FILED
01-22-2024
CLERK OF WISCONSIN
SUPREME COURT

No. 2023AP001399-OA

IN THE SUPREME COURT OF WISCONSIN

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

Petitioners,

GOVERNOR TONY EVERS, IN HIS OFFICIAL CAPACITY; NATHAN ATKINSON, STEPHEN JOSEPH WRIGHT, GARY KRENZ, SARAH J. HAMILTON, JEAN-LUC THIFFEAULT, SOMESH JHA, JOANNE KANE, AND LEAH DUDLEY,

Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION; DON MILLIS, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, AND JOSEPH J. CZARNEZKI, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS COMMISSION; MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION; SENATOR ANDRÉ JACQUE, SENATOR TIM CARPENTER, SENATOR ROB HUTTON, SENATOR CHRIS LARSON, SENATOR DEVIN LEMAHIEU, SENATOR STEPHEN L. NASS, SENATOR JOHN JAGLER, SENATOR MARK SPREITZER, SENATOR HOWARD L. MARKLEIN, SENATOR RACHAEL CABRAL-GUEVARA, SENATOR VAN H. WANGGAARD, SENATOR JESSE L. JAMES, SENATOR ROMAINE ROBERT QUINN, SENATOR DIANNE H. HESSELBEIN, SENATOR CORY TOMCZYK, SENATOR JEFF SMITH, AND SENATOR CHRIS KAPENGA, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN SENATE,

Respondents,

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

Intervenors-Respondents.

MOTION FOR RECONSIDERATION OF SCHEDULE 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

Counsel Listed on Following Page

BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Suite 2200
Madison, WI 53718
608.216.7995
kstjohn@bellgiftos.com

CONSOVOY MCCARTHY PLLC
TAYLOR A.R. MEEHAN*
RACHAEL C. TUCKER*
DANIEL M. VITAGLIANO*
C'ZAR D. BERNSTEIN*
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
703.243.9423
taylor@consovoymccarthy.com

LAWFAIR LLC
ADAM K. MORTARA, SBN 1038391
40 Burton Hills Blvd., Suite 200
Nashville, TN 37215
773.750.7154
mortara@lawfairllc.com

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
RICHARD M. ESENBERG, SBN 1005622
LUKE N. BERG, SBN 1095644
NATHALIE E. BURMEISTER, SBN 1126820
330 E. Kilbourne Ave., Suite 725
Milwaukee, WI 53202
414.727.9455
Luke@will-law.org

AUGUSTYN LAW LLC
JESSIE AUGUSTYN, SBN 1098680
1835 E. Edgewood Dr., Suite 105-478
Appleton, WI 54913
715.255.0817
jessie@augustynlaw.com

LEHOTSKY KELLER COHN LLP
SCOTT A. KELLER*
SHANNON GRAMMEL*
GABRIELA GONZALEZ-ARAIZA*
200 Massachusetts Avenue, NW
Suite 700
Washington, DC 20001
512.693.8350
scott@lkcfirm.com

LEHOTSKY KELLER COHN LLP
MATTHEW H. FREDERICK*
408 West 11th St., Fifth Floor
Austin, TX 78701
matt@lkcfirm.com

** Admitted pro hac vice*

Intervenor-Respondent Wisconsin Legislature, Respondents Senators Rachael Cabral-Guevara, Rob Hutton, Andre Jacque, John Jagler, Jesse L. James, Chris Kapenga, Devin LeMahieu, Howard L. Marklein, Stephen L. Nass, Romaine Robert Quinn, Cory Tomczyk, and Van H. Wanggaard, and Intervenor-Respondents Billie Johnson, Chris Goebel, Ed Perkins, Eric O'Keefe, Joe Sanfelippo, Terry Moulton, Robert Jensen, Ron Zahn, Ruth Elmer, and Ruth Streck respectfully move for reconsideration of the Court's order issued January 11, 2024, pursuant to Wis. Stat. §§809.14 and 809.64. For the reasons stated below, Movants respectfully request that the Court reconsider its order denying their motion for reconsideration of the remedial scheduling order in this case in light of the material factual disputes raised by parties' January 12, 2024, remedial proposals that are now before this Court.

1. On January 11, 2024, this Court issued an order summarily denying a motion for reconsideration filed by the Legislature, Senator Respondents, and Johnson Intervenor-

Respondents. Chief Justice Ziegler, Justice Rebecca Bradley, and Justice Hagedorn dissented.

