



Aria C. Branch
Elias Law Group LLP
10 G St., NE, Suite 600
Washington, D.C. 2002
ABranch@elias.law

October 13, 2021

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

Re: *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA, Redistricting Deadline Response

Dear Ms. Reiff,

Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, and Kathleen Qualheim (the “Hunter Intervenors”) are prospective intervenors in this action and, through their undersigned counsel, write to this Court in response to letter briefs submitted by other parties addressing the deadline by which a new redistricting plan must be in place, pursuant to this Court’s September 22 Order. *See Johnson v. Wis. Elections Comm’n*, No. 2021AP1450-OA, Order at 3 (Wis. Sept. 22, 2021).

Introduction

On October 6, 2021, the Hunter Intervenors submitted a letter brief to this court addressing the deadline by which a new redistricting plan must be in place. The Hunter Intervenors are aware of eight other letter briefs submitted to the Court from the following parties: the Johnson Petitioners, the Respondent Wisconsin Elections Commission (“WEC”), the BLOC Intervenors, the Citizen Mathematicians and Scientists (“Citizen Scientists”), the Congressmen, Governor Evers, the Wisconsin Legislature, and the Senate Democrats.

Though these letter briefs provide the Court with a variety of dates, there is ample agreement among many of the parties on key considerations and the general timeline. This responsive letter brief aims to clarify those points of agreement and highlight the remaining points of disagreement. The nine letter briefs submitted to this Court generally address three substantive deadlines:

1. The date by which *all* redistricting litigation must conclude;
2. The date by which *this* redistricting litigation must conclude; and,
3. The date by which this Court must begin substantive proceedings to timely conclude.

Based on the considerations outlined in their initial letter brief and the discussion below, the Hunter Intervenor submit that, in considering these questions, this Court should conclude: (1) all redistricting litigation must be concluded by March 1, 2022; (2) this Court must enact a redistricting plan by January 24, 2022; and (3) substantive proceedings must commence by November 1, 2021, twelve weeks prior to the deadline for this Court’s action.

1. All redistricting litigation must conclude by March 1, 2022.

Nearly all the submissions to this Court took a position on the date by which a final redistricting plan must be in place.¹ Those views are summarized below in chronological order:

Party	Deadline for All Litigation
Respondent WEC	March 1, 2022
Hunter Intervenor	March 1, 2022
Governor Evers	March 1, 2022/Early March
Senate Democrats	March 1, 2022/Early March
BLOC Intervenor	March 14, 2022
Citizen Mathematicians and Scientists	April 1, 2022
Johnson Petitioners	April 15, 2022
Wisconsin Legislature	April 30, 2022

Across the parties’ suggestions, there is broad agreement that the candidate signature gathering process cannot commence without a new redistricting plan in place. Under Wisconsin law, candidate signature gathering begins on April 15, 2022. Wis. Stat. § 8.15(1). The Wisconsin Legislature is the only party to suggest that redistricting could be settled after the signature gathering process is underway, proposing April 30, 2022 as the deadline for a new plan. Legislature’s Letter at 4. However, the Legislature also admits that adopting a plan by April 15, 2022 “would also allow ample time for the legislative process.” *Id.* at 1. Intruding on the signature gathering process is impractical and—as the Legislature admits—wholly unnecessary.

While there is near universal agreement that the deadline for a redistricting plan must precede the commencement of the candidate signature gathering process on April 15, 2022, there is not similar agreement over whether Wisconsin’s election notice deadlines should be disturbed. The WEC is required to send out various notices to county clerks throughout the election process. *See, generally* Wis. Stat. §§ 10.01-10.07. The WEC must send the first of these notices—the Type A notice—by March 15, 2022. Wis. Stat. § 10.06(1)(f). That Type A notice must include specific information, including “a statement specifying where information concerning district boundaries may be obtained.” Wis. Stat. § 10.06(2)(a). The statute specifically notes that if a “redistricting since the most recent election makes the description of the incumbent’s office of limited usefulness, the notice may contain supplementary information describing the territory in which an election is to be held.” *Id.* The WEC could not possibly transmit that information on March 15, 2022 without a redistricting plan in place.

