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June 24, 2024

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You are hereby notified that the Court has issued the following order:

No. 2023AP1399-OA Clarke v. Wisconsin Elections Commission

In our December 22, 2023 post-decision order, this court appointed Dr. Bernard Grofman and Dr. Jonathan Cervas to serve as the court's consultants in this matter and instructed the Director of State Courts to enter into retainer agreements between the court and Dr. Grofman and Dr. Cervas. That order also stated that "the reasonable costs and expenses incurred by Dr. Grofman and Dr. Cervas pursuant to the retainer agreement(s) identified above shall be borne by the parties as determined by the court in a future order[.]"

On January 3, 2024, pursuant to the court's order, the Director of State Courts entered into separate retainer agreements with Dr. Grofman and Dr. Cervas and filed them with the clerk of this court. Dr. Grofman, Dr. Cervas, and additional individuals under their direction performed services pursuant to the retainer agreements, culminating in a written report that was filed with the clerk of this court on February 1, 2024. On February 26, 2024, Dr. Grofman and Dr. Cervas filed a Statement of Fees and Expenses by the Consultant Team, which sought a total of $128,158.00 for their fees in this matter.

The court has now determined that the fees of the consultants shall be equally allocated to all of the groups of parties who submitted a proposed remedial map in this action. The court determines that there are six such groups: (1) petitioners Rebecca Clark, 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) Schills, Nathaniel Slcak, Mary Smith-Johnson, Denise (Dee) Sweet, and Gabrielle Young; (2) intervenor-petitioner Governor Tony Evers; (3) intervenors-petitioners Nathan Atkinson, Stephen Joseph Wright, Gary Krenz, Sarah J. Hamilton, Jean-Luc Thiffeault, Somesh Jha, Joanne Kane, and Leah Dudley; (4) Democratic Senator respondents Tim Carpenter, Chris Larson, Mark Spreitzer, Dianne H. Hesselbein, and Jeff Smith; (5) intervenor-respondent Wisconsin Legislature and Republican Senator respondents Andre Jacque, Rob Hutton, Devin LeMahieu, Stephen L. Nass, John Jagler, Howard L. Marklein, Rachael Cabral-Guevara, Van H. Wanggaard, Jesse L. James, Romaine Robert Quinn, Cory Tomczyk, and Chris Kapenga; and (6) intervenors-respondents Billie Johnson, Chris Goebel, Ed Perkins, Eric O'Keefe, Joe Sanfelippo, Terry Moulton, Robert Jensen, Ron Zahn, Ruth Elmer, and Ruth Streck. Accordingly,

IT IS ORDERED that, within 21 days of the date of this order, each group of parties identified above shall pay to the Director of State Courts[1] the amount of $21,359.67, which is one-sixth of the fees set forth in the Statement of Fees and Expenses by the Consultant Team submitted by Dr. Grofman and Dr. Cervas. Each of the parties listed in the preceding paragraph shall be responsible for the total amount of fees to be paid by the group with which they are associated. When a payment is made, the party making the payment shall file a letter with the clerk of this court stating the amount and date of the payment.

REBECCA FRANK DALLET, J. (*concurring*). In every case, we—a court of seven—evaluate the parties' submissions and arguments in good faith and render decisions that reckon with the arguments of the parties. At times we disagree, sometimes vehemently. But we remain a seven-member court even when we disagree. The majority vote rules, and the dissenting justices are welcome to voice their disagreement in separate writings.

This case is no exception. In it, we held that the 2022 state legislative district maps violated the contiguity requirements of the Wisconsin Constitution, and we enjoined their use in future elections. See Clarke v. Wisconsin Elections Comm'n, 2023 WI 79, ¶4, 410 Wis. 2d 1, 998 N.W.2d 370. We also urged the legislature and the governor to enact new maps that satisfied all the requirements of state and federal law. But, in the event they failed to do so, we set forth the process and criteria that would guide us in adopting new maps. See id., ¶¶4, 64-71.

The process we set forth was extensive, and included the following steps. All of the parties were given an opportunity to submit proposed maps, supporting briefs, and expert reports. They were then permitted to file briefs and expert reports responding to the submissions of the other parties. We appointed two independent redistricting consultants, Drs. Bernard Grofman

[1] Payments shall be submitted to Hon. Audrey Skwierawski, Director of State Courts, P.O. Box 1688, Madison, WI 53701-1688.

and Jonathan Cervas,[2] to evaluate the parties' proposed maps using the specific criteria we identified in our decision and to file a report containing their analysis. After receiving the Consultants' report, the parties were provided with an additional chance to respond. Ultimately, we received thousands of pages of submissions from the many parties in this case.

As should be clear, at every turn the process we set forth afforded the parties the opportunity to be heard "'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). That is all that due process requires. See id. Like other courts around the country in similar cases, we organized proceedings in a way that gave the parties every opportunity to be heard but also ensured that we would be ready to protect the right of Wisconsinites to vote in constitutional districts if the legislature failed to enact a constitutionally compliant plan in a timely manner.[3] See, e.g., Harper v. Hall, 308 N.C. 302, 306-07 (2022); League of Women Voters of Pa. v. Commonwealth, 175 A.3d 282, 284 (Pa. 2018) (per curiam); Mellow v. Mitchell, 607 A.2d 204, 205 (Pa. 1992). Our constitution demands no less.

In the end, it was not necessary for this court to adopt new maps in this case. That was because the political process worked: The legislature enacted new state legislative district maps and the governor signed them into law. See 2023 Wis. Act 94. Nevertheless, I commend the Consultants for their work in this case. They had an important task, one that none of the parties could have performed: Not recommending any party's proposal, but independently evaluating all the parties' submissions according to the specific criteria the court announced and submitting a report reflecting their analysis on a tight timeline. Drs. Grofman and Cervas were up to this task, and submitted a detailed report that supported their conclusions. I want to make clear that there were no ex parte communications between the court and the Consultants concerning the contents of their report. Those who suggest otherwise are reading boilerplate language in the

[2] Drs. Grofman and Cervas are nationally recognized, non-partisan redistricting experts who have served as special masters or redistricting consultants to state and federal courts across the country. See generally Personhuballah v. Alcorn, 155 F. Supp. 3d 552 (E.D. Va. 2016); Harper v. Hall, 881 S.E.2d 156 (N.C. 2022), superseded on other grounds, 886 S.E.2d 393 (N.C. 2023); Harkenrider v. Hochul, 197 N.E.3d 437 (N.Y. 2022).

