

FILED
04-09-2024
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.

STATEMENT OF POSITION ON ALLOCATION OF CONSULTANTS' FEES AND EXPENSES BY INTERVENOR-RESPONDENT WISCONSIN LEGISLATURE AND RESPONDENTS SENATORS CABRAL-GUEVARA, HUTTON, JACQUE, JAGLER, JAMES, KAPENGA, LEMAHIEU, MARKLEIN, NASS, QUINN, TOMCZYK, AND WANGGAARD

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On April 2, 2024, the Court ordered the parties to submit their position on “what basis the fees and expenses of the consultants should be allocated to the parties in this matter, and why that basis is preferable over other methods of allocation.”

Intervenor-Respondent Wisconsin Legislature and 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 take no position on the apportionment of fees among the other parties who do not object to the assessment of fees. The Legislature and Senator Respondents’ position is that the Court cannot assess the consultants’ fees and expenses against the Legislature, the Senator Respondents, or any of the parties for the following reasons.

First, there is no basis to assess fees because there was no statutory basis for the Court to appoint the consultants. The consultants could not have been appointed pursuant to Wis. Stat. §805.06 because the Legislature was denied a hearing and trial. The consultants also

could not have been appointed pursuant to Wis. Stat. §907.06 because the Legislature was denied discovery of the consultants. *See* Scheduling Order 4 (Dec. 22, 2023) (“No further discovery of Dr. Grofman and Dr. Cervas shall be permitted[.]”).

Second, the Legislature’s counsel advised the Court that the Wisconsin Legislative Technology and Services Bureau could assist the Court as LTSB has done in past redistricting litigation. Wisconsin Supreme Court: *Rebecca Clarke v. Wisconsin Elections Commission* at 2:04:33-2:05:09, Wis. Eye (Nov. 21, 2023), <https://bit.ly/3RYb9CB>; *see Baumgart v. Wendelberger*, No. 01–C–0121, 02–C–0366, 2002 WL 34127473, *1 (E.D. Wis. July 11, 2002) (three-judge court) (noting LTSB was court’s “technical advisor” in malapportionment action). LTSB is a non-partisan legislative services agency with substantial redistricting expertise and GIS capability, and those expert services could have been offered free to the Court and the Wisconsin taxpayers. *Aff. of Jeff Ylvisaker* ¶¶2-3, App’x to Legis. Resp. (Nov. 16, 2023), App.7; *see* Wis. Stat. §13.96. And yet the Court did not even contact LTSB, despite contacting consultants proposed by every other party. *See Aff. of Jeff*

Ylvisaker ¶4, I App'x to Legis. Opening Remedial Br. (Jan. 12, 2024), App.5a (“No one at LTSB has been contacted by the Wisconsin Supreme Court regarding this case.”). *But see* Scheduling Order 1 (“The court contacted all of the persons identified by one or more of the parties as potential consultants to inquire regarding their capabilities and availability.”).

Third, the consultants did not fulfill the Court’s assignment. Rather than identify a contiguity remedy or address any of the Legislature’s arguments about an appropriate contiguity remedy, they simply disqualified both the Legislature’s proposed remedy and the Johnson Intervenors’ proposed remedy as “partisan gerrymanders.” Consultants’ Report 23 (Feb. 1, 2024). There are no partisan gerrymandering claims at issue here, nor could there be. *See Clarke v. Wis. Elections Comm’n*, 2023 WI 70, --- Wis. 2d ---, 995 N.W.2d 779, 781 (declining to hear Petitioners’ partisan-gerrymandering claims); *Johnson v. Wis. Elections Comm’n*, 2022 WI 87, ¶53, 399 Wis. 2d 623, 967 N.W.2d 469 (holding any “right to partisan fairness ... does not exist” in the Wisconsin Constitution).

Fourth, the consultants did not follow the Court's rules. The consultants relied on extra-record evidence, contrary to this Court's order, to dismiss the Legislature's expert submissions. *Compare, e.g.,* Consultants' Report 13-14 nn.25-26, 23 nn.31-32, 24 n.33, *with* Scheduling Order 4 ("Dr. Grofman and Dr. Cervas shall not consider any fact outside the record in this case.").

Finally, the Legislature resolved this vexatious, do-over suit by enacting redistricting legislation that the Governor signed, thereby avoiding further substantial due process problems had the Court adopted remedial maps. *See, e.g.,* Legis. Memo. ISO Mot. Reconsideration 32-58 (Dec. 28, 2023). The Legislature and Senator Respondents should not now be required to pay for consultants who confirmed the constitutional deficiencies pervasive in this litigation. *See generally* Legis. Resp. to Consultants' Report (Feb. 8, 2024).

Dated this 9th day of April, 2024.

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