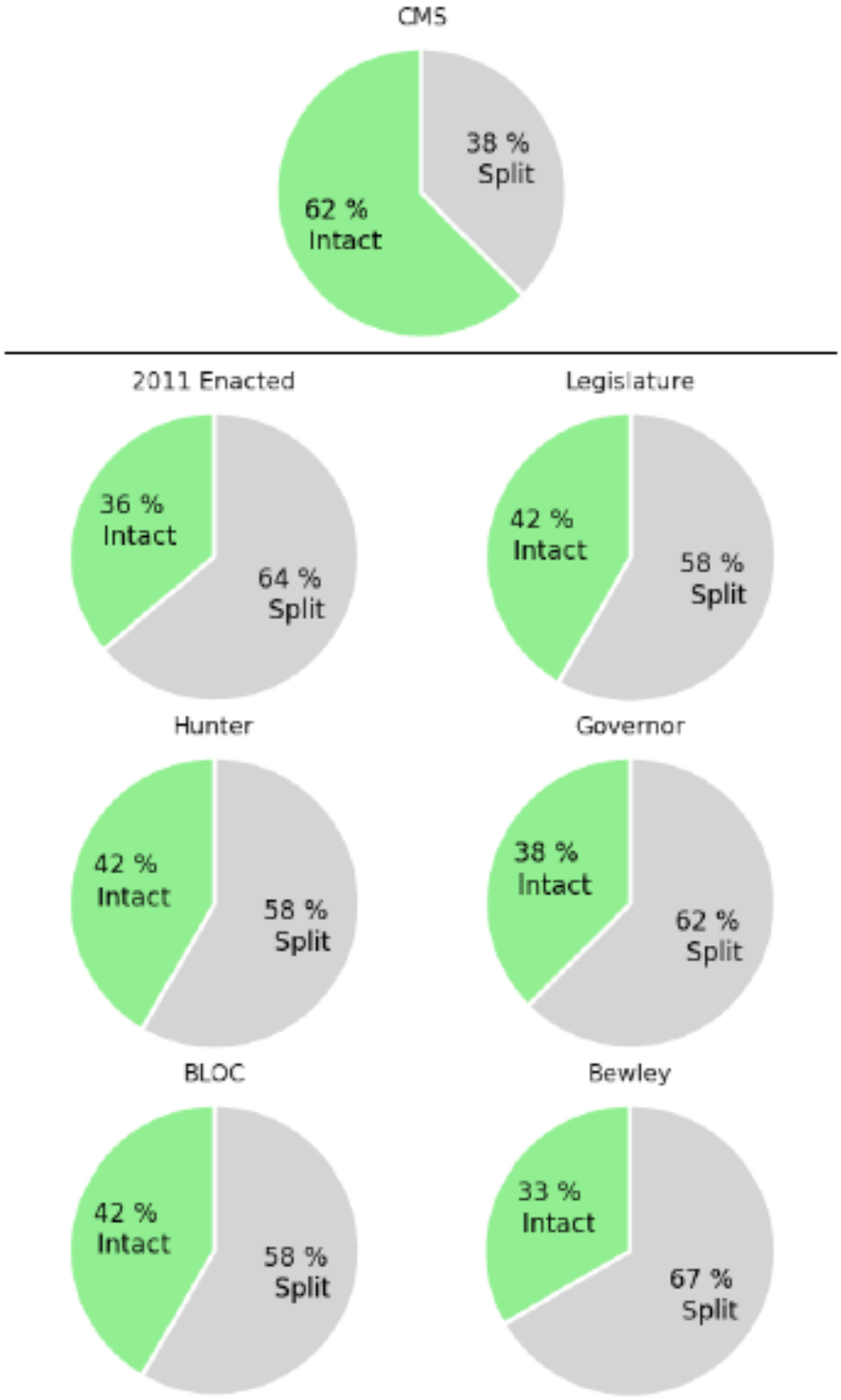


Figure 4: Percentage of Intact Counties in Senate Proposals



DeFord Reply Report 6–8.

