

October 6, 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. 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 on the timing issues raised 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”]. Specifically, the Court asked the parties and prospective intervenors to address the following question: “When (identify a specific date) must a new redistricting plan be in place, and what key factors were considered to identify this date.” *Id.* at 3. The Court also requested views on “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.” *Id.* at 2.

Citizen Mathematicians and Scientists submit that, based on past precedent, **April 1, 2022**, is a reasonable deadline to have final redistricting plans in place, given the August 9, 2022 primary date. As explained below, in the past four redistricting cycles, Wisconsin’s final redistricting plans have been in place between 97 and 125 days before the primary elections. An April 1, 2022 date—130 days before the August 2022 primary—is consistent with precedent.

As to the question of how long this Court should give the Legislature and the Governor to accomplish their constitutional responsibilities before this Court must embark on the task of redistricting, this Court correctly noted that the Wisconsin Legislature bears “primary responsibility” for redistricting and that the Governor is an “indispensable part[] of the legislative process” under the Wisconsin Constitution. *Id.* at 2. Citizen Mathematicians and Scientists hope that the Legislature and the Governor, spurred by this Court’s Order, can reach a consensus on a target date for completing

redistricting consistent with the Wisconsin and United States Constitutions. The timing of proceedings in this Court ultimately may depend in part on the actions of the Legislature and the Governor, and possibly on the actions of the three-judge federal district court where similar claims are currently pending. Given both the compressed timeframe available to this Court before final redistricting plans must be in place, and the potential need for federal review following this Court's actions, it seems likely that this Court will need to commence substantive proceedings by some point in **late November 2021** if the Legislature and the Governor have not yet enacted new redistricting plans.

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

Citizen Mathematicians and Scientists respectfully submit that final congressional and legislative redistricting plans should be in place by **April 1, 2022**. Wisconsin's "Fall Partisan Primary" is set for August 9, 2022, and the candidate filing period opens on April 15, 2022. *See Wis. Stat. § 8.15(1)*. April 1, 2022 would be two weeks before the candidate filing period opens and 130 days before the August 9, 2022 primary is held. As the table below demonstrates, in the last four decennial 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 98 days in 1992, to 103 days in 2002, to 125 days in 2012. Allowing 130 days in 2022—that is, 130 days between an April 1 redistricting deadline and an August 9 primary—closely tracks this pattern.

RETRIEVED FROM DEMOCRACY.ORG

Timing of Prior Redistricting Plans and Primary Elections			
Date of Final Plans	How Plans Were Adopted	Date of Primary	Days Between Adoption of Final Plans and Primary
April 11, 2012	Congressional and legislative plans enacted by Legislature; legislative plan amended by federal court order. ¹	August 14, 2012	125
May 30, 2002	Congressional plan enacted by Legislature; legislative plan established by federal court order. ²	September 10, 2002	103
June 2, 1992	Congressional plan enacted by Legislature; legislative plan established by federal court order. ³	September 8, 1992	98
June 9, 1982	Congressional plan enacted by Legislature; legislative plan established by federal court order. ⁴	September 14, 1982	97

¹ 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).

² 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).

³ 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).

⁴ Michael Gallagher, Joseph Kreye & Staci Duros, *Redistricting in Wisconsin 2020*, at 59 (2020), https://docs.legis.wisconsin.gov/misc/lrb/wisconsin_elections_project/redistricting_wisconsin_2020_1_2.pdf (Legislature, "with the governor's approval . . . enacted a congressional redistricting plan"); *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp.

Having final redistricting plans in place approximately four months (roughly 130 days) before the primary is normal not just in Wisconsin, but also in other states.⁵

II. Late November 2021 Is a Reasonable Target for This Court to Take a More Active Role in Redistricting, Contingent on Actions by the Legislature, the Governor, and Perhaps the Federal District Court.

Citizen Mathematicians and Scientists respectfully submit that the date that this Court should commence substantive redistricting proceedings will depend in part on actions taken by other governmental actors—including the Legislature, the Governor, and perhaps the three-judge federal district court—but will likely be **late November 2021**.

