

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, *and* Kathleen Qualheim,

Plaintiffs,

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,

The Wisconsin Legislature,

Intervenor-Defendant,

Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, *and* Scott Fitzgerald,

Intervenor-Defendants.

Case No. 3:21-cv-512-jdp-ajs-eec (consolidated with No. 3:21-cv-534-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, 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 Elections Commission,* Meagan Wolfe, *in her official capacity as the administrator of the Wisconsin Elections Commission,*

Defendants.

Case No. 3:21-cv-534-jdp-ajs-eec (consolidated with No. 3:21-cv-512-jdp-ajs-eec)

**CONGRESSMEN GLENN GROTHMAN, MIKE GALLAGHER,
BRYAN STEIL, TOM TIFFANY, AND SCOTT FITZGERALD’S
REPLY IN SUPPORT OF THEIR MOTION TO DISMISS
THE *JOHNSON* PLAINTIFFS’ COMPLAINT**

Intervenor-Defendants Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald, who are probable candidates for re-election to the U.S. House of Representatives in 2022 (hereinafter “the Congressmen”), raised two arguments in support of their Motion To Dismiss the *Johnson* Plaintiffs’ Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkt.105. First, *Grove v. Emison*, 507 U.S. 25 (1993), requires dismissal, as the *Johnson* Plaintiffs’ Complaint asks this Court to exercise jurisdiction over this redistricting dispute despite no “evidence” that both the Legislature and the Wisconsin Supreme Court would “fail timely to perform [their redistricting] duty,” as *Grove* requires for this Court to assert jurisdiction here. Dkt.105 at 3 (quoting *Grove*, 507 U.S. at 34). Second, the *Burford* abstention doctrine independently requires dismissal, as the Wisconsin courts are fully available to adjudicate—and, indeed, are already adjudicating—the malapportionment claims in the *Johnson* Plaintiffs’ Complaint, which claims implicate difficult questions of state law affecting core public policy of the State. Dkt.105 at 3–4.

In their Opposition, Dkt.107, the *Johnson* Plaintiffs do not directly confront either of the Congressmen’s arguments for dismissal of their Complaint.

Instead, as to the Congressmen’s first argument, the *Johnson* Plaintiffs state that this Court should not dismiss under *Grove* because this Court previously

rejected this argument when adjudicating the Congressmen’s Motion To Dismiss the *Hunter* Plaintiffs’ Complaint. Dkt.107 at 3. Yet, this Court’s previous refusal to dismiss under *Grove* came *before* the Wisconsin Supreme Court agreed to review the *Johnson* Plaintiffs’ parallel, state-law malapportionment claims in its original jurisdiction. *See* Dkt.105 at 3 n.*. The Wisconsin Supreme Court’s decision is powerful evidence that it will “timely [] perform” its redistricting “duty,” meaning that this Court must dismiss this case so as to “neither affirmatively obstruct” nor “impede” this “state branch[.]” *Grove*, 507 U.S. at 34.

As to the Congressmen’s second argument, the *Johnson* Plaintiffs do not develop any response. *See* Dkt.107 at 3. That failure is erroneous, given the strength of the case for *Burford* abstention here.*

Indeed, subsequent to the Congressmen’s filing of the present Motion, the Seventh Circuit issued a decision in *Driftless Area Land Conservancy v. Valcq*, ___ F.4th ___, No. 20-3325, 2021 WL 4901865 (7th Cir. Oct. 21, 2021), that further bolsters the Congressmen’s argument for *Burford* abstention.

