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October 13, 2021

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

RE: *Billie Johnson, et al. v. Wisconsin Elections Commission, et al.*
Appeal No. 2021AP001450-OA

To the Court:

In response to this Court's request for information on the date by which a new redistricting plan must be in place, the parties have submitted dates falling into three categories.

1. Black Leaders Organizing for Communities et al. (the "BLOC Intervenors"), Lisa Hunter et al. (the "Hunter Intervenors"), and Gary Krenz et al. (the "Krenz Intervenors"), all advocate for this Court to enact maps by **late January or early February 2022**. However, as will be shown, these dates are based on a premise contrary to binding Supreme Court case law, namely that this Court must provide time for federal review, up to and including a federal trial, of its maps in advance of the 2022 elections. That is simply not true.

2. The Wisconsin Elections Commission ("WEC"), Governor Evers, and the Senate Democrats request that this Court adopt maps by **March 1, 2022**. This date is keyed to the April 15, 2022 date when candidates may begin circulating nomination papers, but adds 45 days that WEC says is needed for certain preliminary work. But WEC has provided no explanation for its selection of 45 days (as opposed to 30, or 15, or 5), has not explained why its work cannot be completed simultaneously with the

circulation of nomination papers, and has not explained why this time was not, apparently, granted in previous redistricting cycles.

Congressmen Glenn Grothman et al. (the "Congressmen Intervenors") select a date similar to these parties—**February 28, 2022**, the day before March 1—premised on concerns that the failure to act before the date WEC requests will lead to federal court interference in this suit. The Petitioners sympathize with this concern but, for reasons set forth below, that concern does not control the question of the date by which this Court *must* adopt maps, especially given the federal court's recent order staying those proceedings. *See* Exhibit A at 7. This Court can and should provide the district court with the information—and state law interpretations—it needs so that that court will not erroneously act on March 1.

3. This leaves, finally, the Petitioners and the Legislature, who have advocated for dates in **mid-to-late April, 2022**. This schedule provides ample time for the state branches of government—legislative and executive, then, if necessary, judicial—to see to the task of apportionment, with sufficient time for the 2022 elections to proceed in an orderly fashion, beginning with the circulation of nomination papers that month.

Each of these categories is discussed in greater detail below.

This Court Need Not Adopt a Schedule that Permits Federal Review in Advance of the 2022 Elections

The BLOC Intervenors argue that this Court must "issue remedial maps with sufficient time for federal review," meaning "before the federal trial begins" on January 28, 2022. BLOC Letter 3, 9. The Hunter and Krenz Intervenors argue similarly. *See, e.g.*, Hunter Letter 2 (arguing that "[this Court's] plans should be adopted by January 24, 2022" and that this Court "should take any action before the federal court's scheduled trial"); Krenz Letter 6 ("hav[ing] redistricting plans in place by February 1, 2022" would give federal court "two months to perform its review").

These recommendations are doubly flawed: first, this Court need not and should not work into its schedule time for hypothetical federal court review of its maps; second, the federal court's recent stay of its proceedings shows that the January trial date is no longer fixed. *See* Exhibit A at 3-5 (moving trial

date to January 31, 2022 for the time being but scheduling November 5 status conference given its view that "the Wisconsin Supreme Court did not commit to drawing new legislative or congressional maps, and has not yet set a schedule to do so, or even to decide whether it will do so").

Taking these flaws in order, first, the idea that a state court must work into its redistricting schedule time for collateral federal review is foreclosed by the Supreme Court's decision in *Growe v. Emison*, 507 U.S. 25 (1993). In that case the Supreme Court reaffirmed that "federal judges [must] defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Growe*, 507 U.S. at 33. Relevant here, the Court explained that federal courts were permitted to act "if it [is] apparent that the state court, through no fault of the District Court itself, *would not develop a redistricting plan in time for the primaries*." *Id.* at 36 (emphasis added). Development of a plan before the primaries is the relevant metric.

