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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

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 to provide their views on the deadline by which a new redistricting plan must be in place and the key considerations in reaching that date, 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 August 13, 2021—one day after the U.S. Census Bureau released detailed data confirming that Wisconsin’s current maps are unconstitutionally malapportioned—the Hunter Intervenors filed suit in federal court. *See Hunter v. Bostelmann*, 21-CV-512 (W.D. Wis. Aug 13, 2021). Their suit alleges that Wisconsin’s Republican Legislature and Democratic Governor will not be able to reach agreement on a new redistricting plan, and so court intervention will be necessary to protect their constitutional rights. The Johnson Petitioners, Legislature, Governor, and Wisconsin’s Republican congressmen have all been granted intervention. The three-judge federal panel solicited the parties’ views on the appropriate litigation schedule, and expressed its determination to “set a schedule that will allow for the timely resolution of the case should the state process languish or fail.” *Id.* Sept. 16 Order, Dkt. No. 60 at 8. After holding a status conference on the matter, the panel invited parties to propose discovery and pretrial deadlines consistent with the following framework:

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.

Id. Sept. 21 Order, Dkt. No. 75 at 2-3.

Ten days after the Hunter Intervenors filed their federal action, the Johnson Petitioners filed this original action. Predicting the same political impasse, the Johnson Petitioners asked this Court to stand ready to enact a redistricting plan. This Court granted the Johnson petition on September 22, 2021, and ordered that any intervention motions be filed by October 6, 2021. Consistent with that order, the Hunter Intervenors are, today, filing a motion to intervene as Petitioners. In addition, this Court ordered the submission of letter briefs addressing when new redistricting plans must be in place, and what key factors were considered in reaching that date. The Hunter Intervenors submit this letter brief in response.

Should this Court be required to adopt new redistricting plans due to continued legislative impasse, those plans should be adopted by January 24, 2022. This date reflects (1) the appropriate preliminary period in which state institutions enjoy deference from the federal court in its adjudication of parallel proceedings; and (2) voters' right to associate with prospective candidates and like-minded voters ahead of the election.

Key Considerations

To determine a deadline for a new redistricting plan, this Court should focus on two primary considerations. First, the Court should avoid any collision with federal proceedings by resolving these proceedings in advance of the federal court trial date. Second, this Court should consider the associational rights of Wisconsin residents who need adequate notice of their legislative and congressional districts to meaningfully associate with other residents of their political districts. At this time, both of these considerations counsel in favor of adopting any new redistricting plan by January 24, 2022.¹

I. The Court should take any action before the federal court's scheduled trial.

Federal law is clear on how state and federal courts are to balance parallel redistricting proceedings. It is the prerogative of state institutions to resolve redistricting controversies in the first instance, should they so choose, and federal courts should defer to those efforts—for a time. Once it becomes apparent that the state institutions will not adopt new redistricting plans “in time for the primaries,” the federal court is “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).

The federal panel assigned to the Hunter Intervenors' parallel case has concluded that, “[s]hould 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

¹ If the federal court determines that trial should be held at a different date, including a later date, as the Legislature and Republican Congressmen have proposed, the deadline for this Court to conclude its proceedings should correspondingly extend to the new trial date.

necessary factual findings, and issue a reasoned decision.” Sept. 21 Order at 2-3. And for trial to conclude by January 28, it should reasonably start no later than January 24, 2022. *See* Joint Proposed Discovery Plan and Pretrial Schedule (Plaintiffs’ Proposal), Dkt. No. 98 at 22. These dates are necessary to ensure all redistricting disputes are resolved no later than March 1, as the WEC has advised.² In the companion federal litigation, the WEC has made clear what is required: “In order for the staff of the Wisconsin Elections Commission to be able to timely and effectively administer the November 8, 2022, election—including the nominating petition circulation process starting on April 15, 2022—a new congressional and state legislative district plan needs to be in place no later than March 1, 2022.” *Hunter v. Bostelmann*, 21-CV-512, Dkt. No. 41, Answer (W.D. Wis. Sept. 7, 2021). The federal court schedule works backwards from this date and contemplates the most expedited schedule reasonably feasible.

