

FILED

02-08-2024

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 LEAVE TO SUBPOENA CONSULTANTS FOR DEPOSITIONS AND DOCUMENTS OR, ALTERNATIVELY, TO STRIKE ABSENT FURTHER FACTFINDING 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 leave to subpoena Court-appointed Consultants Drs. Bernard Grofman and Jonathan Cervas for depositions and documents, pursuant to Wis. Stat. §§907.06(1) and 809.14. Further discovery is necessary for resolution of various factual disputes set forth in the Legislature and Senator Respondents' Response to Consultants' Report filed today and Response Remedial Brief filed January 22, 2024. In the alternative, should the Court consider the Consultants referees, pursuant to Wis. Stat. §§805.06(5)(b) and 809.14, Movants seek to strike the Consultants' report and otherwise object to the Court's acceptance of any findings of fact made in their report.

In support of this motion and objection, Movants rely on their briefs and expert reports submitted on January 12, 2024, January 22, 2024, and February 8, 2024, and the following:

1. On December 22, 2023, the Court entered a Scheduling Order governing remedial proceedings, including parties' submissions of proposed remedial maps with supporting briefs and expert reports. Scheduling Order 1-3. The Court ordered that other than data used by experts, "[n]o further discovery shall be permitted." *Id.* at 3.

2. The Court also "appoint[ed] the team of Dr. Bernard Grofman and Dr. Jonathan Cervas to serve as the court's consultants in this matter" and ordered that they "file a written report ... evaluat[ing] each of the parties' submissions." *Id.* at 1, 3-4. The Court ordered that other than data used by the Consultants, "[n]o further discovery of Dr. Grofman and Dr. Cervas shall be permitted." *Id.* at 4.

3. On January 12, 2024, parties submitted proposed remedial plans accompanied by briefs and expert reports. Submissions contained extensive factual assertions and voluminous data related to parties' remedial proposals.

4. On January 22, 2024, the Legislature and Respondent Senators moved for leave to file responsive expert reports with their response remedial brief to assist the Court and the Consultants in evaluating proposed remedial maps. The responsive expert reports identify how several proposed remedies move *millions* of Wisconsin-ites, are not “neutral,” pair droves of Republican incumbents, and unnecessarily disenfranchise an unprecedented number of Wisconsin-ites. The Court granted the motion January 24.

5. As explained in the Legislature and Respondent Senators’ Response Remedial Brief (at 15-21, 28-37), parties’ proposed remedial maps and expert reports raise countless questions that demand further discovery, including cross-examination, of experts and a hearing to resolve factual disputes.

6. On February 1, 2024, the Consultants filed their report, finding the Legislature’s and Johnson Intervenors’ proposals are “partisan gerrymanders” and concluding only the four proposals submitted by Democrats—including one that is not even contiguous—warrant further consideration. As explained in the Legislature’s Response

to Consultants' Report, that report raises questions about the fundamental fairness of these proceedings, *ex parte* communications, disregard for parties' principal arguments and their experts, reliance on extra-record evidence, conclusions about "gerrymandering," and more.

7. The basis for the Consultants' appointment as either referees or experts was initially unclear. Scheduling Order 5 (Grassl Bradley, J., dissenting). Parties have repeatedly asked for clarification, including reconsideration of this Court's denials of discovery and a hearing for factfinding. *See Ehlinger v. Hauser*, 2010 WI 54, ¶201, 325 Wis. 2d 287, 785 N.W.2d 328 (Ziegler, J., concurring in part, dissenting in part) (courts "should always ensure that the parties fully understand the role and scope of the appointee, and the appointee's involvement should never effectuate as a denial of the parties' right to fully develop the case and make a complete record").

8. The role the Consultants are playing is clearer now that the parties have seen their report. It is unmistakably an expert report. It provides a "social science perspective" on parties' submissions.

Report 24-25. From that, it appears the Consultants are serving as Court-appointed experts and further discovery, including cross-examination, is warranted under Wisconsin law. *See* Wis. Stat. §907.06(1). Such discovery is necessary to understand the questions their report raises and to discern the basis for their conclusions. Because they are Court-appointed experts, “deposition[s] may be taken by any party” and they “shall be subject to cross-examination by each party.” *Id.*

9. Due process entitles parties to cross-examination of the Court’s Consultants. *See, e.g., Greene v. McElroy*, 360 U.S. 474, 496-99 & n.25 (1959) (“confrontation and cross-examination are basic ingredients in a fair trial”); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (“where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses”); *Edgar v. K.L.*, 93 F.3d 256, 257, 262 (7th Cir. 1996) (per curiam) (disqualifying judge for *ex parte* communications with court-appointed expert); *Ehlinger*, 2010 WI 54, ¶204 (Ziegler, J., concurring in part, dissenting in part) (“The statutes providing for court-appointed

referees and expert witnesses are rife with procedural safeguards that ensure litigants due process of law.”).

