

FILED
04-09-2024
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

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
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,

Intervenor-Respondents.

**GOVERNOR TONY EVERS' RESPONSE TO THE
COURT'S ORDER ON ALLOCATION OF
CONSULTANTS' COSTS**

The Governor ultimately takes no position on how to allocate the consultants' costs between the parties. However, the Governor believes there are two options that are most worthy of consideration.

First, this Court may wish to allocate the costs equally between the parties that submitted proposed maps on the basis that each of those parties contributed to the work done by the consultants in roughly equal measure. Although there appears to be no Wisconsin case law on how this Court may apportion costs for consultants under the unique circumstances of this case—where the Court acted in an original action pursuant to its inherent authority—that would be consistent with the fact that the parties here, in essence, used the consultants in common. And, although not directly on point, that also would be consistent with circuit courts' authority to allocate certain costs at the court's discretion, *see* Wis. Stat. §§ 805.06(1), 907.06(2), and with the discretion exercised in federal court, *e.g.*, *Navajo Nation v. Arizona Independent Redistricting Commission*, 286 F. Supp. 2d 1087, 1096–97 (D. Ariz. 2003) (ordering costs be “divided between all the parties”).¹

¹ Ordinarily, sovereign immunity bars the assessment of costs or fees against the State, its agencies, and its officers in their official capacities absent express statutory consent. *See Papa v. Wis. Dep't of Health Servs.*, 2020 WI 66, ¶ 47, 393 Wis. 2d 1, 946 N.W.2d 17; *Lister v. Bd. of Regents of Univ. Wis. Sys.*, 72 Wis.

Alternatively, if this Court does not opt to allocate the costs evenly among the parties that submitted maps, the Court may wish to assign the costs to the Legislature, as proposed by the Petitioners, on the basis that the Legislature was the government respondent that defended the maps that were deemed to be unconstitutional. As Petitioners point out, this approach would be consistent with some redistricting courts in other states, in which the state defendant or respondent bears the costs of consultants used by courts to evaluate remedial maps.

Dated this 9th day of April 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Anthony D. Russomanno
ANTHONY D. RUSSOMANNO
Assistant Attorney General
State Bar #1076050

FAYE B. HIPSMAN
Assistant Attorney General
State Bar #1123933

BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

2d 282, 292, 240 N.W.2d 610 (1976) (immunity applies to officials). For purposes of the consultants' costs, the Governor does not assert sovereign immunity against the Court's unique exercise of its authority given that, here, the parties voluntarily proceeded to propose maps under the Court's December 22, 2023, directive that the parties would bear the consultants' costs. However, this should not be taken as a concession that immunity would not ordinarily apply to fees or costs.

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487 (FBH)
(608) 267-2238 (ADR)
(608) 266-0020 (BPK)
(608) 294-2907 (Fax)
hipsmanfb@doj.state.wi.us
russomannoad@doj.state.wi.us
keenanbp@doj.state.wi.us

MEL BARNES
State Bar #1096012
Office of Governor Tony Evers
Post Office Box 7863
Madison, Wisconsin 53707-7863
(608) 266-1212
mel.barnes@wisconsin.gov

CHRISTINE P. SUN*
DAX L. GOLDSTEIN*
States United Democracy Center
506 S Spring St.
Los Angeles, CA 90013
(202) 999-9305
christine@statesuniteddemocracy.org
dax@statesuniteddemocracy.org

JOHN HILL*
States United Democracy Center
250 Commons Dr.
DuBois, PA 15801
(202) 999-9305
john@statesuniteddemocracy.org

* Admitted *pro hac vice*

Attorneys for Governor Tony Evers

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document 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 9th day of April 2024.

Electronically signed by:

Anthony D. Russomanno

ANTHONY D. RUSSOMANNO