

FILED

01-26-2024

CLERK OF WISCONSIN
SUPREME COURT

IN THE SUPREME COURT OF WISCONSIN

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 (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 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; ANDRÉ JACQUE, TIM CARPENTER, ROB HUTTON,
CHRIS LARSON, DEVIN LEMAHIEU, STEPHEN L. NASS, JOHN JAGLER, MARK SPREITZER,
HOWARD L. 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.

WRIGHT PETITIONERS' RESPONSE TO RESPONDENTS'
MOTION FOR RECONSIDERATION OF JANUARY 11 ORDER

Sarah A. Zylstra (Bar No. 1033159)
Tanner G. Jean-Louis (Bar No. 1122401)
Boardman Clark LLP
1 South Pinckney Street, Suite 410
Madison, WI 53701
(608) 257-9521
szylstra@boardmanclark.com
tjeanlouis@boardmanclark.com

Sam Hirsch*
Jessica Ring Amunson*
Jenner & Block LLP
1099 New York Avenue NW, Suite 900
Washington, DC 20001
(202) 639-6000
shirsch@jenner.com
jamunson@jenner.com
(additional counsel listed on inside cover)

Elizabeth B. Deutsch*
Arjun R. Ramamurti*
Jenner & Block LLP
1099 New York Avenue NW, Suite 900
Washington, DC 20001
(202) 639-6000
edeutsch@jenner.com
aramamurti@jenner.com

* *Appearing pro hac vice*

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	4
INTRODUCTION	5
BACKGROUND	5
ARGUMENT.....	7
I. The Litigation Provides Sufficient Time and Process	8
II. The Materials Filed and Exchanged Among the Parties on January 12 and 22 Do Not Require Additional Factfinding.....	10
A. The Volume and Nature of Data Exchanged on January 12 Evinces Transparency and Fairness	11
B. Respondents' Specific Examples of Purported Factual Disputes Similarly Do Not Require Additional Time or Process	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES

<i>Allen v. Georgia</i> , 166 U.S. 138 (1897)	9
<i>Anthony Gagliano & Co. v. Openfirst, LLC</i> , 2015 WI 13, 360 Wis. 2d 1, 860 N.W.2d 855.....	7
<i>Caperton v. A.T. Massey Coal Co.</i> , 556 U.S. 868 (2009).....	9
<i>Carter v. Chapman</i> , 270 A.3d 444 (Pa.), <i>cert. denied</i> , 143 S. Ct. 102 (2022)	13
<i>Goldberg v. Kelly</i> , N397 U.S. 254 (1970)	8
<i>Greene v. McElroy</i> , 360 U.S. 474 (1959).....	8
<i>Jordan v. Massachusetts</i> , 225 U.S. 167 (1912)	9
<i>League of Women Voters of Pennsylvania v. Commonwealth</i> , 175 A.3d 282 (Pa. 2018)	9-10
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	9
<i>Nash v. Auburn University</i> , 812 F.2d 655 (11th Cir. 1987)	8
<i>South Carolina v. Katzenbach</i> , 383 U.S. 301 (1966)	10
<i>State v. Henley</i> , 2011 WI 67, 338 Wis. 2d 610, 802 N.W.2d 175.....	7
<i>State v. Saunders</i> , 2002 WI 119, 256 Wis. 2d 59, 652 N.W.2d 391.....	7

STATUTES

Wis. Stat. § 809.64	7
---------------------------	---

OTHER MATERIALS

Order, <i>Common Cause v. Lewis</i> , No. 18 CVS 014001 (N.C. Super. Ct. Sept. 13, 2019).....	10
Order on Submission of Remedial Plans for Court Review, <i>Harper v. Hall</i> , No. 21-cvs-015426 (N.C. Super. Ct. Feb. 8, 2022)	10
Order, <i>Johnson v. Wisconsin Elections Commission</i> , No. 2021AP1450-OA (Wis. Nov. 17, 2021)	10
Proposed Joint Discovery Plan, <i>Johnson v. Wisconsin Elections Commission</i> , No. 2021AP1450-OA (Wis. Dec. 3, 2021).....	10
Wis. Supreme Court Internal Operating Procedure III.J.....	7

