

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

LISA HUNTER, et al.,

Plaintiffs,

v.

MARGE BOSTELMANN, et al.,

Defendants,

and

WISCONSIN LEGISLATURE,

Intervenor-Defendant.

21-cv-512-jdp-ajs-ec

BLACK LEADERS ORGANIZING FOR
COMMUNITIES, et al.,

Plaintiffs,

v.

ROBERT F. SPINDELL, JR., et al.,

Defendants.

21-cv-534-jdp-ajs-ec

JOINT PROPOSED DISCOVERY PLAN AND PRETRIAL SCHEDULE

Following the Court's September 21, 2021 order, dkt. 75,¹ counsel for the plaintiffs and defendants in the consolidated actions met and conferred on September 30, 2021, and counsel for all parties met and conferred by email exchanged September 27, September 30, and October 1, for

¹ All docket references are to the '512 case docket unless otherwise noted.

the purpose of preparing and submitting a joint proposed discovery plan and pretrial schedule as ordered by the Court.

1. Nature and Timing of the Case

A. Plaintiffs' Statement

Collectively, Plaintiffs allege that Wisconsin's existing state legislative and congressional district plans are unconstitutionally malapportioned under the U.S. Constitution; that Wisconsin's existing state legislative district plans violate Section 2 of the Voting Rights Act (VRA); and that the absence of any lawful districting plans violates voters' First Amendment freedom of association. Plaintiffs seek remedial state legislative and congressional district plans imposed by the Court should the Governor and State Legislature fail to adopt new plans, based on 2020 Census data and compliant with federal law, by March 1, 2022, the date identified by the Wisconsin Elections Commission ("WEC" or the "Commission") as the deadline for new district boundaries to be in place sufficient to administer the 2022 Primary and General Elections.

The WEC's identification of the March 1st deadline, informed by the Commission's expertise in election administration, deserves deference. And because this deadline provides sufficient opportunity for this Court to adopt lawful maps, duly enacted dates and deadlines—including the April 15th start to the circulation of nominating papers and affiliated schedules, *see* Wis. Stat. § 8.15(1)—should not be disturbed. Plaintiffs also note that their freedom of association claim, which is premised on their right to engage in core political activity, such as assessing and recruiting potential candidates, supports maintaining the customary window between the publication of district plans and the formal start to the nominating process.

As is more extensively discussed in the Plaintiffs' respective separate submissions responding to the *Johnson* Plaintiffs' motion to stay, and addressing the impact of the Wisconsin

Supreme Court's September 22, 2021 order granting the petition for original action in the *Johnson* case, Plaintiffs stipulate that this Court should not take action now on claims related to state legislative districts beyond resolving the pending motions to intervene and to dismiss, and setting a schedule for this litigation to proceed to trial and for the events that must occur to prepare the case for trial. The propriety of any further proceedings on these claims can be discussed at a proposed November 12, 2021 status conference after the Legislature's regular session has concluded.

B. Defendants' Statement

State law requires the Wisconsin Elections Commission to administer elections. *See generally* Wis. Stat. ch. 5–10, 12. The Commission has no authority to draw district maps and, accordingly, takes no position in this consolidated action as to the particulars of any maps. Nonetheless, the Commission takes its statutory charge seriously and advocates for final maps to be in place by March 1, 2022, a pragmatic date by which it believes it can properly, effectively, and timely administer the fall general election. As noted previously, the basis for this date is the statutory date of April 15, 2022, when candidates for the fall election may begin to circulate nomination papers. *See* Wis. Stat. § 8.15. Defendants have previously explained the reasons for the time needed by Commission staff between March 1 and April 15, 2022, and do not repeat them here.

Because the Wisconsin and United States Constitutions require new redistricting based on 2020 census data, it is unnecessary to resolve whether old district boundaries violate Section 2 of the Voting Rights Act for the same reasons made and raised in their answer to the BLOC Plaintiffs' amended complaint.

Lastly, rather than propose event deadlines, especially given that Defendants will not be submitting maps, Defendants will abide by the event deadlines subsequently set by this Court. Nonetheless, Defendants agree with Plaintiffs' case schedule in that it sets specific litigation event deadlines based on a January 24–28, 2022, trial. Defendants could agree to a later trial date, but only if the Court could still produce approved maps no later than March 1, 2022.

