

FILED
02-13-2024
CLERK OF WISCONSIN
SUPREME COURT

IN THE SUPREME COURT OF WISCONSIN

No. 2023AP1399

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; 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.

**JOINT RESPONSE OF PETITIONERS, GOVERNOR TONY EVERS,
SENATORS CARPENTER *ET AL.*, AND WRIGHT INTERVENORS TO
MOTION FOR LEAVE TO SUBPOENA CONSULTANTS OR,
ALTERNATIVELY, TO STRIKE**

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INTRODUCTION

No state or federal authority merits—much less requires—this Court to, at this late hour, revisit its December 22, 2023 scheduling order and permit Respondents and Intervenor-Respondents (“Respondents”) to depose the Court’s appointed consultants, Dr. Bernard Grofman and Dr. Jonathan Cervas. Respondents’ motion misapplies the Wisconsin law empowering this Court to appoint them. Moreover, the procedures prescribed by the Court’s December 22 order, under which the parties have been operating, have provided a full and fair opportunity for all parties to address the remedial issues in this case. Those procedures furthermore are completely in line with the practice of other state and federal courts that similarly have used consultants to assist them in evaluating proposed remedial legislative district maps. Similarly, because Drs. Grofman and Cervas were properly appointed consultants, and not referees subject to the procedures described in Wis. Stat. § 805.06, there is no cause to strike their report. The Court should deny Respondents’ latest attempt to derail this case by—yet again—asking this Court to reconsider its December 22 order and procedures.

ARGUMENT

I. The existing procedures fully comport with state law.

Respondents’ motion fundamentally misstates this Court’s authority to appoint consultants, like Drs. Grofman and Cervas, to assist it. The Court’s engagement of Drs. Grofman and Cervas as consultants in this matter easily falls within its inherent powers, and none of the procedures that regulate a circuit court

referee or court-appointed expert under Wis. Stat. §§ 805.06 and 907.06 applies here.

The Court has general authority to enlist whatever assistance it requires to select a new, constitutional map. *See State ex rel. Universal Processing Servs. of Wis., LLC v. Circuit Court*, 2017 WI 26, ¶59 & n.24, 374 Wis. 2d 26, 892 N.W.2d 267 (quoting *Ex Parte Peterson*, 253 U.S. 300, 312 (1920)), which held that courts have “inherent power to provide themselves with appropriate instruments required for the performance of their duties,” including “appoint[ing] persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause”); *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, ¶19, 595 N.W.2d 635 (1999) (explaining that Wisconsin’s courts have “inherent authority” to act to ensure “the orderly and efficient exercise of [their] jurisdiction”); *Barland v. Eau Claire Cnty.*, 216 Wis. 2d 560, ¶¶25-26, 575 N.W.2d 691 (1998). Appointing technical experts as consultants or advisors in redistricting cases is a routine exercise of courts’ inherent authority. *See, e.g.*, Order at 3–4, *Common Cause v. Lewis*, No. 18 CVS 014001 (N.C. Super. Ct. Sept. 13, 2019); Order, *Bethune-Hill v. Va. State Bd. of Elections*, No. 14-cv-00852 (E.D. Va. Oct. 18, 2018); Order at 2, *League of Women Voters of Pa. v. Commonwealth*, No. 159 MM 2017 (Pa. Jan. 26, 2018).

Moreover, the Court’s authority over original actions is necessarily flexible and broad, and, as the Court with constitutionally granted superintending power over the judiciary, *see* Wis. Const. art. VII, § 3, the Court has the authority to set

the procedures that govern its exercise of its original action. *See, e.g.*, Wis. Stat. § (Rule) 809.70(3) (upon granting petition for original action, Court “may establish a schedule for pleading, briefing and submission with or without oral argument.”). The Court’s appointment of consultants to assist it in evaluating the parties’ proposed maps is well within the bounds of this broad authority.

Respondents nonetheless claim they are entitled to relief by operation of Wis. Stat. § 805.06, a provision of Wisconsin’s discovery rules setting forth the ability of parties to subpoena witnesses and to have a hearing, and Wis. Stat. § 907.06, a provision of Wisconsin’s rules of evidence pertaining to a court’s ability to appoint an expert witness. But these statutes do not apply to, much less govern, the authority this Court has exercised in appointing Drs. Grofman and Cervas.¹

First, Wis. Stat. § 805.06 does not apply here because it governs appointment of referees by *circuit courts* to aid them in trials. Section 805.06 is part of Chapter 805 of the Wisconsin Statutes, titled “Civil Procedure—Trials.” *See State v. Lopez*, 2019 WI 101, ¶26, 389 Wis. 2d 156, 936 N.W.2d 125 (explaining that statute titles aid in interpreting statutory meaning and context). The procedures of Chapter 805—including the ability of parties to subpoena witnesses and to have a hearing—do not govern consultants appointed by the Supreme Court. Indeed, Wisconsin law has a separate provision authorizing the Court to appoint referees to aid in adjudicating matters over which it exercises original jurisdiction, Wis. Stat. § 751.09, which

¹ Similarly, this Court’s authority under Wis. Stat. § 751.09 is not constrained by the procedures set forth in Wis. Stat. §§ 805.06 or 907.06.

would be superfluous if § 805.06 *also* applied to original actions in the Supreme Court. Respondents do not mention this statutory provision in their motion.