INTRODUCTION

For yet another time, the Legislature, Republican Senators, and the Johnson Intervenors (collectively, “Respondents”) attempt to repackage their disagreement with this Court’s decision to take original jurisdiction of this case into complaints about process. Once again, Respondents claim that the Court’s remedial procedures provide insufficient time and opportunity to develop the record and resolve purported factual disputes to Respondents’ satisfaction. Once again, this Court should reject that argument. The only thing that has changed since Respondents’ first motion for reconsideration is that the parties have now filed their remedial proposals, supporting materials, and responsive briefs. These productions evince a fair, thorough, and transparent process. Respondents’ motion for reconsideration of this Court’s denial of their prior motion for reconsideration is meritless.

BACKGROUND

On December 28, 2023, Respondents filed their first motion for reconsideration of the Court’s December 22 decision and Scheduling Order. That motion repackaged Respondents’ complaints about the Court’s decision to take original jurisdiction of this case into federal due-process arguments and relitigated their arguments about Justice Protasiewicz’s

participation in this case. *See* First Mot. for Reconsideration at 32–42. Respondents also challenged the Court’s decision and Scheduling Order as providing insufficient time and process to litigate this case consistent with the requirements of federal due process. *Id.* at 42–58. The Wright Petitioners and other parties filed responses on January 4, 2024. This Court denied the reconsideration motion on January 11, 2024. *See* Order, *Clarke v. Wis. Elections Comm’n*, No. 2023AP1399-OA (Wis. Jan. 11, 2024).

On January 12, 2024 (consistent with the Court’s December 22 decision, its Scheduling Order, and a technical-specifications memorandum from the Court-appointed consultants), the parties filed with the Court, served on the consultants, and exchanged with one another their proposed remedial maps, expert reports, and briefs, as well as “digital redistricting data that ha[d] not previously been filed with the court” and “other supporting digital files.” Scheduling Order at 2. The parties also exchanged “all other data and inputs that their experts used in their remedial analyses.” *Id.* The parties then proceeded to file response briefs on January 22, 2024 (again, consistent with the Court’s Scheduling Order). The Legislature and Republican Senators also moved for and were granted leave to file responsive expert reports along with their brief. Legislature’s Motion

for Leave to File Responsive Expert Reports; Order, *Clarke v. Wis. Elections Comm'n*, No. 2023AP1399-OA (Wis. Jan. 24, 2024).

On the same day the parties filed their response briefs, Respondents also filed this motion—their second for reconsideration. Respondents now seek reconsideration of the Court’s January 11 Order “denying [Respondents’] motion for reconsideration.” Mot. for Reconsideration at 3.

ARGUMENT

Reconsideration is warranted “only when the court has overlooked controlling legal precedent or important policy considerations or has overlooked or misconstrued a controlling or significant fact appearing in the record.” Wis. Supreme Court Internal Operating Procedure III.J; *see generally* Wis. Stat. § 809.64.¹ Once again, no ground for reconsideration exists. First, for the same reasons the Wright Petitioners previously explained, due process does not require more time or different procedures.

¹ *See, e.g., Anthony Gagliano & Co. v. Openfirst, LLC*, 2015 WI 13, ¶1, 360 Wis. 2d 1, 3, 860 N.W.2d 855, 855 (2014) (Prosser, J., concurring) (“The court has established strict standards for reconsideration and they are seldom met.” (footnote omitted)); *State v. Henley*, 2011 WI 67, ¶4, 338 Wis. 2d 610, 613, 802 N.W.2d 175, 177 (per curiam) (denying motion for reconsideration because the motion “cites no controlling legal precedent, important policy consideration or controlling or significant fact of record that the court’s ... opinion overlooked”); *State v. Saunders*, 2002 WI 119, ¶4, 256 Wis. 2d 59, 61, 652 N.W.2d 391, 392 (per curiam) (Abrahamson, C.J., concurring) (“Most motions for reconsideration are denied because they re-argue issues already argued and considered.”).

Second, the materials filed and exchanged by the parties on January 12 and January 22 evince a fair and transparent process.