[3] Ensuring that we would be ready to adopt remedial maps in a timely manner necessarily required expedited deadlines for the parties' briefing and submissions. Courts must act quickly sometimes, particularly when the cases before them implicate upcoming elections, or when failing to act in a timely manner would be tantamount to denying relief. See, e.g., Phillips v. Wisconsin Elections Comm'n, 2024 WI 8, ¶¶5-6, 12, 410 Wis. 2d 386, 2 N.W.3d 254 (granting a writ of mandamus directing the placement of a candidate on the Presidential Primary ballot just seven days after filing); Trump v. Biden, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568 (rejecting a challenge to the 2020 Presidential Election results just three days after filing, after ordering both expedited briefing and oral argument).

report about confidentiality out of context. In short, Drs. Grofman and Cervas performed their duties ethically, transparently, and substantially under budget.[4]

I join the court's order splitting the Consultants' fees between the various parties to this case. We did not appoint the Consultants as expert witnesses under Wis. Stat. § 907.06, or as referees under Wis. Stat. § 805.06. Instead, we appointed them as independent consultants under our inherent authority to "ensure the efficient and effective functioning of the court and to fairly administer justice." See State v. Schwind, 2019 WI 48, ¶16, 386 Wis. 2d 526, 926 N.W.2d 742 (quoting another source); see also In re Peterson, 253 U.S. 300, 312 (1920) (explaining that "[c]ourts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties."). As the federal courts have concluded in a similar context, rules permitting court appointment of expert witnesses do not displace that inherent authority. See, e.g., Reilly v. United States, 863 F.2d 149, 155-56 (1st Cir. 1988). And with that inherent authority comes the power to require the parties to bear the cost of the Consultants' work. See, e.g., Laleh v. Johnson, 405 P.3d 286, 290 (Colo. Ct. App. 2016) (concluding that the inherent authority of an appointing court includes the authority to order the litigants to pay the costs of such appointments). Accordingly, I respectfully concur.

I am authorized to state that Justices ANN WALSH BRADLEY, JILL J. KAROFSKY, and JANET C. PROTASIEWICZ join this concurrence.

[4] The total amount of costs and expenses incurred by the consultants was $128,158—more than 35% less than the total amount authorized by their service contracts. In their statement of fees and expenses, the Consultants detailed the total number of hours they and each other member of their team spent on the case, and described the tasks each member of the team performed.

ANNETTE KINGSLAND ZIEGLER, C.J. (*dissenting*). "Trust us! We're from the government, and we're here to collect our $128,158 bill."[5] But trust cannot be demanded where transparency is glaringly absent. From the outset, this case has been rife with procedural irregularities, legal contortions, and due process problems.[6] Now, parties are ordered to pay the non-itemized bill submitted by the "consultants" for services which the court of four contracted through the Director of State Courts.[7] This contract between the Director, on behalf of four

[5] This court ordered the parties to submit proposals for how to allocate the $128,158 in fees billed by the court's "consultants." Order regarding allocation of fees and expenses, Clarke v. Wisconsin Elections Comm'n, No. 2023AP1399-OA unpublished order, at 1 (Wis. Apr. 2, 2024), https://www.wicourts.gov/courts/supreme/origact/docs/23ap1399_0402courtorder.pdf. Now, the court orders the bill be split among the six parties. Some parties question their portion of the bill, rightfully lamenting the lack of transparency which has been part and parcel of this process. Notably, some parties did object to the court contracting with the "consultants." Those objections were silenced and remain unanswered. See Motion for Leave to Subpoena Consultants for Depositions and Documents, No. 2023AP1399-OA (Feb. 8, 2024), https://www.wicourts.gov/courts/supreme/origact/docs/23ap1399_0208motion.pdf.

[6] Clarke v. Wisconsin Elections Comm'n, 2023 WI 79, ¶¶78-184, 410 Wis. 2d 1, 998 N.W.2d 79 (Ziegler, C.J., dissenting). In her concurrence to this order, Justice Dallet incorrectly limits the due process and procedural protections parties are due to "the opportunity to be heard at a meaningful time and in a meaningful manner," stating, "That is all that due process requires." Concurrence, supra, at 3. Justice Dallet's conclusion in this regard is confusing, as she recently authored an opinion putting forward a more expansive view of the due process parties are owed. See Miller v. Carroll, 2020 WI 56, ¶¶22-24, 392 Wis. 2d 49, 944 N.W.2d 542 (applying to Wisconsin the standard for assessing whether the probability of a judge's actual bias rises to the level of a due process violation, as set forth in Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009)). The single case Justice Dallet cites to support this inexplicably narrowed view of due process does not even espouse the narrow view of due process which she attempts to adopt. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976); see also Andrade v. City of Milwaukee Bd. of Fire and Police Comm'rs, 2024 WI 17, ¶¶51-68, 411Wis. 2d 340, 5 N.W.3d 261 (Ziegler, C.J., dissenting). And, in Justice Dallet's strained attempt to provide cover for her fellow majority members, she completely ignores the statutory due process owed the parties as well. In doing so, Justice Dallet appears to continue a troubling trend of ignoring arguments which conflict with a desired outcome. See Catholic Charities Bureau, Inc. v. LIRC, 2024 WI 13, ¶115 n.3, 411 Wis. 2d 1, 3 N.W.3d 666 (Rebecca Grassl Bradley, J., dissenting).

[7] Statement of Fees and Expenses by the Consultant Team (Feb. 25, 2024), https://www.wicourts.gov/courts/supreme/origact/docs/23ap1399_0226consultantsstatement.pdf; Order regarding post-decision matters, Clarke v. Wisconsin Elections Comm'n, No. 2023AP1399-OA, unpublished order, at 1 (Wis. Dec. 22, 2023), https://www.wicourts.gov/courts/supreme/origact/docs/23ap1399_1222order.pdf ("It is further ordered that the Director of State Courts is instructed to enter into one or more retainer agreements between the court and Dr. Grofman and Dr. Cervas for their services.").

members of the court, and the "consultants" was presumably negotiated and subsequently executed without consent of all members of the court or the parties,[8] nor was any record made of the communications then or thereafter. Inexplicably, the report of the "consultants" called for "keep[ing] any communications with members of the Court confidential and never disclos[ing] the contents of any discussion with members of the Court unless and until given permission by the Court." Report of The Court-Appointed Co-Consultants (Feb. 1, 2024), at 2 https://www.wicourts.gov/courts/supreme/origact/docs/23ap1399_0201grofmancervasreport.pdf. The fact that this language was included must raise eyebrows. But now, without allowing any questions or scrutiny of it, the court orders the parties to pay the bill, despite the "consultants" being hired without any constitutional or statutory basis.[9]

The Director's contract also called for the "consultants" to "provide consulting services for the Court in accordance with the provisions" of the court's December 22, 2023 order on post-decision matters,[10] services which centered on their "prepar[ing] and fil[ing] a written report."[11] Through its December 22, 2023 order the court forbade the "consultants" from "consider[ing] any fact outside the record in this case" while preparing their written report.[12] Further, the "consultants" were instructed that their report "shall evaluate each of the parties' submissions

[8] The court claimed that it "contacted all of the persons identified by one or more of the parties as potential consultants to inquire regarding their capabilities and availability." Order regarding post-decision matters, Clarke, No. 2023AP1399-OA unpublished order, supra n.6, at 1. But the Wisconsin Legislature and Republican Senators attest that the court did not contact the Legislative Technology and Services Bureau (LTSB), the Wisconsin Legislature's proposed consultant. See Statement of Position on Allocation of Consultants' Fees and Expenses by Intervenor-Respondent Wisconsin Legislature and Respondents [Republican] Senators (Apr. 9, 2024) at 4, https://www.wicourts.gov/courts/supreme/origact/docs/23ap1399_0409wilegisrepsens.pdf ("No one at LTSB has been contacted by the Wisconsin Supreme Court regarding this case.").

[9] See Clarke, 410 Wis. 2d 1, ¶91 n.26 (Ziegler, C.J., dissenting); see also Order regarding post-decision matters (including appointing Drs. Bernard Grofman and Jonathan Cervas as court "consultants"), Clarke, No. 2023AP1399-OA, unpublished order, supra n.7, at 5-7 (Rebecca Grassl Bradley, J., dissenting).

