

No. 2021AP1450-OA

IN THE SUPREME COURT OF WISCONSIN

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS, AND RONALD
ZAHN,
Petitioners,

BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA,
LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN
STEPHENSON, REBECCA ALWIN, CONGRESSMAN GLENN GROTHMAN,
CONGRESSMAN MIKE GALLAGHER, CONGRESSMAN BRYAN STEIL,
CONGRESSMAN TOM TIFFANY, CONGRESSMAN SCOTT FITZGERALD, LISA
HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA, GERALDINE SCHERTZ,
KATHLEEN QUALHEIM, GARY KRENZ, SARAH J. HAMILTON, STEPHEN
JOSEPH WRIGHT, JEAN-LUC THIFFEAULT, AND SOMESH JHA,
Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, in her official
capacity as a member of the Wisconsin Elections Commission, JULIE
GLANCEY, in her official capacity as a member of the Wisconsin Elections
Commission, ANN JACOBS, in her official capacity as a member of the
Wisconsin Elections Commission, DEAN KNUDSON, in his official capacity as
a member of the Wisconsin Elections Commission,
ROBERT SPINDELL, JR., in his official capacity as a member of the Wisconsin
Elections Commission, AND MARK THOMSEN, in his official capacity as a
member of the Wisconsin Elections Commission,
Respondents,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, in his
official capacity, AND JANET BEWLEY SENATE DEMOCRATIC MINORITY
LEADER, on behalf of the Senate Democratic Caucus,
Intervenors-Respondents.

PROPOSED JOINT DISCOVERY PLAN

Pursuant to the Court's Order of November 17, 2021, the Parties submit the following Joint Discovery Plan:

1. Scope and Subjects of Discovery; Completion.

a. Scope.

- i. Discovery shall be limited to material that is relevant to whether (and to what degree) the Parties' proposed state legislative and congressional apportionment remedial plans comply with the requirements of state and federal law and other parameters set forth in the Court's decision of November 30, 2021.

b. Fact Discovery.

- i. The parties agree that in light of stipulations and the Court's November 30 Order, at this time they do not anticipate that fact discovery is needed beyond the exchange of maps, expert disclosures, and any documents or data that a party intends to rely upon or an expert has relied upon. Noted below, government GIS and Census redistricting data are publicly available on websites maintained by the United States Census Bureau and the Wisconsin Legislative Technology Services Bureau. As indicated below, the Parties stipulate to the authenticity and admissibility of such records.

- ii. If any party seeks to take discovery, it shall do so between December 15 and 23, or otherwise by agreement of the parties or leave of court.¹
- c. **Expert Discovery.** The Parties agree that, to the extent the federal and Wisconsin rules are different, expert disclosures, reports, and discovery of communications shall be consistent with Federal Rules of Civil Procedure 26(a)(2)(B), (a)(2)(E), (b)(4), (e), as opposed to the Wisconsin rules which would otherwise be applicable.
- d. **Time to Complete Discovery.** Except as stipulated herein and as may be otherwise stipulated, discovery shall be completed by December 23, 2021.

2. Initial Disclosures.

- a. The Parties agree that by December 8, the Parties shall disclose all individuals other than experts whose testimony the party intends to use at any possible evidentiary hearing contemplated in the Court's November 17, 2021 Order. This disclosure obligation is ongoing.

3. Expert Disclosures

- a. Timing.
 - i. Initial expert disclosures shall be made on December 15, 2021.
 - ii. All Parties agree that any Party may submit an expert report as an attachment to the Responsive

¹ The Parties do not waive their rights to object to any discovery sought by any other party.

Briefs due December 30. The scope of any expert report or affidavit submitted with the Responsive Brief must be limited to rebutting initial briefs, maps, and reports.

- iii. All Parties agree that any Party may submit an expert report as an attachment to the Reply Briefs due January 4. The scope of any expert report or affidavit submitted with the Reply Brief must be limited to rebutting responsive briefs and reports.
- iv. The Parties may disclose additional experts in connection with the Parties' Responsive and Reply briefs.

b. Reports.

- i. Expert reports or affidavits shall contain all components specified in Fed. R. Civ. P. 26(a)(2)(B), including compensation and work history, as well as identification of facts, data, and assumptions relied upon, and a list of materials relied upon.
- ii. The Parties recognize that the Court previously ordered that expert reports or affidavits shall "strive for brevity and shall contain an executive summary not to exceed 1,100 words."
- iii. Parties and experts have a duty to supplement per Fed. R. Civ. P. 26(a)(2)(E) and (e).

c. Documents and Supporting Materials.

