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 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.

PETITIONERS' RESPONSE TO SECOND MOTION FOR RECONSIDERATION

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Petitioners respectfully urge the Court to deny movants' motion for reconsideration of the Court's prior order denying their motion for reconsideration of the remedial scheduling order. Movants repeat arguments that they made and this Court rejected in denying their initial motion for reconsideration. Nothing has changed since. Movants cite the fact that the parties have submitted extensive briefing and expert reports in support of their own maps and in opposition to other maps, commenting on the characteristics of the various proposals. But that is not a changed circumstance—it is simply what this Court's remedial process contemplated.

First, as explained in Petitioners' Response Brief in Support of Remedial Maps, filed January 22, 2024, the Legislature's (and Johnson Intervenors') maps must be disqualified because they violate the constitutional requirement that assembly districts be "bounded by county, [] town, or ward lines." Wis. Const. art. IV, § 4. It is indisputable as a factual matter that the Legislature and the Johnson maps split wards that fall along the borders of assembly districts, such that 19 assembly districts in the Johnson map and 46 assembly districts in the Legislature's map have segments that are not bounded by county, town, or ward lines. Movants may dispute the *legal* effect of their decisions to split wards along district boundaries, but the facts are not in dispute. The Court accordingly can and should hold that movants' maps are disqualified for reasons that require no resolution of any disputed facts.

Second, and in any event, movants' due process and other arguments remain meritless. Movants have not established that the due process clause even applies in this context, but the Court need not reach that issue because the due process clause does not require state courts to hold an in-person evidentiary hearing in the context of considering remedial redistricting maps. Movants do not cite a single case from any court holding otherwise.

Instead, movants cite the extensive briefing and expert evidence submitted in this case as reason why an evidentiary hearing is required. But this reflects that the parties *have* had an opportunity to be heard, not that they haven't. As Petitioners explained in their opposition to movants' first motion for reconsideration, the remedial process ordered in this case is materially the same as the one the Court ordered in *Johnson*—which likewise involved expert reports and equally contested factual issues about "least change," communities of interest, and other metrics. Petitioners' Response to Motion for Reconsideration 15-19 (January 4, 2024). Indeed, at least 12 separate experts filed reports in *Johnson*, and many of those filed multiple reports. The process here is likewise similar to (or even significantly more fulsome than) remedial processes ordered by courts around the country in redistricting cases, including remedial decisions involving contested assessments of partisan neutrality. *Id.* And, unlike in *Johnson*, the Court will be ably assisted by its consultants, both of whom are recognized experts in this area.

This Court is the "neutral" decisionmaker movants say is required, and in an original proceeding, the Court is fully authorized to resolve factual disputes with the

help of consultants. "Procedures providing less than a full evidentiary hearing have often satisfied due process." *Fed. Deposit Ins. Corp. v. Morley*, 915 F.2d 1517, 1522 (11th Cir. 1990). In many contexts, including contexts where facts are disputed, "[t]he opportunity to brief the issue fully satisfies due process requirements." *Pac. Harbor Cap., Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000). The cases on which movants rely are readily distinguishable. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (the "crucial factor" why due process required a pre-termination evidentiary hearing in the context of cutting off welfare benefits but not other contexts was that "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits").

Third, movants overstate the extent of the factual disputes here. The parties have relied on standard partisan neutrality metrics such as partisan symmetry, mean-median gap, the efficiency gap, or declination. Petitioners' Opening Br. 41-46. These metrics are easily determined by calculating how each party's proposed maps perform using publicly available elections data. The Legislature's briefs principally raise *legal* questions about how to define partisan neutrality, dressed up in factual clothing. Thus, for example, the Legislature claims that considering whether the competing proposals satisfy the "majoritarian principle" raises a "factual" dispute. Response Remedial Brief of Intervenor-Respondent Wisconsin Legislature and Respondent Senators at 29-30. Their dispute is actually legal. The Legislature does not claim (as a factual matter) that their map gives Democrats a majority of seats

when Democrats win the majority of statewide votes; it is undisputed that it only does for Republicans. Their dispute is instead with the normative principle that the party that controls the majority of single-member districts should bear some relationship to whether that party won the majority of votes.

Nor need the Court resolve any disputed factual questions about the effect of political geography to choose a map in this case. As discussed above, the Legislature and Johnson maps should be disqualified for violating Article IV's "bounded" requirement, leaving only four eligible maps to choose from. Moreover, the Legislature and the Johnson Intervenors argue that their simulation evidence shows that maps of Wisconsin drawn by computers without considering partisanship tend to favor Republicans, and that Petitioners' plans and other plans are not neutral because they exhibit greater partisan symmetry than those maps. But any dispute about that question is not material because the Court should hold as a matter of law that simulating nonpartisan maps, while relevant and helpful at the liability stage to determine partisan intent, is not the correct metric for assessing partisan neutrality at the liability stage. *See* Petitioners' Response Brief in Support of Remedial Maps at 24-25. It is indisputably *possible* to draw a neutral map that complies with all other redistricting criteria and respects Wisconsin's political geography by prioritizing compactness and minimizing splitting political subdivisions—as Petitioners' map does. This Court should hold that, at the remedial stage, assessing

partisan neutrality does not depend on what proportion of maps drawn at random are politically neutral.[1]

Finally, like many courts conducting remedial redistricting, this Court has appointed consultants to help evaluate expert submissions, and there is no indication that the consultants are unable to complete that task, aided by the briefing and data the parties have submitted.

For these reasons the Court should deny movants' motion for reconsideration of the Court's denial of the motion for reconsideration.

Respectfully submitted this 26th day of January, 2024.

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[1] In any event, the only evidence the Court has that purports to show that Republicans benefit from some substantial political geography advantage is the Legislature and Johnson Intervenors' simulation evidence. But there is no genuine dispute that this evidence is infirm. Among many other facial defects, it is indisputable, based just on looking at the maps in the experts' backup data, that the experts simulated noncontiguous districts—the very flaw this case seeks to remedy. *See* Petitioners' Response Br. 26-30.

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