[10] Service Contracts of "Consultants," at 2, https://www.wicourts.gov/courts/supreme/origact/docs/23ap1399_0103redactedcervas.pdf and https://www.wicourts.gov/courts/supreme/origact/docs/23ap1399_0104redactedgrofmancorr.pdf.

[11] See Order regarding post-decision matters, Clarke, No. 2023AP1399-OA, unpublished order, supra n.7, at 3.

[12] See id., Clarke, No. 2023AP1399-OA, unpublished order, supra n.7, at 4.

based on the criteria identified in the court's December 22, 2023 opinion."[13] Yet, the report filed by the "consultants" does not adhere to what the court ordered. Instead, the report goes outside the record and evaluates submissions based on criteria the court did not provide.[14] In addition to the report not following the contract, language in the report specifically shields from scrutiny any communications among the Director, the court of four, and the "consultants."[15]

Parties are left in the dark; they are unable to question the process, or the bill, but must foot the bill. Due process rights are denied. [16] No transparency in this Star Chamber.

With respect to the kind of detail Wisconsin courts typically require, the statement of fees and expenses submitted by the "consultants" is woefully inadequate. The parties have asked to be able to question the bill, but the court fails to even address the pending motion. Instead, the court summarily denies the parties any opportunity to ask questions or otherwise inquire. Instead, this court imposes the bill for its contract on the parties to pay, even though no constitutional nor statutory authority exists to do so. And, who is left holding the bag as a result of this farcical exercise in futility? Largely, the taxpayers. Accordingly, I dissent.

As I previously wrote, "[t]his deal was sealed on election night." Clarke v. Wis. Elections Comm'n, 2023 WI 79, ¶78, 410 Wis. 2d 1, 998 N.W.2d 79 (Ziegler, C.J., dissenting).

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[13] See id., Clarke, No. 2023AP1399-OA, unpublished order, supra n.7, at 4; see also Clarke, 410 Wis. 2d 1, ¶¶64-71 (identifying the criteria which the court required the "consultants" to use in evaluating the parties' map submissions); Report of The Court-Appointed Co-Consultants (Feb. 1, 2024), at 3-4, https://www.wicourts.gov/courts/supreme/origact/docs/23ap1399_0201grofmancervasreport.pdf.

[14] The report submitted by the "consultants" extensively relies on social science data "outside the record in this case." In turn, the "consultants" use that data to label two parties' map submissions as "gerrymanders," opining on gerrymandering which was not a criterion the court permitted the "consultants" to consider, and was an issue which the court refused to take up in this case. Report of the Court-Appointed Co-Consultants, supra n.13, at 22-23; Clarke, 410 Wis. 2d 1, ¶¶69-70.

[15] Report of the Court-Appointed Co-Consultants, supra n.13, at 2 ("We agree that we will keep any communications with members of the Court confidential and never disclose the contents of any discussion with members of the Court unless and until given permission by the Court.").

[16] "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." Wis. Const. art. 1, § 9 (emphasis added).

Though redistricting had just been decided by this court in the Johnson litigation,[17] a newly formed four justice majority "impose[d] their will on the entire Assembly and half of the Senate" when they tossed the maps this court implemented as a judicial remedy barely two years prior. Id. This procedurally and legally flawed original action, which was filed to coincide with the change in court membership,[18] requested the court remedy an "inability to achieve a Democratic majority in the state legislature" which "harm[ed] their ability to see laws and policies they favor enacted."[19] Running headlong into the political thicket, the court of four trampled longstanding practices and procedures, abandoned basic due process, and supplanted the law in order to deliver what amounts to a predetermined political outcome for their constituency. Contiguity was the sole reason that four members of the court determined the Johnson maps were

[17] "Johnson litigation" or "Johnson" refers to the collective action of this court in the redistricting original action, Johnson v. Wisconsin Elections Comm'n, No. 2021AP1450-OA, during the 2021-22 term. See Johnson v. Wisconsin Elections Comm'n, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 ("Johnson I"); Johnson v. Wisconsin Elections Comm'n, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 ("Johnson II"), summarily rev'd sub nom. Wisconsin Legislature v. Wisconsin Elections Comm'n, 595 U.S. 398 (2022) (per curiam); and Johnson v. Wisconsin Elections Comm'n, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559 ("Johnson III").

[18] Steve Schuster, Lawsuit to Challenge Wisconsin's Legislative Maps to Be Filed, Wis. L.J. (Apr. 6, 2023), https://wislawjournal.com/2023/04/06/ lawsuit-to-challenge-wisconsins-legislative-maps-to-be-filed/ ("A Madison-based law firm is planning to challenge the state's gerrymandered legislative maps . . . . The lawsuit will be filed after Justice-elect Janet Protasiewicz is sworn in on Aug. 1, Nicole Safar, executive director of Madison-based Law Forward, said . . . ."); see also Judge Janet Protasiewicz (@Janet for Justice) Facebook, (Jan. 9, 2023), https://www.facebook.com/JanetforJustice/ ("POLITICO says that our race could challenge the court's narrow 4-3 conservative majority and have ramifications over future redistricting decisions in Wisconsin.").

[19] Pet. to the Supreme Court of Wisconsin to take Juris. of an Original Action (Aug. 2, 2023), at 8, https://www.wicourts.gov/courts/supreme/origact/docs/23ap1399_ originalactionpetition.pdf. Justice Dallet alleges in her concurrence that in Clarke, the court had to act quickly in overturning its Johnson litigation precedent, because "[c]ourts must act quickly sometimes, particularly when the cases before them implicate upcoming elections." Concurrence, supra, at 3 n.3. The two cases she cites in reliance do not appear to aid the point she wants to make. In Phillips v. Wisconsin Elections Commission, 2024 WI 8, 410 Wis. 2d 386, 2 N.W.3d 254, there was already a court case on all fours, so the court could act quickly to resolve the issue. In Trump v. Biden, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568, the court majority utilized the doctrine of laches to preclude the court from acting on the timely constitutional issue raised. But in Clarke, the court majority "acted quickly" in order to overturn this court's precedent in the Johnson litigation.

unconstitutional.[20] This court declined then to consider additional issues that were presented, including partisan gerrymandering.[21]

Under the guise of contiguity, the court of four invent their own practices and procedures to serve their partisan, political agenda, letting nothing get in the way.[22] Partisan outcomes continue to drive them, but confusion and a lack of transparency consistently follow close behind. They may have had the legal authority to contract for outside assistance had they appointed referees pursuant to Wis. Stat. § 805.06 (2021-22).[23] Referees may assist a court in

[20] Clarke, 410 Wis. 2d 1, ¶¶2-3.

[21] Pet. to the Supreme Court of Wisconsin to take Juris. of an Original Action, supra n.18, at 8; Clarke, 410 Wis. 2d 1, ¶¶68-71 (stating the court will "consider partisan impact when evaluating remedial maps" even though the court "declined to hear the issue of whether extreme partisan gerrymandering violates the Wisconsin Constitution" in granting the original action.).