C. Legislature's Statement

1. Nature of the Case

Plaintiffs challenge existing congressional and legislative districts in Wisconsin, which they allege are malapportioned and in violation of Section 2 of the Voting Rights Act. The *Hunter* plaintiffs also allege that they may have a First Amendment claim if redistricting takes too long.² The Legislature's position remains that a federal court lacks jurisdiction to adjudicate those claims at this time. *See, e.g.*, Doc. 81, 82. The Legislature's positions stated in this joint submittal are made subject to and without waiver of its position that the Court lacks jurisdiction to proceed.

2. The Wisconsin Supreme Court's Order

The Court has requested that parties address the impact of the Wisconsin Supreme Court's September 22, 2021 Order in their proposed schedule. Doc. 80. The Wisconsin Supreme Court has accepted original jurisdiction of a case requesting it to "adopt a new apportionment plan." Order, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Sept. 22, 2022). The Wisconsin Supreme Court's order is further reason to dismiss these federal proceedings. Even if the Court

² The Legislature moved to dismiss the First Amendment count for failure to state a claim. Doc. 9-3, Mot. to Dismiss at 17-20. Neither the presence nor the absence of legislative districts stops Plaintiffs from associating with anyone. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2504 (2019). Every one of Plaintiffs' cited cases in support of that claim is inapposite, involving some kind of state action, be it a state law restricting political parties or preferring major parties over third parties. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 791-92 (1983) (involving discriminatory ballot access requirements for third parties); *Kusper v. Pontikes*, 414 U.S. 51, 53 (1973) (involving state law restricting primary voting). The Court did not analyze that claim in its September 16 order.

does not dismiss, the order demonstrates that this Court should not enter a scheduling order for the following reasons:

First, relief is not available from this Court if either the state legislative *or* judicial processes produce or will produce a timely plan. *Growe v. Emison*, 507 U.S. 25, 32 & n.1 (1993). This Court has also recognized that “responsibility for drawing legislative and congressional maps falls primarily to the states.” Doc. 75 at 2. Therefore, even setting aside the Legislature’s jurisdictional arguments, this Court must “defer consideration” of this action until there “evidence that these state branches will fail to timely perform that duty.” *Id.* at 33-34; *see also Reynolds v. Sims*, 377 U.S. 533, 586 (1964) (“judicial relief” for a malapportionment claim “becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so”). Because Plaintiffs’ claims concededly challenge *existing* districts and because every branch of the state government has already embarked on the “highly political” process of redrawing those districts, there is nothing for the Court to schedule at this time.

And here, there is no reason to assume that Wisconsin cannot timely perform its redistricting duty. The Wisconsin Supreme Court’s Order shows Wisconsin’s judiciary will provide “judicial relief” should the “legislature fail[] to reapportion according to constitutional requisites in a timely fashion.” *Johnson* Order at 2, *supra*. By granting the petition in *Johnson*, the Wisconsin Supreme Court has informed this Court that it will resolve redistricting if there is an impasse. *Id.* at 7, *supra* (R. Bradley, J., concurring). The Wisconsin Supreme Court has already ordered parties, including the state elections commission, and all prospective intervenors to submit letter briefs addressing when a redistricting plan must be in place and why: “When (identify a specific date) must a new redistricting plan be in place, and what key factors were considered to

identify this date.” *Johnson* Order at 3, *supra*. Accordingly, there is no realistic danger that the existing districting laws challenged in the cases before this Court will be used to govern future Wisconsin elections.

Second, and relatedly, that question—*when* maps must be in place for Wisconsin to conduct elections next year, *see Grove*, 507 U.S. at 34, 36—ultimately depends on an analysis of state law. State law largely governs elections and establishes the relevant pre-election deadlines, including ballot access dates (which are subject to legislative change or court-ordered change, *see, e.g., Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 639 (E.D. Wis. 1982)). To the extent the plaintiffs or election commissioners have explained their position, they have done so by referring to state law. *See, e.g.*, Doc. 78 at 9-10, 26. The Wisconsin Supreme Court is now considering these questions of state law, based on input from not only the Wisconsin Elections Commission but also all other interested parties in the *Johnson* original action. The Wisconsin Supreme Court will ultimately have the final word on that question of state law. *Democratic Nat’l Comm. v. Bostelmann*, 949 N.W.2d 423, 425 (Wis. 2020).

