

False Electors and Fair Maps:  
*Penebaker v. Hitt and Clarke v. Wisconsin Elections  
Commission*

*Inns of Court - James E. Doyle Chapter  
February 21, 2024 Meeting Presentation*

**Part 1: *Clarke v. Wisconsin Elections Commission*  
Attorney Dan Lenz, Law Forward**

**1. History/ Context of Redistricting in Wisconsin**

- a. 2011: first time in 40 years unified branches for a redistricting cycle
- b. 2010 Census resulted in the 2011 Walker-era maps, which were extreme partisan gerrymanders, resulting in litigation throughout the decade.
  - i. *Baldus v. Members of the Wisconsin Government Accountability Board*, 849 F. Supp. 2d 840 (E.D. Wis, 2012) – ordered two legislative redistricts redrawn for violating the Voting Rights Act, partisan gerrymandering claim abandoned during trial.
  - ii. *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) – district court ruled maps were unconstitutional partisan gerrymander
  - iii. *Gill v. Whitford*, 138 S. Ct. 1916 (2018): U.S. Supreme Court decided that case needed plaintiffs from *all* districts, but otherwise left district court's findings of fact and conclusions of law undisturbed. While case was pending on remand, Supreme Court issued *Rucho*. As a consequence of *Rucho*, plaintiffs in *Whitford* voluntarily dismissed for lack of standing.
  - iv. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019): U.S. Supreme Court decided federal courts cannot adjudicate partisan gerrymandering because it presents nonjusticiable political question, instructs potential challengers that they should look to their state constitutions.
- c. 2020 Census results in litigation: impasse predicted, many parties sued in state and federal court. The Wisconsin Supreme Court accepted jurisdiction for the first time in decades. Order, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Sep. 22, 2021).
- d. *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 (“*Johnson I*”): Court announces what criteria it would use in selecting maps, including announcing that it would apply a “least

change” methodology in selecting new maps (without defining what that means).

- e. *Johnson v. Wis. Elections Comm'n*, 2022 WI 14, 400 Wis.2d 626, 971 N.W.2d 402 (“*Johnson II*”)— Court adopts Governor’s legislative and congressional maps based on “least change” methodology.
- f. *Wisconsin Legislature v. Wis. Elections Comm'n*, 595 U.S. 398 (2022) U.S. Supreme Court decided Supreme Court of Wisconsin hadn’t sufficiently analyzed VRA issues, remanded.
- g. *Johnson v. Wis. Elections Comm'n*, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559 (“*Johnson III*”) – On remand, Wisconsin Supreme Court adopts the Legislature’s proposal, which were the same maps the Governor had vetoed.

## 2. Current litigation: *Clarke v. Wis. Elections Comm'n*, No. 23AP1399-OA

- a. Nature of case
  - i. 19 individual voters from throughout the state
  - ii. Represented by Law Forward and co-counsel at Stafford Rosenbaum, the Campaign Legal Center, Arnold & Porter, the Elections Law Center at Harvard Law School
  - iii. Challenge to Wisconsin legislative maps.
  - iv. August 2: Our clients filed a Petition for an Original Action with the Wisconsin Supreme Court.
    - 1. Named respondents included the Wisconsin Elections Commission and the odd-numbered Senate Districts
- b. Petition included three general claims
  - i. Legislative maps constituted a partisan gerrymander in violation of the Wisconsin Constitution.
  - ii. Contiguity
    - 1. Wis. Const. Art. IV, Section 4: Description of Assembly districts; “such districts to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable.”
    - 2. Wis. Const. Art. IV, Section 5: “The senators shall be elected by single districts of convenient contiguous territory.”
    - 3. Part of Framers concern was how noncontiguity could be used in gerrymandering/manipulating districts.
  - iii. Current legislative maps violated Wisconsin’s separation-of-powers doctrine.
- c. Procedural history

