

FILED

04-09-2024

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 ROMAIN 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.*

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**JOINT RESPONSE OF PETITIONERS AND WRIGHT INTERVENORS  
REGARDING CONSULTANTS' FEES AND EXPENSES ALLOCATION**

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On April 2, 2024, the Court ordered the parties to advise the Court of their position regarding the allocation of the fees and expenses of the Court's consultants in this matter. For several reasons, the Clarke Petitioners and Wright Intervenor-Petitioners respectfully request that the Court order the Legislature to pay all such fees and expenses.

The general practice in redistricting litigation in both federal and state courts is that the governmental defendant must bear the full cost of consultants, referees, or special masters retained by courts to assist in evaluating or creating a remedial legislative map.<sup>1</sup> This is for two main reasons, both of which apply here. First, in Wisconsin just as in the identified decisions from other jurisdictions, redistricting is the government's obligation, not that of private citizens like Petitioners. *See Clarke v. Wisconsin Elections Comm'n*, 2023 WI 79, ¶57, 410 Wis. 2d 1, 998 N.W.2d 370 (“[T]he legislature . . . has the primary authority and responsibility for drawing assembly and senate districts.”). As this Court has

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<sup>1</sup> *See, e.g.*, Orders, *Allen v. Milligan*, 2:21-cv-01530, Docs. 130, 204 (N.D. Ala. 2022 Aug. 2, 2023) (ordering that costs and expenses for redistricting special master and cartographer be paid by the State of Alabama); Order, *Soto Palmer v. Hobbs*, 3:22-cv-05035, Doc. 246 (W.D. Wash. Dec. 20, 2023) (ordering State of Washington to pay costs for special master and employees because “redistricting is the State’s responsibility”); Order, *Bethune-Hill v. Va. State Bd. of Elections*, 3:14-cv-00852 (E.D. Va. Oct. 18, 2018) (ordering Commonwealth of Virginia to pay special master fees for redistricting remedy); Order, *Covington v. North Carolina*, 1:15-cv-00399, 2018 WL 8060397, at \*2-3 (M.D.N.C. Mar. 22, 2018) (same, noting “it would be unfair to require [Plaintiffs] to pay for the services of a special master when it was the State’s actions that led to the need for those services”); Order, *Personhuballah v. Alcorn*, 3:13-cv-678, Doc. 304 (E.D. Va. Jan. 29, 2016) (same); Order, *Holloway v. City of Virginia Beach*, 2:18-cv-00069, Doc. 275 (E.D. Va. Aug. 9, 2021) (ordering all costs for special master and assistants to be “borne entirely by Defendants” City of Virginia Beach who maintained illegal electoral system); *United States v. Cline*, 388 F.2d 294, 296 (4th Cir. 1968) (holding that special master fees should be borne by the party “largely blamable for the need of...” the suit); *Gary W. v. Louisiana*, 601 F.2d 240, 246 (5th Cir. 1979) (district court did not abuse discretion by taxing losing party with full share of special master’s fee); *Morgan v. Kerrigan*, 530 F.2d 401, 427 (1st Cir. 1976) (same); *In the Matter of Legislative Districting of the State*, 805 A.2d 292, 329 (Md. 2002) (ordering that the “fees and expenses of Nathaniel A. Persily, one of the Court’s technical consultants, are to be paid by the State of Maryland”); Order, *Harkenrider v. Hochul*, No. E2022-01116CV (N.Y. Sup. Ct. April 18, 2022) (appointing Dr. Jonathan Cervas as special master to evaluate New York redistricting proposals and submit plan and ordering State of New York to pay fees and costs).

recognized, “any reapportionment or redistricting case is, by definition, *publici juris*, implicating the sovereign rights of the people of this state.” *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶17, 249 Wis.2d 706, 639 N.W.2d 537. The costs associated with generating a lawful legislative map are thus appropriately borne by the State, not by private citizens like the Petitioners and Wright Intervenor-Petitioners here, who merely prevailed in establishing that the existing map violated their (and all other Wisconsinites’) constitutional rights. *See, e.g., Soto Palmer*, Doc. 246 (ordering State of Washington to bear cost of special master because “redistricting is the State’s responsibility”). Second, the State—and not Petitioners, Wright Intervenor-Petitioners, or other private parties—is responsible for creating and maintaining maps that violated the Wisconsin Constitution’s contiguity requirements. It would be inequitable for Petitioners and Wright Intervenor-Petitioners to shoulder costs associated with the State’s failure to meet its constitutional obligations. *See, e.g., Covington*, 2018 WL 8060397, at \*2-3 (“[I]t would be unfair to require [Plaintiffs] to pay for the services of a special master when it was the State’s actions that led to the need for those services.”); *Holloway*, Doc. 275; *Cline*, 388 F.2d at 296.