Indeed, far from adopting a rule of redistricting-plus-federal-court-review in advance of elections, the Supreme Court rejected even the notion that the state court was required to leave time for *appeal*:

> The District Court also expressed concern over the lack of time for orderly appeal, prior to the State's primaries, of any judgment that might issue from the state court . . . . We fail to see the relevance of the speed of appellate review. [Our precedent] requires only that the state agencies adopt a constitutional plan "within ample time . . . to be utilized in the [upcoming] election." It does not require appellate review of the plan prior to the election, and such a requirement would ignore the reality that States must often redistrict in the most exigent circumstances . . . .

Id. at 35 (citation omitted) (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965)) (second alteration in original). The Court, similarly, *rejected* the argument that federal action had been warranted pending state redistricting proceedings because the federal action raised a federal Voting Rights Act claim but the state proceeding did not. *See id.* Clearly, litigation was not required to conclude in advance of the primaries.

The rule proposed by these intervenors, moreover—that this Court must leave time for "all legal challenges" to be "resolved," BLOC Letter 1—would be limitless. Should the Court work in time for subsequent state court

proceedings raising claims not at issue here? For state appeal? For federal proceedings raising claims not at issue in the federal suit? For federal appeal? Is the timeline supposed to change if a new lawsuit is begun in the late stage of these proceedings? Against this chaos, *Growe* makes clear that the relevant consideration is, instead, state completion of maps in advance of the primary, nothing more.

The Hunter Intervenors nevertheless point as evidence for its view to this Court's statement in *Jensen* that it feared that "[a]ccepting original jurisdiction . . . would necessarily put this case and any redistricting map it would produce on a collision course with the case now pending before the federal three-judge panel." *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶16, 249 Wis. 2d 706, 639 N.W.2d 537. But that case is plainly inapposite—in *Jensen*, the federal proceedings had been pending for over a year. *Id.* at ¶13. This case, in contrast, began within weeks of the release of census data. The federal suit is already stayed. Exhibit A at 7. There is no collision.

Obviously, the BLOC and Hunter Intervenors sought a federal rather than a state forum for their complaints. They opposed the institution of this original action and opposed a stay of the federal proceedings. Having lost on both issues, they now want to invert the federalism-based approach, moving through the state proceedings as quickly as possible in order to save time for the "real" trial in federal court and perhaps invalidation of the maps that this Court adopts. There may perhaps be a time when some party is entitled to a federal forum with respect to some issue related to Wisconsin redistricting but under *Growe* it is not while this case is pending and it is not to be done in a way that interferes with and is at the expense of thorough proceedings here. Federal and/or appellate proceedings, as explained by the Supreme Court, can occur during or after the 2022 elections—if even necessary. *See Growe*, 507 U.S. at 35 ("Our consideration of this appeal, long after the Minnesota primary and final elections have been held, itself reflects the improbability of completing judicial review before the necessary deadline for a new redistricting scheme."); *id.* at 39 (explaining that once the state court declared the old set of maps unconstitutional, the federal Voting Rights Act claim related to those maps became moot).

The second, and related, problem with this line of argument is that the federal court has stayed proceedings and is awaiting further guidance from this Court. *See* Exhibit A at 7. It makes no sense to try and reserve time for a process that may not even occur if this Court makes clear that it need not occur.

Separately, the Hunter Intervenors argue that their date is justified because of the rights of Wisconsinites to "associate with like-minded individuals in advance of the election." Hunter Letter 3. This does not prove much—how long do voters need to associate—a day? A week? A month? The Hunter Intervenors argue that voters "must have an opportunity to learn about and debate the candidates' qualifications and positions" "before . . . signing nomination papers." *Id.* at 4. But not a single plan suggested to this Court—by any party or nonparty—would prevent that. Even under the latest proposed date of April 30, 2022 (Wisconsin Legislature), voters would have a full month before nomination papers come due to associate, several months before the primary, and even longer before the election. The Hunter Intervenors identify no associational rights case that dictates their preferred January date.[1]

WEC Has Not Demonstrated that its 45-Day Grace Period is Warranted

The Respondents Wisconsin Elections Commission and its commissioners, more reasonably, do not take into account the federal proceedings and tie the date by which maps must be enacted to the key deadline for circulating nomination papers, April 15, 2022. WEC Letter 3. But they add 45 extra days to this deadline, asking for maps by March 1, to give them time to complete preliminary work. The Governor "defers" to this date, Governor Letter 2; the Senate Democrats "defer" to the Governor, Bewley Letter 1.