10. Given the “social science perspective” advanced in the Consultants’ report, it does not appear the Court intended them to be referees. Nevertheless, should the Court consider the Consultants’ report a referee’s report, Movants move to strike the report and otherwise object to its adoption as Wisconsin law allows. *See* Wis. Stat. §805.06(5)(b).

11. First, referees are required to call a hearing. *Id.* §805.06(4)(a). The Consultants did not.

12. Second, parties are entitled to bring witnesses before referees. *Id.* §805.06(4)(b). The Court’s Scheduling Order did not permit that, and to date, has not permitted any examination of witnesses. This case requires an evidentiary hearing to resolve factual disputes. *See, e.g., Indus. Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶¶66 n.13, 299 Wis. 2d 81, 726 N.W.2d 898 (“an evidentiary hearing, rather than simply oral argument based on briefs, affidavits, and depositions, is necessary to resolve the [factual] disputes”); *Garfoot v. Fireman’s Fund*

Ins. Co., 228 Wis. 2d 707, 725, 599 N.W.2d 411 (Ct. App. 1999) (“[I]f there are factual disputes, or conflicting reasonable inferences from undisputed facts, an evidentiary hearing will be necessary.”); *accord Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶20, 249 Wis. 2d 706, 639 N.W.2d 537 (“adjudication of redistricting litigation in accordance with contemporary legal standards” requires “at a minimum ... some form of factfinding (if not a full-scale trial)”).

13. Third, a referee may only exercise power in an order of reference. *State ex rel. Universal Processing Servs. of Wis., LLC v. Cir. Ct. of Milwaukee Cnty.*, 2017 WI 26, ¶64, 374 Wis. 2d 26, 892 N.W.2d 267. Here, the Consultants have wandered far afield of the Scheduling Order, opining on “partisan gerrymanders” (which was not a criteria in the Court’s December 22, 2023, opinion), consulting sources outside the record, and committing other irregularities, as explained in the Legislature’s Response to Consultants’ Report at 9-18.

14. Fourth, the Consultants’ methodology (mirroring only the methodology by Democrats) and factual conclusions are clearly erroneous. These critiques and the factual conclusions are addressed

in the Legislature's expert reports and briefs filed January 12, January 22, and today. *See* Leg. Opening Remedial App.183a-228a (Trende); Leg. Resp. Remedial App.11a-20a (Gaines); *id.* at 43a-106a (Trende). At a minimum, these conclusions must be subject to further factfinding. *Supra* ¶¶11-12.

15. Fifth, the Court cannot delegate its “judicial power” to the Consultants, who offer only their “social science perspective.” As far as their “partisan gerrymandering” conclusions—resulting in the exclusion of Movants’ proposed remedies—“[t]he people have never consented to the Wisconsin judiciary deciding what constitutes a ‘fair’ partisan divide.” *Johnson v. Wis. Elections Comm’n (Johnson I)*, 2021 WI 87, ¶45, 399 Wis. 2d 623, 967 N.W.2d 469.

16. In light of the factual issues dominating parties’ filings and the Consultants’ report, and for the reasons given in the Legislature and Senator Respondents’ Response to Consultants’ Report filed today and Response Remedial Brief filed January 22, the Court must *either* permit further discovery, including cross-examination, of the

Court's Consultants under §907.06 *or* afford the parties their procedural rights under §805.06.¹

17. Further scrutiny of the Court's Consultants will advance the Court's goal in selecting what it believes to be the best remedial proposal.

WHEREFORE, the Wisconsin Legislature, Respondent Senators, and Johnson Intervenors request that the Court grant leave to subpoena Drs. Bernard Grofman and Jonathan Cervas for depositions and their documents. In the alternative, if the Court determines the Consultants are referees, the Legislature moves to strike their report and otherwise objects to the adoption of any finding contained in their report without further procedures required under Wisconsin law.

¹ Movants previously requested the Court reconsider its Scheduling Order to "allow an appropriate amount of time for further factfinding through the procedures provided in Wisconsin's civil rules of procedure." Leg. Mot. Reconsideration Schedule 6 (Jan. 22, 2024). The motion remains pending.

Dated this 8th day of February, 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