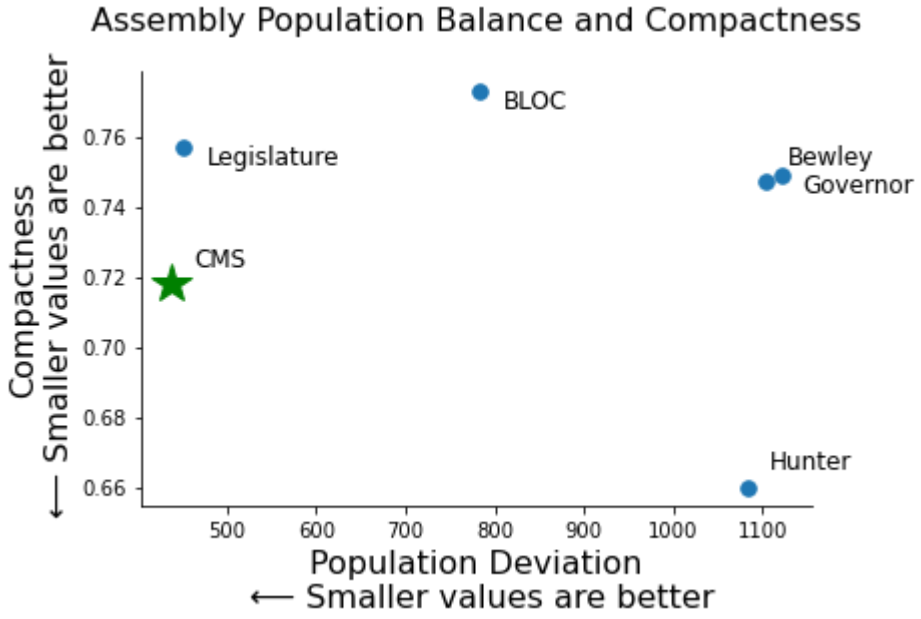
The extent to which parties' district boundaries follow *municipal* lines cannot compensate for a failure to follow county lines, given both counties' relative priority, MathSci Resp. Br. 9 (citing *Cunningham*, 81 Wis. at 521 (Lyon, C.J., concurring)), and the fact that city and village borders are not constitutionally protected. *Id*. 8–9; *accord* Governor Resp. Br. 20. And it is the MathSci Maps that perform well on *town* splits. *See* Ansolabehere Suppl. Report 12, 16, 18.

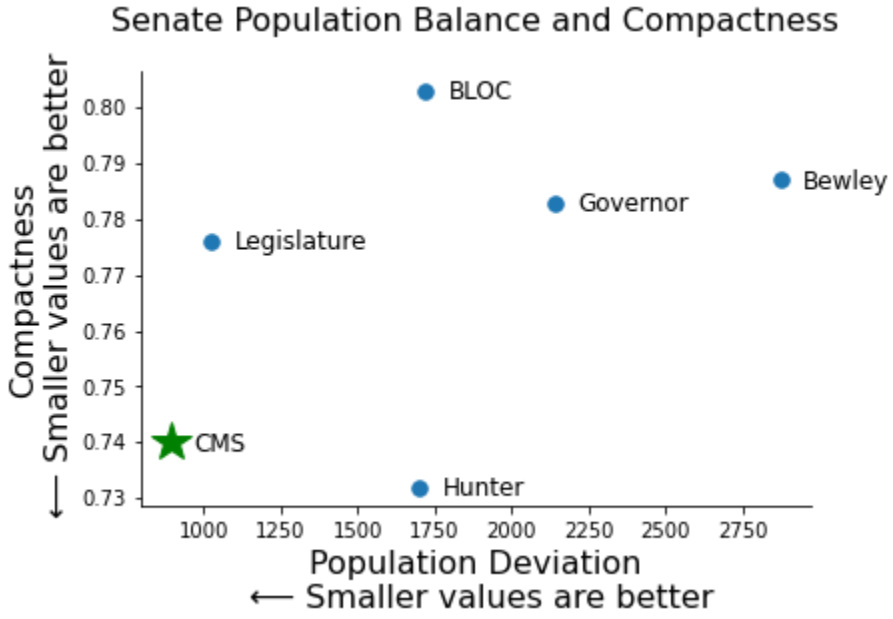
Accordingly, the MathSci Legislative Maps perform best on the Wisconsin Constitution's dictate that district borders follow first county, then town, and finally ward lines. And the MathSci Congressional Map likewise bests every other plan on these metrics. MathSci Resp. Br. 14.

IV. THE MATHSCI MAPS ARE THE MOST COMPACT, GIVEN POPULATION EQUALITY.

The MathSci Maps also score best or second-best on all mean compactness metrics across the proposed maps. The MathSci Congressional Map is objectively the most compact of all congressional proposals under any relevant measure. And the MathSci Legislative Maps are bested only by a proposal (Hunter's) that performs measurably worse on the most important redistricting criteria: population equality. The MathSci Maps thus adhere to the Wisconsin Constitution's dictate that assembly districts be as "compact" as practicable and senate districts be "convenient." Wis. Const. art. IV, §§ 4–5. Although these state constitutional requirements do not textually apply to congressional districts, all parties recognize that congressional districts likewise should be compact and convenient.

