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03-15-2024
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case 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 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 ELECTIONS COMMISSION; AND MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS 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 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.

COMMISSION RESPONDENTS' MOTION FOR CLARIFICATION OF OPINION AND ORDER AS IT RELATES TO RECALL AND SPECIAL ELECTIONS

The Commission Respondents,[1] by undersigned counsel, move the Court for clarification of which maps to use for any recall or special elections that occur before the 2024 election. Specifically, they ask whether this Court's December 22, 2023, opinion and order enjoins the Commission from using the district maps in effect prior to the recent enactment of 2023 Wisconsin Act 94 for such elections. The basis for this motion is as follows:

1. On December 22, 2023, this Court held that the then-"current legislative maps" violated the Wisconsin Constitution and "enjoin[ed] Elections Commission from using [those] legislative maps in all future elections." *Clarke v. WEC*, 2023 WI 79, ¶ 3, 410 Wis. 2d 1, 998 N.W.2d 370; *see also id.* ¶¶ 4, 77.

2. This Court further stated that "remedial maps must be drawn prior to the 2024 elections" and "urge[d] the legislature to pass legislation creating new maps." *Id.* ¶ 4.

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[1] The Commission Respondents are the 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 Commission; and Meagan Wolfe, in her official capacity as administrator of the Commission.

3. Through 2023 Wisconsin Act 94, the Legislature enacted new state legislative district maps, and the Governor signed them into law.

4. Act 94's initial applicability provision reads:

> (1) The act first applies, with respect to regular elections, to offices filled at the 2024 general election.
>
> (2) This act first applies, with respect to special or recall elections, to offices filled or contested concurrently with the 2024 general election.

2023 Wis. Act. 94, § 2.

5. The Director and General Counsel of the Government Accountability Board (GAB), the predecessor agency to the Commission, construed identical applicability language in 2011 Wisconsin Act 43 as meaning that the new lines first applied to elections held on or after the general election date:

> It is the G.A.B. staff's position that the legislative districts created by 2011 Wisconsin Act 43 are not in effect for the purpose of "special or recall elections to offices filled or contested" prior to the General Election on November 6, 2012.
>
> By the specific terms of 2011 Wisconsin Act 43, any recall election or special election to fill a vacancy conducted before November 6, 2012 shall be conducted in the legislative districts in effect prior to the enactment of 2011 Wisconsin Act 43.

GAB Memorandum, October 19, 2011.[2]

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[2] *Legislative Redistricting Memorandum (Oct. 19, 2011)*, State of Wis. Gov't Accountability Bd., https://web.archive.org/web/20120501233524/https://www.wispolitics.com/1006/111019_Chief_Clerk_Guidance.pdf. (last visited Mar. 15, 2024).

6. The Legislative Reference Bureau (LRB) relied on the 2011 GAB Memorandum in its February 13, 2024, memorandum to the Senate majority leader concerning the initial applicability provisions in the bill that became Act 94.[3]

7. The initial applicability language in Act 94 appears to indicate that any recall or special election conducted prior to the 2024 general election would not use the Act 94 maps.

8. Use of the pre-Act 94 maps, however, appears to be prohibited by this Court's December 22, 2023, injunction and declaration. That order did not discuss how its declaration and injunction would apply to interim recall or special elections if new maps were legislatively enacted.

9. As one example of why the Commission requires clarification from this Court, it received a petition for recall of Assembly Speaker Robin Vos on March 11, 2024. The Commission conducted an initial, informal review of the petition and signatures.

10. After its initial review, the Commission must follow the procedures set forth in Wis. Stat. § 9.10(3)(b). Within 31 days, the Commission must "determine by careful examination whether the petition on its face is sufficient and so state in a certificate attached to the petition." Wis. Stat. § 9.10(3)(b). One factor as to sufficiency is proper residency of the signers, which depends upon the application of maps. If the petition is sufficient, the Commission must "file the petition and call a recall election to be held on the Tuesday of the 6th week commencing after the date of filing of the

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[3] *Memorandum: Initial applicability provision under SSA1 to SB488 (Feb. 13, 2024),* Wis. Legis. Reference Bureau, https://www.wispolitics.com/wp-content/uploads/2024/02/240214LRB.pdf (last visited Mar. 15, 2024).

petition." *Id*. The process required under Wis. Stat. § 9.10(3)(b) includes hearing any challenge by the official and rebuttal. Commission staff must undertake this process even if the number of signatures is ultimately insufficient to call a recall election.

11. As other examples, based on the Governor's February 19 letter the Commission is aware that the Governor intends to call a special election for Senate District 4 prior to the general election due to his January 26, 2024, appointment of Senator Lena Taylor to the Milwaukee County Circuit Court (although the map for that district could be the same both before and after Act 94). In addition, the Democratic Senator Respondents stated in their February 19 letter that they were aware of at least two other legislative elections that may need to be called before the general election.

12. The Commission requests clarification of whether this Court's opinion and order enjoins the Commission from using district maps in effect prior to the enactment of Act 94 for any recall or special election that must be conducted before the 2024 general election.

Dated this 15th day of March 2024.

Respectfully submitted,

ERIC J. WILSON
Deputy Attorney General of
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Electronically signed by:

Steven C. Kilpatrick
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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this *Commission Respondents' Motion for Clarification of Order Enjoining Then-Current Legislative Maps as it Relates to Recall and Special Elections* with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 15th day of March 2024.

Electronically signed by:

Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General