WEC's 45-day head start is totally unsupported. The Legislature catalogues multiple redistricting cycles in Wisconsin in which maps were enacted after or just a few days before the nomination period opened. Legislature Letter 4. WEC does not explain why this year is somehow different. Nor does it explain why the preliminary work that it cites cannot be done while nomination papers are circulated. Nor does it explain how it settled on 45 days, as opposed to 30, or 15, or 5. It says its date is "pragmatic." WEC Letter 2. That is insufficient.

The Congressmen suggest a related date of February 28, 2022, *i.e.*, the day before March 1. They acknowledge that the date was selected to "avoid federal court usurpation of Wisconsin's redistricting process," because the district court has credited WEC's requested March 1 date as the date by which maps must be in place. Congressmen's Letter 1.

[1] The BLOC and Krenz Intervenors argue that *federal* review should complete before March 14 and April 1, respectively. *See, e.g.*, BLOC Letter 1; Krenz Letter 6. These arguments are addressed below as though applied to this Court's review.

In the Petitioners' view, the Congressmen's general concerns are wholly warranted, but their requested date is not, for several reasons.

First, as the Legislature notes, "[w]hat constitutes enough time for an election to occur rests on an analysis of state law." Legislature Letter 3. This would include whether WEC's March 1 deadline is justified. If this Court concludes it is not, and communicates that conclusion, the federal court will not be in a position to gainsay it.

Second, as noted, on October 6 the district court granted the Petitioners' (there, the Intervenor-Plaintiffs') motion to stay proceedings—in part. *See* Exhibit A at 7. It suggested that federal litigation "might turn out to be wasted effort if the Wisconsin Supreme Court acts," *id.* at 4, and that it would wait until "at least" November 5, on which date it has requested an "update [by the federal parties] . . . on the status of the action in the Wisconsin Supreme Court." Exhibit A at 5. It observed that this Court has not yet "commit[ted] to drawing new legislative or congressional maps, and has not yet set a schedule to do so, or even to decide whether it will do so," *id.* at 3, and thus has requested information on November 5 regarding "the schedule of [this] action; the scope of any factual development process; and the scope of the legal issues that the parties intend to raise." *Id.* at 5.

Given the district court's willingness to stay federal proceedings thus far, the Petitioners are optimistic that the federal court will not interfere with this redistricting litigation so long as this Court sets a schedule that makes clear to the district court that maps will be in place in advance of the 2022 elections.

Third, in light of the above, the parties will know whether the federal court intends to stay its hand well in advance of March 1, and can seek appropriate relief at that time if it incorrectly declines to do so. In other words, the parties can expect the federal court to announce in advance of March 1 whether it still views that date as the final date by which state proceedings must conclude. *See Growe*, 507 U.S. at 36 ("It would have been appropriate for the District Court to establish a deadline by which, if the Special Redistricting Panel had not acted, the federal court would proceed. . . . [But t]he state court was never given a time by which it should decide on reapportionment, legislative *or* congressional, if it wished to avoid federal intervention.").

Finally, the Congressmen's date is aimed at avoiding conduct they admit would be unlawful. Congressmen Letter 1. This makes their deadline a prudential one, not the date by which this Court *must* have maps in place. As the

Petitioners have noted, this Court should begin acting as soon as the Legislature has adopted a redistricting plan which has either been signed into law by the Governor or vetoed, and that may be well in advance of 2022. Prudentially, the Court may well act quickly. But, as will now be discussed, April 15, 2022 is this Court's actual deadline.

