



October 6, 2021

Via Email & Hand Delivery

Sheila T. Reiff
Clerk of the Supreme Court and Court of Appeals
110 East Main Street, Suite 215
Madison, WI 53703

RE: ***Johnson v. Wisconsin Elections Commission, No. 2021AP1450-OA – Letter brief from Proposed Intervenor-Petitioners Black Leaders Organizing for Communities, et al., in response to the Court’s Order dated September 22, 2021***

Dear Ms. Reiff:

Undersigned counsel represent Black Leaders Organizing for Communities, Voces de la Frontera, the League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson, and Rebecca Alwin, Proposed Intervenor-Petitioners (collectively the “*BLOC* Intervenors”) in the referenced action. On September 22, 2021, the Supreme Court of Wisconsin ordered the parties and all prospective intervenors to submit letter briefs addressing when a new redistricting plan must be in place and the key factors considered to identify that date. Order (Wis. Sept. 22, 2021, amended Sept. 24, 2021). The *BLOC* Intervenors submit this letter brief accordingly.

INTRODUCTION

No later than March 14, 2022, Wisconsin’s new legislative districts¹ must be finalized, with all legal challenges resolved. The next day is a statutory deadline for the Wisconsin Elections Commission (“WEC”) to provide notice of those new districts to county clerks. Although the 2022 partisan primary does not occur until August, Wisconsin statutes, as well as practical constraints, require election officials and candidates to complete multiple administrative steps well in advance. Those preparatory steps are not optional but part and parcel of the primary

¹ The *BLOC* Intervenors seek to participate in this case to address the requirements for new state legislative districts, and have not challenged congressional districts.

(and general) election. The primary election cannot be held unless ballots are printed and distributed. Before ballots can be printed, lots must be drawn to determine the order in which candidates will appear on the ballot, then ballots must be designed, tested, approved, printed, and disseminated to each municipality and then each ward. To establish which candidates' names will appear on the ballot, candidates must be deemed eligible after collecting hundreds of qualifying signatures from voters within the State Assembly or Senate district they seek to represent. It follows, then, that putative candidates cannot begin to collect the necessary signatures, or even strategize for how they will do so, until the boundaries are fixed for the district that each candidate seeks to represent.

The importance of these steps is so great that state statutes² expressly dictate when they must occur, assigning deadlines to each. Wisconsin law sets the third Tuesday in March—in 2022, March 15—as the deadline for the WEC to send notice of the primary and general elections to county clerks. Wis. Stat. § 10.06(1)(f). That notice will direct clerks to the descriptions of the new legislative district boundaries. § 10.01(2)(a). County clerks then must send election notices to municipal clerks on the first Tuesday in April. § 10.06(2)(gm). Chapter 8 of the Wisconsin Statutes provides that candidates may begin circulating nomination papers for signature by electors residing within the boundaries of the district the candidate seeks to represent no earlier than April 15. Wis. Stat. §§ 8.15(1), (3). Candidates must then file nomination papers no later than June 1, 2022. § 8.15(1). This chain of requisite steps predicate to holding the primary election requires the Court to look well ahead of the August 9 election date when determining the deadline for new districts to be in place. Indeed, this Court has previously recognized the many steps that both state and federal law require in the months before election day, and that an election is already underway many weeks before. *See Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶¶5-6, 393 Wis. 2d 629, 948 N.W.2d 877 (commenting in order released on September 14, 2020, that “the [November 3,] 2020 fall general election has essentially begun”).

This series of mandatory events can begin only after new district boundaries are finalized. All legal challenges to maps must therefore be resolved before March 15, 2022, so that the WEC

² Federal law also drives this timeline, as federal offices will appear on the ballots for the August Primary and November General Election in 2022. See discussion of Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 52 U.S.C. §§ 20301, *et seq.* below.

and local clerks may lawfully administer the August Partisan Primary. Currently, in addition to the impasse claims raised in this action, the *BLOC* Intervenors have brought federal Voting Rights Act claims related to Wisconsin's maps (and to appropriate remedial districts) currently pending before a three-judge court in the Western District of Wisconsin. First Am. Compl. ¶¶104-110, *BLOC, et al. v. Spindell, et al.*, No. 3:21-cv-534 (W.D. Wis. Sept. 7, 2021). Because those claims are not before this Court, they might need to be addressed by the federal court *after* the political branches agree upon, or this Court imposes, a map defining state legislative districts, should the state redistricting processes fail to cure those violations of federal law. The federal court has indicated a trial for any such claims will be complete by January 28, 2022. Order, *BLOC, et al. v. Spindell, et al.*, No. 3:21-cv-534 (W.D. Wis. Sept. 21, 2021), attached as Exhibit A. Therefore, if the political branches do not succeed in forging compromise maps that comply with state and federal law, this Court should be prepared to issue a final order in this action before the federal trial begins, and in sufficient time for the federal court to hold an orderly trial.