In *Driftless*, the Seventh Circuit *sua sponte* ordered the district court to abstain from adjudicating a federal due-process claim to the validity of a Wisconsin power-line permit, based on *Colorado River* abstention, given an ongoing state-court case raising a parallel claim against the permit. *Id.* at *10–13. The Seventh Circuit explained that a federal court must abstain under *Colorado River* in light of “parallel

* As the Congressmen have noted, this Court’s previous Order denying the Congressmen’s Motion To Dismiss the *Hunter* Plaintiffs’ Complaint did not address the *Burford* abstention argument. Dkt.105 at 3 n.*; Dkt.60 at 6–8.

state proceedings”—defined practically as a case involving “substantially the same parties” and “issues”—when such abstention would “conserv[e] judicial resources,” “avoid[] duplicative litigation and the risk of conflicting rulings,” and/or “promot[e] a comprehensive disposition” of the dispute in a “single judicial forum.” *Id.* at *11. Importantly, the Seventh Circuit emphasized that “abstention law doesn’t demand an exact fit with the precise parameters of a doctrinal category,” but rather “is flexible and requires a practical judgment informed by principles of comity, federalism, and sound judicial administration.” *Id.* More broadly, *all* of the “main categories of abstention”—including “*Burford*” and “*Colorado River*”—“are not rigid,” as “all implicate . . . underlying principles of equity, comity, and federalism foundational to our federal constitutional structure.” *Id.* at *10 (citation omitted). Applying this flexible inquiry in *Driftless* itself, the Seventh Circuit ordered abstention because: (a) “[f]ederalism concerns loom large here,” implicating “Wisconsin’s sovereign interest in the proper functioning of its administrative law and procedure and the role of the state courts”; (b) the “desirability of avoiding piecemeal litigation over the legality of the power-line permit”; and (c) “[t]he federal courts have no institutional superiority in ruling on” the due-process claims at issue. *Id.* at *12–13.

Driftless strengthens the Congressmen’s already powerful case for *Burford* abstention here, including because the various abstention categories are “not rigid,” but rather serve foundational “principles of equity, comity, and federalism.” *Id.* at *10. As an initial matter, there are parallel state-court proceedings to the federal case here, as in *Driftless*, since the Wisconsin Supreme Court is currently considering

“issues” that are at least “substantially the same” as the issues here, raised by parties who are unquestionably identical. *Id.* at *11; *see* Dkt.91-1. Further, like in *Driftless*, abstention is justified because “[f]ederalism concerns loom large here,” 2021 WL 4901865, at *13, given Wisconsin’s primary, sovereign duty over redistricting, *Grove*, 507 U.S. at 34, and the people of Wisconsin’s “strong interest” in “an institution of state government” redistricting the State, *Jensen v. Wis. Elections Bd.*, 639 N.W.2d 537, 542 (Wis. 2002) (per curiam); Dkt.105 at 3–4. There is also a “desirability of avoiding piecemeal litigation” across state and federal fora in this case, *Driftless*, 2021 WL 4901865 at *12, since Wisconsin “can have only one set of [congressional] districts,” *Grove*, 507 U.S. at 35, and this Court’s simultaneous adjudication of the claims here will be “disruptive of” the “state efforts” to redistrict, *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) (citation omitted); Dkt.105 at 3–4. And this Court does not have “institutional superiority” over the malapportionment claims in this case, *Driftless*, 2021 WL 4901865 at *12–13, since the Wisconsin Supreme Court is currently and fully adjudicating the same equal-population challenges raised here, under the Wisconsin Constitution, *see* Dkt.91-1.

Finally, despite opposing the Congressmen’s Motion, the *Johnson* Plaintiffs concede that this Court could appropriately dismiss their Complaint after the current stay expires on November 5, 2021—unless “all three branches of state government have affirmatively demonstrated” that they will fail to timely adopt new redistricting maps for the State—so long as this Court also dismisses “the claims of the [*Hunter*]

Plaintiffs.” Dkt.107 at 3 (also arguing that continuing this Court’s stay under those circumstances would be appropriate, as an alternative to dismissal). This concession is a plain recognition of the strength of the Congressmen’s arguments here, which arguments require this Court to dismiss both the *Johnson* Plaintiffs’ and the *Hunter* Plaintiffs’ Complaints.

This Court should grant the Congressmen’s Motion To Dismiss the *Johnson* Plaintiffs’ Complaint.

Dated: October 27, 2021

Respectfully Submitted,

/s/ Misha Tseytlin

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of October, 2021, a true and accurate copy of the foregoing was served via the Court's CM/ECF system upon all counsel of record.

/s/ Misha Tseytlin

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