A Date of April 15 for Enactment of Maps by this Court Properly Balances All Competing Considerations

In contrast to all of the above proposals, the date the Petitioners have suggested for the latest by which maps must be enacted—April 15, 2022—provides the political branches and this Court with the maximum amount of time possible while still ensuring an orderly 2022 election. Maps will be in place by the time that candidates normally begin circulating nomination papers, affording them ample time to do so. As discussed above, this comports with prior precedent. *See* Legislature Letter 4. And the only dates to be displaced are statutory notice deadlines, the postponement of which has been judicially authorized in the past. *See Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 639 (E.D. Wis. 1982).[2]

Two other April dates have been suggested. The Krenz Intervenors recommend April 1, 2022 as the date by which maps should be in place following any federal review, *see* Krenz Letter 6. But they do not justify this date. They cite the example of the last four redistricting cycles, *id.* at 2-3, but their proposed 130-day span between adoption and primary is longer than any of those cycles (unlike the Petitioners').

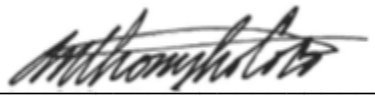
The Legislature, on the other hand, recommends an April 30, 2022 date. As the Petitioners noted in their previous letter, they do not oppose a later date so long as it allows enough time for nominating and ballot access requirements to be met ahead of the Fall election. Johnson Letter 3. The Legislature's proposal appears to meet this standard and would also be appropriate.

For the foregoing reasons, this Court should set **April 15, 2022** as the date by which a new redistricting plan must be in place, and to ensure this Court has sufficient time to review this matter, a status conference should be held no later than **January 14, 2022**.

[2] Although the BLOC Intervenors wish for this Court to complete its review by January 2022, they set March 14, 2022 as the date by which "all legal challenges" must be resolved, based on a March 15, 2022 statutory notice deadline. BLOC Letter 1-2. For the reasons just stated, the Court need not enact maps by this time.

Sincerely,

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
Attorneys for Petitioners



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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA, GERALDINE SCHERTZ, and KATHLEEN QUALHEIM,

Plaintiffs,

and

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS, and RONALD ZAHN,

Intervenor-Plaintiffs,

v.

MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., and MARK L. THOMSEN, in their official capacities as members of the Wisconsin Elections Commission,

Defendants,

and

WISCONSIN LEGISLATURE,

Intervenor-Defendant,

and

CONGRESSMEN GLENN GROTHMAN, MIKE GALLAGHER, BRYAN STEIL, TOM TIFFANY, and SCOTT FITZGERALD,

Intervenor-Defendants,

and

GOVERNOR TONY EVERS,

Intervenor-Defendant.

OPINION and ORDER

21-cv-512-jdp-ajs-eec

EXHIBIT
A

BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, the LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, and REBECCA ALWIN,

Plaintiffs,

v.

MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., and MARK L. THOMSEN, in their official capacities as members of the Wisconsin Elections Commission, and MEAGAN WOLFE, in her official capacity as the administrator of the Wisconsin Elections Commission,

Defendants.

OPINION and ORDER

21-cv-534-jdp-ajs-eec

This order addresses the case schedule and other matters pending before the court.

A. Case schedule and motions to dismiss or stay

The court asked the parties to confer and submit a joint proposed discovery plan and pretrial schedule on the assumption that trial would be completed by January 28, 2022, so that this court could, if necessary, have maps ready by March 1, 2022, which was the deadline provided by the defendant Wisconsin Elections Commission. *See* Dkt. 75.[1] After the Wisconsin Supreme Court granted the petition to commence an original action on redistricting, the court asked the parties to explain how the Wisconsin Supreme Court proceeding would affect this case. Once again, there is little on which the parties agree.

The intervenor-defendant Legislature thinks the federal case should be dismissed entirely, or failing that, delayed as long as possible, presumably to give the Wisconsin Supreme

[1] Docket citations in this order are to the entries in Case No. 21-cv-512.

Court the maximum time to draw Wisconsin's maps. The Johnson intervenor-plaintiffs are generally sympathetic to the Legislature's perspective, and they have filed a second motion to stay these cases.[2] Dkt. 79. The Hunter plaintiffs, the BLOC plaintiffs, and intervenor-defendant Governor Tony Evers would press on in this court and begin discovery almost immediately. The court will reject the two polar approaches.