In light of the Wisconsin Supreme Court’s involvement, any further litigation is at best duplicative and wasteful and at worst irreversibly rushes the ongoing redistricting process and the Wisconsin Supreme Court. (It also creates an opportunity for federal plaintiffs to invite confusion about which map controls and preclusion issues. There should be no confusion given that state redistricting proceedings have primacy even where claims in federal court differ from those raised in state court, any state court judgment would be entitled full faith and credit “[a]t the very least,” and normal preclusion rules would apply to subsequent litigation. *Grove*, 507 U.S. at 34-36.) A federal scheduling order could create conflicting and competing demands on the parties, thereby directly interfering with ongoing redistricting efforts and later state court proceedings. Plaintiffs

have even asserted a right to depose legislators and the Governor, presumably while they are redistricting and/or while Wisconsin Supreme Court proceedings are underway. *But see Tenney v. Brandhove*, 341 U.S. 367, 377-78 (1951); *Biblia Abierta v. Banks*, 129 F.3d 899, 903 (7th Cir. 1997); *In re Hubbard*, 803 F.3d 1298, 1310-11 (11th Cir. 2015); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *see also Whitford v. Vos*, No. 19-2066, 2019 WL 4571109 (7th Cir. July 11, 2019).³

There is no basis for parallel proceedings, even setting aside the Legislature’s jurisdictional arguments. *See Growe*, 507 U.S. at 33-36. That some plaintiffs are pursuing claims other than malapportionment does not change the analysis, as the Legislature explained in its Sept. 30 motion to dismiss the BLOC complaint. *See also Growe*, 507 U.S. at 34-35 (rejecting argument that Voting Rights Act claim was exception to rule that federal court had to defer consideration of proceedings because the “nature of the relief requested” was the same—“reapportionment of election districts”).

3. The March 1 “Deadline”

This Court has also asked the parties to address any disagreement with the March 1 deadline for establishing a map. Doc. 75.

The Legislature disagrees that this Court must address redistricting by March 1, 2021. That deadline works backward from when candidates may begin circulating nomination papers (April 2022), not from the primary elections themselves (August 2022) or even the candidate-qualification deadline (June 2022). *See* Doc. 78 at 10. And the work the Commission states that it must perform before April (updating the statewide voter registration, updating reporting units and ballot styles, Doc. 54 at 8-9) has nothing to do with circulating nomination papers by April 15.

³ Discussed below, the Legislature will object to any such discovery as exceeding the federal rules and longstanding principles of legislators’ privilege.

The relevant date after *Grove* is next year's primary election, not pre-election deadlines. *Grove*, 507 U.S. at 36 ("in time for the primaries"). Citing *Branch v. Smith*, the Court has indicated that the candidate qualification deadline is the relevant deadline. Doc. 75 at 2. (Here, that "candidate qualification" deadline would be June 1, 2022, Wis. Stat. § 8.15(1).) *Branch* is materially distinguishable from the circumstances here. *Branch* involved a covered jurisdiction subject to section 5 preclearance, which necessarily entailed federal involvement before a map could be put in place. *See Branch v. Smith*, 538 U.S. 254, 262 (2003) (distinguishing *Grove* because "the state-court plan [at issue], unlike that in *Grove*, was subject to § 5 of the Voting Rights Act, 42 U.S.C. § 1973c"). *Grove*'s primary benchmark, not *Branch*, applies here.

The Court also indicated concern that the primary dates have changed, such that previous federal redistricting cases are not a helpful guide. Doc. 75 at 2. (The Legislature agrees that these previous federal redistricting cases are on different footing, albeit for different reasons. Now that the Wisconsin Supreme Court has assumed jurisdiction, there is no reason to assume significant federal pretrial discovery, a federal trial, or even federal relief will be necessary.) Primaries in Wisconsin have moved up a month since 2002. *Compare* Wis. Stat. § 5.02(12s), *with* Wis. Stat. § 5.02(18) (2002). Having a map in place by mid- to late-April would enable candidate qualification dates to remain in place while providing as much time for the Elections Commission to prepare for the primary as it was afforded in previous cycles. *See, e.g., Baumgart v. Wendelberger*, Nos. 01-cv-0121, 02-cv-0366, 2002 WL 34127471 (E.D. Wis. May 30, 2002), *amended by* 2002 WL 34127473 (E.D. Wis. July 11, 2002) (ordering new lines on May 30, 2002, amending lines on July 11, 2002, primary held second Tuesday in September, Wis. Stat. § 5.02(18) (2002)); *Prosser v. Elections Bd.*, No. 92-cv-0078, 793 F. Supp. 859 (W.D. Wis. June 2, 1992) (ordering new lines on June 2, 1992, primary held second Tuesday in September, Wis. Stat.