I. The Litigation Provides Sufficient Time and Process.

Respondents renew their arguments that, as a matter of federal due process, “factual disagreements must be tried and resolved by a neutral factfinder” through trial-like proceedings including cross-examination of expert witnesses, and that “the Court must give [the] parties a full and fair opportunity to litigate this case in a way that the current schedule does not allow.” Mot. for Reconsideration at 4–5. But, as this Court has already held in denying reconsideration, the Court’s Scheduling Order affords adequate time and process.

As the Wright Petitioners previously explained and Respondents fail to dispute, there is no freestanding right in civil litigation to the “adversarial pretrial and trial processes” Respondents seek. Mot. for Reconsideration at 6; *see* Wright Petitioners’ Response to Respondents’ Motion for Reconsideration at 18 (collecting cases). Respondents’ arguments about cross-examination suffer the same basic problem—their cited cases do not establish that parties to civil litigation have a right to this (or any specific) trial procedure. *See* Mot. for Reconsideration at 4 (citing *Greene v. McElroy*, 360 U.S. 474, 496–99 & n.25 (1959); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)); *see also, e.g., Nash v. Auburn Univ.*, 812 F.2d 655, 663–64 (11th Cir.

1987) (explaining that while cross-examination may be required in some contexts, like termination of welfare benefits, in most other contexts “cross-examination of witnesses and a full adversary proceeding” is not required).² Instead, the case law establishes a basic rule: Due process requires notice and “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted).

That is precisely what the Court’s Scheduling Order provides. All parties had the opportunity to: propose remedial maps; file briefs; submit expert reports; review all data and inputs used by other parties’ experts; respond to other parties’ submissions; and (on February 8) respond to the consultants’ report. *See* Scheduling Order at 3–4. Procedures like this are common in redistricting cases. *See, e.g., League of Women Voters of Pa. v.*

² The remaining due-process cases Respondents cite do not address what forms of pretrial and trial procedures are necessary to satisfy due process. They instead either support the general proposition that “if the supreme court of a state has acted in consonance with the constitutional laws of a state and its own procedure”—which the Court has done here—“it could only be in very exceptional circumstances that [the U.S. Supreme Court] would feel justified in saying that there had been a failure of due legal process,” *Allen v. Georgia*, 166 U.S. 138, 140 (1897); *Jordan v. Massachusetts*, 225 U.S. 167, 174–75 (1912), or relate to Respondents’ continued attempts to litigate Justice Protasiewicz’s decision not to recuse in this case, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009) (discussing recusal).

Commonwealth of Pa., 175 A.3d 282, 284 (Pa. Jan. 22, 2018) (per curiam); Order, *Common Cause v. Lewis*, No. 18 CVS 014001 (N.C. Super. Ct. Sept. 13, 2019); Order on Submission of Remedial Plans for Court Review, *Harper v. Hall*, No. 21-cvs-015426 (N.C. Super. Ct. Feb. 8, 2022).

Indeed, when this Court adopted similar procedures on a similar timeline in the *Johnson* litigation, neither the Legislature nor the Johnson Intervenors said *anything* about any supposed due-process issues.³ There, as here, there were no expert depositions, no pretrial discovery, and no trial, and the Court did not even enlist expert consultants to evaluate the maps quantitatively. See Order at 2, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Nov. 17, 2021); Proposed Joint Discovery Plan, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Dec. 3, 2021). There, as here, there was no due-process problem.

II. The Materials Filed and Exchanged Among the Parties on January 12 and 22 Do Not Require Additional Factfinding.

Respondents insist that the parties' submission of remedial proposals and "16 GB of underlying source data" changes matters. See Mot. for Reconsideration at 4. Not so. Neither the volume of the data nor Respondents' supposed factual disputes raises any due-process problem.

³ Of course, the Legislature, because it is not an individual, has no due-process rights. See *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966).

**A. The Volume and Nature of Data Exchanged on January 12
Evinces Transparency and Fairness.**

Respondents suggest that, because the parties produced and exchanged many bytes of information, this Court's procedures are insufficient to resolve what must be inherent factual disputes. That is wrong.

To begin, the volume of materials exchanged in this litigation makes this case *more* procedurally sound, not less. Wright Petitioners, for example, disclosed on January 12 to the Court, the consultants, and the parties: their proposed map; a brief in support of the map; two expert reports; two appendices containing data comparing the Wright Map to the 2022 Map; the “digital redistricting data” and “other supporting digital files” specified in the Scheduling Order; *and* “all other data and inputs that their experts used in their remedial analyses.” Scheduling Order at 2–3. This complete disclosure shows a transparent and robust process, not a process problem.