At this point, all parties to the currently pending Wisconsin redistricting cases seem to concur that adjudicating these cases is, very roughly, a two-month project for the judiciary. In the federal district court, the parties recently filed proposed pretrial and trial schedules. *See Hunter v. Bostelmann*, No. 3:21-cv-512, Dkt. 98 (filed Oct. 1, 2021). Both sets of plaintiffs, as well as the Governor and the Wisconsin Elections Commission, proposed a 56-day schedule from the commencement of discovery to the close of trial. *See id.* at 20–22 (proposing a schedule from December 3, 2021, to January 28, 2022). The Legislature, the Congressmen, and the *Johnson* plaintiff-intervenors (who are Petitioners in this Court) all proposed a 59-day schedule. *See id.* at 22–24 (proposing a schedule from January 31 to March 31, 2022).

Empirical evidence suggests a two-month timeframe is reasonable. State supreme courts and federal three-judge district courts have fully adjudicated statewide congressional and legislative redistricting cases in that amount of time. *See, e.g., In re 2003 Apportionment of State Senate*, 2003 ME 86, ¶ 2, 827 A.2d 844, amended, 2004 ME 55, ¶2, 846 A.2d 995 (Maine Supreme Court completed both state senate and congressional redistricting less than two months after its preliminary procedural order); *Belov v. Gardner*, 148 N.H. 1, 963 A.2d 785, 788 (2002) (New Hampshire Supreme Court adopted state senate maps on June 24, 2002, just over one month after the court determined, on May 23, 2002, that it would need to intervene in the process); *Stenger v. Kellett*, No. 4:11CV2230 TIA, 2012 WL 601017, at *2, *13 (E.D. Mo. Feb. 23, 2012) (three-judge court) (Missouri federal court completed discovery and trial within two months, adopting a redistricting plan that met all federal and state constitutional requirements);

630 (E.D. Wis. 1982) (three-judge court) (order establishing legislative redistricting plan).

⁵ *See All about Redistricting, Maps Across the 2010 Cycle*, available at <https://redistricting.ills.edu/resources/maps-across-the-cycle-2010-congress/>.

Order, *Session v. Perry*, No. 2:03-CV-354 (E.D. Tex. Oct. 30, 2003), Dkt. 19; Mem. Op., *Session v. Perry*, No. 2:03-CV-354 (E.D. Tex. Jan. 6, 2004) (three-judge court), Dkt. 162 (Texas congressional redistricting adjudicated in just over two months where plaintiffs' challenges were filed in mid-October, an October 30 court order set trial for December 8, and the court issued an extensive ruling addressing multiple constitutional and statutory issues on January 6).

If the Court began substantive proceedings in late November and those proceedings took approximately two months, the Court would have new redistricting plans in place by February 1, 2021, which would fully comport with the framework established by the U.S. Supreme Court in its unanimous opinions in *Scott v. Germano*, 381 U.S. 407 (1965) (*per curiam*), and *Grove v. Emison*, 507 U.S. 25 (1993). Justice Scalia's opinion in *Grove* was the "United States Supreme Court's effort to put the state supreme courts back into the equation" with respect to redistricting. *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶11, 249 Wis. 2d 706, 639 N.W.2d 537. As this Court previously recognized, "[t]he people of this state have a strong interest in a redistricting map drawn by an institution of state government—ideally and most properly, the legislature, secondarily, this court." *Id.*, ¶¶5, 17 (citations omitted). Thus, although State and federal courts may exercise concurrent jurisdiction over cases challenging the same congressional or legislative plan, it is the State court that has the initial, and primary, judicial role.

This Court has acknowledged, however, that while it plays the initial and primary judicial role, a "redistricting plan adopted by this court—like one adopted by the legislature—would be subject to collateral federal court review for compliance with federal law." *Jensen*, 2002 WI 13, ¶16 (citing cases). Likewise, if this Court is not able to adopt a plan, the federal court must do so. *See Grove*, 507 U.S. at 36 (encouraging federal district court to "establish a deadline by which, if the [state court] ha[s] not acted, the federal court would proceed"); *see also Germano*, 381 U.S. at 409 (directing district court to "enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, may validly redistrict the Illinois State Senate" and to adopt its own plan if "a valid reapportionment plan for the State Senate is not timely adopted").⁶ The federal court must "allow the state court adequate opportunity to develop a redistricting plan." *Branch v. Smith*, 538 U.S. 254, 262 (2003).