[22] As chronicled, the court of four, in pursuit of partisan outcome-based decision making, silence the voices of their colleagues in their quest for power. Their actions portray a new court majority which appears unable to resist the allure of political control. They met repeatedly behind closed doors, in secret, over the protestations of their colleagues, before their newest member had even been seated on the court. They met in secret before the court's term began in order to change longstanding court policies and procedures and in order to seize the power to administer the court system (a power which the constitution vests in the chief justice). The court of four made hiring and firing decisions without their colleagues' input and in violation of this court's rules. And, they have continuously changed this court's internal operating procedures to further entrench their majority control over the court's calendar and processes for handling cases, further silencing and restricting dissenting voices in the process. So, while Justice Dallet apparently now agrees with the constitutional imperative that we are intended to be a court of seven, her actions over the past year evince this change of heart as being disingenuous. Concurrence, supra, at 2; see, e.g., Statement of Chief Justice Annette Kingsland Ziegler (Aug. 2, 2023), https://www.wispolitics.com/2023/chief-justice-annette-kingsland-ziegler-statement/; Press Release, Chief Justice Annette Kingsland Ziegler (Aug. 4, 2023), https://www.wicourts.gov/news/archives/view.jsp?id=1578&year=2023; Order granting petition for leave to commence original action, Clarke v. Wisconsin Elections Comm'n, No. 2023AP1399-OA, unpublished order, at 34 (Wis. Oct. 6, 2023), https://www.wicourts.gov/courts/supreme/origact/docs/23ap1399_1006order.pdf (Hagedorn, J., dissenting) (noting that in spite of the petitioners "standing by until the court's composition changed, the court dutifully adopts an accelerated briefing and oral argument schedule. It even changed our internal writing deadlines on original actions to ensure this case would be fast-tracked.").

[23] All subsequent references to the Wisconsin Statutes are to the 2021-22 version unless otherwise indicated.

"making findings of fact and conclusions of law" and provide a written report.[24] The parties retain the right to provide written objections to the referee's report and otherwise challenge the referee's findings.[25] Courts engaging the services of referees "should clearly delineate the court's expectations regarding the types of evidence the referee should examine and the form of the report, including whether the referee should make findings of fact and conclusions of law." Ehlinger v. Hauser, 2010 WI 54, ¶89, 325 Wis. 2d 287, 785 N.W.2d 328. "Explicit parameters that are enumerated in a reference will help clarify the procedures and keep the court, the parties, and the referee on track." Id.

Alternatively, the court of four could have appointed expert witnesses pursuant to Wis. Stat. § 907.06. Expert witnesses can be called to testify, provide expert opinions for a court, and provide a written report, as a referee does. Parties, however, are entitled to depose and cross-examine expert witnesses.[26]

Referees and expert witnesses, depending on the role, assist the court in matters such as factfinding, accounting, reaching other conclusions, and drafting written reports, and expert witnesses are subject to cross-examination by the parties. Referees and expert witnesses are granted this authority via statute. See Wis. Stat. § 805.06; Wis. Stat. § 907.06. The court failed to act pursuant to either statute even though the parties are entitled to know what statutory or other authority exists for the appointment of the "consultants," and then hold the court to the parameters of the appointment. "A court that appoints such an individual should always ensure

[24] Wis. Stat. § 805.06(5)(a) ("The referee shall prepare a report upon the matters submitted by the order of reference and, if required to make findings of fact and conclusions of law, the referee shall set them forth in the report.").

[25] Wis. Stat. § 805.06(5)(b) ("In an action to be tried without a jury the court shall accept the referee's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. . . . The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instruction.").

[26] Wis. Stat. § 907.06(1) ("The judge may on the judge's own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The judge may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of the judge's own selection. An expert witness shall not be appointed by the judge unless the expert witness consents to act. A witness so appointed shall be informed of the witness's duties by the judge in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness's findings, if any; the witness's deposition may be taken by any party; and the witness may be called to testify by the judge or any party. The witness shall be subject to cross-examination by each party, including a party calling the expert witness as a witness.").

that the parties fully understand the role and scope of the appointee." Ehlinger, 325 Wis. 2d 287, ¶201 (Ziegler, J., concurring in part, dissenting in part).

But while referees and expert witnesses are statutorily vested with the authority to assist the court in carrying out its responsibilities, "consultants" have no such authorization or authority. Neither the constitution nor our statutes authorize this court to contract as it did with the "consultants." Consequently, these "consultants" lack any constitutional or statutory authority to assist the court, much less act in the stead of the Legislature and the Governor to redistrict anew.[27] Apparently in this regard too, no process is due to the parties.

Fundamentally, due process requires that it be clear how these "consultants" were meant to be appointed, either as referees or expert witnesses, because "[t]he statutes providing for court-appointed referees or expert witnesses are rife with procedural safeguards that ensure litigants due process of law." Ehlinger, 325 Wis. 2d 287, ¶204 (Ziegler, J., concurring in part, dissenting in part). "When a court appoints a referee or an expert witness, that appointee is subject to certain requirements which provide the parties with adequate safeguards and the ability to make a record." Id., ¶201. It is a court's responsibility to "ensure that the parties fully understand the role and scope of the appointee, and the appointees' involvement should never effectuate as a denial of the parties' right to fully develop the case and make a complete record." Id.

But not according to the majority's order or Justice Dallet's concurrence. Ignoring the parties' and fellow justices' voiced concerns about the court's lack of constitutional or other authority to appoint these "consultants,"[28] Justice Dallet and her colleagues finally acknowledge that they appointed these "consultants" not as statutorily recognized expert witnesses or referees, but as "independent consultants." Concurrence, supra, at 4. But the same due process concerns still go unanswered by Justice Dallet and her colleagues; namely, that no constitutional nor statutory authority exists to appoint these "independent consultants," let alone to delegate their decision-making responsibility.

But the court of four further overreaches its constitutional power and pretends that one branch of government—the Judiciary—has the authority to impose costs on a separate branch of

[27] See Order regarding post-decision matters (including appointing Drs. Bernard Grofman and Jonathan Cervas as court "consultants"), Clarke, No. 2023AP1399-OA, unpublished order, supra n.7, at 5-7 (Rebecca Grassl Bradley, J., dissenting).

[28] Id.

government—the Legislature. The law prohibits such an imposition.[29] See Klingseisen v. Wis. State Highway Comm'n, 22 Wis. 2d 364, 370, 126 N.W.2d 40 (1964) ("It is well-established in Wisconsin that [court] costs may not be taxed against the state unless authorized by statute."); see also DOT v. Wisconsin Pers. Comm'n, 176 Wis. 2d 731, 736-38, 500 N.W.2d 664 (1993) (citing Martineau v. State Conservation Comm'n, 54 Wis. 2d 76, 79, 194 N.W.2d 664 (1972) ("Costs, including attorney's fees, may not be taxed against the state without express statutory authorization.")). And, in either event, it's the taxpayer who foots the bill.

The majority and Justice Dallet's concurrence ignore this and other inconvenient roadblocks, claiming that pursuant to the court's inherent authority, the court has the power "to require the parties to bear the cost of the Consultants' work." Concurrence, supra, at 4. But they cannot reconcile this "inherent authority" line of reasoning with the fact that no constitutional nor statutory authority exists for one branch of government to assess fees and costs against another separate branch of government. Disappointingly, all Justice Dallet provides to prop up her assertion is a solitary foreign case dealing with the court's appointment of special masters and expert witnesses. That was not the case here. She cites a solitary foreign case that involves private parties, rather than another branch of government.

