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,

Defendants,

and

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.

21-cv-512-jdp-ajs-eec

BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, the LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, REBECCA ALWIN, HELEN HARRIS, WOODROW WILSON CAIN, II, NINA CAIN, TRACIE Y. HORTON, PASTOR SEAN TATUM, MELODY MCCURTIS,

21-cv-534-jdp-ajs-eec

BARBARA TOLES, and EDWARD WADE, JR.

Plaintiffs,

v.

ROBERT F. SPINDELL, JR., MARK L. THOMSEN, DEAN KNUDSON, ANN S. JACOBS, JULIE M. GLANCEY, MARGE BOSTELMANN, in their official capacity as members of the Wisconsin Election Commission, MEAGAN WOLFE, in her official capacity as the Administrator of the Wisconsin Elections Commission,

Defendants.

BLOC PLAINTIFFS'[1] RESPONSE IN OPPOSITION TO MOTION TO STAY PROCEEDINGS

Introduction

Federal law is clear: when a plaintiff requests that a federal district court adjudicate federal claims relating to state legislative and congressional redistricting, the federal court "must neither affirmatively obstruct state reapportionment nor permit federal litigation be used to impede it." *Growe v. Emison*, 507 U.S. 25, 34 (1993). Thus, the district court must give state actors "adequate opportunity to develop a redistricting plan," *Branch v. Smith*, 538 U.S. 254, 262 (2003), and give them "the opportunity to make [their] own redistricting decisions so long as that is practically possible and the State chooses to take the opportunity," *Lawyer v. Dept. of Justice*, 521 U.S. 567, 576 (1997). This requires deference, not abstention, and district courts may – and commonly do – set a schedule, including deadlines, to adjudicate the federal claims should it become necessary. Through their motion to stay, the *Johnson* Intervenor-Plaintiffs ask this Court a second time to stay

[1] The "*BLOC* Plaintiffs" are Black Leaders Organizing for Communities, Voces de la Frontera, the League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson Rebecca Alwin, Helen Harris, Woodrow Wilson Cain, II, Nina Cain, Tracie Y. Horton, Pastor Sean Tatum, Melody McCurtis, Barbara Toles, and Edward Wade, Jr., plaintiffs in case number 21-cv-534-jdp-ajs-eec.

these proceedings. Dkt. 79.[2] Although they fail to identify what they propose that stay actually include, presumably, they seek a complete and indefinite stay of these proceedings. Nothing in federal law or in the current context compels that result.

In its September 16, 2021 Order, this Court held that "[t]he court and the parties must prepare now to resolve the redistricting dispute, should the state fail to establish new maps in time for the 2022 elections." Dkt. 60 at 8. While the Wisconsin Supreme Court has joined the legislature as one of the state actors that ***might*** establish new maps, the fact that this Court and the parties must prepare to resolve the dispute in the event that the state fails has not changed. The Court may deny the stay in keeping with *Growe*, and it should do so. In light of the Wisconsin Supreme Court granting the *Johnson* Intervenor-Plaintiffs' petition for original action, this Court should set a deadline by which it will adjudicate plaintiffs' federal claims should the state political actors and courts fail to produce legally compliant maps, and it should set a schedule by which the parties will be prepared to try these consolidated cases to the Court should the need arise. The *BLOC* Plaintiffs respectfully request that this Court deny Intervenor-Plaintiffs' motion to stay these proceedings.

Background

These consolidated cases were commenced on August 13, 2021 (the '512 case) and August 23, 2021 (the '534 case). The Court has issued two orders on substantive issues:

- On August 27, the Court granted the Legislature's motion to intervene in the '512 case; issued an order to show cause why the two cases should not be consolidated; and set other deadlines, including a deadline of September 13, 2021, for the parties to submit a joint proposed schedule for the two cases. Dkt. 24.

- On September 16, the Court consolidated the cases; granted the outstanding motions to intervene filed by the *Johnson* Plaintiffs, the Republican Congressmen, Governor Evers; and granted the *BLOC* Plaintiffs' motion for leave to amend their complaint. The Court further denied the pending motions to dismiss and to stay. Dkt. 30 at 8-9.

Significantly for the purpose of the pending motion to stay, the Court noted in its September

[2] All docket references are to the docket in the '512 case unless otherwise noted.

