

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,

21-cv-512-jdp-ajs-ee

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.

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-ee

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 WISCONSIN
LEGISLATURE’S MOTION TO DISMISS**

The Wisconsin Legislature’s second motion to dismiss² recycles arguments this Court already rejected. (Dkt. 60 at 6-9³) The *BLOC* Plaintiffs agree with the *Johnson* Intervenor-Plaintiffs that this Court has subject matter jurisdiction to adjudicate this case. (Dkt. 102) Nothing that the Legislature has put forth in its motion to dismiss remotely calls into question this Court’s prior ruling that this Court has subject matter jurisdiction to adjudicate the *BLOC* Plaintiffs’ claims.

The Legislature erroneously cites *Grove v. Emison*, 507 U.S. 25 (1993), for the proposition that a Court lacks jurisdiction when a state begins the redistricting process. *Grove* calls for deference,

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 (the “534 case”).

² The Legislature’s motion to dismiss is based on an alleged lack of subject matter jurisdiction. However, the Legislature’s motion wades into the merits of the *BLOC* Plaintiffs’ Voting Rights Act claim. (Dkt. 86 at 4-5) While such arguments contradict the Legislature’s assertion that there is no Article III case or controversy, this brief will not address arguments unrelated to this Court’s subject matter jurisdiction.

³ Unless otherwise indicated, all docket references are to the docket in 21-cv-512-jdp-ajs-eec (the “512 case”).

not abstention. *Grove* held that, unless there is evidence that a state's political branches of government will fail to timely perform their redistricting duty, "a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* at 34. *Grove* expressly endorsed "establish[ing] a deadline by which, if the [state] had not acted, the federal court would proceed." *Id.* at 36.

Grove did not alter longstanding Supreme Court precedent holding that a federal district court retains jurisdiction while state redistricting occurs. *Scott v. Germano*, 381 U.S. 407, 409 (1965). In *Germano*, the Supreme Court directed a federal district court to establish a deadline for the Illinois political and judicial branches to adopt a State Senate redistricting plan. *Id.* It then held that "[t]he District Court shall retain jurisdiction of the case and in the event a valid reapportionment plan for the State Senate is not timely adopted it may enter such orders as it deems appropriate, including an order for a valid reapportionment plan for the State Senate." *Id.*

Branch v. Smith, 538 U.S. 254 (2003), decided ten years after *Grove*, underscores that a federal district court may retain subject matter jurisdiction consistent with providing the deference *Grove* prescribed. *Branch* involved Mississippi's failure to adopt new congressional districts after the state lost a congressional seat. 538 U.S. at 258. In *Branch*, Mississippi's Chancery Court had already conducted a trial and sent congressional maps for preclearance review under § 5 of the Voting Rights Act. 538 U.S. at 260. Having serious doubts that the Mississippi state courts would have a precleared plan in place by March 1, 2002, the federal panel began redistricting proceedings in January 2002. *Id.* On February 4, the federal panel promulgated a redistricting plan. *Id.* However, the federal panel waited until February 26 before it enjoined the Mississippi Chancery Court's maps and installed the federal panel maps. *Id.* at 260-261. The Supreme Court endorsed the federal panel's retention of jurisdiction and map drawing concurrent with state-court redistricting because it did not obstruct or impede state-court proceedings. *Id.* at 261-62.

This is exactly what occurred in another post-*Grove* case, *Arrington v. Elections Board*, 173 F. Supp. 2d 856 (E.D. Wis. 2001), a case the Legislature continues to ignore. The *Arrington* panel found that, in the redistricting context, “[a]s long as the pleadings realistically allege actual, imminent harm, standing has been established.” *Id.* at 862. The *Arrington* plaintiffs had standing in circumstances identical to this case. Specifically, they alleged: (1) their voting rights would be diluted under then-existing congressional districts; and (2) partisan division between the political branches likely meant there would be no legislatively enacted maps in time for the 2002 elections. *Id.* So, too, here.

Read together with the facts at issue here, *Arrington*, *Branch*, *Germano*, and *Grove* uniformly confirm this Court’s jurisdiction. The *BLOC* Plaintiffs have alleged that Wisconsin’s Assembly and Senate districts are unconstitutionally malapportioned. (Dkt. 74 ¶¶28-39, 94-103) The Legislature does not contest that the current maps are unconstitutional. Wisconsin’s political split between the Republican-controlled Legislature and Democratic Governor, along with Wisconsin’s repeated failures to adopt legislative maps in the absence of unified party control of the political branches, practically guarantees legislative impasse. (*Id.* ¶¶40-44) Like the *Arrington* plaintiffs, the *BLOC* Plaintiffs have satisfied their “‘relatively modest’ burden of alleging a realistic threat of imminent injury to their voting rights,” thereby providing this Court with subject matter jurisdiction. *Arrington*, 173 F. Supp. 2d at 862 (quoting *Bennett v. Spear*, 520 U.S. 154, 171 (1997)).