The court of four invited further confusion into the map-selecting process and its concerns over its fairness when, in addition to appointing these "consultants," "the [court] order[ed] the parties to propose maps that comply with all of the parameters set forth in its opinion," but the court did not even make clear what "criteria it [would] consider."[30] The court required the parties to play the game, but without any rules or knowledge of how the game would be won. Then the court allowed the "consultants" to rely on extraneous evidence, render conclusions based on partisanship, and eliminate certain maps. The court seemingly just supplanted its own decision-making responsibility with that of the "consultants," but judicial decision making requires more. A court cannot just delegate its judicial responsibility to weigh and consider the evidence and arguments by outsourcing those legal determinations to extra-

[29] Sovereign immunity has also been held to bar taxation of costs against the state unless there is an express waiver. See DOT v. Wisconsin Pers. Comm'n, 176 Wis. 2d 731, 736-38, 500 N.W.2d 664 (1993); State v. Bocorny, 2007 WL 22265108 (dealing with sovereign immunity question under a separation of powers framework, determining that only the Legislature may waive sovereign immunity to allow costs to be assessed against the state); Klein v. DOR, 2020 WI App 56, ¶33, 394 Wis. 2d 66, 949 N.W.2d 608 (quoting Martineau v. State Conservation Comm'n, 54 Wis. 2d 76, 79, 194 N.W.2d 664 (1972)) ("[C]osts may not be taxed against the state or an administrative agency of the state unless expressly authorized by statute."); see also Wisconsin Elections Commission Response to April 2, 2024 Court Order (Apr. 9, 2024), at 2, https://www.wicourts.gov/courts/supreme/origact/docs/23ap1399_0409wecresponse.pdf.

[30] See Order regarding post-decision matters, Clarke, No. 2023AP1399-OA, unpublished order, supra n.7, at 7 (Rebecca Grassl Bradley, J., dissenting).

statutory third party "consultants."[31] Moreover, our court cannot mandate that parties proceed to have an arbitrator finally decide their disputes. But that is the equivalent of what happened here.[32] Gray v. Eggert, 2001 WI App 246, ¶10, 248 Wis. 2d 99, 635 N.W.2d 667 (determining that while courts have the authority "to order parties in civil litigation to attempt mediation or other settlement processes to resolve a case," "[n]owhere does Wis. Stat. § 802.12(2) provide a court the authority to require resolution") (emphasis added)).

What we have learned is that "contiguity" was merely window dressing for the resultant brazen partisan map selecting. Contiguity really had little, if anything, to do with the report submitted by the "consultants." Instead, "partisan impact" was the unstated, undefined,

[31] State ex rel. Universal Processing Servs. of Wis., LLC v. Cir. Ct. of Milwaukee Cnty., 2017 WI 26, ¶136, 374 Wis. 2d 26, 892 N.W.2d 267 (Rebecca Grassl Bradley, J., concurring in part, dissenting in part) (quoting La Buy v. Howes Leather Company, 352 U.S. 249, 256 (1957) (determining that the court's delegation to a referee "over all matters in the litigation . . . amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation")).

[32] Under Wis. Stat. § 802.12, courts may employ the use of alternative dispute resolutions in order to assist parties in attempting settlement. Binding arbitration is one such alternative dispute resolution. Wis. Stat. § 802.12(1)(a). Under binding arbitration:

1. A neutral 3rd person is given the authority to render a decision that is legally binding.

2. It is used only with the consent of all the parties.

3. The parties present evidence and examine witnesses.

4. A contract or the neutral 3rd person determines the applicability of the rules of evidence.

5. The award is subject to judicial review under ss. 788.10 and 788.11.

Id. Unless all the parties consent, courts "may not order the parties to attempt settlement through binding arbitration." Wis. Stat. § 802.12(2)(b). But that is what the court of four did here. They gave the "consultants" the authority to render legally binding decisions, in the absence of all of the parties' consent, while denying the parties the ability to present evidence or otherwise challenge the "consultants," their report findings, or their fees.

determinative factor.[33] Even though a lack of contiguity was allegedly the "problem" with the maps, the parties were required to take "partisan impact" into consideration, and were judged on how well they complied with it, but were never told what "it" was. Though the court declined to consider "gerrymandering" claims when it took the case, the "consultants" spent a sizeable portion of their report discussing this nebulous "gerrymandering" criterion and assessing the parties' submissions against it.[34] So much for contiguity rendering the Johnson maps unconstitutional.

More specifically, the court's order limited data that would be considered solely to the "consultants" factfinding.[35] Then the court allowed the "consultants" to rely on extra-record evidence in promoting and demoting the map selections, eliminating two more "Republican" submissions over concerns of "gerrymandering," while promoting a "Democratic" map which did not even satisfy contiguity.[36] This is again, a complete disregard of the parties' due process

[33] The court of four determined that contiguity was the reason the Johnson maps were unconstitutional. Then, through the Director of State Courts, they contracted with the two "consultants" to assist the court in assessing and selecting remedial maps to remedy this contiguity issue. Yet, of the 25-page report, the "consultants" devoted one paragraph to assessing contiguity in the proposed maps, while spending more than 10 pages outlining their social science approach to assessing gerrymandering under the umbrella of "partisan impact." See Clarke, 410 Wis. 2d 1, ¶¶69-70; Letter from "consultants" re: technical specifications (Dec. 26, 2023), at 2-3, https://www.wicourts.gov/courts/supreme/origact/docs/23ap1399_1226memo.pdf.

[34] Clarke, 410 Wis. 2d 1, ¶¶69-70; Response of Intervenors-Respondents Billie Johnson [et al.] to April 2 Order Regarding Consultants' Fees (Apr. 9, 2024), at 4, https://www.wicourts.gov/courts/supreme/origact/docs/23ap1399_0409johnsonintervenorsrespondents.pdf; Order regarding post-decision matters, Clarke, No. 2023AP1399-OA, unpublished order, supra n.7, at 3; Report of the Court-Appointed Co-Consultants, supra n.13.

[35] Order regarding post-decision matters, Clarke, No. 2023AP1399-OA, unpublished order, supra n.7, at 4 ("In preparing their report and any proposed remedial map, Dr. Grofman and Dr. Cervas shall not consider any fact outside the record in this case.").

[36] The Intervenors-Respondents, Billie Johnson, et al., question the neutrality of the court's "consultants" and their end product which they now are being ordered to pay for, given that the "consultants" denied for consideration only the maps from parties on one side of the litigation while recommending the court choose from any of the other four maps submitted by the parties on the other side of the litigation. Perhaps tipping their hand as to what they were actually hired to do, the "consultants" recommended a map that was not even contiguous—presumably the underlying reason the court got involved in redistricting again in the first place, and why they needed help from "consultants." See Response of Intervenors-Respondents Billie Johnson [et al.] to April 2 Order Regarding Consultants' Fees, supra n.34, at 2-3.

rights, as well as legal and statutory requirements, to instead rely on extra-record evidence, which is prohibited, and using that to reach conclusions about map drawing and "gerrymandering."[37]

What of due process when statutory protections do not apply to this court's employment of "consultants" to advise them, and the "contiguity" reason for new map-drawing was not the required criterion in the new map selection? Does the majority condone courts seeking outside advice to assist them in deciding cases, without regard to statutory confines? But the law requires that judges who seek the advice of experts "on the state of the law applicable to a particular proceeding" must "notify the parties in the pending proceeding, inform them of the information received, and afford them the opportunity to respond to it." In re Judicial Disciplinary Proceedings Against Tessmer, 219 Wis. 2d 708, 724, 580 N.W.2d 307 (1998) (per curiam). This procedural "fundamental fairness" safeguard is in place to protect the parties' right to a neutral arbiter, as "persons outside the judicial system have no place in a judge's decision making." Id. The parties' concerns about the court majority's reliance on extra-record evidence is legitimate: "It is not normal process for our court to hire experts to present new evidence and influence decision making with information outside the record." Clarke, 410 Wis. 2d 1, ¶91 (Ziegler, C.J., dissenting).