§ 5.02(18) (1992)); *Wis. State AFL-CIO v. Elections Bd.*, No. 82-cv-0113, 543 F. Supp. 630 (E.D. Wis. June 9, 1982) (ordering new lines on June 9, 1982, primary held second Tuesday in September, Wis. Stat. § 5.02(18) (1982)).

In all events, the Wisconsin Supreme Court is best suited to determine the date by which redistricting must be completed and is doing so now, *supra*. The Wisconsin Elections Commission will have an opportunity to explain to the Wisconsin Supreme Court how much time it needs to prepare so that next August's *primaries* can be conducted. *See Growe*, 507 U.S. at 36. And the Wisconsin Supreme Court will also be able to move any pre-election deadlines as necessary as part of the litigation. *See, e.g., Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 639 (E.D. Wis. 1982).

There is no reason for this Court to apply a March 1 deadline. This Court should defer to Wisconsin Supreme Court proceedings, which are highly likely to moot any reason for continued litigation here. If this Court were to enter a schedule over the Legislature's objections, any federal trial could occur the week of March 28, leaving roughly a month thereafter to enter judgment by April 30, 2022.

D. Governor's Statement

The Governor agrees that new maps should be in place as soon as possible, and that WEC's representations about needing maps by March 1 should be deferred to given the pressing election deadlines and preparatory steps needed.

E. Johnson Plaintiffs' Statement

The *Johnson* Plaintiffs have argued that this proceeding should be stayed while the Wisconsin Supreme Court proceedings are litigated with a status conference scheduled so that this

Court can be updated on any progress. By responding or providing input herein the *Johnson* Plaintiffs do not waive any argument that this action should be stayed.

In the event this Court does establish a scheduling order in this case, the *Johnson* Plaintiffs agree with the Legislature's approximate 8-week schedule for discovery and a trial, whether keyed to April 15, WEC's proposed deadline, or the Legislature's proposed deadline.

The *Johnson* Plaintiffs agree with the Legislature on all other matters related to the discovery plan and pretrial schedule but take no position on the Legislature's arguments regarding the March 1 deadline.

F. Statement Of Intervenor-Defendants Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald (“the Congressmen”)

The *Hunter* Plaintiffs assert an equal-population challenge to Wisconsin's existing congressional maps, and have asked this Court to draw “a new congressional district plan” if the Legislature and Governor fail to do so. Dkt.1 at 16.

The Congressmen believe that this Court should not set any schedule in this case, given the ongoing Wisconsin Supreme Court proceedings in *Johnson v. Wisconsin Elections Commission*, No.2021AP1450-OA (Wis. amended Sept. 24, 2021). Indeed, the Wisconsin Supreme Court's grant of the *Johnson* petition compels this Court to dismiss this case under both *Grove v. Emison*, 507 U.S. 25 (1993), and the *Burford* abstention doctrine, see, e.g., *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996)—a basis for dismissal that this Court did not address in its September 16, 2021 Order denying the then-pending motions to dismiss in this case, Dkt.60 at 6–8. If this Court does not dismiss this case outright, however, it should at minimum stay the proceedings pending resolution of the *Johnson* proceedings before the Wisconsin Supreme Court.

2. Related Cases

The two captioned cases have been consolidated. The parties are unaware of any other related cases pending at this time in federal court. As this Court is aware, on September 22, 2021, the Wisconsin Supreme Court granted the petition for original action filed in *Johnson v. Wisconsin Elections Commission*, No. 2021AP1450-OA. In its September 23, 2024 Text Order, this Court acknowledged that ruling and ordered that “[t]he parties may have until October 1 to respond to the motion or to otherwise address the question of how the supreme court’s decision should affect Case nos. 21-512 and 21-534.” Dkt. 80. The Text Order further stated “the proposed schedule should take into account the supreme court’s decision.” *Id.* Consequently, plaintiffs will address the effect of the Wisconsin Supreme Court’s September 22 order in a separate submission to this Court. The Legislature has addressed the effect of the Wisconsin Supreme Court’s order in this submission.