Even assuming that Wis. Stat. § 805.06 applies (which it does not), the Court always has discretion to “specify or limit” the powers of its consultants or referees, or to “direct” them to “report only upon particular issues or to do or perform particular acts.” Wis. Stat. § 805.06(3); *see also* Wis. Stat. 805.06(4)(a) (contemplating that a hearing may not take place if “the order of reference otherwise provides”). The Court has appropriately exercised that discretion to properly scope the consultants’ work here. All parties have had the opportunity to respond to the consultants’ report—which is, in essence, all the procedure that Wis. Stat. § 805.06 provides.

Second, Wis. Stat. § 907.06 is part of Wisconsin’s rules of evidence; its procedural requirements, like the opportunity for cross-examination, apply only *when a court has appointed an expert witness*. Here, the Court plainly did not appoint Drs. Grofman and Cervas as expert witnesses—it appointed them as consultants to help evaluate the parties’ remedial proposals. The consultants’ report confirms this role: as discussed in greater detail below, *see infra* Part III, the consultants did not generate new opinions or undertake work similar to that of the parties’ experts.²

² Respondents also cite Wis. Stat. § 809.14, *see* Mot. at 3, which is the rule of appellate procedure requiring a party seeking relief to file a motion for that relief, but that has no substantive applicability here.

In sum, this Court appointed Drs. Grofman and Cervas as consultants to aid it in evaluating the parties' proposed maps pursuant to its inherent authority, as countless other courts have done, and its broad power to structure proceedings in original actions. It did not appoint the consultants as referees to aid at trial or as expert witnesses, and so the procedural requirements that govern such appointments do not apply here.

II. The existing procedure fully comports with due process.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *see also Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2001 WI 65, ¶48, 244 Wis. 2d 333, 627 N.W.2d 866 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970)) ("The fundamental requisite of due process of law is the opportunity to be heard."). "Procedures providing less than a full evidentiary hearing have often satisfied due process." *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.* In many contexts, including contexts where facts are disputed, "[t]he opportunity to brief the issue fully satisfies due process requirements." *Pac. Harbor Cap., Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000). The cases on which movants rely are readily distinguishable. *See, e.g., Goldberg*, 397 U.S. at 264 (the "crucial factor" why due process required a pre-termination evidentiary hearing in the context of cutting off welfare benefits but not other

contexts was that “termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits”).

The type of proceeding that Respondents’ motion envisions—a subpoena for deposition and documents after briefing has concluded—is not a fundamental part of due process. *See e.g. Nash v. Auburn Univ.*, 812 F.2d 655, 663-64 (11th Cir. 1987) (cross-examination may be required in some contexts, but in most others, “cross-examination of witnesses and a full adversary proceeding” is not required); *see also Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971). Federal and state courts faced with the task of determining remedial legislative districts frequently appoint consultants to assist in reviewing remedial proposals without providing for depositions of those consultants. For example, the New Hampshire Supreme Court, after finding state legislative maps unconstitutional, gave the legislature until May 26, 2022 to enact a new map—and simultaneously (1) appointed a special master, (2) ordered the parties to submit their own proposed maps by May 16 and to respond to the other parties’ proposed maps by May 18, and (3) ordered the special master to issue a recommendation by May 27, if the legislature failed to act. Order, *Norelli v. Sec’y of State*, No. 2022-0184 (N.H. May 12, 2022). The New Hampshire court noted that, “[a]s a judicial officer, neither the special master nor staff members acting at his direction may be subjected to cross-examination.” *Id.* And unlike in this case, the parties there were not provided with an opportunity to respond in writing to the special master’s recommendation. *Id.* It is, in fact, common for courts

to appoint consultants, technical advisors, or special masters in redistricting cases, and when they do, these individuals are not subject to discovery. *See, e.g.*, Order at 3-4, *Common Cause v. Lewis*, No. 18 CVS 014001 (N.C. Super. Ct. Sept. 13, 2019); Order, *Bethune-Hill v. Va. State Board of Elections*, No. 14-cv-00852 (E.D. Va. Oct. 18, 2018); Order at 2, *League of Women Voters of Pa. v. Commonwealth*, No. 159 MM 2017 (Pa. Jan. 26, 2018); Order on Submission of Remedial Plans for Court Review at 2-3, *Harper v. Hall*, No. 21-cvs-015426 (N.C. Super. Ct. Feb. 8, 2022); Order, *Personhuballah v. Alcorn*, No. 3:13-cv-678 (E.D. Va. Sept. 25, 2015) (three-judge court); Minute Entry, *Favors v. Cuomo*, No. 11-cv-5632 (E.D.N.Y. Feb. 27, 2012) (three-judge court).

