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Via Email and Hand Delivery

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:

Pursuant to the Court's January 31, 2022 Order, the Citizen Mathematicians and Scientists (the "CMS Intervenors") respond to the Hunter Intervenors' January 25, 2022 Motion for Leave (the "Hunter Motion").

As an initial matter, the CMS Intervenors note that the Hunter Motion misconstrues what transpired at the January 19 oral argument. The Hunter Motion alleges that "counsel for the Citizen Data Scientists and Mathematicians raised for the first time at oral argument that a Pennsylvania court in 2002 had invalidated a congressional plan with an 18-person population deviation, and counsel suggested 'a majority of states have abided by the rule of one person deviation.'" Hunter Mot. at 4 (quoting Oral Argument Recording, vol. 2, at 2:14:20). The Motion then continues: "[C]ounsel was *incorrect* to suggest a majority of states require a population range of one person or fewer. *In the same 2000 redistricting cycle that counsel cited to*, 24 of the 43 states (55.8%) that engaged in congressional redistricting adopted a plan with a population range greater than one person." *Id.* at 5 (emphasis added).

However, counsel for the CMS Intervenors stated at oral argument that *after* the 2002 Pennsylvania decision—that is, during the 2011–2012, not the 2001–2002, redistricting cycle—most States opted for a one-person deviation. The point, of course, was that the widely reported 2002 judicial decision invalidating

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a map with a very small deviation persuaded States to tighten their standards in future congressional redistricting.<sup>1</sup>

Furthermore, the statement by the CMS Intervenor's counsel was accurate. During the 2011–2012 redistricting cycle that followed the 2002 Pennsylvania decision, only 14 States adopted congressional maps with a maximum population deviation greater than one person.<sup>2</sup> See *Evenwel v. Abbott*, 578 U.S. 54, 60 n.2 (2016) (defining “maximum population deviation”).

The Hunter Motion also errs in suggesting there is no distinction between (a) maps with a one-person maximum population deviation and (b) maps that “contain districts with populations that deviate one person above and one person below the mathematical ideal.” Hunter Mot. at 3. The CMS Intervenor's Map falls into the former category, as every one of its eight congressional districts contains either 736,714 or 736,715 residents. By contrast, the Hunter Map and the Governor's Map fall into the latter category, as each contains districts with 736,714 or 736,715 **or 736,716** residents. The CMS Intervenor's Map thus has a maximum population deviation of one person (736,715 minus 736,714), while the Hunter and Governor's maps have a maximum population deviation of two persons (736,716 minus 736,714), which is twice as large.

Likewise, the Hunter Motion errs in stating: “Because no party here has proposed a congressional map with districts that deviate from the ideal by more than one person, none of the proposed maps are unconstitutional.” Hunter Mot. at 5. But proposing a map “with districts that deviate from the ideal by more than one person” is precisely what the Hunter Intervenor (and the Governor) did when they proposed a map with districts containing 736,716 residents, which is 1.25 persons more than the ideal (5,893,718 people divided by 8 districts, or 736,714.75).

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<sup>1</sup> See Oral Argument Recording, vol. 2, at 2:14:12–2:14:40 (“Ever since [the 2002 ruling], ...”), <https://wiseeye.org/2022/01/19/wisconsin-supreme-court-oral-arguments-johnson-v-wisconsin-elections-commission/>. Contrary to counsel's recollection at oral argument, the 2002 Pennsylvania map had 19 districts and a 19-person deviation. See *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 674–78 (M.D. Pa. 2002) (three-judge court).

<sup>2</sup> See National Conference of State Legislatures, *2010 Redistricting Deviation Table* (Jan. 15, 2020), <https://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx>.

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To be sure, the CMS Petitioners have never argued that the two-person deviation renders the Hunter Map flatly unconstitutional. Rather, at oral argument, counsel expressly stated that a one-person maximum population deviation “may not be an absolute legal mandate” but cautioned that, if the Court adopted a map with a two-person deviation, it could raise “the risk of this Court’s map getting attacked in federal court.”<sup>3</sup> That statement is correct. U.S. Supreme Court precedents require any State that rejects a one-person-deviation map to then justify the larger deviation by “show[ing] with some specificity” that the population differences “were necessary to achieve some legitimate state objective.” *Karcher v. Daggett*, 462 U.S. 725, 740–41 (1983). The Hunter Intervenor have not identified any legitimate state objective that could justify their map’s larger population deviation.

Finally, for at least two reasons, the Court should deny the Hunter Intervenor’s request for leave to file a modified proposed congressional map that fixes its two-person deviation.

*First*, in its November 17 Order, the Court set a December 15 deadline for submitting maps; and the Court has subsequently accepted three rounds of briefing and expert reports on those maps from all parties, followed by a seven-hour oral argument. If the Hunter Intervenor are allowed at this late date to offer a new map, so too must the other parties. The CMS Intervenor have consistently opposed *all* tardy maps,<sup>4</sup> and do so again here, as well.

*Second*, the CMS Intervenor have also consistently argued that final maps should be in place by April 1 and that, given the pendency of the Hunter Intervenor’s case before a three-judge panel in the U.S. District Court for the Western District of Wisconsin, this Court has a duty to wrap up its redistricting efforts by early February.<sup>5</sup> Tolerating new maps, and the need for new briefing

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<sup>3</sup> Oral Argument Recording, vol. 2, *supra* note 1, at 2:14:33-2:14:52.

<sup>4</sup> *See, e.g.*, CMS Opposition to Congressmen’s Motion to Submit Their Modified Version of Their Proposed Remedial Congressional Map (Jan. 5, 2022); BLOC Motion to File a Corrected Version of Their Proposed Remedial Legislative Maps ¶ 12 (Jan. 4, 2022) (noting CMS Intervenor’s opposition to motion); Governor Tony Evers’s Motion to File Corrected Proposed State Maps ¶ 15 (Jan. 6, 2022) (same).

<sup>5</sup> *See* CMS Letter Brief at 1–7 (Oct. 6, 2021); CMS Letter Brief at 1–5 (Oct. 13, 2021).

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and argument about new maps, could at this juncture render timely state-court resolution of this controversy impossible.

The CMS Intervenors thus respectfully request that the Court deny the remaining portion of the Hunter Motion, determine that no new maps will be accepted, and proceed to timely resolve this case so that Respondents can properly administer the August 9, 2022 primary election. The CMS Intervenors also renew their request that the Court adopt the CMS MathSci Maps for the reasons explained in their December 15, December 30, and January 4 briefs and expert reports, as well as their January 19 oral argument.

#### **LENGTH CERTIFICATION**

I hereby certify that this letter response conforms to the Court's January 31, 2022 Order for a letter response produced with a proportional serif font. The length of this letter response 1,071 words.

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" being clearly legible, and "P." in the middle.

Michael P. May

cc: All Counsel of Record

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