3. Material Factual and Legal Issues to be Resolved at Trial

A. Plaintiffs’ Statement of Issues

The material factual and legal issues to be resolved at trial will be further refined through the discovery process. The claims as pled are directed at existing districts because no new state legislative or congressional districts based on 2020 census data have been proposed or enacted into law. At this time, the list of such issues could include, but is not limited to the following:

- a. Whether Wisconsin’s current state legislative and/or congressional districts are unconstitutionally malapportioned.
- b. The ideal population of state legislative and congressional districts, which districts exceed or fall short of this ideal population, and the total deviation of the current populations of such districts from the ideal.
- c. Whether Wisconsin’s current state legislative districting plan violates Section 2 of the VRA.

- d. Whether the absence of lawful state legislative and congressional district plans violates voters' First Amendment freedom of association.
- e. Whether any person or entity involved in the development of new state legislative or congressional districts intended the composition of any one or more of those districts to dilute the voting power of African-American or Latino voters in Wisconsin.
- f. Whether an impasse has occurred such that the political branches have failed to enact legally compliant maps for the 2022 Primary and General Election.
- g. The legal criteria and data the Court should employ to create remedial maps, should it be required to act.
- h. The boundaries of remedial state legislative and congressional districts that comply with federal law.
- i. Whether proposed remedial districts comply with Section 2 of the VRA and federal constitutional requirements.
- j. The data, information, and analysis that the Legislature and Governor relied on in fabricating their proposed districts.
- k. The objectives and/or motives relied on by—or available to—state lawmakers, their staff, and/or any consultants or experts in the planning, development, negotiation, drawing, revision, or redrawing of the districts in adopted bills or any other potential legislative plan that was not adopted.
- l. The relationship between race, voting, and electoral results in the Milwaukee area.
- m. Racial voting patterns in the Milwaukee area.
- n. Whether the Milwaukee area could include at least seven single-member state Assembly districts with a Black Voting Age Population (BVAP) of 50% or more.
- o. The existence of historical racial disparities in health outcomes, education, income, policing, employment and housing in Wisconsin.
- p. The percentage of the Black population over 18 years of age in Wisconsin that was registered to vote in 2008, 2012, 2016, and 2020, and is presently registered to vote.
- q. Whether and how the Milwaukee Common Council is involved in allocating polling place resources such as voting machines, and the process by which the Council decides how to allocate these resources between different precincts.
- r. Any instances of voter intimidation in Wisconsin from January 1, 2000 to the present.

- s. Racial appeals or racist incidents in political campaigns in Wisconsin from January 1, 2010 to the present.
- t. Wisconsin's history of racial discrimination, from January 1, 2000 to present.
- u. Any lawsuits—formal or otherwise—against the City of Milwaukee, or any municipality located in Milwaukee County, or the City of Mequon, Village of Thiensville, or Village of Elm Grove, from 2000 to the present that alleged or related to racial discrimination or national origin discrimination.

B. Defendants' Statement of the Issues

Defendants do not agree that all the issues presented by Plaintiffs are proper or necessary.

Disagreements can be addressed as the case progresses.

C. The Legislature's Statement of the Issues

Should this Court proceed, the Legislature does not agree that all of the issues listed in Plaintiffs' statement are relevant, but believes those disagreements can be addressed in the discovery process, through briefing, through motions in limine, and at trial. In addition to those issues stated by Plaintiffs, additional questions would have to be resolved, including whether plaintiffs or intervenor-plaintiffs have standing to seek statewide relief.

D. Congressmen's Statement of the Issues

To the extent that this Court chooses not to dismiss or stay this case, the Congressmen believe that no sensible or appropriate statement of issues is possible until after the Wisconsin Supreme Court concludes its proceedings.

4. Amendments to the Pleadings

Plaintiffs propose that any amendments to the pleadings must be filed within 10 days of impasse, defined as a gubernatorial veto of maps that have passed both chambers of the Legislature, or not later than November 19, 2021.

The Legislature proposes any amendments to the pleadings must be filed not later than November 1, 2021.