The court of four failed to hold its "consultants" to the terms of their contract and the court's accompanying order. In reality, the "consultants" did not analyze the parties' submissions as required by either the court's contract or the court's orders.[38] The court has essentially denied the parties what should be the statutory right to conduct discovery of these "consultants," challenge the decisions these "consultants" made, or depose or cross-examine the "consultants" or otherwise question their recommendations.[39] Even the parties' motion to subpoena the "consultants" has been thus far ignored by my colleagues.[40] None of this comports with any notion of basic due process. When the court of four makes up the law as it goes, they invite these legitimate questions and concerns about the process afforded the parties: Due process.

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[37] Motion for Leave to Subpoena Consultants for Depositions and Documents, supra n.5, at 3.

[38] See Order regarding post-decision matters, Clarke, No. 2023AP1399-OA, unpublished order, supra n.7, at 3; Service Contracts of "Consultants," supra n.10, at 2; Report of the Court Appointed Co-Consultants, supra n.13, at 23.

[39] See Order regarding post-decision matters, Clarke, No. 2023AP1399-OA, unpublished order, supra n.7, at 4 ("No further discovery of Dr. Grofman and Dr. Cervas shall be permitted[.]").

[40] See Motion for Leave to Subpoena Consultants for Depositions and Documents, supra n.5.

These parties have been denied due process in numerous respects. Legitimate questions remain unanswered, including the report's language which shields from scrutiny whether and what might be undocumented hidden communications between members of this court or the Director's office and these "consultants." The "consultants" seem to at least infer the existence of such communications in their report, rather inexplicably including a confidentiality clause not found in the court's contracts with the "consultants." In this confidentiality clause, the "consultants" agree to "keep any communications with members of the Court confidential and never disclose the contents of any discussion with members of the Court unless and until given permission by the Court."[41] The contracts between the Director on behalf of the court and these "consultants" contain no such confidentiality clause. Why did this reassurance suddenly become necessary to include, and what conversations between some members of the court and the "consultants" do the parties need to be excluded from?

Justice Dallet hastily tries to dispense with this rather jarring due process concern by labeling the confidentiality clause mere "boilerplate language," which she alleges is being read "out of context." Concurrence, supra, at 3. Inquiring minds want to know which context Justice Dallet believes would change the language of the confidentiality clause promising to "keep any communications with members of the Court confidential and never disclose the contents of any discussion with members of the Court unless and until given permission by the Court" into something less violative of parties' due process rights? The language of the included confidentiality clause is clear. The parties' concerns of potential undocumented communications between members of the court and their "consultants" throughout this process are legitimate.

But in her haste to continue to deny the parties the right to question anything, Justice Dallet fails to pay any heed to the overarching argument made. Justice Dallet declares that the "consultants" "performed their duties ethically and transparently," but neglects to address all of the legal roadblocks to the action they order. Concurrence, supra, at 3. The primary focus and concern is whether the court of four, not their "consultants," acted transparently. Also curiously—and presumably unintentionally—Justice Dallet narrows the focus of the parties' due process concerns here to just concerns about ex parte communications "concerning the contents of their report." In so doing, she again dodges the serious due process concerns about the entirety of this case from beginning to end.

Despite my request that a written record be made of any communications with the "consultants," that request was ignored and no such record exists documenting communications between the "consultants" and the Director, members of the court, or others. And, in the report we first learn that those communications are hidden pursuant to a confidentiality clause. This should raise concern.

Yet, here we are. The "consultants" were appointed pursuant to no constitutional nor statutory authority and submitted a report which relied on assessing partisan impact rather than

[41] See Report of The Court-Appointed Co-Consultants, supra n.13, at 2.

remedying contiguity. While ignoring the parties' process concerns, the court of four now pass along the bill for services submitted by the "consultants," which is devoid of the detail courts normally require in assessing costs and fees: detail such as itemization of time and reasonableness. The court's own order outlined that the "reasonable costs and expenses incurred by [the "consultants"]" for their services would be "borne by the parties," but now the court denies the parties the right to challenge or determine what those reasonable costs and expenses are.[42]

Wisconsin law traditionally requires detail and reasonableness when assessing costs or fees. For example, in the circuit courts, when a party files a bill of cost, the bills must be itemized. Wis. Stat. § 814.10(2) (requiring that "[a]ll bills of costs shall be itemized . . . ."). Itemization of the bill of costs allows parties to question the bill, object, or provide proof challenging the assessment of costs. Wis. Stat. § 814.10(3)-(4);[43] see also Milwaukee Metro. Sewerage Dist. v. City of Milwaukee, 2003 WI App 209, ¶31, 267 Wis. 2d 688, 671 N.W.2d 346, aff'd on other grounds, 2005 WI 8, 277 Wis. 2d 635, 691 N.W.2d 658.

If the circuit court is awarding costs related to the appointment of a referee, then Wis. Stat. § 814.13 states that "[a]fter the trial of any issue by a referee pursuant to a compulsory reference for that purpose his or her fees and expenses shall be fixed by the court in which his or her report has been filed and paid by the state as other circuit court expenses are paid." The parties "may agree in writing upon any other rate of compensation" in all other referee

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[42] Order regarding post-decision matters, Clarke, No. 2023AP1399-OA, unpublished order, supra n.7, at 4 ("IT IS FURTHER ORDERED that the reasonable costs and expenses incurred by Dr. Grofman and Dr. Cervas pursuant to the retainer agreement(s) identified above shall be borne by the parties as determined by the court in a future order.").

[43] Wisconsin Stat. § 814.10(3) and (4) provide as follows:

> (3) OBJECTIONS, PROOFS, ADJOURNMENT. The party opposing such taxation, or the taxation of any particular item shall file with the clerk a particular statement of the party's objections, and the party may produce proof in support thereof and the clerk may adjourn such taxation, upon cause shown, a reasonable time to enable either party to produce such proof.
>
> (4) COURT REVIEW. The clerk shall note on the bill all items disallowed, and all items allowed, to which objections have been made. This action may be reviewed by the court on motion of the party aggrieved made and served within 10 days after taxation. The review shall be founded on the bill of costs and the objections and proof on file in respect to the bill of costs. No objection shall be entertained on review which was not made before the clerk, except to prevent great hardship or manifest injustice. Motions under this subsection may be heard under s. 807.13.

compensation cases. Wis. Stat. § 814.13. Courts recognize that "allowing trial courts routinely to shift their responsibilities to private judges unfairly requires the litigants, who are already paying taxes to fund the operation of the courts, to also bear the very substantial cost of private judges . . . . [S]uch a burden ultimately could discourage . . . meritorious claims." State ex rel. Universal Processing Servs. of Wis., LLC v. Cir. Ct. of Milwaukee Cnty., 2017 WI 26, ¶99, 374 Wis. 2d 26, 892 N.W.2d 267 (quoting Jovine v. FHP, Inc., 64 Cal. App. 4th 1506, 1531 (1998)); see also Peter v. Progressive Corp, 986 P.2d 865, 872-73 (Alaska 1999) ("More fundamentally, all potential litigants . . . have a constitutional right . . . of meaningful access to the justice system. Prohibitively high [referee] fees could potentially jeopardize such access. . . .").