Over the last six decades, when Wisconsin has had divided government, it has frequently failed to enact redistricting plans, and the federal courts—not the Wisconsin Supreme Court—have drawn Wisconsin's maps. When these cases were filed, it seemed likely that the federal courts would be called upon once again. But the recent decision by the Wisconsin Supreme Court to take up the redistricting issue suggests that this pattern may not repeat itself. It seems as unlikely as ever that Wisconsin will enact a redistricting law, but the Wisconsin Supreme Court seems poised to step into the breach for the first time since 1964.

Federal rights are at stake, so this court will stand by to draw the maps—should it become necessary. The court recognizes that responsibility for redistricting falls first to the states, and that this court should minimize any interference with the state's own redistricting efforts. But the Wisconsin Supreme Court did not commit to drawing new legislative or congressional maps, and has not yet set a schedule to do so, or even to decide whether it will do so. Dkt. 79-1, at 3. It is appropriate for this court to provide a date by which the state must act to avoid federal involvement in redistricting. *Growe v. Emison*, 507 U.S. 25, 36 (1993).

[2] The renewed motion to stay is fully briefed. The parties' responses are at Dkt. 89 to Dkt. 95. The Congressmen intervenor-defendants, the Hunter plaintiffs, and the Johnson intervenor-plaintiffs each ask for leave to file an additional brief. Dkt. 97; Dkt. 100; Dkt. 101. The court will grant each of those motions and will accept the proffered briefs.

The court is not persuaded by the Legislature's proposal to forestall trial until late March. Nomination papers for the 2022 partisan primary elections are due June 1. Wis. Stat. § 8.15(1) (2019–20). By statute, candidates may begin collecting signatures to support their candidacies on April 15, giving them six weeks to collect signatures. *Id.* Defendant Wisconsin Election Commission says it needs six weeks to prepare for the April 15 deadline, which would mean that Wisconsin's maps must be ready by March 1. The Legislature apparently assumes, without providing any explanation why, that the redistricting process can cut into the commission's preparation time or the candidates' six-week window to circulate nomination papers. 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. Until the court is persuaded otherwise, the court will reserve five days beginning January 31, 2022, for trial of this matter.

This trial date is not far off, but the court will not open discovery immediately. The BLOC plaintiffs have professed the need for particularly searching discovery, which will impose significant burdens on the parties. It also risks substantial interference with the redistricting process and other government functions. All this might turn out to be wasted effort if the Wisconsin Supreme Court acts, and also because the BLOC plaintiffs' claims are the target of a pending, and not yet fully briefed, motion to dismiss.

Moreover, the proceeding in the Wisconsin Supreme Court will, presumably, provide some fact-development process through which the parties can develop much of the evidence they would need should the federal case proceed to trial. But that leads to one of the difficulties this court faces in determining how to proceed: this court lacks information about the timing of the redistricting process in the Wisconsin Supreme Court and the scope of the issues to be resolved. The supplemental briefs from the Congressmen intervenor-defendants and the

Hunter plaintiffs raise the question of whether the Wisconsin Supreme Court action will address malapportionment of the congressional map. And it is not yet clear whether the parties to that action will be able to raise federal Voting Rights Act claims.

In light of these concerns, the court will grant the Johnson intervenor-plaintiffs' motion for a stay, in part. Discovery is stayed until at least November 5. By that date, the parties must update the court on the status of the action in the Wisconsin Supreme Court. The status report should address: the schedule of the action; the scope of any factual development process; and the scope of the legal issues that the parties intend to raise. Per the usual practice, the parties should submit a joint report, setting out points of disagreement. The court may schedule a status conference shortly after the status report.

In the meantime, the parties are directed to complete briefing on the Legislature's motions to dismiss the BLOC plaintiffs' amended complaint and the Johnson intervenor-plaintiffs' complaint. Dkt. 86 and Dkt. 87. The briefing schedule is set out in the order below.