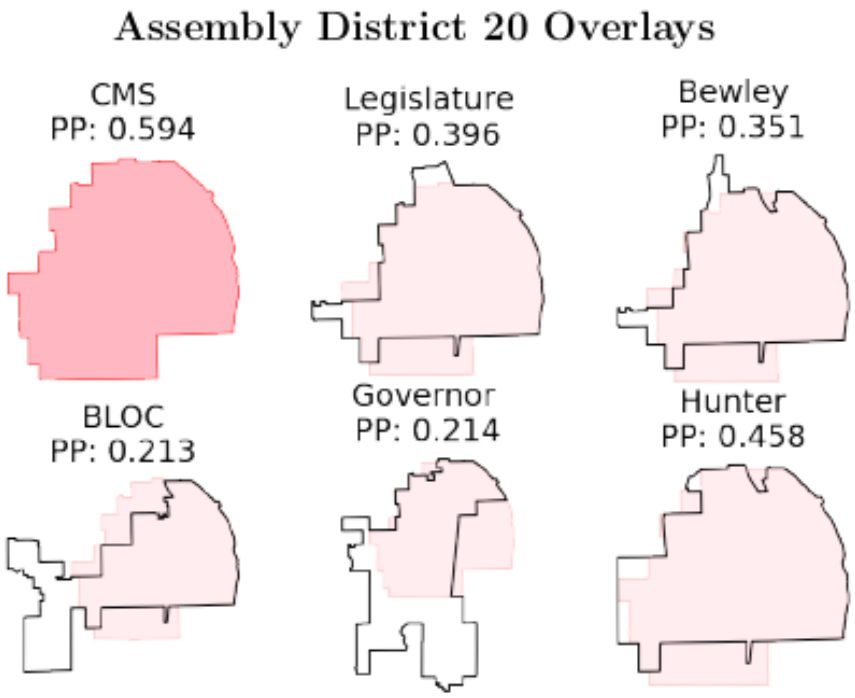
Although one might imagine that there must be trade-offs between compactness and population balance, the MathSci Maps balance them to a remarkable degree, as these graphs demonstrate.

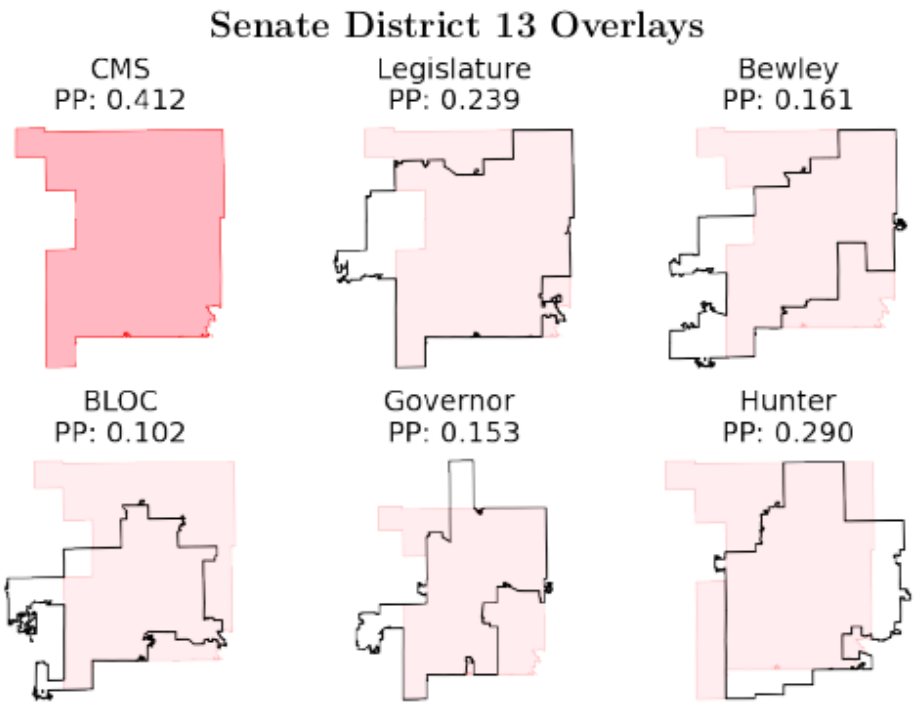




DeFord Reply Report 3–4.

As examples of the differences in compactness, the following maps compare two individual MathSci districts (and their Polsby-Popper compactness scores) with their competitors' districts covering the same parts of Wisconsin—specifically Assembly District 20 and Senate District 13 (with higher being better).





DeFord Reply Report 13–14.

Since Hunter is the only comparable map on compactness, and the MathSci Legislative Maps far outperform Hunter on population inequality and county lines, *see supra* sections II and III, the compactness factor also weighs in favor of the MathSci Legislative Maps. And although compactness is not constitutionally required for congressional districts, the MathSci Congressional Map has the best mean Polsby-Popper, mean Reock, and cut-edges scores, making it objectively the most compact congressional proposal. MathSci Resp. Br. 15.