If the circuit court is awarding costs related to the appointment of an expert witness, the expert witness is "entitled to reasonable compensation in whatever sum the judge may allow." Wis. Stat. § 907.06(2). The court "shall require that the party seeking discovery pay the expert a reasonable fee" in accordance with the expert's time spent responding to discovery and "obtaining facts and opinions." Wis. Stat. § 804.01(2)(d)3. Expert witness fees are statutorily capped at $300, plus standard witness fee and mileage, Wis. Stat. § 814.04(2), but the expert must testify at trial for fees to be recoverable. McLoone Metal Graphics, Inc. v. Robers Dredge, Inc., 58 Wis. 2d 704, 713-14, 207 N.W.2d 616 (1973).

If the circuit court is awarding attorney fees, the court considers a list of statutory factors in determining whether to award the attorney fees and in determining whether the attorney fees are reasonable. The general rule is that "parties to litigation typically are responsible for their own attorney fees" unless a statute or contract provides otherwise.[44] Wis. Stat. § 814.045(1)

[44] Wisconsin generally follows the American Rule in this regard——that parties to litigation typically are responsible for their own attorney's fees unless a statute or contract provides otherwise. Est. of Kriefall v. Sizzler USA Franchise, Inc., 2012 WI 70, ¶72, 342 Wis. 2d 29, 816 N.W.2d 853; Talmer Bank & Trust v. Jacobsen, 2018 WI App 15, ¶8, 380 Wis. 2d 171, 908 N.W.2d 495. Wisconsin has recognized several statutory exceptions to this general rule of nonrecoverability of attorney's fees. See, e.g., Wienhagen v. Hayes, 179 Wis. 62, 65, 190 N.W. 1002 (1922) (determining that "where the wrongful acts of the defendant have involved the plaintiff in litigation with others, or placed him in such relation with others as to make it necessary to incur expense to protect his interest, such costs and expense should be treated as the legal consequences of the original wrongful act"); Nationstar Mortg. LLC v. Stafsholt, 2018 WI 21, ¶3, 380 Wis. 2d 284, 908 N.W.2d 784 (quoting Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 167 (1939) (deciding that "circuit courts may include attorney fees as part of an equitable remedy 'in exceptional cases and for dominating reasons of justice'")); Talmer Bank & Trust, 380 Wis. 2d 171, ¶16 (holding that attorney's fees may be assessed against a party whose fraudulent or otherwise wrongful acts cause a second party to incur legal expenses to protect its interests against a third party); Meas v. Young, 142 Wis. 2d 95, 101, 417 N.W.2d 55 (Ct. App. 1987) (holding that an exception exists where the parties contract for the award of attorney's fees); DeChant v. Monarch Life Ins. Co., 200 Wis. 2d 559, 547 N.W.2d 592 (1996) (concluding that "attorney's fees . . . are recoverable by a prevailing party in a first-party bad faith action as part of those compensatory damages resulting from the insurer's bad faith").

(providing a list of the factors the court shall consider in determining whether to award attorney fees). Parties can dispute the reasonableness of the attorney's fees. Id.; see also Wis. Stat. § 804.01(3)(b)-(c); Wis. Stat. § 804.12(1)(c). The attorney's fees are statutorily limited, but that presumption may be overcome if the court determines a greater amount is reasonable following consideration of those statutory factors. § 814.045(2)(a).

If the circuit court is awarding costs for actions involving state government agencies,

> [a] party seeking an award under this section shall, within 30 days after final judgment in the action, submit to the clerk under s. 814.10(1) an itemized application for fees and other expenses, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.

Wis. Stat. § 814.245(6). [45] The legislature drafted § 814.245(6) in line with the federal equal access to justice act, 5 U.S.C. § 504. Section 504(2) states, in part:

> A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application . . . including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.

This court also requires itemization in lawyer regulatory disciplinary proceedings. The respondent attorney is provided the procedural opportunity to object to the statement of costs.[46]

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[45] See also Wis. Stat. §§ 227.485 and 227.483.

[46] Supreme Court Rule (SCR) 22.24, relating to the assessment of costs in lawyer regulatory disciplinary proceedings, provides in pertinent part:

> (1m) The court's general policy is that upon a finding of misconduct it is appropriate to impose all costs, including the expenses of counsel for the office of lawyer regulation, upon the respondent. In some cases the court may, in the exercise of its discretion, reduce the amount of costs imposed upon a respondent. In exercising its discretion regarding the assessment of costs, the court will consider the statement of costs, any objection and reply, the recommendation of the referee, and all of the following factors: . . .
>
> (2) In seeking the assessment of costs by the supreme court, the director shall file in the court, with a copy to the referee and the respondent, a statement of costs within 20 days after the filing of the referee's report or a SCR 22.12 or 22.34(10) stipulation, together with a recommendation regarding the costs to be assessed against the respondent. If an appeal of the referee's report is filed or the

Traditionally, the costs incurred "are payable to the office of lawyer regulation." Supreme Court Rule (SCR) 22.24(1). Additionally, SCR 22.16(7) requires a referee to "file with the supreme court a recommendation as to the assessment of reasonable costs" and to do so "within 10 days after the parties' submissions regarding assessment of costs."

In virtually every scenario where attorney's fees and costs are awarded, an itemized and accounted bill is required. Why is that not required for the bill submitted by the "consultants"? Instead, the parties are denied the chance to challenge this presented bill of costs and fees. This course of action is an affront to any notion of process, fairness, and transparency. I also question whether there has ever been a time when litigants have paid any such invoice, let alone cut checks, to the Director of State Courts.[47]

Far from being an exercise in transparency, the court of four's machinations throughout this case continue to be shrouded in secrecy. This court failed to independently exercise its discretion here. They contracted with "consultants," pursuant to no statutory nor other authority,

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> supreme court orders briefs to be filed in response to the referee's report, a supplemental statement of costs and recommendation regarding the assessment of costs shall be filed within 20 days of the state of oral argument or, if no oral argument is held, the filing date of the last brief on appeal. The recommendation should explain why the particular amount of costs is being sought. The respondent may file an objection to the statement of costs and recommendation within 21 days after a service of the statement of costs. A respondent who objects to a statement of costs must explain, with specificity, the reasons for the objection and must state what he or she considers to be a reasonable amount of costs. The objection may include relevant supporting documentation. The office of lawyer regulation may reply within 11 days of receiving the objection. In proceeding before a referee the referee shall make a recommendation to the court regarding costs. The referee shall explain the recommendation addressing the factors set forth in SCR 22.24(1m). The referee shall consider the submissions of the parties and the record in the proceeding. No further discovery or hearing is authorized.
>
> (3) Upon the assessment of costs by the supreme court, the clerk of the supreme court shall issue a judgment for costs and furnish a transcript of the judgment to the director. The transcript of the judgment may be filed and docketed in the office of the clerk of court in any county and shall have the same force and effect as judgments docketed pursuant to Wis. Stat. §§ 809.25 and 806.16 (1997-98)..