- i. October 6, 2023: Justice Protasiewicz denies motion to recuse. *Clarke v. Wis. Elections Comm'n*, 2023 WI 66, \_\_ Wis. 2d \_\_, 995 N.W.2d 735; the Court grants the Petition for an Original Action in part. *Clarke v. Wis. Elections Comm'n*, 2023 WI 67, \_\_ Wis. 2d \_\_, 995 N.W.2d 699; the Court also denied the *Wright* petition.
- ii. In its order granting our petition, the Court instructs the parties to address four questions:
  - 1. Do the existing state legislative maps violate the contiguity requirements contained in Article IV, §§ 4 and 5 of the Wisconsin Constitution?
  - 2. Did the adoption of the existing state legislative maps violate the Wisconsin Constitution's separation of powers?
  - 3. If the Court rules that the existing legislative maps are unconstitutional, and the Legislature and Governor are unable to adopt legislative maps, what standards should guide the court in imposing a remedy?
  - 4. What fact-finding, if any, w
- iii. November 21, 2023: Oral arguments
- iv. December 22, 2023: Court issues decision: *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370.
- d. Law regarding contiguity
  - i. *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35 (1892): contiguous means touching, cannot include detached territories.
- e. Current maps are unconstitutionally noncontiguous.
  - i. 54/99 assembly districts contain noncontiguous blobs or islands.
  - ii. 21/33 senate districts
  - ii. Wisconsin is an outlier. No other state has this level of pervasive noncontiguity. There are only a handful of other noncontiguous districts nationwide.
- f. The December 22, 2023 decision
  - i. Article IV's contiguity requirements "mean what they say: Wisconsin's state legislative districts must be composed of physically adjoining territory." 2023 WI 79, ¶3.
  - ii. Current maps are unconstitutionally noncontiguous.
  - iii. Addressed various defenses. *Id.*, ¶¶36-55.
  - iv. Remedy. ¶¶56-71.
    - 1. Enjoined WEC from using the existing maps;
    - 2. Encouraged the Legislature to exercise its "primary authority and responsibility" and pass constitutional districts;

3. Should the Legislature not be able to pass maps in time, set out the criteria the Court would consider if it needed to impose a remedy.
  4. Rejected “least change” methodology, set other criteria for remedial maps.
- v. Dissents from Chief Justice Ziegler (*id.*, ¶¶78-184); Justice Rebecca Grassl Bradley (*id.*, ¶¶185-263), and Justice Hagedorn (*id.*, ¶¶264-302).
- g. Accompanying order regarding remedial procedure. Order, *Clarke v. Wisconsin Elections Comm'n*, No. 2023AP1399-OA (Dec. 22, 2023).
    - i. Appointed two expert consultants;
    - ii. Set schedule to permit parties to submit maps, expert reports, briefs, and responses.

**3. Where things stand:**

- a. January 12, 2024: Parties submitted their maps (in a snowstorm)
- b. January 22: Parties responded to the various proposals
- c. February 1: The consultants issued their reports, finding that the Johnson Intervenors’ and the Legislature’s maps violated the “bounded by” provision of the Wisconsin Constitution and represented partisan gerrymanders. The consultants reported that, of the four remaining eligible submissions, each met the constitutional requirements and there was little material difference in terms of political neutrality. Offered to draw a new map if requested.
- d. February 8, 2024: The parties responded to the consultants’ submission. The Legislature and the Johnson Intervenors also moved to subpoena the consultants.

**4. What happens next:**

- a. WEC has told the Court they need maps in place no later than March 15, 2024.
- b. Candidates begin circulating nomination papers on April 15. Wis. Stat. § 8.15(1).

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**Part 2: Khary Penebaker et al. v. Andrew Hitt et al;  
Dane Cnty Case No. 2022-CV-1178**  
Attorney Scott B. Thompson, Law Forward

1. Background
  - a. Who are presidential electors? Wis. Stat. § 5.10
  - b. What is their role?
    - i. Timing, Wis. Stat. § 7.75; 3 U.S.C. § 7
    - ii. Obligations, U.S. Const. amend. XII.
  - c. Historical abnormalities
    - i. Wisconsin 1856
      1. Wisconsin's first example with electoral college irregularity. Electors unable to meet because of snowstorm.
      2. Votes for John C. Frémont counted, over the objections of members of Congress.
    - ii. Hawaii 1960
      1. Nixon leads Kennedy with recount pending on the day elector meeting is scheduled.
      2. Electors for both candidates meet together to cast their ballots.
    - iii. Wisconsin 2020
      1. Initial canvass declares Biden victory.
      2. November 18, 2020
        - a. Recount petition, Wis. Stat. § 9.01(1).
        - b. Atty. Chesebro Memo: *The Real Deadline for Settling a State's Electoral Votes*
      3. November 30, 2020
        - a. Recount certified,
        - b. Wisconsin Elections Commission Chair certifies Democratic candidates for the office of presidential elector, Wis. Stat. § 7.70(3),

