No. 23AP1399-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 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, JOSEPH J. CZARNEZKI, 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, INTERVENORS-RESPONDENTS.

RESPONSE OF INTERVENORS-RESPONDENTS BILLIE JOHNSON, CHRIS GOEBEL, ED PERKINS, ERIC O'KEEFE, JOE SANFELIPPO, TERRY MOULTON, ROBERT JENSEN, RON ZAHN, RUTH ELMER, AND RUTH STRECK TO APRIL 2 ORDER REGARDING CONSULTANTS' FEES

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ARGUMENT

This Court has ordered the parties to submit their proposals for how to allocate the $128,158 in fees billed by the Court's consultants.

I. The Court Should Pay the Consultants' Fees.

The consultants' fees should be paid by the Court. This Court chose to retain them, defined the scope of their work, and negotiated the price. And only the Court had any opportunity to oversee their work to ensure that they stayed within the bounds of their assignment and did not unreasonably run up the bill (both of which the Johnson Intervenors question, as explained in more detail below). Moreover, the Legislature proposed an alternative—the Legislative Technology Services Bureau—that would have been much cheaper (and actually neutral). Leg. 2/8/24 Br. at 9. Finally, there is no statutory authority, that the Johnson Intervenors are aware of, for the Court to hire consultants and impose the costs on the parties.[1] For these reasons, the Court should bear the cost of its own consultants.

II. Alternatively, the Petitioner Parties Should Pay the Consultants' Fees, Since They Effectively Served as a Witness for Their Side in the Litigation.

Alternatively, if this Court assigns the costs to some of the parties, then it should assign them to the Petitioner Parties (the Petitioners, the Governor, the Democratic Senators, and the Wright Intervenors). The Court's consultants were anything but neutral, instead effectively serving as an adverse witness in support of one side of the litigation—and witnesses that the Johnson Intervenors repeatedly objected to and

[1] The statute related to court-appointed experts, Wis. Stat. § 907.06, does not apply, because the Court did not permit the parties to depose or cross-examine the consultants, as the statute requires. *Id.* § 907.06(1) Similarly, the statute related to court-appointed referees, Wis. Stat. § 805.06, also does not apply because the parties were not permitted a hearing or the opportunity to present witnesses before them, as the statute requires. *Id.* § 805.06(4)(a).

had no opportunity to depose or cross examine. The consultants lack of neutrality is evidenced by, among other things:

(1) They rejected every remedial proposal from one side of the litigation, while endorsing every proposal from the other side, including one *that was not even contiguous*.

(2) The consultants labeled the Johnson Intervenors' map a "stealth gerrymander" without any evidence to support that characterization, while ignoring the Johnson Intervenors' explanation that it was drawn *without even considering partisan outcomes*, as well as significant evidence supporting that it was drawn neutrally and tracked Wisconsin's natural, political geography. Johnson 1/12/24 Br. 24–30; Johnson 1/22/24 Br. 8–13.

(3) At the same time that they labeled the Johnson Intervenors' map a "stealth" gerrymander without any evidence of gerrymandering, they ignored substantial evidence that all of the Petitioner Parties' maps *were* intentionally drawn to gerrymanders in favor of Democrats, a major focus of the Johnson Intervenors' submissions. Johnson 1/22/24 Br. 8–29. The evidence that the Johnson Intervenors submitted, and the consultants ignored, is the kind of evidence the consultants previously described as "powerful circumstantial evidence," "particularly useful to demonstrating *intent* [to gerrymander]." Johnson 2/8/24 Br. 16.

(4) The consultants' report contradicts *their own prior work* in a variety of other ways as well, as the Johnson Intervenors illustrated with numerous quotes from their previous writings, Johnson 2/8/24 Br. 14–17, showing that the consultants were biased in favor of a particular result.

(5) The consultants also disregarded most of the other evidence submitted by the Legislature and the Johnson Intervenors, including evidence related to Wisconsin's natural political

geography, the number of voters moved, and incumbent pairings, among other things.

(6) On the flip side, the consultants blindly accepted evidence from the other side, even copying and pasting a table from the Wright Intervenors' brief containing data that they did not produce or verify, further demonstrating their bias. Johnson 2/8/24 Br. 22–23.

All of this shows that the consultants were, in reality, witnesses in favor of one side in the litigation. Thus, if any parties should bear their costs, it should be the side they were advocating for.

III. This Court Should Discount Any Time Spent on the Political Neutrality Section of the Report, Since the Consultants Failed to Follow This Court's Directions.

If the Court does assign any of the consultants' fees to the Johnson Intervenors, the Johnson Intervenors also have two objections to the amount of those fees.

First, this Court should exclude any hours spent on the "political neutrality" portion of their report (which comprised the majority of it, Grofman & Cervas Report 11–21), because that section deviated from what they were assigned to do. When this Court accepted this case, it specifically declined to take the partisan gerrymandering claims given "the need for extensive factfinding (if not a full-scale trial)." 10/6/23 Order p.3. Yet the entire focus of the consultants' "political neutrality" section was the consultants' "social science perspective" that "both the Legislature's plan and the Johnson plan … are partisan gerrymanders." Grofman & Cervas Report 22–23, 25 (summarizing their conclusions). In other words, the Court's supposedly neutral consultants spent the majority of their time litigating the very claim that this Court told all the parties it would not be considering in this case.