SCR 22.24(1m)-(3) (emphasis added).

[47] Order, supra, at 2 n.1 ("Payments shall be submitted to Hon. Audrey Skwierawski, Director of State Courts . . . .").

to assist them in fashioning a contiguity remedy in the wake of declaring the Johnson maps unconstitutional on that basis. The court then permitted the "consultants" to submit a report which did not comply with the court's orders or directives, which provided recommendations based on criteria outside the record, and which did not even provide a contiguity remedy. Now, they hand the parties the bill, all the while having denied the parties their due process rights to question or scrutinize the "consultants," their findings, or their bill of costs. This progression is the court of four's outcome-based, political, activist, decision making in action. But such political activism, lack of transparency, and denial of parties' due process rights have no place on this court. Procedural safeguards exist for a reason. Legal principles, process, and procedure should not be a free-for-all.

For all the foregoing reasons, I dissent.

I am authorized to state that Justice REBECCA GRASSL BRADLEY joins this dissent.

BRIAN HAGEDORN, J. (*dissenting*). What a mess. To no one's surprise, this case is moving toward closure with new legislative maps that align with four justices' sense of political fairness.[48] The only question was how—not if—we would get here. And now we're left with a $128,000 bill that needs to be paid. Following the theme of this entire case, today's order is a brazen imposition of judicial will, not a principled application of the law.

Without citation to supporting legal authority, the majority hired two political scientists to "assist" them in drawing new maps.[49] A court certainly can bring in third parties to help on

[48] As I've previously explained, the majority took this case by disregarding the law of standing and permitting an impermissible collateral attack on this court's ruling from just 17 months earlier. See Clarke v. Wis. Elections Comm'n, 2023 WI 79, ¶¶280, 289, 410 Wis. 2d 1, 998 N.W.2d 370 (Hagedorn, J., dissenting). Then, ignoring the law of legal remedies, the court decreed that eliminating the sparsely populated municipal islands had some unexplained "ripple effect" that required a complete redraw of the state's legislative maps from scratch. Id., ¶56. Even more, the court explicitly told the parties that it was going to evaluate the "partisan impact" of proposed maps so they would not "advantage one political party over another." Id., ¶¶69, 71. Although it didn't say what that meant, everyone saw the writing on the wall: the prior maps gave too much of an advantage to Republicans, and the court was going to make sure there were substantially fewer Republicans in the legislature going forward. The fact that the legislature and the governor subsequently enacted new legislative maps in response to the court's ruling does not change the troubling nature of the majority's declarations, or the outcome-oriented approach that led us to this point.

[49] Let it be known—the way the court hired the "consultants" was highly irregular. It did not request briefing from the parties. It did not even formally tell the parties that it was considering appointing advisors. Instead, the topic was sprung on each party at oral argument, and most of them understandably did not have an answer. Then, a few hours after oral argument, one party sent the court a letter suggesting a few options. Following this, members of the court

complicated cases. We have the authority to hire referees,[50] expert witnesses,[51] and maybe even technical advisors.[52] But there are limits. In most instances, the law provides explicit procedural protections for the parties. This ensures they receive due process, and it prevents judges from ceding their case-deciding authority to others.

The majority apparently found those protections inconvenient. It appointed Dr. Grofman and Dr. Cervas to be "consultants,"[53] a role with no prior basis in Wisconsin law. It then gave them broad discretion to analyze the maps submitted to the court, offering scant direction for how to do so. Then, perhaps because these "consultants" would actually be performing the duties of court-appointed expert witnesses—which are statutorily subject to discovery and cross-examination[54]—the majority simply decreed that no discovery or cross-examination would be allowed.[55] When some parties objected and asked for discovery in a motion for reconsideration, the majority denied it without comment.[56]

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or their staff contacted possible experts without the knowledge or authorization of the court—or even a discussion about who we might hire, what they would be paid, or what their duties would be.

[50] See Wis. Stat. § 805.06.

[51] See Wis. Stat. § 907.06.

[52] Technical advisors appear to be more common in federal courts, although they have a limited role. See Reilly v. United States, 863 F.2d 149, 157-58 (1st Cir. 1988). The authority to appoint them under Wisconsin law is less clear. The concurrence argues that we have inherent authority to appoint technical advisors when it would help us act efficiently and effectively. But we traditionally exercise significant caution when invoking our inherent authority, only doing so when necessary to the judicial function. State v. Schwind, 2019 WI 48, ¶15, 386 Wis. 2d 526, 926 N.W.2d 742. The court's order hiring Dr. Grofman and Dr. Cervas never explained the source or limits of our inherent authority with reference to our cases in this area.

[53] Order regarding post-decision matters, Clarke v. Wisconsin Elections Comm'n, No. 2023AP1399-OA, unpublished order, at 1 (Wis. Dec. 22, 2023).

[54] See Wis. Stat. § 907.06(1).

[55] Order regarding post-decision matters, Clarke, No. 2023AP1399-OA unpublished order, supra n.53, at 4 ("No further discovery of Dr. Grofman and Dr. Cervas [beyond them providing a written report with supporting data and inputs] shall be permitted[.]").

[56] Clarke v. Wis. Elections Comm'n, No. 2023AP1399-OA, unpublished order (Wis. Jan. 11, 2024).

The majority created this new "consultant" role without the guardrails of discovery and cross-examination for the same reason they did not provide any real guidance on what partisan impact meant. They wanted to enable Drs. Grofman and Cervas to recommend maps based upon their own notions of partisan fairness without being subject to any scrutiny. And it worked. Dr. Grofman and Dr. Cervas eliminated the only politically neutral map submitted simply because it led to too many Republican-leaning seats, and saw fit to recommend only maps drafted with explicitly partisan motivations in one direction. And they did all of this without having to answer for their methodology or recommendations.

Now they submit their bill without having to answer for their fees. When the "consultants" filed an invoice requesting over $128,000 in fees, certain parties objected and asked for an itemization. Today's order completely ignores this request. Who among us, upon receiving a six-figure bill would simply write a check for that amount without asking any questions? The majority, however, without any citation to legal authority or any legal rationale, decrees that the parties to this case (in reality, largely the taxpayers) must do just that.[57]

None of this inspires confidence. At the end of a case, judges know the losing side will not be happy. But every party should have a sense that, win or lose, they had their day in court before a neutral tribunal. I doubt the same will be felt here. This order continues the pattern of decisions that appear aimed at giving every advantage to one side of this litigation over another. I dissent.

I am authorized to state that Chief Justice ANNETTE KINGSLAND ZIEGLER and Justice REBECCA GRASSL BRADLEY join this dissent.

Samuel A. Christensen
Clerk of Supreme Court

[57] Order regarding post-decision matters, Clarke, No. 2023AP1399-OA unpublished order, supra n.53, at 4. Sloughing off the court's consultant fees onto the parties raises the additional question of which parties should pay and how much. The majority today simply decrees that the fees will be equally allocated among six groups of parties. Once again, it provides no legal authority or rationale for its decree.

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