

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 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”), move to dismiss the *Johnson* Plaintiffs’ Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkt.73. The Congressmen provide the grounds for this Motion below, and they incorporate by reference their previous arguments for dismissal, Dkt.30-3; Dkt.91, so as to avoid duplicative briefing.

The *Johnson* Plaintiffs’ Complaint before this Court claims that Wisconsin’s current congressional districts are malapportioned, in violation of the “one person, one vote” principle, as a result of the U.S. Census Bureau’s 2020 census. *See* Dkt.73, ¶¶ 1–2. Yet, both the Wisconsin Legislature and, thereafter, the Wisconsin Supreme Court have primary authority over congressional redistricting in Wisconsin, not the federal courts. *Grove v. Emison*, 507 U.S. 25, 34 (1993). While the *Johnson* Plaintiffs’ Complaint does properly recognize the Wisconsin Supreme Court’s primary role, Dkt.73 ¶¶ 8–10, the Complaint still asks this Court to continue to exercise jurisdiction and enter a stay in case both the Legislature and the Wisconsin Supreme Court fail to timely complete their sovereign, redistricting duties. Dkt.73 at 10 ¶ B.4.

The *Johnson* Plaintiffs' Complaint violates both *Grove*, 507 U.S. 25, and the *Burford* abstention doctrine, meaning this Court should dismiss this case.*

Grove requires this Court to dismiss the *Johnson* Plaintiffs' Complaint. Under *Grove*, federal courts must “defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself.” *Grove*, 507 U.S. at 33 (emphasis added). Only where there is “evidence” that these “state branches will fail timely to perform [the redistricting] duty” may a federal court adjudicate a redistricting dispute. *Id.* at 34. Here, the Legislature has already begun the process of redistricting, Dkt.77, ¶ 33, and the Wisconsin Supreme Court has granted the original-action petition in *Johnson v. Wisconsin Elections Commission*, No.2021AP1450-OA (Wis. amended Sept. 24, 2021), explaining that it will adopt a new congressional map for Wisconsin if the “legislature fails to reapportion according to constitutional requisites in a timely fashion,” Dkt.91-1 at 2 (hereinafter “*Johnson Order*”). The *Johnson* Plaintiffs have put forward no “evidence” that the Legislature and the Wisconsin Supreme Court would both “fail timely to perform [the redistricting] duty” despite these clear actions, thus *Grove* requires dismissal. *Grove*, 507 U.S. at 34.

The *Burford* abstention doctrine also requires this Court to dismiss the *Johnson* Plaintiffs' Complaint. The *Johnson Order* shows that the Wisconsin state

* The Congressmen understand that this Court has denied their Motion To Dismiss the *Hunter* Plaintiffs' Complaint. However, and with respect, this Court's Order did not discuss the *Burford* abstention argument, Dkt.60 at 6–8, and, further, the denial came before the Wisconsin Supreme Court granted the *Johnson* Plaintiffs' Petition for Original Action.

courts are “available” to provide “timely and adequate state-court review” of Plaintiffs’ redistricting claims, and are actually reviewing the *Johnson* Plaintiffs’ claims. *New Orleans Pub. Serv., Inc. (“NOPSI”) v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726–27 (1996). The *Johnson* Plaintiffs’ claims satisfy all three general conditions for *Burford* abstention, with satisfaction of one condition being sufficient. First, their redistricting claims raise “difficult questions of state law” that involve significant public-policy concerns, *NOPSI*, 491 U.S. at 361 (citation omitted), as the drawing of a new congressional map requires a sensitive balance of often competing “traditional redistricting criteria,” *League of Women Voters of Chicago v. City of Chicago*, 757 F.3d 722, 726 (7th Cir. 2014), and the resolution of “critical legal and political issues,” *Jensen v. Wis. Elections Bd.*, 639 N.W.2d 537, 542 (Wis. 2002) (per curiam); *accord Johnson* Order at 2. Second, since Wisconsin “can have only one set of [congressional] districts,” *Grove*, 507 U.S. at 35, “the exercise of federal review” here will be “disruptive of” the “state efforts” to complete redistricting, *NOPSI*, 491 U.S. at 361 (citation omitted); *Quackenbush*, 517 U.S. at 726–27. And third, this Court abstaining under *Burford* would further “principles of federalism and comity,” *Quackenbush*, 517 U.S. at 728 (quoting *Grove*, 507 U.S. at 32), in light of Wisconsin’s primary duty over redistricting, *Grove*, 507 U.S. at 34, and Wisconsinites’ “strong interest” in “an institution of state government” adopting new congressional districts for the State, *Jensen*, 639 N.W.2d at 542.

For the foregoing reasons, and for the reasons that the Congressmen presented in their previous filings, Dkt.30-3; Dkt.91, the Congressmen respectfully request that this Court grant their Motion To Dismiss the *Johnson* Plaintiffs' Complaint.

Dated: October 7, 2021

Respectfully Submitted,

/s/ Misha Tseytlin

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th 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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