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October 6, 2021

VIA E-FILING BY EMAIL

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

Re: *Johnson v. Wisconsin Elections Commission,* No. 2021AP1450-OA; Prospective-Intervenor Wisconsin Legislature's Letter Brief Regarding Timing Of New Redistricting Plan

Dear Ms. Reiff,

On September 22, the Court directed the parties and prospective intervenors in the above-titled action to submit letter briefs by October 6 that 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?

Order at 3. This correspondence is Proposed-Intervenor the Wisconsin Legislature's letter brief.

Date of Plan: The Legislature believes a new redistricting plan should be in place before April 30, 2022. This date would provide ample time for the legislative process and ample time to prepare for the August 2022 primaries. Adopting a plan by April 15, 2022, as Petitioners have requested, would also allow ample time for the legislative process.

Addressed below, the Legislature requests this Court enter an order establishing the date by which maps will be put in place in the event of an impasse absent modification of election-related deadlines.

Key Factors Used to Identify the Date:

1. Ample time for the legislative process. The obligation to redistrict after each census rests with the Legislature. U.S. Const. art. I, §4, cl. 1; Wis. Const. art. IV, §3. State redistricting is to occur at the Legislature's first session after the census. Wis. Const. art. IV, §3. This Court has recognized the Legislature must be given opportunity to redistrict before the judiciary adopts a plan. *See* Order at 2; *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 571, 126 N.W.2d 551 (1964); *see also Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("judicial relief" for a malapportionment claim "becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so").

The Legislature is in the process of redistricting based on the 2020 census data. *See* Non-Party Brief of Wisconsin Legislature in Support of Petition to Supreme Court to Take Jurisdiction of Original Action, p. 9 & n.2. Legislative leadership has solicited public input on proposed maps by October 15, 2021, and the Governor has indicated that he intends to share his proposal with the Legislature by the end of October. Transcript at 12-14, *Hunter v. Bostelmann*, No. 3:21-cv-512 (W.D. Wis. Sept. 23, 2021), ECF No. 78. While the legislative process is iterative and timing depends on all of the Legislature's members and on public input, the Legislature is committed to acting on redistricting legislation with all deliberate speed. The next available floor period to vote on a plan after receiving this input will end on November 11, 2021. *See* 2021 Senate Joint Resolution 1, §1(3)(p) (enrolled). Legislative leadership intends to take up a redistricting plan before the end of that floor period, depending on the public input it receives. In any event, additional dates for floor consideration of redistricting proposals may be added at any time this fall or winter during the legislative session. *See id.* §1(3)(a).

Once the Legislature passes a map—likely this fall—there is no reason to delay proceedings in this Court.

2. Ample time for the August 2022 primaries. The relevant dates for the Court to consider when determining the date on which maps must be in place are (1) next year's primary elections on August 9, 2022, Wis. Stat. §5.02(12s), and (2) the nomination period, which opens April 15, 2022, and closes on June 1, 2022, *id.* §8.15(1). New maps should be put in place in time for candidates to stand for and voters to vote in the August 2022 primaries, taking into account the pre-election nomination deadline.

Both this Court and federal courts have aimed to resolve malapportionment claims in time for the next election. *See Zimmerman*, 22 Wis. 2d at 571 (setting schedule to execute a new apportionment plan "in sufficient time for the process of nomination and election thereafter"); *see also Growe v. Emison*, 507 U.S. 25, 36 (1993) (federal courts are "justified" in adopting redistricting plans when "it [is] apparent that the state court … would not develop a redistricting plan in time for the primaries"); *Scott v. Germano*, 381 U.S. 407, 409 (1965) (redistricting plan should be adopted by state with "ample time to permit such plan to be utilized" in next election). Accordingly, Wisconsin's districting plans should be put in place with enough time so that those plans can be used before next year's primaries for state legislative and congressional offices.

What constitutes enough time for an election to occur rests on an analysis of state law. Here, the primaries will occur on August 9, 2022. Wis. Stat. §5.02(12s). *Zimmerman* instructs that redistricting plans should be in place with sufficient time for the nomination process. 22 Wis. 2d at 571. Today, that process involves the circulation and filing of nomination papers together with a declaration of candidacy. Wis. Stat. §§8.15(1), 8.21. Nomination papers may be circulated after April 15, 2021, and nomination papers and declarations of candidacy are due by June 1, 2022. *Id.* §8.15(1).