5. New Parties to be Added

A motion to intervene, filed by a group of proposed plaintiff-intervenor “Citizen Data Scientists” on September 20, 2021, remains pending. *See* dkt. 66. At this time, the parties do not intend to add any new parties.

6. Estimated Length of Trial

Should this case proceed, the parties estimate a trial of no more than five days.

7. Other Matters

Should this case proceed, parties anticipate that the Court will set a date for a final pretrial conference to address substantive and logistical issues for the trial, including any appropriate COVID protocols.

8. Proposed Discovery Plan and Schedule

The parties submit the following proposed discovery plan and schedule in accordance with the Court’s Standing Order Governing Preliminary Pretrial Conferences and Fed. R. Civ. P. Rule 26(f)(3)(A) – (F).

A. Rule 26(a) Initial Disclosures. Plaintiffs propose the parties will exchange initial disclosures on or before December 3, 2021. Plaintiffs do not otherwise seek any changes in the timing, form, or requirement for disclosures under Rule 26(a)(1).

Should this case proceed, the Legislature does not see a need for initial disclosures (if at all) until January 31, 2022, eight weeks before the Legislature’s proposed trial date.

B. Subjects and Completion of Discovery.

i. Subjects on which discovery may be needed. Plaintiffs believe that subjects of discovery may include the following: proposed state legislative district boundaries; proposed congressional district boundaries; the factors and priorities used by the parties in creating

proposed remedial maps; expert opinion on compliance with legal and other redistricting criteria, the Senate Factors considered under the Section 2 totality of the circumstances analysis, the existence of racially polarized voting, demographic data, and other data including the material factual and legal issues identified above.

Plaintiffs anticipate that discovery may include written interrogatories, written requests for the production of documents, written requests for admissions, oral depositions of lay witnesses, and oral depositions of expert witnesses, including discovery of third parties.

Defendants believe that only minimal written discovery as the Wisconsin Elections Commission is necessary and appropriate; their depositions are unnecessary. To the extent Defendants may possess relevant evidence, it is unlikely to be disputed and should be subject to factual stipulations by the parties.

Should this case proceed, the Legislature does not believe any discovery should begin until January 31, 2022. Discovery should not preempt or interfere with ongoing redistricting efforts at the state level, including ongoing state court proceedings. The Legislature believes that discovery should be limited to fact discovery regarding Plaintiffs' standing and expert discovery.

ii. Time to complete discovery. Plaintiffs propose that fact discovery be allowed to commence December 3, 2021. Plaintiffs further propose that all discovery (including of fact witnesses) shall be completed no later than January 11, 2022.

The Legislature does not believe there should be any discovery until January 31, 2022, and that limited fact and expert discovery could be completed between January 31 and March 9, 2022. This leaves sufficient time for a late March trial and judgment by the end of April. But at this time, there is no reason to embark on expensive, duplicative, and currently unnecessary discovery with respect to existing districts that Plaintiffs agree are currently being redrawn, whether by the

Legislature or courts.

C. Disclosure of Discovery of ESI. At this time, the parties do not anticipate any special issues related to the disclosure or discovery of electronic information, but will promptly address any issues that do arise during the course of discovery.

D. Production of Documents (Format)

Plaintiffs propose that electronic documents shall be produced in the form of single-page Bates-numbered TIFF images, together with load files. All Excel (or other electronic spreadsheet) files, PowerPoint (or other electronic slideshow files) files, shapefiles (including, but not limited to, file extensions .dbf, .shp, .shx, .sbn, .prj, and .xml) and photographic files, including any such files attached to emails, shall be produced in their native format, if available. The following metadata fields shall be included in the load files to the extent the metadata is embedded in the individual electronic documents:

- DocId
- BegDocId
- EndDocId
- Document Type
- AttachDocIds
- ParentDocId
- Author
- Filename
- Date Created
- Date Modified
- MD5Hash
- DateSent
- TimeSent
- Subject
- To
- From
- CC
- BCC
- File Source Location

Plaintiffs propose that non-electronic documents shall be produced as Bates-numbered TIFF images, together with load files, and only the following metadata fields: DocId, BegDocId, and EndDocId fields.

The Legislature proposes that the parties could agree on a separate ESI protocol, including how electronic and non-electronic documents should be produced, if and when any such protocol becomes necessary.

