

FILED
11-16-2023
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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 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 ELECTIONS COMMISSION; MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION; ANDRE JACQUE, TIM CARPENTER, ROB HUTTON, CHRIS LARSON, DEVIN LEMAHIEU, STEPHEN L. NASS, JOHN JAGLER, MARK SPREITZER, HOWARD MARKLEIN, RACHAEL CABRAL-GUEVARA, VAN H. WANGGAARD, JESSE L. JAMES, ROMAINE ROBERT QUINN, DIANNE H. HESSELBEIN, CORY TOMCZYK, JEFF SMITH AND CHRIS KAPENGA IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN SENATE,

Respondents,

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

Intervenors-Respondents.

JOINT RESPONSE BY INTERVENORS-RESPONDENTS WISCONSIN LEGISLATURE, JOHNSON, GOEBEL, PERKINS, O'KEEFE, SANFELIPPO, MOULTON, JENSEN, ZAHN, ELMER, AND STRECK AND RESPONDENTS SENATORS CABRAL-GUEVARA, HUTTON, JACQUE, JAGLER, JAMES, KAPENGA, LEMAHIEU, MARKLEIN, NASS, QUINN, TOMCZYK, AND WANGGAARD TO JOINT MOTION FOR CORRECTED LTSB REDISTRICTING DATA

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INTRODUCTION

The Clarke Petitioners, the Democratic Senator Respondents, the Governor, and Citizen Mathematicians move this Court “for an Order directing Intervenor-Respondent the Wisconsin Legislature to instruct its Legislative Technology Services Bureau (‘LTSB’) to review and correct the statewide ward ‘shapefile’ that the Legislature, this Court, and all parties to *Johnson v. Wisconsin Elections Commission* . . . used in 2021 and 2022 for purposes of state-legislative redistricting . . . so that the shapefile accurately delineates wards and municipalities, and to re-release the corrected shapefile no later than December 1, 2023.” Mot. 1. Movants contend that relief is necessary so “all parties—and the Court—[will] be able to rely on a common, accurate ward shapefile in any remedial phase of this litigation.” Mot. 5.

The motion should be denied without prejudice. The Legislature, the Republican Senator Respondents, and the Johnson Intervenors agree that all parties and the Court should have a common, accurate dataset should there be further remedial proceedings. All parties currently have access to the same municipal, ward, and census block information through a common dataset maintained by LTSB based on 2020 U.S. Census data. Ensuring

accuracy is central to LTSB's mission. And Movants have shown no error, either in their motion or in correspondence with Respondents, that is attributable to LTSB. Rather, any "errors" are instead a function of the U.S. Census data itself and its designation of municipalities, which LTSB does not alter. Movants' request for relief is also premature. There is no dispute between the parties at this time. If disputes arise related to municipality designations in any future remedial proceedings, the parties could resolve any such issues through stipulations and bring only those unresolved disputes to this Court. But in no event should the Court order LTSB, which is not a party to this litigation, to manipulate U.S. Census data. There is no basis for any such order now or later.

BACKGROUND

On November 8, counsel for Citizen Mathematicians informed counsel for the Legislature that they, together with the Clarke Petitioners and other movants, intended to file a motion to require the Legislature to direct LTSB to "correct the statewide ward 'shapefile'" that same afternoon. App.5. Counsel for Citizen Mathematicians asserted that they "believe there are more than 200 ward fragments—that is, single Census blocks or small

groups of Census blocks—for which the LTSB Redistricting Dataset seems to misidentify the municipality name or the ward number or perhaps both.”

Id. Citizen Mathematicians’ counsel did not attach any supporting information.