⁶ Following remand from *Germano*, 381 U.S. at 409, the Justices of the Supreme Court of Illinois and the federal district court's chief judge (who was also a member of the three-judge panel handling the case) worked together to successfully settle the state and federal cases, in what one commentator described as a "model for the nation, at least in those states where there is no formal and effective provision for a bipartisan commission with a tie breaker." ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 313 (1968).

But the schedule also must allow sufficient time for the federal court either to “adopt[] its own plan” if the State fails to “develop a redistricting plan” or, in the event the State court does adopt a plan, to entertain any federal challenges to it. *Grove*, 507 U.S. at 36.

Beginning substantive proceedings in this Court in late November, in order to have redistricting plans in place by February 1, 2022, would give this Court the approximately two months that all parties agree is needed for the judicial process. It also would give the federal court two months to perform its review, to ensure that constitutional plans are in place by April 1, 2022. This is the schedule that members of the Citizen Mathematicians and Scientists have proposed to the three-judge federal court: April 1, 2022, as “the date to adopt final redistricting plans,” and February 1, 2022, as “the date for the State [of Wisconsin]’s legislative, executive, and judicial branches to finish their [redistricting] processes.” *Hunter v. Bostelmann*, No. 21-cv-0512, Dkt. 94 at 8 (Notice of Position of Proposed Plaintiff-Intervenor Citizen Data Scientists on Matters Raised in the Court’s September 23, 2021 Order). If the federal district court were to adopt those proposed February 1 and April 1 dates, then this Court would certainly be entitled to likewise take two months, or more, to adjudicate this case. And given that the two months of December and January contain more holidays than the federal court’s two months in February and March, it seems reasonable for this Court to plan to embark on the task of redistricting no later than some point in late November 2021.

Finally, as is further explained in the memorandum supporting their Motion to Intervene, the Citizen Mathematicians and Scientists believe that “computational redistricting”—a relatively recent field applying principles of mathematics, high-speed computing, and spatial geography to the redistricting process—will be of great assistance to the Court given the compressed timeframe the Court is facing.⁷ The Citizen Mathematicians and Scientists and their experts can efficiently apply their nonpartisan scientific approach of “computational redistricting” both to offer redistricting plans for this Court to adopt, if that becomes necessary, and to analyze redistricting plans that other parties may propose. Accordingly, the Citizen Mathematicians and Scientists

⁷ See, e.g., Siobhan Roberts, *Mathematicians Are Deploying Algorithms to Stop Gerrymandering*, MIT TECHNOLOGY REVIEW (Aug. 12, 2021), available at <https://www.technologyreview.com/2021/08/12/1031567/mathematicians-algorithms-stop-gerrymandering/>; Moon Duchin, *Geometry v. Gerrymandering: Mathematicians Are Developing Forensics to Identify Political Maps that Disenfranchise Voters*, SCIENTIFIC AMERICAN, Nov. 2018, at 48–53, available at <https://www.scientificamerican.com/article/geometry-versus-gerrymandering/>; Amariah Becker, Moon Duchin, Dara Gold & Sam Hirsch, *Computational Redistricting and the Voting Rights Act*, 20 ELECTION L.J. (forthcoming 2021), available at magg.org/publications/VRA-Ensembles.pdf.

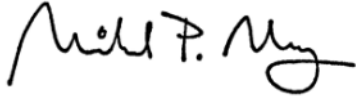
OCTOBER 6, 2021

PAGE 7

believe the claims before the Court can be fully and timely adjudicated commencing in late November 2021.

Sincerely,

BOARDMAN & CLARK LLP

A handwritten signature in black ink, appearing to read "Michael P. May". The signature is fluid and cursive, with the first name "Michael" and last name "May" clearly legible.

Michael P. May
State Bar No. 1016110
MPM/rh

cc: All counsel of record

RETRIEVED FROM DEMOCRACYDOCKET.COM