

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-eec

BLACK LEADERS ORGANIZING FOR
COMMUNITIES, et al.,

Plaintiffs,

v.

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

Defendants.

21-cv-534-jdp-ajs-eec

PARTIES' JOINT PROPOSAL REGARDING SCHEDULING

In accordance with the Court's August 27, 2021 orders ('512 case dkt. 24 at 4, '534 case dkt. 17), counsel for various parties and proposed intervenors in captioned action 21-cv-512-jdp-ajs-eec (the "'512 case") and captioned action 21-cv-534-jdp-ajs-eec (the "'534 case") met and conferred by videoconference on September 2 and September 10, 2021, and by email exchanged between those two videoconferences, for the purpose of preparing and submitting a proposed

schedule as ordered by the Court. Plaintiffs and Defendants invited Proposed Intervenor-Plaintiffs and Proposed Intervenor-Defendants to participate in those videoconferences and joint scheduling proposal so that all sides could be heard should they ultimately be made parties to this action. The Intervenor-Defendant participated in the September 2 videoconference, and its positions regarding scheduling are included in this joint proposal. Proposed Intervenor-Defendants Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald participated in both videoconferences and elected to participate in this joint proposal; Proposed Intervenor-Plaintiffs participated in the September 2 videoconference but did not elect to participate in this joint proposal.¹

Proposed Schedule

Event	Plaintiffs' Proposed Date	Defendants' Proposed Date	Intervenor's Proposed Date
Response to Intervenor's motion to dismiss	September 13, 2021	September 13, 2021 (as already ordered by the Court).	September 13, 2021 (as already ordered by the Court).
Reply in support of Intervenor's motion to dismiss	September 20, 2021	September 20, 2021 (as already ordered by the Court).	September 20, 2021 (as already ordered by the Court).
Rule 26(a)(1) initial disclosures	September 24, 2021	Defendants take no position on this proposed date, subject to the statement below regarding completion of the new maps by March 1, 2022.	The Legislature objects. For the Legislature's position on this deadline and others, see below.

¹ While the *Hunter* Plaintiffs have not opposed the intervention of the Proposed Intervenor-Plaintiffs, they have opposed the intervention of Proposed Intervenor-Defendants. Both motions remain pending.

Deadline to amend pleadings	September 30, 2021	Defendants take no position on this proposed date, subject to the statement below regarding completion of the new maps by March 1, 2022.	The Legislature objects. For the Legislature’s position on this deadline and others, see below.
Rule 26(a)(2) disclosures (simultaneous for all parties)	October 8, 2021	Defendants take no position on this proposed date, subject to the statement below regarding completion of the new maps by March 1, 2022.	The Legislature objects. For the Legislature’s position on this deadline and others, see below.
Rebuttal expert report deadline (simultaneous for all parties)	October 29, 2021	Defendants take no position on this proposed date, subject to the statement below regarding completion of the new maps by March 1, 2022.	The Legislature objects. For the Legislature’s position on this deadline and others, see below.
Expert discovery cutoff	November 24, 2021	Defendants take no position on this proposed date, subject to the statement below regarding completion of the new maps by March 1, 2022.	The Legislature objects. For the Legislature’s position on this deadline and others, see below.
Rule 26(a)(3) disclosures	December 10, 2021	Defendants take no position on this proposed date, subject to the statement below regarding completion of the new maps by March 1, 2022.	The Legislature objects. For the Legislature’s position on this deadline and others, see below.

Motions in limine and objections to Rule 26(a)(3) disclosures	December 24, 2021	Defendants take no position on this proposed date, subject to the statement below regarding completion of the new maps by March 1, 2022.	The Legislature objects. For the Legislature's position on this deadline and others, see below.
Responses to motions in limine	January 5, 2022	Defendants take no position on this proposed date, subject to the statement below regarding completion of the new maps by March 1, 2022.	The Legislature objects. For the Legislature's position on this deadline and others, see below.
Statement of stipulated facts and short trial briefs outlining what the parties believe the evidence will show at trial	January 13, 2021	Defendants take no position on this proposed date, subject to the statement below regarding completion of the new maps by March 1, 2022.	The Legislature objects. For the Legislature's position on this deadline and others, see below.
Deadline for motions and briefs submitted by proposed <i>amici</i>	January 13, 2021	Defendants take no position on this proposed date, subject to the statement below regarding completion of the new maps by March 1, 2022.	The Legislature objects. For the Legislature's position on this deadline and others, see below.
Trial	January 18-24, 2022	Defendants take no position on this proposed date, subject to the statement below regarding completion of the new maps by March 1, 2022.	The Legislature objects. For the Legislature's position on this deadline and others, see below.