Counsel for the Legislature agreed that “there is a shared interest in using a common and accurate dataset” and asked counsel to “share the basis for your concerns—what datasets are you using, where are the supposed inaccuracies, etc.” App.4. Counsel for the Legislature stated that “we are willing to work with you” and “no motion would be necessary” if the Legislature had more information to evaluate the parties’ concerns. *Id.* Counsel explained that without additional information, “we do not even know if there is a disagreement among the parties, much less a disagreement that can’t be worked through by assessing your concerns.” *Id.*

Citizen Mathematicians’ counsel did not provide any additional information in response. Counsel stated that they would “share the details about the basis for [their] concerns” in a motion filed with the Court. *Id.*

In their five-page motion, Movants assert, “it appears that the LTSB Redistricting Dataset that this Court and all parties relied on in *Johnson*

contains errors and thus does not accurately delineate all wards and municipalities.” Mot. 3. They show one example of an alleged “stray Census block” in Sheboygan Falls. *Id.* And they attach “an illustrative (but likely not exhaustive) list” of 204 alleged “fragments,” which Movants assert are examples of misidentified municipality names, ward numbers, or both. *Id.* The motion does not identify *who* identified these alleged errors or *how* they were identified or with *what* data.

That additional information is necessary to assess any alleged inaccuracies because underlying data regarding municipality lines, wards lines, and census blocks are available from multiple sources, for multiple years, and for multiple purposes.¹ As discussed in the attached affidavit from LTSB Director Jeff Ylvisaker, there could be differences between datasets for several reasons. *See* Ylvisaker Aff. ¶¶5.a-5.b, App.7. For a simple example, one dataset includes geographic information for lakes while another does not.² For another example affecting all of Wisconsin, there are changes to

¹ Compare, e.g., TIGER/Line Shapefiles, U.S. Census Bureau, <https://bit.ly/3sx927> (shapefiles by State available for 2023 to 2007), with Census & Redistricting Data - 2020 Wisconsin Blocks with P.L. 94-171 Redistricting Data as U.S. DOJ Summarized Fields, LTSB Geographic Info. Servs (GIS), <https://bit.ly/49FwS98>.

² Compare, e.g., Census & Redistricting Data - 2020 Wisconsin Blocks with Water, LTSB GIS, <https://bit.ly/49FwS98>, with Census & Redistricting Data - 2020 Wisconsin Blocks without Water, LTSB GIS, <https://bit.ly/49FwS98>.

geographic boundaries over time.³ LTSB keeps a database of municipal lines, as required by state law. *See* Wis. Stat. §13.96(1)(b). But when it comes to the U.S. Census data on which redistricting plans are built, the U.S. Census Bureau has its own municipal boundaries as of 2020, and those census municipal boundaries do not always match actual municipal lines collected by LTSB as of 2020 from local municipalities. *See* *Ylvisaker Aff.* ¶¶5.a-5.b, 5.h, 6, App.7-9. Accordingly, municipal lines reflected in the U.S. Census’s “TIGER” shapefile, which is used for redistricting, will deviate sometimes from municipal lines reflected in LTSB’s municipal boundaries database, used for other purposes. *See id.* ¶¶5.g-5.h, 6, 7.a, App.8-9; *see also* Wis. Stat. §13.96(1)(b).

ARGUMENT

The motion should be denied without prejudice as premature. There is a common dataset made available to all parties by LTSB based on

³ For instance, a shapefile with 2020 municipality or ward lines will look different than a shapefile with 2023 municipality or ward lines. *See, e.g.,* Memo. ISO Pet. 72-73 (discussing changed municipal lines in Dane County due to annexations since 2022). Citizen Mathematicians agree that further proceedings must follow 2020 lines, making any alleged inaccuracy with respect to later lines irrelevant for these proceedings. Citizen-Math. Resp. Br. 27 (“the same rationale for mandating decade-long use of the population totals from the most recent Census—taken on April 1, 2020—requires decade-long use of the municipal and ward lines from that same date”).

unaltered 2020 U.S. Census data.⁴ If all parties use that common dataset, then all parties will have the same municipal, ward, and census block information. If parties wish to manipulate 2020 U.S. Census data – which is what Movants’ motion would appear to require – then the parties can negotiate stipulations and bring to the Court’s attention only unresolved disputes, if any, as part of any future remedial proceedings that may or may not occur. Doing so now would be premature. And there is no basis for ordering a state agency, which is not a party to this litigation, to manipulate that Census data now or later.

1. LTSB is a nonpartisan state legislative service agency overseen by Director Jeff Ylvisaker. *See* Wis. Stat. §13.96(2); Ylvisaker Aff. ¶¶1-2, App.7. LTSB is responsible for maintaining mapping and geographic data services for not only the Legislature but also state service agencies, counties, local municipalities, and the public. *See* Wis. Stat. §13.96.⁵

Every decade, LTSB makes census data available for redistricting. Any member of the public can download redistricting data from LTSB’s

⁴ *See* Census & Redistricting Data, LTSB GIS, <https://bit.ly/49FwS98>.