E. Electronic Service

The parties agree that documents that are served on another party, but are not filed with the Court, may be served by email, addressed to the attorneys of record for each receiving party. Documents filed with the Court electronically will be deemed served when filed.

The parties agree that service by email or through electronic filing will be treated the same as service by hand-delivery; three additional days will not be added to any response date.

The parties agree that copies of all written discovery requests shall be provided and/or served electronically in Microsoft Word format, and that copies of all proposed findings of fact shall be provided and/or served electronically in Microsoft Word format.

9. Procedures Regarding Claims of Privilege and Work Product Protection

At this time, the parties do not anticipate any special issues related to the disclosure or discovery of attorney-client privileged or work product information. 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. The parties ask the Court to include this agreement in the Pretrial Conference Order in this case.

10. Limitations on Discovery

Plaintiffs do not propose any changes to the limitations on discovery set forth by the Federal Rules of Civil Procedure. Plaintiffs anticipate that the Legislature might raise attorney-client and/or legislative privileges as barring discovery of the Legislature or individual members of the Assembly and Senate, arguments that it raised and that were rejected by the three-judge panel in *Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 843 F. Supp. 2d 955 (E.D. Wis. 2012). Plaintiffs propose that any such claims must be asserted promptly when discovery commences to ensure that such claims are resolved quickly and that discovery is not unduly delayed. Plaintiffs therefore propose that the Legislature, and any other party, be required to assert blanket claims of attorney-client and/or legislative privilege that they believe exempt them from any discovery being taken of them by filing a motion for protective order with the Court no later than November 12, 2021; for any response filed no later than November 19, 2021; and for the Court to order a prompt hearing to resolve such claims.

Should this case proceed, the Legislature does not believe there should be any discovery beyond expert discovery and fact discovery limited to Plaintiffs' standing. If the complaints are not dismissed and if there is a reason for continued federal proceedings, the Legislature believes the parties should address any changes from the Federal Rules or limitations on discovery at a status conference to occur on January 31, 2022.

With respect to Plaintiffs' statements that they anticipate seeking discovery of legislators or the Governor, the Legislature objects to any attempt to take discovery of individual legislators. Doing so transgresses legislative immunity and privilege and exceeds the scope of permissible discovery under the federal rules. See Fed. R. Civ. P. 26(b)(1).⁴ The Legislature disagrees with Plaintiffs' proposal to brief that issue now, in the abstract, thereby creating even more unnecessary and potentially duplicative litigation activity in this Court.

To the extent that this Court chooses not to dismiss or stay this case, the Congressmen believe that any discovery should be strictly limited to jurisdictional issues and, if it proves necessary, expert discovery. The Congressmen further believe that any discovery directed toward legislators or former legislators, for actions taken in their legislative capacity, is contrary to binding Seventh Circuit and Supreme Court caselaw. See *United States v. Brewster*, 408 U.S. 501, 526 (1972); *Tenney v. Brandhove*, 341 U.S. 367, 377–78 (1951); *Biblia Abierta v. Banks*, 129 F.3d 899, 905 (7th Cir. 1997).

11. Protective Order

The parties agree that a protective order controlling access to confidential and proprietary material and information pursuant to Fed. R. Civ. P. 26(c) may be necessary. If the complaints are

⁴ Only extraordinary circumstances justify such discovery, and no such circumstances are present here. Acts relating to the legislative process or other acts “necessary and proper to the exercise of legislative authority” are privileged. *Biblia Abierta v. Banks*, 129 F.3d 899, 903 (7th Cir. 1997); see also *Tenney v. Brandhove*, 341 U.S. 367, 377-78 (1951); see also, e.g., *In re Hubbard*, 803 F.3d 1298, 1310-11 (11th Cir. 2015); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018). An individual legislator’s understanding of a bill, moreover, is not controlling as to its meaning. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979); see also *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2350 (2021). *Baldus* and other redistricting cases involving issues of legislator discovery rest on the fiction that there should be a redistricting exception to well-established legislative privilege and immunity rules. But when Plaintiffs in *Whitford v. Gill* attempted to invoke that exception to standard rules of legislative privilege, the Seventh Circuit initially stayed and ultimately vacated an order compelling discovery of an individual legislator. See *Whitford v. Vos*, No. 19-2066, 2019 WL 4571109 (7th Cir. July 11, 2019) (vacating discovery order after *Rucho*).

not dismissed, the parties expect to negotiate any necessary protective order and present such order to the Court no later than the date on which discovery begins.