16 Opinion and Order that "the issue of a more limited stay will be considered at the upcoming [September 21] status conference," and that the Court was "inclined to follow the *Arrington* approach by imposing a limited stay to give the legislative process, and perhaps the state courts, the first opportunity to enact new maps." *Id.* at 8. The Court further stated that it would "set a schedule that will allow for the timely resolution of the case should the state process languish or fail." *Id.* At the September 21 Status Conference, the Court ordered the parties to meet and confer, and to prepare and submit a proposed discovery plan and pretrial schedule. Dkt. 75 at 3. The Court observed in its Order of the same day that the U.S. Supreme Court has approved of a district court's use of a candidate-qualification deadline as a basis to establish a deadline by which a state must adopt new maps "to forestall federal adjudication." *Id.* at 2 (citing *Branch v. Smith*, 538 U.S. 254, 260-62 (2003). Relying on that precedent, and on the Wisconsin Elections Commission's stated deadline of March 1, 2022 for new districts to be in place to properly administer the Wisconsin partisan primaries on August 9, 2020, the Court set a trial to be concluded by January 28, 2022. *Id.* at 2-3. Consequently, the Court also was clear that the parties' proposed schedule must include pretrial dates so that the cases are ready to be tried the last week in January. *Id.* at 3.

On September 22, the Wisconsin Supreme Court granted the petition for original action filed in *Johnson v. Wisconsin Elections Commission*, case number 2021AP1450-OA. Dkt. 81-1. Beyond granting the petition, the Wisconsin Supreme Court denied all other requested relief. *Id.* at 3. Specifically, the court "decline[d] to formally declare, at the onset, that a new apportionment plan is needed," commenting that "we have, as yet, an inadequate record before us upon which to make such a pronouncement." *Id.* Turning to scheduling issues in that case, the court stated that "the petitioners do not say how long this court should give the Legislature and the Governor to accomplish their constitutional responsibilities before the court would need to embark on the task the petitioners have asked of us in order to ensure its timely completion." *Id.* at 2. Consequently, the court set a number

of deadlines for parties, proposed intervenors, and *amici* to submit various motions and briefs on a variety of issues, including motions to intervene; letter briefs addressing when a new redistricting plan must be in place, and the key factors used to identify that date; and responses to those filings. *Id.* at 3. The latest of the filings ordered by the Court must be submitted by October 13; in other words, of the issues that the Court has identified for briefing, all will be fully briefed by October 13. Beyond that, the court has not stated how, when, or even whether it will proceed. All that is known at this point is that the state supreme court has taken jurisdiction.

In the wake of the Wisconsin Supreme Court's September 22 order, the Legislature submitted to this Court a "Notice" that included a reiteration of its argument that this Court is without jurisdiction and that these consolidated cases should be dismissed. Dkt. 81. The Legislature further petitioned the United States Supreme Court to issue a writ of mandamus prohibiting this Court from adjudicating this dispute, or, in the alternative, a writ of prohibition directing the Court to dismiss this case. Dkt. 82-1. The *Johnson* Intervenor-Plaintiffs, for their part, moved for a second time to stay these proceedings, citing just one case: the United States Supreme Court's opinion in *Growe*. Dkt. 79.

This Court's response to the Wisconsin Supreme Court's order was to extend to October 1 the parties' deadline to submit a joint proposed discovery plan and pretrial schedule, and to instruct the parties 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.

Argument

When considering whether to impose a stay, the Court must "balance the interests favoring a stay against interests frustrated by the action, while keeping in mind the virtually unflagging obligation of the federal courts to exercise jurisdiction in cases properly before them." *Ultratec, Inc. v. Sorenson Commc'ns, Inc.*, No. 13-CV-346-BBC, 2013 WL 6044407, at *2 (W.D. Wis. Nov. 14,

2013) (internal citations and quotations omitted). Courts analyzing this balance often consider:

> (1) whether the litigation is at an early stage; (2) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (3) whether a stay will simplify the issues in question and streamline the trial; and (4) whether a stay will reduce the burden of litigation on the parties and on the court.

Id.

Here, although the case is at an early stage, the balance of interests favor denying the stay because the Court is already following the guidance of *Growe* and its progeny. Additionally, a stay would unduly prejudice the non-moving parties by potentially requiring them to prepare for trial with even less time than the proposed schedules currently before this Court. As discussed below, the proposed trial schedule would allow this Court to streamline the litigation while also not interfering with Wisconsin's redistricting process. A stay, however, would increase the burden on the parties while the intervening time will not lead to simplifying the issues before this Court.