- i. No later than the day following the disclosure of any expert report or affidavit, sponsoring Parties

must make available facts or data considered by the expert witness in forming his or her opinion otherwise not disclosed and available in the expert reports. Without limitation, this disclosure shall include any raw data (that is not otherwise clearly identified and publicly available), any modified data, r-files, statistical analysis, formulas, other backup sufficient to replicate analysis, inaccessible articles or books, and similar materials relied upon. The Parties agree to make good faith efforts to make such information available the same day as the disclosure of the expert report or affidavit.

d. Depositions.

- i. The parties agree there will be no expert depositions.

4. Production of Maps.

- a. Proposed maps shall be disclosed in the following formats: CSV, Shapefile, and PDF.
- b. Each CSV file must contain two fields: one that identifies all census blocks in the state, and another that identifies the district to which each census block has been assigned. File compression software shall not be used.
- c. Parties shall exchange proposed maps with the expert disclosures on December 15, 2021.

5. Production of Other Documents; Stipulations.

- a. Petitioners, the Legislature, the BLOC and Hunter Intervenor-Petitioners, the Congressmen, the Governor, the Citizen Mathematicians and Scientists, the Wisconsin Elections Commission Respondents, and Senator Bewley stipulate to the authenticity and admissibility of the 2020 Census Redistricting Data available at <https://legis.wisconsin.gov/ltsb/gis/data/> and listed under the subheadings “U.S. DOJ Summarized Fields” and “2020 TIGER Geography & P.L. 94-171 Redistricting Data as U.S. DOJ Summarized Fields.”
- b. Petitioners, the Legislature, the BLOC and Hunter Intervenor-Petitioners, the Congressmen, the Governor, the Citizen Mathematicians and Scientists, the Wisconsin Elections Commission Respondents, and Senator Bewley stipulate to the authenticity and admissibility of the relevant portions of the legislative record (including Legislative Reference Bureau and Legislative Council materials) contained on the Legislature’s website for the following bills and resolutions:
 - i. 2021 Wisconsin Senate Bill 621 (available at <https://docs.legis.wisconsin.gov/2021/proposals/reg/sen/bill/sb621> and referenced legislative journal entries).
 - ii. 2021 Wisconsin Senate Bill 622 (available at <https://docs.legis.wisconsin.gov/2021/proposals/reg/>

- sen/bill/sb622 and referenced legislative journal entries).
- iii. 2021 Wisconsin Assembly Bill 624 (available at <https://docs.legis.wisconsin.gov/2021/proposals/ab624> and referenced legislative journal entries).
 - iv. 2021 Wisconsin Assembly Bill 625 (available at <https://docs.legis.wisconsin.gov/2021/proposals/reg/asm/bill/ab625> and referenced legislative journal entries).
 - v. 2021 Senate Joint Resolution 65 (available at https://docs.legis.wisconsin.gov/2021/proposals/reg/sen/joint_resolution/sjr65 and reference legislative journal entries).
- c. The Legislature created a website relating to redistricting that, among other things, allowed the public to submit proposed maps between September 1, 2021 through October 15, 2021. This website used the domains <https://drawyourdistrict.legis.wisconsin.gov> and <https://redistricting.legis.wisconsin.gov>. Petitioners, the Legislature, the Congressmen, the Citizen Mathematicians and Scientists stipulate to the authenticity and admissibility of all materials contained at the domains <https://drawyourdistrict.legis.wisconsin.gov> and <https://redistricting.legis.wisconsin.gov> as of the date of this submission.

- d. Petitioners, the Legislature, the BLOC and Hunter Intervenor-Petitioners, the Governor, the Congressmen, the Citizen Mathematicians and Scientists, the Wisconsin Elections Commission Respondents, and Senator Bewley stipulate to the authenticity and admissibility of Executive Order #66, which can be accessed through the Legislature's website at https://docs.legis.wisconsin.gov/code/executive_orders/2019_tony_evers/2020-66.pdf.
- e. The Citizen Mathematicians and Scientists stipulate to the authenticity and admissibility of the General Election Returns from the Election Data section of the above website (<https://legis.wisconsin.gov/ltsb/gis/data/>).
- f. The Citizen Mathematicians and Scientists stipulate to the authenticity and admissibility of the CVAP (Special Tabulation by Race and Ethnicity) data for the five-year period ending in 2019, available at <https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.2019.html>.
- g. The Citizen Mathematicians and Scientists stipulate to the authenticity and admissibility of the Shapefiles of American Indian Lands from the Census PL Data, titled AMIN shapefile: tl_2020_55_aiannh20.zip", which is available at https://www2.census.gov/geo/tiger/TIGER2020PL/STATE/55_WISCONSIN/55/, as well as the blockfiles of the same information, which is titled