ARGUMENT

I. Wisconsin Statutes and Practical Considerations Require Redistricting be Complete, and New Districts Finalized, no Later than March 15, 2022.

Statutory deadlines as early as March require district boundaries be determined so that election officials can meet their statutory obligations to timely publish legally required notices, potential candidates can determine their eligibility for office, and election materials can be timely prepared. Chapter 10 of the Wisconsin Statutes sets the third Tuesday in March (March 15, 2022) as the deadline for the WEC to send Type A Notice of Partisan Primary and General Election for 2022 to county clerks. Wis. Stat. § 10.06(1)(f). For any election held within a district, the Notice of Election must include “where information concerning district boundaries may be obtained...” *Id.* § 10.01(2)(a). The notice also provides important information about the next steps in the election process: “the beginning date for circulating, the place and deadline for filing declarations of candidacy and nomination papers, where required...” and therefore necessarily requires that those dates be firmly set (as they are in statute) by the time the Notice is sent on March 15. *Id.* This notice then triggers the county clerks to send a notice to municipal clerks on the first Tuesday in April. § 10.06(2)(gm).

By April, campaigns for state legislative districts are under way. Chapter 8 of the Wisconsin Statutes dictates that candidates may begin circulating nomination papers—which may be signed only by those electors residing within the candidate's newly defined district—on

April 15th. Wis. Stat. §§ 8.15(1), (3). These papers must in turn be submitted by June 1, 2022. § 8.15(1). Only those candidates who submit nomination papers bearing a sufficient number of valid signatures acquired within the allotted time and filed before the deadline may have their names appear on the August ballot. *Id.* Because prospective candidates must collect hundreds of signatures in this window, the timeline for these activities is already quite compressed. Adding to the urgency and complexity of the election preparation process, candidates' nomination papers, and consequently their right to appear on the ballot, may be challenged before the WEC, with an appeal to circuit court. *See Wis. Stat.* § 5.06.

Election-administration deadlines build from the statutory dates set for the March and April notices, nomination papers, and the June 1 filing deadline. The rest of June, July, and early August are consumed with finalizing and distributing ballots for the coming primary, across 99 State Assembly districts and 33 State Senate districts. Because federal races will appear on the August ballots, ballots must be transmitted to eligible overseas voters no later than June 22 under the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”). 52 U.S.C. § 20302(a)(8). In the event the sufficiency of signatures submitted on candidate nomination papers is challenged, these related deadlines become incredibly tight. *See Hawkins*, 2020 WI 75, ¶5 n.1 (“[U]nder the current statutory scheme, the time between the date the Commission makes its rulings on ballot access and the date that ballots must be sent to voters is extremely short. . . . We urge the legislature to consider broadening the statutory timelines to afford a more reasonable amount of time for a party to file an action raising a ballot access issue.”).

These cumulative statutory dates and deadlines are summarized here:

Statutory Election-Related Deadlines for 2022

<i>Date</i>	<i>Event</i>	<i>Statutory Cite</i>
March 15, 2022	Deadline for WEC to send Type A notice of August 9, 2022 Partisan Primary, and November 8, 2022 General Election, to county clerks. This notice must contain a statement specifying where information concerning district boundaries may be obtained.	Wis. Stat. §§ 10.01(1), (2)(a), 10.06(1)(f) – 3rd Tuesday in March.
April 5, 2022	Deadline for County clerks to send Type A notice of 2022 Partisan Primary and General Election to municipal clerks.	Wis. Stat. §§ 10.01(2)(a), 10.06(2)(gm) – 1st Tuesday in April.