¹ The Hunter Intervenor do not understand the Congressmen to have expressed a view on this issue separately from their views on when *this Court* must act. As discussed in Part 2 below, they identify that date as February 28, 2022.

Respondent WEC, the Hunter Intervenors, Governor Evers, Senate Democrats, and the BLOC Intervenors all propose deadlines that respect this March 15 deadline for the Type A notice. The Citizen Scientists propose an April 1 deadline without acknowledging or discussing Wisconsin election notices. The Johnson Petitioners admit that their proposed April 15 deadline does not comport with the March 15 deadline for election notices, but they insist that this Court is empowered to alter those election notice deadlines.

As the other proposals reflect, there is no need to alter election notice deadlines, and this Court should not accept the invitation to unnecessarily disregard or modify deadlines that currently exist under Wisconsin law. No party has suggested that there is not enough time for this Court to enact a redistricting plan well in advance of March 15, 2022. Indeed, the Johnson Petitioners' letter asks this Court to willingly delay consideration of the case until at least January 14, 2022, and then subsequently alter statutory deadlines to facilitate the 2022 election. Thus, the Johnson Petitioners effectively request that the Court modify duly enacted state laws to abate delays of its own making. They identify no support for doing so. Instead, they rely upon *Wisconsin State AFL-CIO v. Elections Board*, but that case was filed in February of the relevant election year. *See* Johnson Letter at 3 (citing *Wis. State AFL-CIO*, 543 F. Supp. 630, 639 (E.D. Wis. 1982)). This Court has more than five months of additional notice, so there is no need for this Court to abridge those statutory deadlines.

Finally, in addition to deadlines under state law, this Court must consider the associational rights of the Hunter Intervenors and other Wisconsin voters. The delay in determining district lines will impede voters' interest in associating with other members of their district and learning about candidates' qualifications and positions in advance of the primary election. *See Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (citations omitted) ("Free discussion about candidates for public office is no less critical before a primary than before a general election."). These rights are protected by art. I, sections 3 and 4 of the Wisconsin Constitution—and they require this Court to act in a timely manner so voters know in which district they are going to be and with whom they should associate and organize in advance of the 2022 election.

2. This litigation must conclude, and the Court approve a plan, by January 24, 2022.

Only some of the submissions addressed this question specifically.² As other parties have noted, the federal panel has identified March 1, 2022 as a provisional deadline for having a final redistricting plan. *See e.g.*, Congressmen's Letter at 1-2. Of the parties who commented on this deadline, most recognized that this Court must act well in advance of the deadline for a final plan to permit sufficient time for federal review of this Court's redistricting plan, while the others effectively expressed the view that this Court need not leave any time for federal review. The Hunter Intervenors submit that this Court must conclude this litigation by January 24, 2022. Further delay would almost certainly result in the federal court adopting its own plan without having the opportunity to review this Court's plan.

² The Hunter Intervenors do not understand Respondent WEC, the Governor, the Wisconsin Legislature, or the Senate Democrats to have expressed a view on this issue separately from their views on when redistricting litigation should be complete, generally.

The parties' expressed views on when this Court must act are summarized below in chronological order:

Party	Deadline for This Litigation
BLOC Intervenors	Before a federal trial
Hunter Intervenors	January 24, 2022
Citizen Mathematicians and Scientists	February 1, 2022
Congressmen	February 28, 2022
Johnson Petitioners	April 15, 2022