2. The next day, parties submitted proposed remedies, remedial briefs, and expert reports. Over 1,500 pages of arguments, expert opinions, and supporting material and 16 GB of underlying source data raise substantial issues of fact. Experts must be put to the test of cross-examination. *See, e.g.*, *Prosser v. Elections Bd.*, 793 F. Supp. 859, 868 (W.D. Wis. 1992) (explaining expert's partisanship analysis "was destroyed on cross-examination"). And factual disagreements must be tried and resolved by a neutral factfinder in this case. *See, e.g.*, *Greene v. McElroy*, 360 U.S. 474, 496-99 & n.25 (1959) ("basic ingredients in a fair trial"); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("due process requires an opportunity to confront and cross-examine adverse witnesses"). Those constitutional harms are compounded by the Court exempting this case from normal procedural rules and judicial impartiality. *See Allen v. Georgia*, 166 U.S. 138, 140 (1897); *accord Jordan v. Massachusetts*, 225 U.S. 167, 174-75 (1912); *see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009).

3. In light of the factual issues dominating these filings, the Court must give parties a full and fair opportunity to litigate this case in a way that the current schedule does not allow. For the reasons given in the Legislature and Senator Respondents' response remedial brief filed today and those given in Movants' December 28, 2023, motion for reconsideration, the remedial scheduling order forecloses parties' ability to develop the record in a manner consistent with due process. Parties' remedial filings (and "corrected" filings) themselves evince the need for further factfinding about experts' methodology, the basis for corrections, and myriad other factual assumptions that pervade parties' assertions about communities of interest, partisan neutrality, or other claimed features of proposed remedies. *See generally* Leg. Remedial Response Br. This Court cannot choose a remedy before such factfinding and credibility determinations occur.

4. This Court's order of January 11, 2024, did not address any of Movants' reasons why reconsideration is warranted. Nor could it have addressed the factual disputes brought to light by parties' remedial proposals submitted on January 12, 2024. Those proposed

remedies move *millions* of Wisconsinites, unnecessarily disenfranchise hundreds of thousands of citizens, and contemplate extensive statewide changes that cannot possibly be analyzed by the parties, their experts, the Court-appointed consultants, and ultimately the Court in the amount of time provided by the Court and without the standard adversarial pretrial and trial processes that governs every other litigation in the State.

WHEREFORE, the Wisconsin Legislature, Respondent Senators, and Johnson Intervenor-Respondents request that the Court's order denying their motion for reconsideration be reconsidered and that this Court amend its remedial scheduling order to allow an appropriate amount of time for further factfinding through the procedures provided in Wisconsin's civil rules of procedure and a hearing before a neutral factfinder.

Dated this 22nd day of January, 2024.

Respectfully submitted,

Electronically Signed by
Jessie Augustyn

AUGUSTYN LAW LLC
JESSIE AUGUSTYN, SBN 1098680
1835 E. Edgewood Dr., Ste. 105-478
Appleton, WI 54913
715.255.0817
jessie@augustynlaw.com

Counsel for Respondents Senators Cabral-Guevara, Hutton, Jacque, Jagler, James, Kapenga, LeMahieu, Marklein, Nass, Quinn, Tomczyk & Wanggaard

LEHOTSKY KELLER COHN LLP
SCOTT A. KELLER*
SHANNON GRAMMEL*
GABRIELA GONZALEZ-ARAIZA*
200 Massachusetts Ave., NW, Ste. 700
Washington, DC 20001
512.693.8350
scott@lkcfirm.com

LEHOTSKY KELLER COHN LLP
MATTHEW H. FREDERICK*
408 West 11th St., Fifth Floor
Austin, TX 78701

Counsel for Wisconsin Legislature & Respondents Senators Cabral-Guevara, Hutton, Jacque, Jagler, James, Kapenga, LeMahieu, Marklein, Nass, Quinn, Tomczyk & Wanggaard

Electronically Signed by
Kevin M. St. John

BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Ste. 2200
Madison, WI 53718
608.216.7995
kstjohn@bellgiftos.com

CONSOVOY MCCARTHY PLLC
TAYLOR A.R. MEEHAN*
RACHAEL C. TUCKER*
DANIEL M. VITAGLIANO*
C'ZAR BERNSTEIN*
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
703.243.9423
taylor@consovoymccarthy.com

LAWFAIR LLC
ADAM K. MORTARA, SBN 1038391
40 Burton Hills Blvd., Ste. 200
Nashville, TN 37215
773.750.7154
mortara@lawfairllc.com

Counsel for Wisconsin Legislature

* *Admitted pro hac vice*

Additional Counsel Listed on Following Page

Electronically Signed by
Luke N. Berg

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.
RICHARD M. ESENBERG, SBN 1005622
LUKE N. BERG, SBN 1095644
NATHALIE E. BURMEISTER, SBN 1126820
330 E. Kilbourne Ave., Suite 725
Milwaukee, WI 53202
414.727.9455
Luke@will-law.org

Counsel for Intervenors-Respondents Billie Johnson, Chris Goebel, Ed Perkins, Eric O'Keefe, Joe Sanfelippo, Terry Moulton, Robert Jensen, Ron Zahn, Ruth Elmer, and Ruth Streck