April 12, 2022	Deadline for County clerks to publish Type A notice of Partisan Primary and General Election for 2022.	Wis. Stat. § 10.06(2)(h) – 2nd Tuesday in April.
April 15, 2022	Candidates may begin to circulate nomination papers for the General Election (and by extension to appear on the Partisan Primary ballot in August).	Wis. Stat. § 8.15(1).
May 20, 2022	Deadline for incumbents not seeking reelection to file Notification of Noncandidacy with the filing officer. (Failure to notify will extend nomination-paper deadline 72 hours for that office.)	Wis. Stat. § 8.15(1) – 2nd Friday prior to the deadline for nomination papers.
June 1, 2022	Deadline for state legislative candidates to file nomination papers, declarations of candidacy, and campaign registration statements with WEC for the General Election (unless incumbent failed to comply with Wis. Stat. § 8.15(1)), in which case deadline is extended 3 days).	Wis. Stat. §§ 8.15(1), 8.20(8)(a), 8.21.
June 4, 2022	Deadline for state candidates to file Statement of Economic Interests with Wisconsin Ethics Commission (unless granted an extension).	Wis. Stat. § 19.43(4) – 3rd day following deadline for nomination papers.
June 4, 2022	Deadline for challenges to nomination papers to be filed (unless incumbent failed to comply with Wis. Stat. § 8.15(1)), in which case deadline is extended 3 days).	Wis. Stat. § 8.07, Wis. Admin. Code § EL 2.07 – within 3 days of deadline to file nomination papers.
June 7, 2022	Last possible day for the deadline for a challenged candidate to file a verified response with the filing officer (unless incumbent failed to comply with Wis. Stat. § 8.15(1), in which case deadline is extended 3 days).	Wis. Admin. Code § EL 2.07(2)(b) – within 3 calendar days of the challenge being filed.
(June 2022)	Filing officers draw names of candidates by lot for placement on the Partisan Primary ballot.	Wis. Stat. §§ 5.60(1)(b), 5.62(3), (4).
June 10, 2022 (or as soon as possible after deadline for	WEC sends Type B notice information and certification of candidates to county clerks for Partisan Primary.	Wis. Stat. §§ 10.01(2)(b), 10.06(1)(h).

determining ballot arrangement)		
(June 2022)	County clerks prepare ballots and send proofs to WEC for review as soon as possible before printing.	Wis. Stat. §§ 5.72(1), 7.10(2) – as soon as possible.
June 22, 2022	Deadline for county clerks to deliver ballots and supplies to municipal clerks for the Partisan Primary.	Wis. Stat. § 7.10(1), (3) – 48 days before Partisan Primary.
June 23, 2022	State-law deadline for distribution of absentee ballots if requested by this date.	Wis. Stat. § 7.15(cm) – 47 days before Partisan Primary.
June 25, 2022	Federal-law deadline for transmitting ballots to eligible UOCAVA voters.	52 U.S.C. § 20302(a)(8) – 45 days before any election including a federal office. <i>See also United States v. Wisconsin</i> , No. 3:18-cv-00471-jdp (W.D. Wis. 2018).
July 10, 2022	Deadline for municipality to establish polling places for Partisan Primary, including combining wards for Primary.	Wis. Stat. §§ 5.15(6)(b), 5.25(3) – 30 days before election.
July 12, 2022	Deadline for voters to acquire residence at a new address in a ward or election district in order to vote in the Partisan Primary from that ward or district.	Wis. Stat. §§ 6.02(1), (2).
August 5, 2022	Deadline for write-in candidates to file a registration statement for the Partisan Primary.	Wis. Stat. § 7.50(2)(em) – Friday preceding election.
August 8, 2022	Last day for special voting deputies to conduct absentee voting in nursing homes and care facilities; County clerks publish Type B notice of voting instructions and facsimile ballots for Partisan Primary.	Wis. Stat. §§ 6.875(6), 10.01(2)(b), 10.02, 10.06(2)(j) – Monday preceding the election.
August 9, 2022	Partisan Primary	Wis. Stat. § 5.02(12s) – 2nd Tuesday in August.
November 8, 2022	General Election	Wis. Stat. § 5.02(5) – Tuesday after the 1st Monday in November.

By law, Wisconsin has clearly ordered the many tasks required to hold an election, setting deadlines that allow its nearly 2,000 county and municipal clerks across the state to operate in a consistent, timely, orderly manner.