- c. Governor executes certificate of ascertainment, Wis. Stat. § 7.70(5)(b).
  - 4. December 6, 2020
    - a. Atty. Chesebro Memo: Important That All Trump-Pence Electors Vote on December 14.
  - 5. December 7, 2020
    - a. Atty. Troupis email outlining “our strategy”
  - 6. December 9, 2020
    - a. Atty. Chesebro Memo: *Statutory Requirements for December 14 Electoral Votes*
  - 7. December 11, 2020
    - a. After the Trump Campaign seeks judicial review, Milwaukee County Circuit Court affirms the recount results. See *Trump v. Biden*, Nos. 2020CV2514 & 2020CV7092 (Milwaukee Cnty. Cir. Ct.)
    - b. Post-ruling, Trump Campaign appealed and simultaneously moved for bypass to the Wisconsin Supreme Court.
    - c. Wisconsin Supreme Court granted the petition, ordered expedited briefing that evening, and oral argument for the following day.
    - d. Republican Electors instructed to meet on Dec. 14
  - 8. December 14, 2020
    - a. Wisconsin Supreme Court affirms the recount results. See *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568.
    - b. Wisconsin’s electors meet to cast their ballots for the Democratic candidates.
    - c. 10 Republican electors meet and do the same.
  - 9. Jan. 4, 2020
    - a. Trump Campaign asks for electoral votes to be flown to Washington D.C.
  - 10. Jan. 5, 2021
    - a. Fraudulent electoral votes flown to Washington D.C.
  - 11. Jan. 6, 2021
    - a. Transmitting the votes to Pence
    - b. Attack on the Capitol
2. Plaintiffs’ Claims
- a. Civil Conspiracy
  - b. Public Nuisance
  - c. Public Nuisance
  - d. Quo Warranto

3. Procedural Background

4. Motion to Dismiss

- a. Theme: “A dearth of injury betrays an illegitimate purpose: to publicly destroy attorneys who dare represent the Campaign, chilling representation of future Republican interests. But isolating half of the country from able lawyering will ill-serve the courts, clients, and our democracy. This crude effort at intimidation is a misuse of the judicial system. It should be decisively repudiated.”
- b. Argument:
  - i. Immunities
  - ii. Conspiracy not plead
  - iii. Nuisance not plead
  - iv. Punitive damages is not a claim
  - v. Article I, § 9 is not a claim
- c. Decision and Order: Granting in part and denying in part
  - i. Generally, the claims are validly plead
  - ii. But see
    - 1. Injury to all taxpayers
    - 2. Punitive damages
    - 3. Wis. Const. Art. I, § 9

5. Motion to Dismiss: granted in part and denied in part

- a. Troupis does not have conditional immunity because the complaint alleges he conspired to fraudulently impersonate public officials.
- b. Troupis has absolute liability for his statements made in judicial proceedings, but this does not matter.

6. Settlement

- a. Restrictions on future conduct
- b. Statement:
  - i. On December 14, 2020, in compliance with requests received from the Trump campaign and the Republican Party of Wisconsin, we met at the Wisconsin State Capitol and executed a document titled “Certificate of the Votes of the 2020 Electors from Wisconsin.” That document stated, in part, that we were “the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Wisconsin.” The Elector Defendants took the foregoing action because they were told that it was necessary to preserve their electoral votes in the event a court challenge may later change the outcome of the election in Wisconsin. That document was then used as part of an attempt to improperly overturn the 2020 presidential election results.

The duly elected presidential electors for the State of Wisconsin for the 2020 presidential election were: Meg Andrietsch, Shelia

Stubbs, Ronald Martin, Mandela Barnes, Khary Penebaker, Mary Arnold, Patty Schachtner, Shannon Holsey, Tony Evers, and Benjamin Wikler.

We hereby reaffirm that Joseph R. Biden, Jr. won the 2020 presidential election and that we were not the duly elected presidential electors for the State of Wisconsin for the 2020 presidential election.

We oppose any attempt to undermine the public's faith in the ultimate results of the 2020 presidential election.

We hereby withdraw the documents we executed on December 14, 2020, and request that they be disregarded by the public and all entities to which they were submitted.

- c. Document publication
- 7. Present Posture
  - a. Pending appeal: 23AP1985
  - b. Pending motions
    - i. Coverage
    - ii. Disqualification
    - iii. Compel
    - iv. To "affirm the confidentiality of the privilege log"
  - c. Upcoming
    - i. March 1 – Summary Judgment
    - ii. March.8 – Daubert