

FILED
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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

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 (PARD) 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
Election 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,

Intervenor-Respondents.

**GOVERNOR TONY EVERS' OPPOSITION TO
INTERVENORS-RESPONDENTS' SECOND MOTION
FOR RECONSIDERATION**

Respondents' second reconsideration motion repeats and compounds the issues that were fatal to their first motion.

First, Respondents do not identify anything about this Court's schedule or remedial process that violates federal due process. Instead, Respondents' real interest seems to be delay—with an aim to impose unconstitutional districts on the people of Wisconsin for still another election cycle. (*See* Resp. Remedial Br. of Legislature 28.) That clearly is not a reason to reconsider the Court's decision. (*See* Opening Br. of Legislature 60–62; Resp'ts' First Mot. for Recons. 4–5; Resp'ts' Second Mot. for Recons. 4–5.) Apart from some additional case law that they failed to cite previously, Respondents' only new material is an incorrect and irrelevant assertion that the parties have not adequately explained the basis for their proposed maps. (*See* Resp. Remedial Br. of Legislature 28; Resp'ts' Second Mot. for Recons. 4–6.) At no point have Respondents identified—let alone satisfied—the standard that actually governs their purported due process claim. That alone is dispositive of Respondents' second motion.

Second, Respondents' second reconsideration motion is procedurally deficient. It improperly requests reconsideration of a denial of reconsideration—something this Court does not permit. And like in the first reconsideration motion, Respondents do not pass the high bar for granting reconsideration. Those flaws each independently warrant denial of the second motion.

ARGUMENT

I. Respondents' second reconsideration motion fails to raise a proper due process claim.

Just as they did in their failed first reconsideration motion, Respondents do not address the standard for their assertion of a due process violation. Instead, Respondents again assert that their rights are being infringed because the “current schedule does not allow” them their chosen amount of time to litigate this case. (Resp'ts' Second Mot. for Recons. 5.)

This argument is hard to square with the amount of time they have spent on repeated reconsideration motions amid this allegedly truncated schedule.

And more fundamentally, due process requires only “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Fed. Deposit Ins. Corp. v. Morley*, 915 F.2d 1517, 1522 (11th Cir. 1990). “Parties entitled to such process cannot, however, choose the precise process they desire.” *Id.* As the Governor explained in opposing Respondents' first reconsideration motion, the Court's remedial proceedings provide fair, reliable, and adequate process. (*See* Governor's Br. in Opp. to First Mot. for Recons. 17-23.)¹ Moreover, since the Court denied Respondents' first motion, Respondents' opportunities to meaningfully be heard in this litigation have only grown: Respondents sought and were granted leave to file two expansive responsive expert reports totaling 300 additional pages of analysis.

The three groups of cases on which Respondents now rely—beyond the inapposite cases they already cited in their first motion—do not further their argument. First, Respondents cite *Prosser v. Elections Bd.*, 793 F. Supp. 859,

¹ The Governor incorporates by reference his opposition to Respondents' first reconsideration motion.

868 (W.D. Wis. 1992), for the proposition that “[e]xperts must be put to the test of cross-examination.” (Resp’ts’ Second Mot. for Recons. 4.) *Prosser* does not mention the Due Process Clause or due process at all, however. Rather, the *Prosser* court merely noted that the opinions of one expert in that case were undermined during his cross-examination. 793 F. Supp. at 868. Here, the Court’s procedures provide numerous opportunities for the parties to test and attempt to undermine the conclusions of the various experts, as well as the Court having the added benefit of its consultants’ insights when it assesses the parties’ submissions, including experts’ representations.

Second, Respondents cite *Greene v. McElroy*, 360 U.S. 474, 496–99 & n.25 (1959), and *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970), to assert that “factual disagreements must be tried and resolved by a neutral factfinder in this case.” (Resp’ts’ Second Mot. for Recons. 4.) But Respondents identify no specific factual “disagreements” in this case. Even if there were any, this Court is a neutral factfinder that will resolve them, with the aid of its consultants’ report and the parties’ voluminous submissions. The authority cited by Respondents does not in any way suggest that the procedures currently in place violate due process.

Greene is not a due process case—it addressed whether the President or Congress had delegated authority to the Department of Defense to administer a security clearance program in whatever way it saw fit. *See* 360 U.S. at 493. In dicta regarding the historical foundations for certain types of administrative procedural safeguards, *Greene* noted that “confrontation and cross-examination” are basic ingredients in criminal trials under the Sixth Amendment and then discussed similar procedures in “cases where administrative and regulatory actions were under scrutiny.” *Id.* at 496–97 & n.25. *Greene* is not relevant to this case.

Goldberg is likewise off-point. Also an administrative case, it involved a welfare recipient challenging the state's termination of benefits without any pre-termination process whatsoever. *See* 397 U.S. at 260 (“The constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing before the termination of benefits.”). Conversely, here all parties will have had the benefit of considerable process, including (at least) submission of multiple rounds of briefing, proposed maps, expert reports, response reports, a report from the Court's consultants, and briefs in response to the consultants' report, all before the Court makes its final decision.²

Third, Respondents cite a string of cases for the proposition that the alleged harm to their due process rights is “compounded by the Court exempting this case from normal procedural rules and judicial impartiality.” (Resp'ts' Second Mot. for Recons. 4.) Again, Respondents' premise—that the Court is flouting “normal procedural rules”—is plainly incorrect. As the Governor demonstrated in his opposition to Respondents' first reconsideration motion, the Court implemented even more procedural safeguards in this redistricting case than it did in the *Johnson* redistricting litigation just a few years ago. (*See* Governor's Br. in Opp. to First Mot. for Recons. 20–22.)

Relatedly, many of the same issues that Respondents assert require additional process here—such as “how [the parties'] proposals were drawn,” “why certain changes were made,” “[w]hy redraw Milwaukee-area districts,” and “[w]ho is right about ‘communities of interest’ and does it matter,” (Resp. Remedial Br. of Legislature 28)—similarly had to be

² Respondents have also requested oral argument on the parties' proposed maps and supporting submissions. The Governor stands ready to participate in any such argument if the Court would find it useful.

answered by the *Johnson* Court. So too with questions about “experts’ methodology.” (Resp’ts’ Second Mot. for Recons. 5.) But just as the *Johnson* Court’s adoption of Respondents’ maps did not violate any party’s due process rights, neither will this Court’s adoption of maps violate Respondents’ due process rights.

Simply put, Respondents’ request for their *preferred* process comes nowhere near a violation of *due* process.

II. Respondents’ second reconsideration motion is procedurally flawed.

This second motion should also be denied because “this court does not reconsider denials of reconsiderations.” *City of Edgerton v. Gen. Cas. Co. of Wis.*, 190 Wis. 2d 510, 513, 527 N.W.2d 305 (1995).

Further, in their second reconsideration motion, like in their first, Respondents do not identify any new evidence or manifest error of law or fact in this Court’s rejection of their arguments, as is required to support a motion for reconsideration. *See Bauer v. Wis. Energy Corp.*, 2022 WI 11, ¶ 13, 400 Wis. 2d 592, 970 N.W.2d 243. Because motions for reconsideration are “not intended to be an opportunity to reargue issues already argued and considered.” Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 22.4 (2014), Respondents’ second reconsideration motion fails for the same reasons as the first.

CONCLUSION

Respondents' second reconsideration motion covers the same ground as the first. It not only fails for the same reasons, but also for the added reason that Respondents repetitive litigation tactics are prohibited. This Court should deny the motion.

Dated this 26th day of January 2024.

Respectfully submitted,

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