3. Prior reapportionment schedules. Prior judicial reapportionment orders are instructive as to when a map must be put in place and what steps that entails. Past courts have aimed to have maps in place for the nomination period preceding the primary.

When this Court adopted new plans in the 1960s, it issued a reapportionment order on May 14, 1964, and allowed parties approximately a week to file objections. *State ex rel. Reynolds v. Zimmerman*, 23 Wis. 2d 606, 618, 128 N.W.2d 16 (1964). After considering but not sustaining objections, the plan was in place on May 25, 1964. *State ex rel. Reynolds v. Zimmerman*, 23 Wis. 2d 606, 629, 128 N.W.2d 349, 349 (1964). At that time, nomination papers could be circulated in mid-May. Wis. Stat. §5.05(4) (1964). Nomination papers were due sixty days later on the second Tuesday in July. *Id.* §5.05(1) (1964). The primaries were then held on the second Tuesday in September. *Id.* §§5.01(2), 5.03 (1964). Thus, the *Zimmerman* plan was in place shortly after the nomination period was opened and before it closed, with fifteen weeks before the primary.

The federal courts most recently addressing Wisconsin's reapportionment followed similar timelines. Those courts issued plans around the time that the nominations period began under then-current law. *Compare Baumgart v. Wendelberger*, Nos. 01-CV-121, 02-CV-366, 2002 WL 34127471 (E.D. Wis. May 30, 2002), *amended by* 2002 WL 34127473 (E.D. Wis. July 11, 2002) (ordering new lines on May 30, 2002, amending lines on July 11, 2002), *with* Wis. Stat. §§5.02(18), 8.15(1) (2002) (nomination period from June 1 to second Tuesday in July, primary held second Tuesday in September); *compare Prosser v. Elections Bd.*, No. 92-CV-78, 793 F. Supp. 859 (W.D. Wis. June 2, 1992) (ordering new lines on June 2, 1992), *with* Wis. Stat. §§5.02(18), 8.15(1) (1992) (nomination period from June 1 to second Tuesday in July, primary held second Tuesday in September).[1]

[1] In 1982, the federal court's action in 1982 came even later. The order was filed on June 16, 1982, after the initial June 9 order was corrected. In that case, the court ordered election deadlines relating to matters such as the election notices and nomination papers "relaxed to the extent necessary to permit the elections to take place as scheduled." *Wis. AFL-CIO v. Elections*

These prior court actions are consistent with the Legislature's proposal that reapportionment is completed no later than April 30, 2022.

Conclusion and Request for an Order:

Any decision on timing must allow time for the Legislature to redistrict on the front-end and time for the primaries on the back-end. An April 2022 date strikes that balance.

Likely, this Court will have the opportunity to act sooner. Once the Legislature passes a map, whether or not approved by the Governor, this Court can begin adjudicating Petitioners' claims. Adjudicating the claim at that time would not foreclose the Legislature's prerogative to act in the future. *See Zimmerman*, 22 Wis. 2d at 571 (acknowledging that judicial plans may be subsequently displaced by a validly enacted apportionment plans).

Finally, the Legislature respectfully requests that this Court issue an Order setting forth when it concludes maps must be in place to timely prepare for next year's elections. That is a question of Wisconsin law, upon which this Court has the last word. This Court did so in *Zimmerman*. 22 Wis. 2d at 572. Such an order is appropriate to unmistakably inform the federal courts that there is no evidence that Wisconsin's branches of government "will fail timely to perform" Wisconsin's "primary responsibility for apportionment of [its] federal congressional and state legislative districts." *Growe*, 507 U.S. at 34.

Bd., 543 F. Supp. 630, 639 (E.D. Wis. 1982).

Respectfully submitted,

Electronically Signed By
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cc: All counsel noticed in Supreme Court's September 22 Order (by email; parties also by mail)

[2] I certify that the body of this letter brief uses proportional serif font and contains 1,360 words as calculated by Microsoft Word.