V. THE MATHSCI MAPS COMPLY WITH THE VRA.

To guard against any potential Voting Rights Act ("VRA") liability, this Court must ensure that any maps provide racial and language-minority groups with an adequate opportunity to nominate and elect representatives of their choice in a number of districts roughly

proportional to their share of the State's adult citizen population. *See Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994). The MathSci Maps do exactly that. Although no party contends otherwise as to the MathSci Congressional or Senate Maps, the BLOC and Hunter plaintiffs argue that the MathSci Assembly Map does not create seven assembly districts effective for Black voters. That is wrong for the reasons explained in Professor Duchin's December 15 report. Duchin Report 18–19. Because the MathSci Assembly Map contains seven Milwaukee County assembly districts that are effective for Black voters, *id.*, it provides a safe harbor against VRA liability. *See Cooper v. Harris*, 137 S. Ct. 1455, 1469–72 (2017).

VI. THIS COURT SHOULD NOT PICK POLITICAL SIDES.

This Court was clear that, in implementing a judicial remedy for malapportionment, it did not want to consider questions of "partisan fairness." Order ¶¶39–63. The Legislature, the Congressmen, and the Johnson petitioners all urged that result. Oct. 25 Legislature Br. 41–42; Oct. 25 Congressmen Br. 23–25; Nov. 1 Johnson Br. 9. Reversing course, the Legislature now asks the Court to delve into the deeply politicized issue of incumbency protection, disguising that request as a measure of least change. Legislature Resp. Br. 28–30. The Court should flatly reject the Legislature's invitation to render political judgments about which particular incumbents should or should not be protected.

Likewise, this Court should give no stock to the bald assertion that the Legislature's plan is the "product of policymaking by Wisconsin's elected representatives." *Id.* 20. The Legislature's map—just like those of the Governor and Senate Democrats—is a plan *advocated in litigation* by elected representatives, but has not been enacted into law. "It is the enacted law, not the unenacted intent, that

is binding on the public." *State ex rel. Kalal v. Circuit Court for Dane Cnty*., 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110; *cf. Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). As this Court already recognized, the Legislature's plan deserves no greater deference than any other. Order ¶72 n.8.

VII. THE MATHSCI MAPS BEST RESPECT TRADITIONAL REDISTRICTING CRITERIA.

The MathSci Maps also best respect neutral traditional redistricting criteria.

As discussed above, in the congressional context, where only population equality and VRA compliance are strictly mandated, the MathSci Congressional Map's besting of all other proposals on adherence to county lines is highly significant, given the centrality of counties in Wisconsin's political and redistricting history. MathSci Opening Br. 17–18; *cf.* Congressmen Resp. Br. 20 n.2 (agreeing that maintaining even less critical municipal lines is "probative" when assessing congressional maps). Likewise, the MathSci Congressional Map succeeds on the key metrics for compactness, a traditional redistricting criterion for Wisconsin congressional maps. DeFord Report 12.

In the legislative context, the neutral redistricting criteria identified by the concurrence included respecting communities of interest and minimizing the number of Wisconsin residents who must wait six years to vote for a state senator. Order ¶83 & n.9. To the extent that Senate reassignments are considered, the MathSci Senate Maps score acceptably on that criterion, although (as with least change) their performance on this metric reflects a trade-off with their stricter adherence to county lines and compactness. DeFord Report 17. As to communities of interest, as multiple parties recognize, *see* Hunter

Opening Br. 16–17; BLOC Resp. Br. 50, in Wisconsin these are best protected by adhering to county, town, and ward lines—which the MathSci Maps do better than any party. DeFord Report 12, 15, 18. In addition, the Citizen Mathematicians and Scientists are the only party that attempted to systematize and evaluate in a neutral way the submissions received by the People's Map Commission regarding communities of interest. Duchin Report 11, 14, 17, 20.

CONCLUSION

The Citizen Mathematicians and Scientists urge the Court to adopt their Proposed Maps.

BOARDMAN & CLARK LLP
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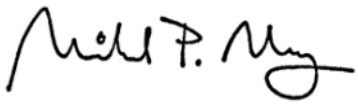

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FORM & LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief 2,721 words.

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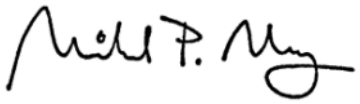

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Michael P. May

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

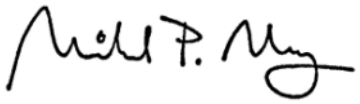
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

BOARDMAN & CLARK LLP
By



Michael P. May