I. *Growe* and its progeny permit this Court to set a deadline for the state political actors and courts to adopt new districts before it will rule on plaintiffs' federal claims, and the March 1, 2022 deadline the Court has set complies with that controlling authority.

Growe and its progeny require "deferral, not abstention," *id*. at 37, and a formal stay is not required for such deferral. *See, e.g., Wesch v. Folsom*, 6 F.3d 1465, 1473 (11th Cir. 2003); *Keller v. Davidson*, 299 F. Supp. 2d 1171, 1178 n.4 (D. Colo. 2004); *Vigil v. Lujan*, 191 F. Supp. 2d 1273, 1274 (D.N.M. 2001); *Thompson v. Smith*, 52 F. Supp. 2d 1364, 1368 (M.D. Ala. 1999). When a state court becomes involved in redistricting, the federal court must practically "allow the state court adequate opportunity to develop a redistricting plan." *Branch*, 538 U.S. at 262; *see also Lawyer*, 521 U.S. at 576 ("A State should be given the opportunity to make its own redistricting decisions ***so long as that is practically possible*** and the State chooses to take the opportunity." (emphasis added)). Federal courts are permitted and indeed encouraged to set a deadline for the state political actors and courts to complete their redistricting efforts before the federal court need intervene. *See, e.g., Growe*,

507 U.S. at 36 ("It would have been appropriate for the District Court to establish a deadline by which, if the Special Redistricting Panel had not acted, the federal court would proceed."); *Smith v. Clark*, 189 F. Supp. 2d 548 (S.D. Miss. 2002) (ordering enforcement of the map ordered by the federal court after that court gave state actors a January 7 deadline to make clear that a redistricting plan would be in place by March 1, *Smith v. Clark*, 189 F. Supp. 2d 503, 506 (2002)), *aff'd*, *Branch*, 538 U.S. 254; *Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 867 (E.D. Wis. 2001).

In this matter, then, the Court may elect to establish a deadline by which either the Wisconsin Legislature or Supreme Court must make evident that redistricting plans will be in place before the federal court will adopt such maps. The *Johnson* Intervenor-Plaintiffs concede as much in their motion. There, they acknowledge that *Growe* expressly approves of this court "communicat[ing] to [the Wisconsin Supreme court] the 'time by which it should decide on reapportionment, legislative *or* congressional, if it wishe[s] to avoid federal intervention . . . ." Dkt. 79 at 4. Indeed, the Court already has done that. In its September 21 Order, the Court expressly identified the date by which it will act – March 1, 2022 – a date based on information provided by the Wisconsin Election Commission regarding the deadline for candidates to circulate nomination papers to qualify for the August 9, 2022 partisan primary. *See* Dkt. 75 at 2. As the Court noted, the U.S. Supreme Court in *Branch* approved of a district court's use of just such a "candidate-qualification deadline . . . to establish a deadline by which the state had to establish its maps to forestall federal adjudication." *Id.* Although the *BLOC* plaintiffs identified for the Court several Wisconsin statutes that, in combination, suggest a March 15 deadline for final districts to be in place, *see* dkt. 44 ¶ 44; Wis. Stat. §§ 7.15, 8.15(1), 10.01(2)(a), 10.06(1)(f), the two-week difference in time between the WEC's stated March 1 deadline and the *BLOC* Plaintiffs' suggested March 15 deadline is functionally negligible.

Consequently, the Court's September 21 Order setting March 1, 2022, as the deadline by

which the state political actors and courts must act is both wholly supported by federal law, supported by the specific facts, and remains unchallenged by the movants.

II. *Growe* and its progeny further authorize the Court, in the interim, to set a pretrial schedule to prepare the federal cases for trial, if necessary.