It is of course true that this Court could, if required by sufficiently compelling circumstances, adjust one or more of these statutory deadlines as part of the relief granted. To plan now to override statutorily set dates would be inappropriate, however. The two courts where redistricting litigation is currently underway have nearly five months in which to resolve the disputes over districts should the political actors be unable to do so. Because the Legislature has established these multiple steps—and their deadlines relative to each other—the Court cannot simply choose in advance to condense this timeline or omit steps for expediency. *Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶60, 281 Wis. 2d 300, 697 N.W.2d 417 (“[W]hen the legislature has acted, the judiciary is limited to applying the policy the legislature has chosen to enact, and may not impose its own policy choices.” (internal quotation marks omitted)); *State ex rel. Zignego v. Wis. Elections Comm’n*, 2020 WI App 17, ¶3, 391 Wis. 2d 441, 941 N.W.2d 284, *aff’d as modified*, 2021 WI 32, ¶3, 396 Wis. 2d 391, 957 N.W.2d 208 (“[C]ourts may not rewrite the plain language of the statutes the legislature has enacted.”); *accord, e.g., Meyers v. Bayer AG, Bayer Corp.*, 2007 WI 99, ¶53, 303 Wis. 2d 295, 735 N.W.2d 448; *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110.

Further, while it might be feasible to adjust a single deadline by court order, practical issues are sure to arise should the Court delay individual components of election administration. There are simply too many tasks that must be completed, in a relatively compressed timeframe, for hardworking clerks—many of whom hold office part-time—to expedite their work significantly. As little room as there is for delay or error under the best of circumstances, razor-thin margins between the cascading deadlines to prepare for an election have already led to difficulties administering Wisconsin’s elections when unforeseen circumstances arise. These issues range from limited and local, *see O’Bright v. Lynch*, No. 2020AP1761-OA (Wis. Oct. 29, 2020) (ballot printing errors), to broad and potentially catastrophic, *see Democratic Nat’l Comm. v. Bostelmann*, 451 F. Supp. 3d 952 (W.D. Wis. 2020) (extending electronic and mail-in voter registration deadline by a single week due to pandemic), *stay granted in part and denied in part*, Nos. 20-1538 & 20-1546, Nos. 20-1539 & 20-1545, 2020 WL 3619499 (7th Cir. April 3, 2020), *stay granted in part sub. nom. Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct.

1205 (2020). At least one of these election deadlines cannot be adjusted by a court or the Wisconsin Legislature: the state must meet the June 22 deadline for ballot transmission to eligible overseas voters implicated by UOCAVA. 52 U.S.C. § 20302(a)(8). Wisconsin is currently subject to a consent decree due to past failures to comply with this federal law. Order, *United States v. Wisconsin*, No. 3:18-cv-00471-jdp (W.D. Wis. June 20, 2018). If state legislative maps are not finalized before March 15, a cascading delay of deadlines threatens to make administering our state's elections unworkable, and likely will cause the WEC to violate state, and possibly federal, law.

II. Past Redistricting Litigation Confirms the Importance of Finalizing New District Boundaries before March 15, 2022.

In focusing on the mid-March statutory date, the *BLOC* Intervenors also consider past experience. Wisconsin is not unfamiliar with litigation over state legislative districts. *See, e.g., Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *vacated and remanded on other grounds*, 138 S. Ct. 1916 (U.S. 2018); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012); *Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992); *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982); *Baumgart v. Wendelberger*, Nos. 01-C-0121 & 02-C-0366, 2002 WL 34127471 (E.D. Wis. May 30, 2002), *amended*, 2002 WL 34127473 (E.D. Wis. July 11, 2002). In *Baldus*, the most recent decision in which a court adjusted Wisconsin's legislative districts, the court issued its merits opinion in March, and a final order establishing new boundaries on April 11. *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840 and 862 F. Supp. 2d 860 (E.D. Wis. 2012). But that litigation required altering the boundaries of only two Assembly districts, directly neighboring one another. This litigation, by contrast, will likely adjust every Assembly and Senate district, as well as Wisconsin's eight congressional districts.

Previous impasse litigation requiring a federal court to impose new districts statewide is not directly comparable because Wisconsin's partisan primary, previously held in September, now occurs earlier, in August. In 2002, the *Baumgart* court issued remedial maps in May (though technical errors led the court to amend its order in July). *Baumgart*, Nos. 01-C-0121 & 02-C-0366, 2002 WL 34127471 (E.D. Wis. May 30, 2002), *amended*, 2002 WL 34127473 (E.D. Wis. July 11, 2002). The cycle prior, in *Prosser*, 793 F. Supp. 859, the court issued final maps on June 2, 1992.