Plaintiffs' Points of Disagreement with Defendants' and Intervenor Defendant's Positions

The Wisconsin Elections Commission (“WEC”), whose six individual members and Administrator are named in their official capacities as Defendants in both actions, informed this Court on September 7, 2021 in their Answer to the *Hunter* Plaintiffs’ Complaint that any remedial state legislative and congressional districting plans must be in place no later than March 1, 2022, for the WEC to meet its statutory obligations with respect to administering elections to be held in 2022. *See* ‘512 case dkt. 41 at 2. Plaintiffs jointly proposed to the Defendants and Intervenor-Defendant a schedule that would meet that deadline, while allowing time for fact discovery, expert reports and discovery, preparation of pretrial filings such as proposed findings of fact, a short trial, this Court’s issuance of an opinion and remedial districting plans, and appeal. Plaintiffs’ counsel are highly experienced in redistricting and Voting Rights Act litigation, having collectively litigated and tried cases in federal courts in this state and around the country, including the *Baldus v. Members of Government Accountability Board* action in the Eastern District of Wisconsin in 2012. The schedule Plaintiffs have proposed is both necessarily expedited and workable in their experience. In response to the Plaintiffs’ proposed schedule, Defendants have proposed no dates other than that new redistricting plans be set by March 1, 2022, and the Intervenor-Defendant has proposed no dates other than the briefing deadlines set on its motion to dismiss in the ‘512 action. While Intervenor-Defendant insists that, if this Court is to set a schedule beyond the motion to dismiss, it should push that schedule deep into 2022, this argument relies heavily on the prior schedules in Wisconsin’s federal impasse cases, the majority of which were based on a different election calendar in which the primary was held in mid-to-late September. Now that the Legislature

has moved Wisconsin's partisan primary election to early August, candidates are scheduled to begin circulating nomination papers as soon as April 15, 2022. *See* '512 case dkt. 41 at 2.²

The schedule Plaintiffs have proposed is, notably, even more generous than the schedule imposed by another three-judge court in this Circuit, appointed by Chief Judge Diane S. Sykes to hear the redistricting challenge to the Illinois state and congressional legislative districts. *See McConchie v. Illinois State Board of Election, et al.*, Case No. 21-cv-3091 (N.D. Ill.). The three-judge court in that case, which includes the Hon. Robert M. Dow, Jr., a member of the three-judge court that adjudicated the *Baldus* case, has issued several scheduling orders that have resulted in fact discovery *already* having closed, with expert reports having been exchanged, expert discovery begun, motions to dismiss and summary judgment motions being briefed now, in preparation for a trial that the parties have agreed should be held in late-November or early-December of this year. *See generally* Order, No. 21-cv-3091, dkt. 97 (N.D. Ill. Sept. 8, 2021).

The Intervenor-Defendant suggests that the filing of its motion to dismiss in the '512 case (and provisional motion to dismiss attached to its motion to intervene in the '534 case) requires that this Court issue no schedule at all in this case. That position is not only contrary to law, but also impractical. No federal authority precludes this Court from putting in place an overall case schedule that would both recognize and respect the legislative process in Wisconsin for new state legislative and congressional districts to be adopted by the Wisconsin Legislature, and then presented to the Governor for signature or veto, as Wisconsin law requires. *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 553-59, 126 N.W.2d 551, 557-59 (1964). Indeed, the United States Supreme Court has repeatedly recognized that although federal courts must initially defer to state governments to perform the political task of redistricting, that deference is not

² The partisan primary election for the November 2022 general election will be held on August 9, 2022. *See* <https://elections.wi.gov/elections-voting/2022/fall> (last accessed September 12, 2022).

unlimited in time. As the *Hunter* Plaintiffs explain in more detail in their Opposition to the Intervenor-Defendants' Motion to Dismiss, the Supreme Court expressly recognizes that three-judge federal panels in redistricting lawsuits may identify a deadline by which a federal court may act in the absence of a political resolution of new state legislative and congressional districts. *See Grove v. Emison*, 507 U.S. 25, 36 (1993); *Scott v. Germano*, 381 U.S. 407, 409-10 (1965).

If this Court is to ever offer Plaintiffs relief in advance of the 2022 elections, it must set a timeline that will enable it to implement relief well before primary elections. Impasse suits, unlike most other suits that federal courts hear, cannot be fully remedied with a simple order and injunction; they require detailed remedial schemes that take time to develop, which is why federal courts in these cases take jurisdiction and consider remedial plans well before the eve of the election. *See, e.g., Flateau v. Anderson*, 537 F. Supp. 257, 262 (S.D.N.Y. 1982) (three-judge panel) (“If we waited until there no longer was time in 1982 for the reapportionment to be effected, the constitutional violation would then have occurred, but it would be too late for any timely remedy to be structured.”).

