

October 13, 2021

Sheila Reiff, Clerk  
Supreme Court of Wisconsin  
110 East Main Street, Suite 215  
P.O. Box 1688  
Madison, WI 53701-1688

**RE: Johnson v. Wisconsin Elections Commission, et al.,  
Case No. 2021AP1450-OA**

Dear Ms. Reiff:

Proposed intervenors Gary Krenz, Sarah J. Hamilton, Stephen Joseph Wright, Jean-Luc Thiffeault, and Somesh Jha (collectively, “Citizen Mathematicians and Scientists”) respectfully submit this letter brief in response to the letter briefs addressing timing submitted by the other parties and proposed intervenors, as requested in the Court’s September 22, 2021 Order (as amended on September 24, 2021). *See Johnson v. Wisconsin Elections Comm’n*, No. 2021AP1450-OA, Order (Wis. Sept. 24, 2021) [hereinafter “Order”].

**I. Final Redistricting Plans Should Be in Place by April 1, 2022.**

The other parties and proposed intervenors set out essentially two opposing positions regarding the deadline for final congressional and legislative plans. The Wisconsin Elections Commission states that final maps must be in place by March 1, 2022.<sup>1</sup> Several proposed intervenors have deferred to this claim and therefore also

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<sup>1</sup> *See Wisconsin Elections Commission Letter Brief Regarding Timing at 1* (Oct. 6, 2021); *Hunter v. Bostelmann*, No. 3:21-cv-512, Dkt. 98 (filed Oct. 1, 2021).

propose this deadline.<sup>2</sup> Conversely, the Petitioners and the Legislature propose later deadlines at the middle or end of April.<sup>3</sup>

The April 1, 2022 deadline proposed by the Citizen Mathematicians and Scientists represents a reasonable compromise between these two positions and is supported by empirical data regarding the timing of prior redistricting cycles. As the Citizen Mathematicians and Scientists demonstrated in their opening brief, in the last four redistricting cycles the number of days between districts becoming final and Wisconsin holding its primary elections has crept upward from 97 days (in 1982) to 125 days (in 2012). An April 1, 2022 date for final adoption of plans would be 130 days before the August 9, 2022 primary.

The Elections Commission claims that a March 1 deadline is necessary for it to “accurately integrate new districting data into its statewide election databases, and to timely and effectively administer the fall 2022 general election.” Wisconsin Elections Commission Letter Brief Regarding Timing at 1 (Oct. 6, 2021). Specifically, the Commission claims that maps must be in place “at least 45 days before April 15, 2022,” which is the beginning of the period for circulating nomination papers for the fall general election. *Id.* at 3. Certainly, some degree of deference to the Elections Commission is appropriate; but the Commission has not explained why 45 days is necessary to complete its work this cycle, when in past cycles the time available between adopting final maps and starting the nomination period has been far shorter.

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<sup>2</sup> See Governor Evers Letter Brief on Timing at 2 (Oct. 6, 2021) (deferring to the Elections Commission); Janet Bewley Letter Brief on Timing at 1 (Oct. 6, 2021) (deferring to Governor Evers); Hunter Intervenors Letter Brief Regarding Redistricting Deadline at 1 (Oct. 6, 2021) (quoting the federal court deferring to the Elections Commission). Proposed Intervenors the Black Leaders Organizing for Communities, et al., propose a slightly later date of March 14, 2021. Letter Brief from Proposed Intervenor-Petitioners Black Leaders Organizing for Communities, et al. at 9 (Oct. 6, 2021).

<sup>3</sup> See Petition to the Supreme Court of Wisconsin to Take Jurisdiction of an Original Action at 17 (Aug. 23, 2021) (proposing that final maps be in place no later than the April 15, 2022 deadline to begin circulating nomination papers); Wisconsin Legislature Letter Brief on Redistricting Deadline at 1 (Oct. 6, 2021) (proposing an April 30, 2022 deadline).

<b>Date of Final Plans</b>	<b>Beginning Date for Circulating Nomination Papers</b>	<b>Days Between Final Plans and Beginning of the Period for Circulating Nomination Papers</b>
April 11, 2012 <sup>4</sup>	April 15, 2012 <sup>5</sup>	4 days
May 30, 2002 <sup>6</sup>	June 1, 2002 <sup>7</sup>	2 days
June 2, 1992 <sup>8</sup>	June 1, 1992 <sup>9</sup>	none

At the other end of the spectrum, the Legislature has not explained why the Court should be required to shorten or postpone the candidate nomination period set by Wisconsin Statute § 8.15 in order to accommodate the Legislature’s proposed April 30, 2022 date for finalizing new maps.