This is the first decennial cycle of redistricting involving an impasse claim since Wisconsin moved the partisan primary to August, leaving fewer weeks for election-administration deadlines leading up to that vote. Looking to the November General Election or even August Partisan Primary as a deadline for new maps is untenable. The work of holding those elections begins months before the first vote is cast. Even if the work of administering the elections could be further compressed in a dire situation, it cannot be skipped over or ignored. The steps outlined in Wisconsin law must occur, and will take several months to complete, ahead of the August Partisan Primary.

III. Any Schedule Set by this Court Must Provide Sufficient Time for Federal Challenges to Remedial Districts to be Completed Before March 15, 2022.

The Court's September 22 order did not request that parties and potential intervenors propose a full and detailed schedule for this Court to manage this litigation, so the *BLOC* Intervenors do not address such a schedule here. We note, however, that as mentioned above, the *BLOC* Intervenors' claim under Section 2 of the Voting Rights Act remains pending before the federal court. For Wisconsin's state legislative districts to be finalized by March 15 in a form compliant with federal law, the federal court must be given time to review—and possibly alter—maps adopted by this Court. That will require additional time before the March 15 deadline for that court's proceedings *and* rulings. The federal panel has already established that it expects a trial in that court to be held in January 2022. Consequently, if this Court endeavors to set a trial date for the impasse claims now before it, judicial economy suggests an earlier trial date is necessary to allow the Court to conclude its work and issue remedial maps with sufficient time for federal review, in addition to the administration of the August and November elections themselves.

CONCLUSION

Wisconsin's election statutes are detailed and clear. New districts must be finalized no later than March 14, 2022, so that state, county, and municipal election officials can timely execute their legal duties to administer the August 9 Partisan Primary statewide, and to ensure that all predicate steps necessary to effectively administer and hold that primary election can be completed.

Sincerely,



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EXHIBIT A

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,

ORDER

Defendants,

and

21-cv-512-jdp-ajs-eec

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.

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.

ORDER

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,

21-cv-534-jdp-ajs-eec

Defendants.

The court held a video status conference on September 21, 2021, to gather information needed to set the case schedule. All the parties appeared by counsel, as did the recent proposed intervenors.

The court recognizes that responsibility for drawing legislative and congressional maps falls primarily to the states. But the time available for redistricting is unusually compressed during this decennial cycle because of the late release of the 2020 Census data, and the problem is particularly acute in Wisconsin because its primary election date has been moved up to August. So previous federal redistricting cases may not be useful scheduling prototypes. In *Branch v. Smith*, 538 U.S. 254, 260–62 (2003), the Supreme Court approved the use of the earlier candidate-qualification deadline (rather than the election date itself) to establish a deadline by which the state had to establish its maps to forestall federal adjudication. Based on information from the defendant Wisconsin Election Commission, March 1, 2022, is the date by which maps must be available to the Commission if it is to effectively administer the

2022 elections. Should it be necessary for this court to adjudicate Wisconsin's maps, a trial of the issues would have to be complete by January 28, 2022, to give the court time to consider the evidence, make the necessary factual findings, and issue a reasoned decision.

Accordingly, as ordered during the status conference, the parties have until September 28, 2021, to confer and submit a joint proposed discovery plan and pretrial schedule on the assumption that trial will be completed by January 28, 2022, with trial briefs due a week before the start of trial. The court fully expects the parties to cooperate and submit a joint proposal, but the parties may submit alternatives on points of unresolvable disagreement.

Establishing the trial-completion date and setting a corresponding pretrial schedule does not mean that this court will inevitably adjudicate Wisconsin's maps. If the State enacts maps by March 1, 2022, the court may be able to refrain from issuing a judgment in this case. And there may be other circumstances that affect the case schedule. For example, if the State were to enact legislation that moves the nomination-petition circulation deadlines, and the related deadlines, later into 2022, thus relieving some of the urgency the Commission now faces, then the Court could consider alternative trial dates. Given these contingencies, the court will allow a party to propose an alternative schedule with a different trial date if the party disagrees with the Commission's March 1 deadline. Any alternative schedule must include the reasons for the party's disagreement with the Commission's deadline. And to be clear, submitting such an alternative proposal does not relieve the party of its obligation to cooperate in preparing the plan for the January trial.

Entered September 21, 2021.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge

/s/

AMY J. ST. EVE
Circuit Judge

/s/

EDMOND E. CHANG
District Judge