These factors are heightened here because the consultants’ fees and expenses would not have been incurred had the Legislature simply acted sooner to enact a remedial map that resolved the straightforward contiguity violation.<sup>2</sup> Instead, the Legislature waited

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<sup>2</sup> The constitutional violation was not reasonably questionable. *See Clarke*, 2023 WI 79, ¶3 (noting that the Constitution’s contiguity requirements “mean what they say”). That is—or should have been—especially so if one adheres to an “original meaning” method of constitutional interpretation. *See id.* ¶267 (Hagedorn, J., dissenting) (“And the claim here that the constitution’s original meaning requires the territory in all legislative districts to be physically contiguous is probably correct . . .”); *compare Town of Wilson v. City of Sheboygan*, 2020 WI 16, ¶57, 390 Wis. 2d 266, 938 N.W.2d 493 (Grassl Bradley, J., concurring) (relying

almost 60 days after this Court declared the prior maps unconstitutional and until after the consultants had incurred fees and expenses to enact the maps the Governor had proposed. This delay was not because the Legislature engaged in any sort of robust public legislative process as it originally predicted it would. *See* Br. in Support of Legislature’s Mot. for Reconsideration 25 (claiming legislative enactment would involve public hearings, a public portal, committee meetings, *etc.*). Rather, the Legislature did nothing to involve the public or committee members and instead enacted the maps in a single day: February 13, 2024.<sup>3</sup> Nothing prevented the Legislature from completing its one-day legislative effort before the consultants undertook their work. That would have eliminated, or at least reduced, the resulting costs.

Finally, although there are multiple non-legislative governmental entities in the case—including the Wisconsin Election Commission (and its members and administrator) and the Governor—the Legislature is the most appropriate entity among them for the Court to order to pay the consultants’ fees and expenses. Pursuant to Wis. Stat. §§ 13.365(3) and 13.90(2), the Joint Committee on Legislative Organization approved the Legislature’s intervention in this case. As a result, the “costs of participation in the proceeding” are

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upon the 2019 edition of Black’s Law Dictionary to identify the “plain meaning” of “contiguous” to be “[t]ouching at a point or along a boundary; ADJOINING”), *with Clarke*, 2023 WI 79, ¶¶185, 187, 193, 198, 199 (Grassl Bradley, J., dissenting) (labeling the majority as “heavy on hypocrisy,” “intellectually dishonest,” and “sophomoric[]” for relying upon the 2019 edition of Black’s Law Dictionary to ascertain the plain meaning of “contiguous”).

<sup>3</sup> As Petitioners repeatedly explained in briefing and at oral argument, the Legislature’s (and the Johnson Intervenors’) repeated contentions that it was impossible to comply with the contiguity requirements, or that doing so would increase municipal splits, proved false. Indeed, the parties *improved* on the various constitutional and traditional redistricting metrics compared to the enjoined (and prior decades’) maps while also producing contiguous districts.

automatically appropriated as part of the “sum sufficient to carry out the functions” of the assembly and senate. *See* Wis. Stat. §§ 13.90(2); 20.765(1)(a) & (b). The Court can order the Legislature to pay the full amount, which will be a “cost[] of participation in the proceeding,” Wis. Stat. § 13.90(2), without requiring any further legislative appropriation or action. An order requiring the other non-legislative governmental entities to pay either might require a specific appropriation by the Legislature or interfere with other budgeted priorities. Regardless, the private litigants in the case should bear no costs associated with the consultants’ fees and expenses.

### **CONCLUSION**

For the foregoing reasons, the Court should order the Legislature to pay the fees and expenses of the consultants.

Respectfully submitted this 9th day of April, 2024.

By Electronically signed by Daniel S. Lenz

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