An April 1, 2022 deadline would not require altering the candidate qualifying period and would provide ample time for the necessary preparations for the primary, while not needlessly constraining this Court.<sup>10</sup>

<sup>4</sup> 2011 Wisconsin Act 44 (congressional redistricting plan); 2011 Wisconsin Act 43 (legislative redistricting plan); *Baldus v. Members of Wisconsin Gov’t Accountability Bd.*, 862 F. Supp. 2d 860 (E.D. Wis. 2012) (three-judge court) (order amending two assembly districts).

<sup>5</sup> Wis. Stat. § 8.15 (2012).

<sup>6</sup> 2001 Wisconsin Act 46 (congressional redistricting plan); *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (three-judge court) (order establishing legislative redistricting plan), *amended*, No. 01-C-0121, 2002 WL 34127473 (E.D. Wis. July 11, 2002) (three-judge court).

<sup>7</sup> Wis. Stat. §§ 5.02(18), 8.15(1) (2002).

<sup>8</sup> 1991 Wisconsin Act 256 (congressional redistricting plan); *Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992) (three-judge court) (order establishing legislative redistricting plan).

<sup>9</sup> Wis. Stat. §§ 5.02(18), 8.15(1) (1992).

<sup>10</sup> The federal court has indicated that it believes March 1, 2022 is the deadline for final remedial redistricting plans. *See Hunter v. Bostelmann*, No. 3:21-cv-0512, Dkt. 103, at 4 (Oct. 6, 2021) (“Based on the information that the parties have so far provided to the court, March 1, 2022, is the deadline by which the maps must be available.”). Regardless of whether the federal court ultimately adheres to the March 1, 2022 date provided by the Elections Commission, the federal court must allow this Court an “adequate opportunity to develop a redistricting plan.” *Branch v. Smith*, 538 U.S. 254, 262 (2003); *see also Grove v. Emison*, 507 U.S. 25, 33–34 (1993) (holding that “federal judges [are required] to defer consideration of disputes involving redistricting where the State,

## **II. Late November 2021 Is a Reasonable Target for This Court to Take a More Active Role in Redistricting.**

The Citizen Mathematicians and Scientists suggested in their prior brief that if the Court were to begin substantive proceedings in **late November 2021**, this would provide sufficient time for this Court to adopt new redistricting plans by **February 1, 2022**, while leaving the federal court ample time to review any federal-law issues that might then remain.

The Legislature was the only other party to address the Court's question regarding "how long this court should give the Legislature and the Governor to accomplish their constitutional responsibilities before the court would need to embark on the task [of putting constitutional redistricting plans in place] in order to ensure its timely completion." Order at 2. The Legislature stated that it "intends to take up a redistricting plan" by the end of the floor period on November 11, 2021.<sup>11</sup> Any plan adopted during the floor period ending on November 11 would then be presented to the Governor. Accordingly, the late November 2021 timeframe previously suggested by Citizen Mathematicians and Scientists for this Court to become more actively involved in redistricting comports with the Legislature's timing.

## **III. February 1, 2022 Is a Reasonable Date for This Court to Adopt Remedial Redistricting Plans if the Legislature and Governor Fail to Do So.**

All parties generally acknowledge that any remedial redistricting plan adopted by this Court would be potentially subject to federal-court review and that the three-judge federal district court in *Hunter* intends to adopt remedial redistricting plans if this Court does not do so.<sup>12</sup> The federal court has indicated that until it is "persuaded otherwise," it

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through its legislative *or* judicial branch, has begun to address that highly political task itself" and that federal litigation "must neither affirmatively obstruct state reapportionment nor . . . be used to impede it").

<sup>11</sup> Prospective-Intervenor Wisconsin Legislature's Letter Brief Regarding Timing of New Redistricting Plan at 2 (Oct. 6, 2021).

<sup>12</sup> See Letter Brief from Proposed Intervenor-Petitioners Black Leaders Organizing for Communities, et al. at 9 (Oct. 6, 2021) (explaining that the federal court might need time to address Voting Rights Act claims after this Court adopts a legislative map); Hunter Intervenor Letter Brief Regarding Redistricting Deadline at 3 (Oct. 6, 2021) (suggesting that this Court order its remedy before the start of the federal trial); Proposed Intervenor-Petitioners Congressmen Letter Brief Regarding Timing at 2 (Oct. 6, 2021) (noting the need for this Court to set a briefing schedule well in advance of the federal court's final redistricting deadline); Wisconsin Legislature Letter Brief on Redistricting

will plan to go forward with a five-day trial beginning January 31, 2022. *Hunter v. Bostelmann*, No. 3:21-cv-0512, Dkt. 103, at 4 (Oct. 6, 2021). The Citizen Mathematicians and Scientists previously had suggested (both to this Court and to the federal court) that this Court should have until **February 1, 2022** to put remedial redistricting plans into place.