For practical reasons, too, that is precisely what the Court should do in these cases. Plaintiffs in both cases allege claims arising under federal law, and Plaintiffs in the ‘534 case have further filed a proposed amended complaint alleging claims under Section 2 of the Voting Rights Act. Their claims are federal in nature, and they are entitled to have those claims heard by this Court. The Court should therefore proceed by adopting a full schedule in this case, including designating a trial date, so that the parties can engage in the discovery, motion practice, and briefing necessary as a predicate to trial, and so that the members of this three-judge Court may reserve adequate time on their own respective calendars for trial of these cases. If, in the meantime, their federal claims become moot because of actions taken by the Wisconsin Legislature and/or

Governor, Plaintiffs are confident that Defendants and Intervenor-Defendant will seek immediate dismissal on that basis. Moving forward with a schedule in this case now is necessary to meet the stated purpose of Rule 1: “to secure the just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1.

Defendants’ Points of Disagreement with Plaintiffs’ and Intervenor-Defendant’s Positions

Defendants take no position on the proposed dates so long as the new congressional and state legislative plan for Wisconsin is in place by March 1, 2022.

Wisconsin’s congressional and state legislative districts must be reapportioned on the basis of the 2020 census data prior to any future congressional or state legislative election. *See* U.S. Const., art. I, §§ 2, 4; U.S. Const. amend. XIV, § 2; Wis. Const., art. IV, § 3. The next general election for congressional and state legislative seats in Wisconsin is November 8, 2022; the partisan primary for that election is August 9, 2022; and the period for candidates to circulate nominating petitions for the November 8, 2022, election begins on April 15, 2022.

As a result of the COVID-19 pandemic, publication of the census data was severely delayed. In previous redistricting cycles, the U.S. Census Bureau scheduled delivery of the initial data to Wisconsin no later than March 31 of the year after the census. In this cycle, however, the Bureau released the official population numbers for all states on August 12, 2021, at which point the Wisconsin Legislature began processing the data and releasing it to local governments. This unusually late release of data has significantly shortened the period during which the redistricting process—including any court action—takes place.

In order for the Wisconsin Elections Commission to be able to timely and effectively administer the November 8, 2022, election—which includes the nominating petition circulation process starting on April 15, 2022—a new congressional and state legislative district plan should be in place no later than March 1, 2022. Once new congressional and state legislative district

boundaries have been determined, Commission staff must begin the complex process of recording these new boundaries in the statewide voter registration system and integrating the new redistricting data with existing voter registration and address data. This process includes manual review of ward map changes and parcel boundary data throughout the State of Wisconsin, to ensure accurate and efficient implementation of new redistricting data—i.e., to ensure that each voter receives the correct ballot and is correctly located in their proper districts. Before candidates can begin to circulate nomination papers, Commission staff also must update reporting units and ballot styles in the statewide voter database to ensure that voters receive the correct ballot and must produce new district lists for nomination paper review. And both before and after the new maps are applied to the state-wide system, the Commission must perform basic quality assurance checks on the data.

If the Commission has less than 45 days before April 15, 2022, to begin administering the fall general election with new maps, there is a significant risk that there will be errors in the statewide system and in turn less time for the Commission to attempt to correct those errors before circulation of nomination papers begins. In short, a new maps deadline of March 1 will significantly increase the accuracy of the data in the statewide system and the election itself.

Intervenor-Defendant Wisconsin Legislature's position on Proposed Schedule

For the reasons stated in the Legislature's pending motion to dismiss, the only necessary schedule is the already-issued briefing schedule for the Legislature's motion to dismiss. There is no Article III basis for exercising federal jurisdiction over Plaintiffs' complaints. The Legislature is engaged in redistricting, as it is constitutionally required to do after each census, and the Wisconsin courts are the proper forum to resolve any dispute that might later arise. Plaintiffs' federal complaints should therefore be dismissed for lack of jurisdiction, and Plaintiffs' can re-file their complaints if and when an actual case-or-controversy exists.

Plaintiffs' own schedule illustrates the lack of a justiciable controversy. Plaintiffs have proposed exchanging expert reports in October and a "Trial" in January with no description of what the experts would be reporting on or what issues would be tried. There is no basis for any disclosures or discovery this fall or a trial in January, at a time when the Wisconsin Legislature (with the involvement of the Wisconsin courts, if it becomes necessary) are finalizing new redistricting plans. *See Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("[R]eapportionment is primarily a matter for legislative consideration and determination," and "judicial relief 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.").