B. The Citizen Data Scientists' motion to intervene

A group of Wisconsin voters living in now-malapportioned congressional and legislative districts seeks to intervene. Dkt. 65. These proposed intervenors, who identify themselves as the "Citizen Data Scientists," say that they "are some of Wisconsin's leading professors, practitioners, and research scientists in data science, computer science, mathematics, statistics, and engineering." Dkt. 67, at 2. They say that they "are nonpartisan scientists and mathematicians whose interest is in seeing the redistricting process proceed fairly and transparently for all Wisconsin voters." *Id.* at 3. They propose using "'computational redistricting'—a relatively recent field applying principles of mathematics, high-speed computing, and spatial geography to the redistricting process." *Id.*

The court has warned that any additional intervenors would have to make a particularly compelling showing. Dkt. 60, at 5. The Citizen Data Scientists resist any heightened intervention standard because they didn't have notice that the court would impose such a standard, no party opposes their intervention, and the litigation has not yet meaningfully progressed. The point of the court's statement was that it was now unlikely that any proposed intervenor would have an interest not already adequately represented by the existing parties.

The Citizen Data Scientists' motion is timely in the sense that it was filed only five weeks after the Hunter plaintiffs' complaint. But the motion comes after the court has already allowed numerous other parties into the litigation and consolidated the '512 and '534 cases. The Citizen Data Scientists' malapportionment claims are the same as those already filed by the other sets of plaintiffs, and their stated interest in "fair and transparent" redistricting does not distinguish them from other parties in the case. Each set of parties brings its own perspective, but there are myriad political affiliations and demographic groups in the state of Wisconsin. Not every such party or group—partisan or not—has a right to intervene in this case.

The court must also consider whether intervention will unduly delay the case or prejudice the existing parties. Fed. R. Civ. P. 24(b)(3); *see also Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 803 (7th Cir. 2019). This litigation has already become quite complex; adding yet another party will needlessly further complicate the proceedings, potentially prejudice the other parties, and might invite a flood of additional motions to intervene by groups who believe that they have their own superior method of drawing the maps. The court concludes that the Citizen Data Scientists are not entitled to intervene, either as a matter of right or permissively.

The Citizen Data Scientists don't really have a unique interest that supports intervention. What they purport to bring is unique expertise. The Citizen Data Scientists "advocate that high-speed computers and cutting-edge algorithmic techniques can and should be used to thwart gerrymandering, streamline and accelerate the mapmaking process, and promote fair and effective representation for all Wisconsin residents." Dkt. 67, at 6. Their expertise is welcome: the court will grant them leave to submit amicus briefs on any substantive issue in the case.

ORDER

IT IS ORDERED that:

1. Plaintiffs may have until October 20, 2021, to respond to intervenor-defendant Wisconsin Legislature's motions to dismiss, Dkt. 86 and Dkt. 87. The Legislature may have until October 27, 2021, to reply.

2. The Congressmen intervenor-defendants', Hunter plaintiffs', and Johnson intervenor-plaintiffs' motions for leave to file additional briefing on the Johnson intervenor-plaintiffs' motion to stay, Dkt. 97; Dkt. 100; Dkt. 101, are GRANTED. The court accepts their additional briefs, Dkt. 97-1; Dkt. 100-1; Dkt. 101-1.

3. The Johnson intervenor-plaintiffs' second motion to stay proceedings, Dkt. 79, is GRANTED in part. Proceedings other than briefing on the Legislature's motions to dismiss are stayed until November 5, 2021.

4. The parties must, by November 5, 2021, update the court on the Wisconsin Supreme Court proceedings, as described above, with a joint submission, setting out any points of disagreement.

5. The motion to intervene filed by Leah Dudley, Somesh Jha, Joanne Kane, Michael Switzenbaum, Jean-Luc Thiffeault, and Stephen Joseph Wright, Dkt. 65, is DENIED, but they are granted amicus status and may file briefs on any substantive issue in the case.

Entered October 6, 2021.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge

/s/

AMY J. ST. EVE
Circuit Judge

/s/

EDMOND E. CHANG
District Judge