12. Proposed Case Schedule

The parties' proposed pre-trial and trial schedules for these claims are presented separately as follows:

Plaintiffs' Proposed Pre-Trial and Trial Deadlines				
Event	Plaintiffs' Proposed Date	Defendant WEC's Proposed Date	Intervenors' Wisconsin Legislature's, Wisconsin Congressmen's, and <i>Johnson</i> Plaintiffs' Proposed Date	Intervenor-Defendant Governor Evers's Proposed Date
Any additional motion to dismiss	October 4, 2021	Defendants do not object to Plaintiffs' proposed event deadlines.	Intervenor-Defendants Wisconsin Legislature and Wisconsin Congressmen and Intervenor Plaintiffs Johnson et al object. For their positions on deadlines, see below.	The Governor does not propose different deadlines than the plaintiffs
Response to any additional motion to dismiss	October 15, 2021			
Parties propose special master	November 10, 2021			
Status Conference	November 12, 2021			

Deadline to amend pleadings	The earlier of ten days after impasse (veto) or no later than November 19, 2021			
Court selects special master (if desired)	December 1, 2021			
Parties submit proposed map(s) and brief in support	December 3, 2021			
Rule 26(a)(1) initial disclosures	December 3, 2021			
Rule 26(a)(2) disclosures	December 3, 2021			
Discovery commences	December 3, 2021			
Parties submit rebuttal to proposed maps	December 20, 2021			
Expert rebuttals to other parties' maps and/or experts	December 20, 2021			
Rule 26(a)(3) disclosures	December 23, 2021			
Discovery closes	January 11, 2022			
Motions in limine and objections to Rule 26(a)(3) disclosures	January 12, 2022			
Statement of stipulated facts, proposed	January 14, 2022			

findings of contested facts, and short trial briefs outlining what the parties believe the evidence will show at trial				
Deadline for motions and briefs submitted by proposed <i>amici</i>	January 14, 2022			
Responses to motions in limine	January 19, 2022			
Final Pretrial Conference	January 20 or 21, 2022			
Trial	January 24-28, 2022			

Should this Court proceed, the Legislature and the *Johnson* Plaintiffs⁵ and the Congressmen parties propose the following possible schedule.

⁵ As noted *supra*, the *Johnson* Plaintiffs agree generally with the 8-week timeline the Legislature proposes below, keyed to whatever deadline the Court adopts.

Event	Defendant WEC's Proposed Date	Intervenor-Defendant Wisconsin Legislature's⁶ and Wisconsin Congressmen's Proposed Date	Intervenor-Defendant Governor Evers's Proposed Date	Intervenor-Plaintiffs Johnson et al. Proposed Date
Any additional motion to dismiss		Sept. 30, 2021		<i>See 1.E., supra.</i>
Response to any additional motion to dismiss		October 14, 2021		
Deadline to amend pleadings		November 1, 2021		
Status Conference to determine what if any reason there is for continued proceedings		January 31, 2022		
Limited fact discovery commences		January 31, 2022		
Rule 26(a)(1) initial disclosures		January 31, 2022		
Plaintiffs' Rule 26(a)(2) disclosures on Plaintiffs' claims (liability and remedy)		February 7, 2022		

⁶ By proposing these dates, the Legislature does not waive its jurisdictional arguments or its position that no schedule should be entered at this time in light of those jurisdictional arguments and the ongoing Wisconsin Supreme Court proceedings.

Defendants' Rule 26(a)(2) disclosures on Plaintiffs' claims (liability and remedy)		February 21, 2022		
Expert depositions		February 21-March 9, 2022		
Rule 26(a)(3) disclosures		March 9, 2022		
Discovery cutoff		March 9, 2022		
Any dispositive motions (e.g., plaintiffs' standing to seek a statewide remedy)		March 16, 2022		
Motions in limine and objections to Rule 26(a)(3) disclosures		March 16, 2022		
Short trial briefs (< 20 pages, excluding any exhibits) outlining what the parties believe the evidence will show at trial		March 21, 2022		
Responses to motions in limine		March 23, 2022		
Final Pretrial Conference		March 23, 2022		
Trial		March 28-31, 2022		

Dated: October 1, 2021

Respectfully submitted,

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