The real question that the Motion to Stay raises is not so much the question of the March 1, 2022 deadline the Court has set, but, instead, what U.S. Supreme Court authority allows to occur in this case between now and then. The *Johnson* Intervenor-Plaintiffs suggest that this Court is essentially powerless to do ***anything*** more than set a deadline. According to their reading of *Growe*, this Court is prohibited from giving any "consideration" to this dispute "while state judicial proceedings are pending," preventing this Court from "involv[ing]" itself in redistricting. Dkt. 79 at 4. Nonsense. *Growe* does not say that, and notably, the *Johnson* Intervenor-Plaintiffs cite no authority in their entire motion other than *Growe*. So what does federal authority ***actually*** allow this Court to do? To start, *Growe* dictates that absent evidence that the state legislature or judicial branch will fail to perform their duty of redistricting, "a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation be used to impede it." *Growe*, 507 U.S. at 34. Thus, it is clear from *Growe* that the Court may allow these cases to proceed so long as they do not "obstruct" or "impede" efforts by the state political actors or the state supreme court to redistrict. What that means in practice is that district courts may enter pretrial schedules, and even permit discovery and motion practice to prepare the case for trial. There is ample federal authority holding that *Growe* does not require deferral of "the usual pre-trial tasks" necessary to prepare a federal case for trial before the deadline set by the district court for a state to conduct its their own redistricting. *See, e.g., Brown v. Kentucky*, No. 13-CV-25 DJB-GFVT, 2013 WL 3280003, at *2 (E.D. Ky. June 27, 2013) ("The Supreme Court precedent…clearly permits simultaneous operation of [the legislature and the courts] to ensure constitutional legislative districts are in place in time for an election."); *Balderas v.*

Texas, No. 6:01-cv-158, 2001 WL 36403750, at *1 (E.D. Tex. Nov. 14, 2001) ("Pursuant to the Supreme Court's direction in *Growe*…we deferred proceedings in federal court until October 1, 2001….We prescribed the usual pre-trial tasks."). Indeed, a pre-trial schedule is necessary to help relieve the burden of this litigation on all parties by giving them as much time as possible to complete the required tasks all while not interfering with the State's process.

III. The plaintiffs' proposed pretrial schedule complies with the dictates of *Growe* but also allows this case to be ready for trial on January 24.

Contemporaneous with this Brief, the *BLOC* Plaintiffs have submitted a proposed discovery plan and pretrial schedule, which suggests commencing fact discovery, exchanging expert reports, and preparing for trial beginning in December 2021. None of the proceedings that the *BLOC* Plaintiffs have suggested may advance in this Court to prepare this case for trial on January 24, 2022 would obstruct or impede Wisconsin's redistricting efforts. Previous experience demonstrates that this case will require at least 12 weeks of pretrial proceedings to prepare the case for trial. In *Baldus v. Members of Wisconsin Gov't Accountability Board*, for example, the district court issued a scheduling order providing for a trial date of February 21, 2011; fact discovery commencing in November 2011 after the exchange of initial disclosures by the parties; the exchange of expert reports in mid-December; and a close of discovery approximately two weeks before trial. Declaration of Douglas M. Poland ("Poland Decl."), Ex. 1. That consolidated case, like these consolidated cases, involved both malapportionment claims and claims under Section 2 of the Voting Rights Act. Even with a compressed trial that was held over two (very long) days, the *Baldus* court issued its merits opinion on March 22, 2012, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012), and issued its order adopting remedial districts on April 11, 2012, *Baldus v. Members of Wis. Gov't Accountability Bd*., 862 F. Supp. 2d 860 (E.D. Wis. 2012). By analogy, if the Court were to put these consolidated cases on the same pretrial track as *Baldus* but with the Court's

stated trial date of late January 2022 – approximately one month earlier in the year than the *Baldus* trial commenced in 2012 – discovery would need to commence in November, expert reports would be exchanged the same month, and expert depositions would be taken in December and January.

Nor would allowing such pretrial proceedings to occur offend *Growe*'s dictate that the district court case not "impede" or "obstruct" the state political actors or state courts. The *Johnson* Intervenor-Plaintiffs complain that were the Court to allow these cases to proceed in the face of parallel state-court proceedings, "[t]he prospect of overlapping, and perhaps conflicting, federal-state discovery, expert, and trial schedules, rules, and orders is simply untenable," and that "the mere need of the parties to double all litigation efforts will necessarily 'impede' state proceedings." Dkt. 79 at 4. That contention is without merit, for several reasons. ***First***, discovery taken of any party or person other than the Legislature or Governor in their respective roles as political actors could not possibly prejudice redistricting efforts, as neither the Legislature nor the Governor would be the subject of that discovery. ***Second***, the *Johnson* Plaintiffs, the Legislature, and the Governor are ***intervenors*** in this matter, participants by their own volition rather than by any action taken by the Plaintiffs; the federal court's ability to provide "a last-minute federal-court rescue of the…electoral process" if the state actors fail to complete redistricting themselves should not be prejudiced by Intervenors' deliberate decisions to engage in lawsuits at multiple levels. *Growe*, 507 U.S. at 37. If the *Johnson* Intervenor-Plaintiffs (or any other intervenors) do not wish to be subject to discovery in concurrent jurisdictions, the solution is easy: they may seek to withdraw as parties from these cases.