This Court should conclude these proceedings in advance of that trial date. The last time this Court considered a redistricting action, it recognized that “the *Grove* rule is deference, not abstention,” and that state court proceedings should avoid “a collision course with the case now pending before the federal three-judge panel.” *Jensen v. Wis. Elections Bd.*, 249 Wis.2d 706, 716, 639 N.W.2d 537 (2002). The clear path for this Court to avoid such a collision is to conclude its proceedings before the federal panel sits for its scheduled trial and orders a final judgment that must come before March 1. By enacting final maps no later than January 24, 2022, this Court will leave the requisite “ample time” ahead of the approaching elections, 381 U.S. at 409, and avoid the risk of directly competing proceedings in state and federal court.

II. The Court should consider the associational rights of voters.

At stake in this action is not just the voters’ right to cast an equal ballot on election day, but also the voters’ right to associate with like-minded individuals in advance of the election. Wisconsin voters have a right to know which districts they reside in, which candidates they can vote for, and with whom they should organize in advance of the 2022 election. This core political activity includes the right to identify, recruit, and organize in support of potential candidates in advance of the formal start to the nominating process.

The Hunter intervenors raise associational claims here under Article I, sections 3 and 4, of the Wisconsin Constitution, which mirror their First Amendment claim in federal court. *See Lawson v. Hous. Auth. of City of Milwaukee*, 270 Wis. 269, 274, 70 N.W.2d 605 (1955) (recognizing Sections 3 and 4, art. I, of the Wisconsin Constitution “guarantee the same freedom of speech and right of assembly and petition as do the First and Fourteenth amendments of the United States constitution”). It is well established that associational rights extend to the “orderly group activity” that voters pursue long before an election. *Kusper v. Pontikes*, 414 U.S. 51, 56-67 (1973). Even

² Under Wisconsin Law, the WEC is charged with administering federal and state elections. *See* Wis. Stat. § 5.01(1). Specifically, it is entrusted with administering Chapters 5, 10, and 12 of the Wisconsin Statutes, “and other laws relating to elections and election campaigns.” *Id.* These laws include §10.06(1)(f), which requires the WEC to distribute notices related to district boundaries by March 15. Given the WEC’s central role in election administration, the federal court’s—and this Court’s—deference to the WEC’s views on what is necessary for a well-administered 2022 election is appropriate.

before electing—or signing nomination papers for—a candidate, the voters must have an opportunity to learn about and debate the candidates’ qualifications and positions, which is the time at which associational rights apply with their “fullest and most urgent application.” *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (“Free discussion about candidates for public office is no less critical before a primary than before a general election.”). These considerations militate against any delay in establishing a redistricting plan, and they support providing clarity to the voters well in advance of the candidate signature gathering process that begins in April.

The Hunter Intervenors are entitled “to gather in pursuit of common political ends” with like-minded voters. *Norman v. Reed*, 502 U.S. 279, 288 (1992). This associational freedom crucially depends upon their ability to “identify the people who constitute the association.” *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986). Delays in establishing districts, however, mean that “voters who want to become fully involved in the process will not timely know in which district they are going to be, and thus will not timely know where and with whom to become involved.” *Smith v. Clark*, 189 F. Supp. 2d 503, 510-11 (S.D. Miss. 2002). Incumbent politicians may be less concerned about this uncertainty, but it is the “insurgent candidate or political newcomers” who will be “significantly prejudiced if no districting plan is in place.” *Favors v. Cuomo*, 866 F. Supp. 2d 176, 185 (E.D.N.Y. 2012).

In the absence of a redistricting plan, voters can only associate with others in the most general of ways. While voters can speak to and gather with other voters who share their political beliefs, they cannot channel any of that association into the “common advancement of political beliefs” among their representatives in the Wisconsin Legislature or the U.S. House of Representatives. *Kusper*, 414 U.S. at 56-57. Thus, voters are deprived of their “associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power.” *Tashjian*, 479 U.S. at 216. Irrespective of the disagreements between the Governor and the Legislature, Wisconsin voters are entitled to the same associational and organizational opportunities they would have in any other election. To preserve that timeline, this Court must be prepared to enact a redistricting plan in the early part of 2022. The federal court’s January trial date provides an appropriate deadline under this consideration as well.

Conclusion

For the reasons stated above, this Court should adopt a litigation schedule that ensures all proceedings will conclude by the start of trial in federal court, which is currently set to be on or about January 24, 2022.

Respectfully,

Aria C. Branch

Cc: *See* attached certificate of service.

CERTIFICATE OF SERVICE

I certify that on this 6th 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 6, 2021

/s/ Aria C. Branch

Aria C. Branch