Likewise, the Court has jurisdiction to adjudicate *BLOC* Plaintiffs’ claim under Section 2 of the Voting Rights Act (“VRA”). The *BLOC* Plaintiffs have alleged facts supporting their argument that, under the VRA, Milwaukee must have seven majority-Black voting-age-population districts, as opposed to the six that currently exist. (Dkt. 74 ¶¶104-110) As with the malapportionment claim, there is an extremely high likelihood that the pending state redistricting proceedings will end in legislative impasse, thus posing a “realistic threat of imminent injury” that the current use of unlawful

maps will continue. *Arrington*, 173 F. Supp. 2d at 862. Indeed, the Legislature’s recent adoption of 2021 Senate Joint Resolution 63,⁴ which provides that new legislative districts should “[r]etain as much as possible the core of existing districts,” leaves no doubt that the Legislature intends to keep Wisconsin’s legislative districts as similar as possible to their current make-up. This action by the Legislature, framed as the “public policy of this state” even without being approved through the legislative process, is a strong indicator that, even in the highly unlikely event there is no legislative impasse, any maps adopted by Wisconsin’s political branches will include only six majority Black Voting Age Population districts in Milwaukee. Consequently, there exists a “realistic threat of imminent injury” to the *BLOC* Plaintiff’s voting rights under Section 2 of the VRA, and this Court has subject matter jurisdiction.

The Legislature’s argument that a Section 2 VRA claim cannot be brought before adoption of a redistricting plan is nonsensical. (Dkt. 86 at 3-4) The *BLOC* Plaintiffs have alleged sufficient facts establishing that Wisconsin’s current legislative maps violate Section 2 of the VRA. That existing injury grants this Court subject matter jurisdiction. The Legislature can cite no case that prohibits bringing such a claim before adoption of a redistricting plan. Indeed, any redistricting plan must be evaluated to ensure it complies with the mandates of the VRA. Since there is an existing injury to the *BLOC* Plaintiffs and the injury will continue, either through legislative impasse or the adoption of new maps in accordance with the Legislature’s proposed approach, the Court has subject matter jurisdiction to adjudicate the VRA claim.

The recent orders from the Wisconsin Supreme Court requiring the parties in the original action to submit briefs on various legal issues, as well as proposals for the litigation process that the

⁴ Text of the resolution is available here: <https://docs.legis.wisconsin.gov/document/proposaltext/2021/REG/SJR63>

court should use to resolve disputes over proposed districts, do not change the jurisdictional analysis currently before this Court. *Branch* provides a model, approved by the United States Supreme Court, for handling this process. As explained above, the district court in *Branch* retained jurisdiction while the state courts were drawing new congressional districts. But when it became likely that the state court would not have maps in place by March 1, 2002, the federal panel began drawing maps simultaneously with state court proceedings. The Supreme Court endorsed this approach. *Branch*, 538 U.S. at 261-62. Similarly, in 2011, the district court for the southern district of Mississippi retained jurisdiction in a redistricting suit to allow the state’s legislature an opportunity to draw maps. In doing so, it determined that, “By retaining jurisdiction rather than dismissing the case as unripe, we act consistently with what the Supreme Court required in *Grove v. Emison*, 507 U.S. at 34.” *Mississippi State Conf. of N.A.A.C.P. v. Barbour*, No. 3:11CV159-TSL-EGJ-LG, 2011 WL 1870222, at *9 n.6 (S.D. Miss. May 16, 2011), *aff’d*, 565 U.S. 972 (2011), and *aff’d sub nom. Mississippi State Conf. of N.A.A.C.P. v. Bryant*, 569 U.S. 991 (2013). The Eastern District of New York similarly ruled that federal courts retain jurisdiction while state court proceedings occur. *Favors v. Cuomo*, 881 F. Supp. 2d 356, 363-366 (E.D.N.Y. 2012). These cases all demonstrate that federal courts can—and in some cases must—act simultaneously with state court proceedings.

Consistent with *Grove* and the above decisions, this Court can certainly exercise jurisdiction and grant a stay (or stays) while the Wisconsin Supreme Court attempts to draw maps. Indeed, even if the Wisconsin Supreme Court adopts a redistricting map, federal courts are “empowered to entertain” challenges to state court maps. *Grove*, 507 U.S. at 36. Retaining jurisdiction and proceeding simultaneously with the Wisconsin Supreme Court is necessary given the extremely limited amount of time between when (or if) the Wisconsin Supreme Court adopts maps, allowing this Court adequate review, and March 1, 2022. That can only be accomplished by this Court retaining its existing jurisdiction.

The only limitation under *Grove* is that the Court may not obstruct or impede Wisconsin's branches of government until there is evidence they will fail to timely redistrict, imperiling Plaintiffs' federal legal rights. But the *BLOC* Plaintiffs have not asked this Court to obstruct or impede the state branches from redistricting, nor has the Court done so. All the Court has done is set deadlines that will allow it to perform its proper and constitutionally mandated function to adjudicate Plaintiffs' federal claims if Wisconsin's legislative and judicial processes fail to timely produce new legally compliant state legislative districts. As the Court previously determined, it has subject matter jurisdiction. (Dkt. 60 at 6-9) Accordingly, the Legislature's motion to dismiss must be denied.

For the foregoing reasons, Plaintiffs 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., respectfully request that the Legislature's motion to dismiss be denied.

Dated: October 20, 2021.

Respectfully submitted,

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