

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LISA HUNTER, et al.,

Plaintiffs,

BILLIE JOHNSON, et al.,

Intervenor-Plaintiffs

v.

Case No. 3:21-CV-512-JDP

MARGE BOSTELMANN, et al.,
IN THEIR OFFICIAL CAPACITIES AS
MEMBERS OF THE WISCONSIN
ELECTIONS COMMISSION,

Defendants,

THE WISCONSIN LEGISLATURE,

Intervenor-Defendant

CONGRESSMEN GLENN GROTHMAN, et al.,

Intervenor-Defendants

GOVERNOR TONY EVERS,

Intervenor-Defendant

**INTERVENOR-DEFENDANT GOVERNOR TONY EVERS'
RESPONSE TO STAY MOTION**

ARGUMENT

The Court has requested responses to the Johnson Plaintiffs’ stay motion following the Wisconsin Supreme Court’s acceptance of a redistricting matter, *Johnson v. Wisconsin Elections Commission*, No. 2021AP1450-OA (Wis. Sup. Ct.). This Court should deny the motion. The Court proceeding is consistent with *Grove v. Emison*, 507 U.S. 25 (1993) because it would not impede the state case and would allow this Court to act if the state efforts bear no fruit in time to administer the coming election.

Grove explained that federal law “requires deferral” to state efforts to redistrict, but “not abstention.” *Id.* at 37. The rule is that “[a]bsent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.” *Id.* at 34.

First, *Grove* requires only that a federal court “neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it,” *id.*, and proceeding with this case would do neither. The preparatory steps for this case—drafting proposed maps and retaining experts—also would need to be done for the state case. Having this case continue in parallel would not prevent anything from happening in state court or state government. Instead, it would put this Court in the position to act, if needed. That is the very scenario contemplated by the Supreme Court in

Grove, which stated that “the District Court would have been justified in adopting its own plan if it had been apparent that the state court, through no fault of the District Court itself, would not develop a redistricting plan in time.” *Id.* at 36. To fulfill that potential role, this case should continue.

As to the timeliness point, there is no guarantee that state efforts will result in maps in time for the coming election deadlines and reason to think that they will not. The Wisconsin Supreme Court has set a briefing schedule on intervention and when maps must be complete, and that preliminary briefing period lasts through October 13, 2021. *Johnson*, No. 2021AP1450-OA, Order of Sept. 22, 2021. The order granting leave to proceed in the supreme court provides no indication of when, or how, the court will hear the case. A concurrence notes that the court may eventually appoint a referee or special master or may have a circuit court address factual issues, but it defers those considerations to an unspecified later date. However, redistricting is rife with complex factual issues. Given the tight timeline for the present redistricting, there currently is no established state-based path to new maps by March 1, 2022, when the Wisconsin Elections Commission has stated it needs the maps to properly administer the election given the statutory deadlines. *See Wis. Stat. § 10.06(1)(f)* (stating that Type A notice must be sent by March 15, 2021); *Wis. Stat. § 10.01(1)(a)* (stating that Type A notice addresses redistricting); *Wis.*

Stat. § 8.15(1) (stating an April 15 deadline to begin circulating nomination papers); (Dkt. 41:2).

That problem is made more acute because the Legislature has been unwilling to provide this Court with a date by which it will complete its proposed maps and its leadership has not committed to completing maps during the Assembly's fall floor period. WisPolitics, *Vos not committing to new maps as part of fall agenda*, <https://www.wispolitics.com/2021/210924report/> (Sept. 24, 2021) (referring to interview).

Thus, *Grove's* timeliness-by-state-actors consideration currently has not been met. In other circumstances, that might mean a federal panel could stay its hand to see what happens in the state political process and the state courts, but the present circumstances do not allow for that luxury. If this case were completely halted and the state processes fall short, then it would become untenable to litigate this case in time for maps to be in place for the coming election deadlines.

CONCLUSION

The motion to stay should be denied.

Dated this 1st day of October 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Anthony D. Russomanno
ANTHONY D. RUSSOMANNO
Assistant Attorney General
State Bar #1076050

BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

Attorneys for Wisconsin
Governor Tony Evers

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2238 (ADR)
(608) 266-0020 (BPK)
(608) 294-2907 (Fax)
russomannoad@doj.state.wi.us
keenanbp@doj.state.wi.us