If this Court begins substantive proceedings in late November 2021 with the goal of adopting remedial redistricting plans by January 31 or February 1, this would provide the Court with more than two months to perform its work. That would be similar to the amount of time other courts have taken to adopt remedial redistricting plans, as described in Citizen Mathematicians and Scientists' opening brief. Two months would be sufficient given that—as Proposed Intervenor-Petitioners the Congressmen note—this proceeding should not require extensive fact-finding or discovery.<sup>13</sup> Rather, proceedings will focus on proposals for remedial maps, with briefs and expert reports followed by rebuttal briefs and reports, and then a hearing. This Court could adopt a schedule for such proceedings beginning in late November and concluding by January 31.

#### **IV. State and Federal Courts Have Worked Cooperatively in Redistricting-Impasse Situations Before, and Could Do So Here.**

Given the parallel state and federal proceedings here, some coordination between the courts may be helpful. Fortunately, there is precedent for a state Supreme Court and a three-judge federal district court to work cooperatively to adopt redistricting plans where the State's political branches failed to do so, in what one commentator described as a "model for the nation."<sup>14</sup>

Proceedings seeking judicial adoption of a new Illinois state senate map were brought in both state and federal courts. Conflicts arose between the three-judge federal district court and the Illinois Supreme Court, and an appeal from the former was taken to the United States Supreme Court. In *Scott v. Germano*, 381 U.S. 407, 409 (1965) (*per curiam*)—the case that established the doctrine now known as "*Germano/Growe* deferral"—the U.S. Supreme Court ordered the federal district court to retain jurisdiction but set a reasonable deadline for the State, including the Illinois Supreme Court, to adopt a new map. After remand, the Illinois Supreme Court and the federal district court's chief

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Deadline at 3 (Oct. 6, 2021) (noting the need for state and federal courts to resolve any malapportionment claims in time for the next election).

<sup>13</sup> See Proposed Intervenor-Petitioners Congressmen Letter Brief Regarding Timing at 2 (Oct. 6, 21021).

<sup>14</sup> ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 313 (1968).

judge (a member of the three-judge panel handling the case) worked together to successfully resolve the state and federal cases without the need to go to trial.<sup>15</sup>

The Illinois Supreme Court directed the parties to submit redistricting proposals.<sup>16</sup> With the Illinois Supreme Court's approval, the federal district court's chief judge then held a series of pretrial conferences to bring the parties closer to agreement.<sup>17</sup> Both courts reviewed the parties' proposed maps and then, on the same date, approved a compromise map that complied with federal and state law.<sup>18</sup> This state/federal cooperative approach avoided duplicative litigation and artificial compression of deadlines. A similar process might work well in Wisconsin today.

In any event, some coordination between this Court and the federal court will be required on timing at the very least. The federal district court has stayed proceedings in deference to this Court until November 5, 2021, and has asked that parties to that case who are also participating in this case file on November 5 a joint status report addressing this action's schedule and factual-development process (if any), and the scope of the legal issues to be resolved. *Hunter*, No. 3:21-cv-512, Dkt. 103, at 4–5, 7 (Oct. 6, 2021). Therefore, we join the other proposed intervenors<sup>19</sup> in asking this Court to announce its plans for this action's timing and scope by **November 4, 2021**, so that the parties can inform the federal court that this Court intends to timely adopt new districts.

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<sup>15</sup> See *People ex rel. Engle v. Kerner*, 210 N.E.2d 165, 166–68 (Ill. 1965), *appeal dismissed*, 384 U.S. 30 (1966); *Germano v. Kerner*, 247 F. Supp. 141, 142–44 (N.D. Ill. 1965) (three-judge court).

<sup>16</sup> See *Engle*, 210 N.E.2d at 166.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at 167; see also *Germano*, 247 F. Supp. at 142–44. A detailed, contemporaneous account of the process, based in part on Professor Dixon's interviews and correspondence with key participants, including at least one of the judges, can be found in DIXON, *supra* note 14, at 300–13.

<sup>19</sup> See Wisconsin Legislature Letter Brief on Redistricting Deadline at 5 (Oct. 6, 2021); Letter Brief from Proposed Intervenor-Petitioners Black Leaders Organizing for Communities, et al. at 9 (Oct. 6, 2021); Proposed Intervenor-Petitioners Congressmen Letter Brief Regarding Timing at 2 (Oct. 6, 2021); Hunter Intervenors Letter Brief Regarding Redistricting Deadline at 2–3 (Oct. 6, 2021).

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Sincerely,

BOARDMAN & CLARK LLP

A handwritten signature in black ink, appearing to read "Michael P. May". The signature is written in a cursive style with a large initial "M" and a long horizontal stroke at the end.

Michael P. May  
State Bar No. 1016110

cc: All counsel of record