In other contexts, too, court-appointed special masters, consultants, and technical advisors are not treated as expert witnesses or required to submit to deposition. *Gary W. v. La. Dep't of Health & Hum. Servs.*, 861 F.2d 1366, 1369 (5th Cir. 1988) (affirming magistrate's refusal to allow party to depose court-appointed special master); *TechSearch, LLC v. Intel Corp.*, 286 F.3d 1360, 1380 (Fed. Cir.), *cert. denied*, 537 U.S. 995 (2002) (Consultants or advisors appointed pursuant to a court's inherent authority are not necessarily subject to discovery); *In re Joint E. & S. Dists. Asbestos Litig.*, 151 F.R.D. 540, 544 (E.D.N.Y. 1993) (same). Indeed, when the Wisconsin Supreme Court has appointed consultants, referees, or technical advisors in past original actions, those individuals have not been subject to discovery. *See e.g., State v. Brodson*, 11 Wis. 2d 124, 103 N.W.2d 912 (1960) (per curiam) (in original action involving attorney-discipline proceedings, relying

on report of court-appointed referee who was not deposed, otherwise subjected to discovery, or cross-examined); *State v. Eisenberg*, 48 Wis. 2d 364, 180 N.W.2d 529 (1970) (per curiam) (same).

III. Respondents grossly mischaracterize the nature of the consultants' work in this case.

The Court should also deny Respondents' motion because it is based on a profound misunderstanding of the work Drs. Grofman and Cervas performed. Although Respondents try to distort their analysis, as Drs. Grofman and Cervas said, they conducted "independent verification of [the] quantitative data" provided by the parties. Ltr. from Drs. Grofman and Cervas, Dec. 26, 2023. It does not appear the consultants performed any type of new, original, or untested analysis. Their task was not to generate new substantive opinions or to undertake the type of work performed by the parties' own experts. Had they done so, the Court had previously required them to disclose back-up or supporting data to the parties. Dec. 22, 2023 Scheduling Order. Rather, the consultants were tasked with gathering the data on which the parties' proposed maps were based to allow apples-to-apples comparisons of the various plans' metrics, and then assembling those comparisons in a way that the parties and the Court could understand, and they could evaluate fairly. As disinterested, objective, and trusted consultants to *the Court*, and not to any one or more of the parties, the consultants were uniquely situated to assist the Court in this way. And as both this Court and the consultants made clear, any ultimate decisions rest with the Court.

The consultants' analysis of political neutrality, while both helpful and thorough, was not based on novel theories, but instead upon the type of tested metrics on which courts regularly rely. *See, e.g., Harper v. Hall*, 881 S.E.2d 156, 166-69, 177 (N.C. 2022) (*Harper II*), *superseded on other grounds*, 886 S.E.2d 393 (N.C. 2023) (partisan symmetry, efficiency gap, mean-median difference, and declination); *Carter v. Chapman*, 270 A.3d 444, 475 (Pa. 2022) (Donohue, J., concurring) (partisan symmetry, efficiency gap, mean-median difference, and declination); *Harper v. Hall*, 868 S.E.2d 499, 520-21, 523, 547-48, 552, 554 (N.C. 2022) (*Harper I*), *superseded on other grounds*, 886 S.E.2d 393 (N.C. 2023) (partisan symmetry, efficiency gap, and mean-median difference); *Adams v. DeWine*, 195 N.E.3d 74, 91-92 (Ohio 2022) (partisan symmetry, efficiency gap, mean-median difference, and declination); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 192 N.E.3d 379, 411 (Ohio 2022) (partisan symmetry); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 777-78, 817, 820 (Pa. 2018) (efficiency gap and mean-median difference). Under this Court's scheduling order, Respondents had every opportunity to provide evidence supporting their proposed maps and analyze the maps provided by other parties. Indeed, the Legislature submitted rebuttal expert evidence, to which no party objected and which this Court received. Order, Jan. 24, 2024.

IV. Respondents' arguments are moot.

Finally, Respondents' attempt to manufacture new issues is moot because, even if they could demonstrate a factual dispute regarding political neutrality (which

they have not done), their remedial proposals indisputably fail to meet the basic requirement of the Wisconsin Constitution. Both the Johnson Intervenors and the Legislature have offered maps containing districts not “bounded by county, [] town or ward lines.” Wis. Const. art. IV, § 4, and such defects cannot be remedied through technical corrections. Nothing further is required for the Court to determine that Respondents’ maps do not meet the basic criteria of the Wisconsin Constitution and should not be considered further.

CONCLUSION

For the reasons stated herein, Respondents’ motion should be denied.

Respectfully submitted this 13th day of February, 2024.

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