One final consideration is necessary with respect to the deadline the Court sets for the State to act, and to the pretrial schedule. The Legislature's actions in the last redistricting cycle portend that the Court should anticipate and plan for delays both to the overall schedule and to pretrial proceedings, especially with respect to discovery. When served with Rule 45 subpoenas in the *Baldus* case in early December 2011, the Legislature objected, refused to produce materials based

on claims of privilege that were later overruled, and complied with its discovery obligations only after the three-judge court issued an order sanctioning the Legislature and its counsel for their obstinateness and warning the Legislature to "cooperate immediately." *Baldus v. Members of Wis. Gov't Accountability Bd.*, 843 F. Supp. 2d 955, 960 (E.D. Wis. 2012). Consequently, documents that should have been produced in early December 2011 were not produced until mid-January, significantly delaying the plaintiffs' ability to prepare for trial. Other documents were not produced at all, which later spawned nearly nine months of post-judgment discovery. *See Baldus v. Members of Wis. Gov't Accountability Bd.*, No. 11-CV-562 JPS-DPW-RMD, 11-CV-1011 JPS-DPW-RMD, 2013 WL 690496 (E.D. Wis. Feb. 25, 2013).

The Legislature's actions with respect to implementing remedial districts last decade also merits consideration now for purposes of setting a schedule. Upon the *Baldus* court's March 22, 2012 ruling enjoining 2011 Act 43 from being implemented for elections because it violated Section 2 of the Voting Rights Act, and yielding to the Legislature the task of adopting compliant districts, *Baldus*, 849 F. Supp. 2d at 861, the Legislature refused to act. Instead, the Legislature issued public statements that it would not adopt compliant districts, which the *Baldus* plaintiffs brought to the district court's attention. *See* Poland Decl. Ex. 2 ¶¶ 2-4; Ex. 3 at Exs. A-D. Those public statements by the Legislature's leadership resulted in the district court immediately taking on the task of adopting remedial districts. *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 862, 863-64 (E.D. Wis. 2012) ("To be sure, we had every expectation that the Legislature would undertake its responsibility and adopt the precious few changes necessary to bring Wisconsin's redistricting plan into compliance with the VRA. But in the end, the Legislature has once again declined our invitation …."). The Legislature's intransigence in adopting compliant districts last decade foreshadows a similar lack of urgency by the Legislature now. Just last week, the media reported that Assembly Speaker Vos "isn't committing to passing new legislative district maps as

part of the Assembly's fall floor period." Poland Decl., Ex. 4 at pp. 7-9. The article further states that the fall floor periods are scheduled for October and the first week of November, and reports that Rep. Vos said that the Assembly likely would then break until January.

If past is prologue, the Court can and should take Rep. Vos at his word; it is unlikely that the Legislature will adopt state legislative and congressional districts until January. Given that schedule, as a practical matter, it would be impossible for the Legislature's maps to be submitted to the Governor for consideration, and then to be fully adjudicated before the Wisconsin Supreme Court, before this Court's scheduled trial commences on January 24. The Court should clearly convey now to the Legislature, Governor, and Wisconsin Supreme Court that March 1, 2022 is the deadline for compliant districts to be in place; that trial will commence on January 24, 2022; and that in the meantime, an expedited pretrial schedule will be set to ensure this case is ready for trial. The Legislature alone controls the pace at which it conducts its legislative business. All that federal law requires this Court to do is to give the Legislature an opportunity to act. If it chooses to move so slowly in carrying out its legislative duties that it fails to take advantage of the window of opportunity that federal law provides, that is its own choice. But that deliberate choice cannot and should not stop this Court from carrying out its own constitutional obligations.

Conclusion

This Court's September 21, 2021 order correctly observes that *Growe v. Emison* permits it to set a deadline of March 1, 2022 for Wisconsin to adopt new state legislative and congressional districts that comply with federal law before this Court will adopt new districts. The Court's decision to set a trial to be completed by the end of January 2022 is similarly defensible under *Growe*, as is the setting of a pretrial schedule to prepare the case for trial. The Wisconsin Supreme Court's September 22, 2021 order taking jurisdiction over the *Johnson* Plaintiffs' original action does not render that schedule improper under federal law. The motion to stay should be denied, and the Court

should enter the schedule the Plaintiffs have submitted.

Dated: October 1, 2021.

Respectfully submitted,

By: */s/ Douglas M. Poland*

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