The consultants' "political neutrality" section is also inconsistent with this Court's decision on December 22. In that decision, this Court explained that "neutrality" means that "judges should not select a plan that … [allows] one party [to] do better than it would do under a plan drawn up by persons having no political agenda." 2023 WI 79, ¶70 (quoting *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶12, 249 Wis. 2d 706, 639 N.W.2d 537 (in turn quoting *Prosser v. Elections Bd.*, 793 F. Supp. 859, 867 (W.D. Wis. 1992)). The Johnson Intervenors took this Court at its word and submitted a map that was drawn with no political agenda, and the evidence proves it—it "looks like a map drawn without respect to partisanship," Leg. 1/22/24 App'x 54a. Even outside observers agreed: "The WILL submission looks a lot like the modal value in the party-blind algorithmically-generated ensembles that I've seen."[2] It was drawn solely to track Wisconsin's political geography as closely as possible, which is why it substantially beat all other maps on county, town, and municipal splits. Johnson 1/22/24 Br. 4–8.

The consultants' theory of neutrality flipped the Court's definition of neutrality on its head. In the consultants' view, to be "neutral," a map must allow Democrats to get to 50 seats, which is "better than [they] would do under a plan drawn up by persons having no political agenda." *See* Report 11–25. They completely ignored the effects of Wisconsin's political geography, flippantly writing that "geography is not destiny." Grofman & Cervas Report 24. Of course "it is possible to draw plans" that gerrymander in favor of Democrats, overcome Wisconsin's geography, and achieve 50 (or more) seats in the Assembly for Democrats. Report 23. As expected, such maps underperform on traditional criteria and result in bizarrely shaped districts. Johnson 1/22/24 Br. 13–21. But the point here is that the consultants' analysis of neutrality in their report

[2] John D. Johnson tweet (Feb. 4, 2024), https://twitter.com/jdjmke/status/1754215053157405187

is inconsistent with this Court's instructions in its December 22 decision about what neutrality means.

Not only is the report's theory of neutrality inconsistent with this Court's decision, it's also inconsistent with their own prior work. Johnson 2/8/24 Br. 14–17. Indeed, in their prior writings, the consultants *defined* "[n]eutral plans" as "those that are drawn entirely with respect to traditional good government criteria, with no attention paid to partisan considerations."[3] In their "Terminology of Redistricting" paper, they explain that the "common [approach] in the academic literature" is to take the natural effects of political geography, as estimated by an ensemble of computer-generated maps, as the "baseline for neutral treatment."[4] In that same paper, they define "[n]atural gerrymander" as a "plan drawn according to traditional districting principles" that favors one party "due simply to the differences in geographic concentration of party support." They "regard [the term] as somewhat of a misnomer," however, because the "natural bias" results not from gerrymandering, but from "differences in the geographic concentration of electoral support between the parties."[5] Yet they ignored all of that in favor of a different, "not yet as well known" theory that they applied in this case.

To summarize, the "social science" perspective offered in the "political neutrality" section of the consultants' report is inconsistent with this Court's order when it granted this case, with this Court's decision on December 22, and with their own prior work. Thus, this Court should exclude any time spent on that portion of the report from the costs it assigns to parties.

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[3] Cervas & Grofman, *Tools for identifying partisan gerrymandering with an application to congressional districting in Pennsylvania*, p.20 (Aug. 16, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248713.

[4] Grofman & Cervas, The Terminology of Districting, p.16 (March 30, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3540444.

[5] *Id.* at 13 and n.35.

IV. At the Very Least, This Court Should Require a Detailed Accounting of the Consultants' Hours and Allow the Parties to Review Those and Object to any Portion.

The Johnson Intervenors also do not simply accept that the consultants actually worked the number of hours they say that they did or that all of those hours were reasonable and should be billed to the parties. Parties normally receive a detailed breakdown of the hours billed as costs and have the opportunity to object to various portions. But thus far, the consultants have only provided the parties with a top-line number. This Court should, at the very least, require the consultants to provide a detailed accounting of the hours they spent on this case and give the parties an opportunity to review those hours and object to any. The total number certainly raises eyebrows; a single, 25-page report should not cost $128,000.

V. Charging the Johnson Intervenors for a Biased, Adverse Witness Compounds the Due Process Violations in this Case.

Finally, the Johnson Intervenors have repeatedly objected to the due process violations in this case, and in particular, to those related to the consultants and their report. *E.g.*, Johnson 2/8/24 Br. 18–22. And the Johnson Intervenors have a pending motion to strike that report, in part due to the due process violations. To then *charge* the Johnson Intervenors for a hostile adverse expert witness who ignored the evidence they submitted, rejected their proposal based on a theory this Court said it would not consider, and without evidence to support it, and applied an unexpected definition of neutrality at odds with this Court's Dec. 22 decision and their own prior work, without any opportunity to depose or cross examine them, would only compound and magnify the due process violations in this case.

* * * * *

One final word of caution. If this Court charges parties like the Johnson Intervenors—who are just voters, after all—over $20,000 just for participating in this case to defend their rights, it will set a dangerous precedent. In future cases, parties will think twice before coming to this Court or intervening to protect their rights, lest they find themselves slapped with an exhorbitant and unexpected fee at the end of the case.

CONCLUSION

This Court should either pay the fees itself, or apportion them among the Petitioner Parties. And if it does charge the parties, it should exclude any hours spent on the "political neutrality" portion of the report for failing to follow this Court's directions. Finally, it should require the consultants to submit a detailed accounting of their hours to the parties for review to allow objections before charging the parties for these fees.

Dated: April 9, 2024.

Respectfully submitted,

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Electronically signed by Luke N. Berg

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