The Congressmen and the Johnson Petitioners are the only parties to suggest deadlines that would put the conclusion of this litigation either right up against or even after the federal panel's March 1 deadline. The Johnson Petitioners request that this Court act on the *last day* prior to the opening of the signature gathering process for candidates in the 2022 election. Delaying action until after March 1, 2022, would call into question whether this Court is acting "in time for the primaries" and whether a federal court would be "justified in adopting its own plan." *Grove v. Emison*, 507 U.S. 25, 36 (1993); *see also Scott v. Germano*, 381 U.S. 407, 409 (1965) (providing that the federal panel may enter an order reapportioning a state if the state institutions do not produce a plan "within ample time to permit such plan to be utilized in the" next scheduled elections). This proposal would needlessly set this litigation on a "collision course with the case now pending before the federal three-judge panel." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 16, 249 Wis.2d 706, 716, 639 N.W.2d 537 (2002).

The Congressmen's suggested deadline violates *Jensen* in a different way. While their February 28, 2022 deadline precedes the provisional federal deadline by a single day, it would function to preclude any collateral federal review prior to March 1, 2022. However, this Court explicitly declined to accept jurisdiction and enact a redistricting plan in *Jensen* because of the "likelihood of follow[-]up federal court review, and, therefore, continued uncertainty and delay." *Jensen*, 249 Wis.2d 706, 718. Failing to provide adequate time for federal review of this Court's decision—as the Congressmen and Johnson Petitioners suggest—would "delay and disrupt the [upcoming] election" when parties' subsequently seek "review in federal court." *Id.* at 716. This unnecessarily dilatory approach is unfair to Wisconsin voters and inconsistent with the principles of cooperative federalism and federal-state comity that were upheld in *Jensen*. *Id.* at 717.

3. This Court must begin substantive proceedings by November 1, 2021 to timely conclude.

In their letter, the Citizen Mathematicians and Scientists suggest that this Court should begin substantive proceedings in late November in anticipation of a ruling by February 1, 2022. *See* Citizen Scientists' Letter at 2. Though they were the only party to explicitly identify when substantive proceedings must begin, the Court can expect broad agreement on the general timeline provided by this deadline—approximately two months to litigate this action.

This two-month period appears in many other parties' suggestions in this suit and in the parallel federal litigation. For example, the Johnson Petitioners state that they expect litigation would "take a total of eight weeks from beginning to end." Johnson Letter at 4. Further, as noted in the Citizen Scientists' letter at 4, this two-month window also corresponds to the schedules proposed by parties to the corresponding federal litigation. *See Hunter v. Bostelmann*, 21-CV-512,

Dkt. 98, Joint Proposed Schedule at 20-24. (W.D. Wis. Oct 1, 2021) (proposing 56- and 59-day schedules from start of discovery to close of trial). That submission included input from the Respondent WEC, the Johnson Petitioners, the BLOC Intervenors, the Hunter Intervenors, the Congressmen, the Governor, and the Wisconsin Legislature.

However, the two-month window proposed in the federal litigation ended with a trial, not a decision from the federal court. While the Hunter Intervenors share the apparent views of the Johnson Petitioners and the Citizen Scientists—that this redistricting case will take about two months to litigate—Hunter Intervenors also want to build in adequate time for this Court to consider the various proposals and arguments and draft a thorough order. Whatever deadline this Court sets for its own action, substantive proceedings should begin *no less than twelve weeks prior*, so that this Court may thoroughly consider the record generated over the eight weeks of litigation. To avoid collision with corresponding federal litigation, this Court should be prepared to commence substantive proceedings by November 1, 2021.

Conclusion

For the reasons stated above, this Court should adopt a litigation schedule that provides twelve weeks to litigate and decide this case no later than January 24, 2022, so as to ensure the conclusion of all redistricting litigation by March 1, 2022.

Respectfully,

/s/ Aria C. Branch
Aria C. Branch

Cc: *See* attached certificate of service.

CERTIFICATE OF SERVICE

I certify that on this 13th day of October 2021, I caused a copy of this brief to be served upon counsel for each of the parties via e-mail and Federal Express.

Dated: October 13, 2021

/s/ Aria C. Branch
Aria C. Branch