⁵ *See also* LTSB Teams, Wis. State Legislature, <https://perma.cc/T7UF-Y5Q5>.

website.⁶ The redistricting data is based on information directly from the U.S. Census Bureau.⁷ And LTSB takes the information from the U.S. Census as it finds it. Most relevant here, the U.S. Census's "TIGER 2020" data contains the U.S. Census Bureau's version of municipal boundaries and census blocks with population information as it existed in 2020. LTSB then assigns wards to that census data, working within the census-designated municipalities and census blocks. *Ylvisaker Aff.* ¶¶6.a-6.c, App.8. At no point does LTSB manipulate the municipal boundaries as delineated in the U.S. Census data, even if the census's municipal boundaries deviate (as they often do) from actual municipal lines reported regularly by municipalities to LTSB. *Id.* ¶¶6.c, 6.e, App.8-9.⁸ Deviating from the U.S. Census Bureau's municipal boundaries would alter the U.S. Census Bureau's population figures, thereby defeating the very purpose of the census.

2. Movants assert that LTSB redistricting data "contains data errors incorrectly delineating wards and municipalities," such that "the Court will

⁶ See Census & Redistricting Data, LTSB GIS, <https://bit.ly/49FwS98>.

⁷ See TIGER/Line Shapefiles, U.S. Census Bureau, <https://bit.ly/3sxC927>.

⁸ LTSB is statutorily required to maintain municipal and ward lines in a "statewide data base consisting of municipal boundary information for the entire state." Wis. Stat. §13.96(1)(b). LTSB regularly reports changes or corrections to municipal boundaries to the U.S. Census Bureau, but the U.S. Census Bureau does not always incorporate those changes or corrections into census data. See *Ylvisaker Aff.* ¶¶5.f-5.h, App.8.

be unable to ensure that the parties' remedial proposals fully cure any constitutional violation the Court finds." Mot. 2. Movants request an order from this Court that would appear to require LTSB—which is not a party to this litigation—to change redistricting data provided by the U.S. Census Bureau. Movants' request should be denied without prejudice. There is no factual or legal basis for it.

As for the absent factual basis, Movants' motion is predicated on an assertion that "it *appears* that the LTSB Redistricting Dataset . . . contains errors." Mot. 3 (emphasis added). Movants do not clearly identify the dataset they are challenging. Nor is the motion accompanied by any *evidence* establishing a material issue of fact—only attorney argument. The motion includes one example purporting to show an "erroneous" ward fragment, but it does not identify the source of that image or describe the methodology by which Movants concluded this lone fragment is erroneous. Mot. 3-4. Movants provide even less information for the attached list of alleged ward fragments. That additional information is critical because what might appear to be a "fragment" could be a multi-part ward, which appear throughout the State, where some parcels in a ward are disconnected from other

parts of the ward. *See, e.g.*, Legis. Resp. Br. 23 n.6 (discussing examples of disconnected wards in the City of Oshkosh). Movants do not identify the underlying datasets used, the year of those datasets, or any other information necessary to assess their contentions. Nor do they identify what the comparator is—that is, what other datasets Movants are relying on for their conclusion that boundaries are amiss. They’ve provided this Court no basis to order the review of the alleged discrepancies they identify, to say nothing of a review of the more than 200,000 Wisconsin census blocks in the redistricting file.

Nevertheless, LTSB has begun to investigate Movants’ assertions. *See generally* Ylvisaker Aff. ¶7, App.9. Their findings confirm that there is no basis for Movants’ motion now. Movants’ alleged “inaccuracies” appear to stem from the *U.S. Census Bureau’s* data, where the *U.S. Census Bureau* has misidentified census blocks as part of one municipality when they are in fact part of another municipality. *See id.* ¶7.a, App.9. LTSB does not change that census data. While in a perfect world there would be no discrepancies in the census data, the U.S. Census Bureau does not always incorporate all updates and corrections that LTSB provides for municipal boundaries. *Id.* ¶5.g,

App.8. The census data is “the most accurate version of Wisconsin’s municipal boundaries to date,” as compared to past decennials, but it remains imperfect. *Id.* ¶5.h, App.8.