What's more, a substantial portion of the “16 GB” consists of matters of public record. Wright Petitioners' contributions include, for instance, the Census population for each of Wisconsin's 200,000 Census blocks and the votes cast in all 19 recent statewide general elections in each of Wisconsin's 7,000 wards. The data provided by other parties are similar.

The purpose of the parties' extensive production is to facilitate a fair process by allowing the parties and the Court's expert consultants to evaluate all the maps according to criteria specifically defined by the Court. All parties will then have an opportunity to file briefs in response to the evaluation by the consultants. There is no reason that different "adversarial pretrial and trial processes" are necessary given these procedures.

B. Respondents' Specific Examples of Purported Factual Disputes Similarly Do Not Require Additional Time or Process.

Respondents also claim there are specific factual disputes created by the January 12 submissions. *See* Mot. for Reconsideration at 5; Response Remedial Brief of Legislature at 28–37. None of these arguments is persuasive.

First, Respondents again argue that the parties made partisan-gerrymandering claims that this Court declined to hear due to the "extensive fact-finding" they could require. Response Remedial Brief of Legislature at 28 (quoting *Clarke v. Wis. Elections Comm'n*, 2023 WI 70, 995 N.W.2d 779, 781). This argument (once more) mischaracterizes the parties' arguments for *politically neutral remedies*, arguments that avoid the more difficult *liability* question—"How much partisanship is too much?"—that partisan-gerrymandering claims implicate. *See* Wright Petitioners' Response to Respondents' Motion for Reconsideration at 17.

Second, the fact that the parties may use slightly different metrics and models to evaluate proposed remedial maps' neutrality and partisan impact does not create material factual disputes. *See* Response Remedial Brief of Legislature at 29–34. As explained above, all parties have all the data, replication code, and expert analysis of each other party and can therefore perform their own analyses. And the Court's expert consultants have the means of running the same analyses on all maps. *See* Wright Petitioners' Response to Respondents' Motion for Reconsideration at 16–17 (explaining that the Court need not conduct extensive factfinding to resolve political neutrality because it can simply look to well-established quantitative metrics); *Carter v. Chapman*, 270 A.3d 444, 470 (Pa.) (discussing the well-established “metrics [that] have been developed to allow for objective evaluation of proposed districting plans to determine their partisan fairness”), *cert. denied*, 143 S. Ct. 102 (2022).

Third, to the extent the Court is concerned about any of the Legislature's grab-bag of “[o]ther facets of proposed remedies [that] raise still more fact questions,” Response Remedial Brief of Legislature at 34, after the consultants generate a report, the Court still has the opportunity to address these issues through oral argument or otherwise.

* * *

Respondents' second motion for reconsideration is, like their first, a transparent attempt to transform a state court's application of state law using state procedures into a purported federal due-process problem. The Court should, again, reject Respondents' effort.

CONCLUSION

The Court should deny Respondents' second motion for reconsideration.

Dated: January 26, 2024

Respectfully submitted,

Electronically signed by

Sarah A. Zylstra

Sarah A. Zylstra (Bar No. 1033159)

Tanner G. Jean-Louis

(Bar No. 1122401)

Boardman Clark LLP

1 South Pinckney Street

Suite 410

Madison, WI 53701

(608) 257-9521

szylstra@boardmanclark.com

tjeanlouis@boardmanclark.com

Sam Hirsch*

Jessica Ring Amunson*

Elizabeth B. Deutsch*

Arjun R. Ramamurti*

Jenner & Block LLP

1099 New York Avenue NW

Suite 900

Washington, DC 20001

(202) 639-6000

shirsch@jenner.com

jamunson@jenner.com

edeutsch@jenner.com

aramamurti@jenner.com

* *Appearing pro hac vice*

CERTIFICATE OF COMPLIANCE

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 2,018 words.

Dated: January 26, 2024.

Electronically signed by

Sarah A. Zylstra

Sarah A. Zylstra

(WI Bar No. 1033159)

Boardman Clark LLP

1 South Pinckney Street

Suite 410

Madison, WI 53701

(608) 257-9521