Even if there were a basis for exercising jurisdiction, and even if there were some basis for maps to be drawn by a federal court rather than the Wisconsin courts, courts have historically allotted significantly more time for redistricting to occur. When there have been claims of an impasse, trials have occurred in April with final decisions issued in June and July:

- *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): In a malapportionment suit filed in the 2001 redistricting cycle, trial occurred in April 2002, with pretrial briefs filed in March. The federal court issued its decision, with an order containing new district lines, on May 30, 2002. The court then amended that decision on July 11, 2002.
- *Prosser v. Elections Bd.*, No. 92-cv-0078, 793 F. Supp. 859 (W.D. Wis. June 2, 1992): In a malapportionment and Voting Rights Act suit filed in the 1991 redistricting cycle, an evidentiary hearing occurred in late April 1992. (The suit was filed on January 30, 1992, at which point there was still no redistricting plan from the Legislature.) The federal court issued its decision, with an order containing new district lines, on June 2, 1992.
- *Wis. State AFL-CIO v. Elections Bd.*, No. 82-cv-0113, 543 F. Supp. 630 (E.D. Wis. June 9, 1982): In malapportionment suits filed in the 1981 redistricting cycle, the federal court issued its decision, with an order containing new district lines, on June 9, 1982. (The suits were filed in February and April 1982, and the federal court initially entered an order urging the political branches to establish their own redistricting plan in late April 1982.)

Even in *Baldus*, which was not an impasse case and did not present the Article III and federalism concerns present here, trial did not occur until late February:

- *Baldus v. Members of the Wis. Gov't Accountability Bd.*, Nos. 11-cv-0562, 11-cv-1011, 849 F. Supp. 2d 840 (E.D. Wis. Mar. 22, 2012), 862 F. Supp. 2d 860 (E.D. Wis. April 11, 2012): In a Voting Rights Act suit filed in the 2011 redistricting cycle after the Legislature had enacted redistricting maps, a trial on the Voting Rights Act claims occurred in late February 2012 and the federal court issued its liability decision in late March 2012. 849 F. Supp. 2d 840. The federal court then issued its remedial decision, altering two legislative districts' lines, on April 11, 2012. 862 F. Supp. 2d 860. The court then amended its order to add written descriptions (by census block) for the altered districts lines on November 6, 2012. *See* Dkt. 269, Court Ordered Description of Boundaries, No. 11-cv-0562.

Even setting aside the serious jurisdictional defects of Plaintiffs' complaints, there is no justification for Plaintiffs' unprecedentedly accelerated schedule, starting with initial disclosures this month and ending with a trial in January. It will merely distract from the redistricting efforts occurring in Wisconsin and threatens to interfere with concurrently filed state court actions, should a state court's involvement even be necessary.

Plaintiffs' disagreement relies largely on the answer filed by the Wisconsin Elections Commission, which alleges that the Commission needs new district lines by March 1, 2022. The Legislature has not admitted that allegation and does not know the basis for it. In any event, to the extent any court would need to be involved to meet pre-election deadlines (deadlines that are themselves moveable by the State), it is a state court and not this Court.

Similarly, Plaintiffs' arguments regarding the pending motion to add a Voting Rights Act claim and ongoing Illinois litigation are unconvincing. With respect to the proposed addition of a Voting Rights Act claim, that claim challenges existing districts that the Legislature is actively working to redraw, no different than Plaintiffs' premature malapportionment claims. This Court must still defer to the Legislature and state courts. *See Growe v. Emison*, 507 U.S. 25, 34-35 (1993) (addition of a Voting Rights Act claim in federal case did not alter obligation of federal court to defer to ongoing state court reapportionment proceedings). With respect to the ongoing Illinois

litigation, that schedule in inapposite. In Illinois, the General Assembly and the Governor have already passed a 2021 redistricting plan; the Illinois litigation challenges the validity of that new plan. Here, Plaintiffs' proposed schedule inserts this Court into redistricting midway through the redistricting process in Wisconsin and before any impasse has arisen.

In sum, Plaintiffs' position is untenable, allotting this Court more time to engage in redistricting than the state branches of government with the constitutionally conferred power to redistrict.

Proposed Intervenor-Defendants Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald's position on Plaintiffs' proposed schedule

Proposed Intervenor-Defendants Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald (hereinafter "the Congressmen") continue to believe that this Court should dismiss this case, as they argued in their proposed Motion to Dismiss. Dkt.30-2. If, however, this Court does not dismiss this case, the Congressmen will commit to abiding by any schedule that this Court sets.

Dated: September 13, 2021

Respectfully submitted,

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By: /s/ Douglas M. Poland

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