“BlockAssign_ST55_WI_AIANNH.txt,” available at <https://www.census.gov/geographies/reference-files/time-series/geo/block-assignment-files.html>

- h. The Governor, the Wisconsin Elections Commission Respondents, and the Citizen Mathematicians and Scientists stipulate to the authenticity and admissibility of the Primary Election Returns from the Wisconsin Elections Commission, available at <https://elections.wi.gov/elections-voting/results-all>.
- i. The Parties agree to work cooperatively to join all parties where possible to the above-stipulations and to enter additional stipulations. Parties agree to enter such stipulations by January 11, 2022, and shall file those completed and additional stipulations with the Court by January 12, 2022.
- j. If the Parties contemplate substantial production of documents, other than those stipulated to above, then all production shall be in a format mutually agreed upon in a separate Electronically Stored Information (ESI) discovery protocol.

6. Service of Documents

- a. The Parties stipulate service and production of discovery by electronic mail.
- b. The Parties stipulate that publicly available government records, including for example the legislative record, need not be re-produced during the discovery phase.

7. **Claims of Privilege and Work Product.**

- a. The Parties agree that any documents in any format that contain privileged information or legal work product (and all copies) shall be immediately returned to the producing party if the documents appear on their face to have been inadvertently produced or if there is notice of the inadvertent production within 10 days after the producing party discovers that the inadvertent production occurred. The Parties agree that the recipient of such inadvertently produced information will not use the information, in any way, in the prosecution of the recipient's case. Further, the Parties agree that the recipient may not assert that the producing Party waived privilege or work product protection based upon the inadvertent production; however, the recipient may challenge the assertion of the privilege and seek a Court order denying such privilege.

8. **Post-Briefing Procedures.** Should the Court decide an evidentiary hearing “on one or more of four consecutive days beginning January 18, 2022” is necessary, the Parties may negotiate additional pretrial disclosure deadlines (*e.g.*, exhibit lists, witness lists, and the like) at a later date. The Parties offer the following comments on potential proceedings:

- a. Should the Court decide an evidentiary hearing “on one or more of four consecutive days beginning January 18, 2022” is necessary, The Legislature proposes that

Parties shall exchange written direct testimony of all fact and expert witnesses no later than January 11, 2022. The expert written direct testimony may be the experts' report(s), but is not required to be the experts' reports given the potential for written direct testimony to streamline the issues. Direct testimony would be filed with the Court no later than January 12, 2022. Absent stipulation by all Parties, witnesses for whom a sponsoring party has submitted direct testimony shall be made available for live cross-examination and re-direct.

- b. Should the Court decide an evidentiary hearing "on one or more of four consecutive days beginning January 18, 2022" is necessary, the Citizen Mathematicians and Scientists take no position on whether expert direct testimony should occur live at the hearing or be in the form of written direct testimony. If the Court prefers written direct testimony, however, the Citizen Mathematicians and Scientists submit that, for the sake of judicial economy, each Party's expert reports or affidavits serve as its written expert direct testimony and no additional written direct testimony be permitted. Absent stipulation by all Parties, witnesses for whom a sponsoring party has submitted direct testimony shall be made available for live cross-examination, re-direct, and re-cross.

- c. The Petitioners and the Congressmen state that any evidentiary hearing appears to be unnecessary, since the parties have agreed that no fact discovery is needed beyond exchange of maps, expert disclosures, and disclosure of data relied upon by experts.
- d. The BLOC and Hunter Intervenor-Petitioners, the Governor, and Senator Bewley agree with the Petitioners and the Congressmen that any evidentiary hearing appears to be unnecessary, since the parties have agreed that no fact discovery is needed beyond exchange of maps, expert disclosures, and disclosure of data relied upon by experts. Should the Court decide an evidentiary hearing “on one or more of four consecutive days beginning January 18, 2022” is necessary,” the BLOC and Hunter Intervenor-Petitioners, the Governor, and Senator Bewley propose the expert reports and affidavits submitted to the Court shall serve as the direct testimony for all witnesses, whether expert or otherwise, in this proceeding. Cross-examination of expert witnesses may be unnecessary, but the parties can make expert witnesses available if the court would like oral expert testimony.
- e. The Wisconsin Elections Commission Respondents take no position on post-briefing procedures.

Dated December 3, 2021.

Respectfully Submitted,

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