Movants’ alleged municipal boundary errors are part of the *census* itself. They are not errors to be corrected by LTSB, any more than it would be appropriate for LTSB to correct alleged U.S. Census Bureau errors counting people. LTSB takes the census data as it finds it. *Id.* ¶6.e, App.9. For example, the lone example in Movants’ motion (at 3) is a census block that the *U.S., Census Bureau* has identified as part of the Town of Sheboygan Falls, when it is in fact part of the City of Sheboygan Falls. *Id.* ¶7.b, App.9. But correcting the U.S. Census Bureau’s error would also require altering the official population figures for both municipalities—the very population data that the U.S. Census Bureau exists to compile.

The parties, too, should take the census data as they find it, as this Court has long required. *See State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35, 54 (1892) (rejecting malapportionment challenge claiming census data was wrong); *see also* Wis. Const. art. IV, §3 (census triggers redistricting). That entails using the LTSB’s common dataset as they find it, as parties

in redistricting litigation have long done. *See, e.g., Baumgart v. Wendelberger*, No. 01–C–0121, 02–C–0366, 2002 WL 34127473, *1 (E.D. Wis. July 11, 2002) (three-judge court) (noting LTSB was court’s “technical advisor” in malapportionment action), App.11. Should the parties wish to manipulate census data as Movants’ motion would appear to require—for example, by stipulating to corrections to the U.S. Census Bureau’s misidentified municipal boundaries in the City of Sheboygan Falls or elsewhere—they can do so as part of any further remedial proceedings that may or may not occur.⁹ But there is no need for this Court’s intervention unless and until there is an actual dispute relevant to remedial proceedings that cannot be resolved by stipulation. Based on what little information Movants have provided, there appears to be no such dispute at this time.

Nor is there any legal basis for this Court to order anything of LTSB now or later. LTSB is not a party to this litigation. Movants have not

⁹ LTSB’s database of municipal boundaries would also be judicially noticeable. *See Ryan v. State*, 168 Wis. 14, 168 N.W. 566, 566 (1918) (stating that “when the exact boundaries of the various political subdivisions of the state come in question, the court must take judicial notice of such public records of the state as define such boundaries”); Wis. Stat. §13.96(1)(b) (requiring LTSB to keep “statewide data base consisting of municipal boundary information for the entire state”).

explained how this Court could (or should) order the Legislature to order a state agency, as a nonparty, to manipulate census data.¹⁰

3. The Court need not initiate any further factfinding at this time. The motion is premature. When this Court granted the petition in part, it acknowledged further factfinding might be required. Order 3 (Oct. 6, 2023). It remains an open question whether all, some, or none of the legislative districts will be reconsidered. Until then, there is no basis for this Court to order anything of the Legislature, let alone LTSB. The Legislature remains willing to confer with Movants about whether there are in fact any errors that the parties can jointly advise LTSB to reconcile. But right now, there appears to be no factual or legal basis for the Court's intervention. Given the nature of the alleged errors, the parties are fully able to resolve Movants' concerns amicably and without unnecessarily involving this Court should there be further proceedings.

¹⁰ There is a well-worn path for parties to challenge state agency action. If Movants' claim is that LTSB has compiled GIS databases in a manner inconsistent with law or arbitrarily and capriciously, it presumably could be pursued in a separate action under Chapter 227, subject to applicable claims or defenses. Such claims would proceed on the legal standards applicable to those actions. Movants provide no authority for the proposition that the Court may order an administrative agency to reperform its work in any context other than those actions. And the petition for original action did not assert such a claim.

CONCLUSION

The motion should be denied without prejudice.

Dated this 16th day of November, 2023.

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CERTIFICATION REGARDING LENGTH AND FORM

I hereby certify that this response conforms to the rules contained in Wis. Stat. §809.81, which governs the form of documents filed in this court where Chapter 809 does not expressly provide for alternate formatting. The length of this response is 2,619 words as calculated by Microsoft Word.

Dated this 16th day of November, 2023.

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