

**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,

v. *Intervenor-Plaintiffs,*

21-cv-512-jdp-ajs-eec

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

GOVERNOR TONY EVERS,

Intervenor-Defendant,

and

CONGRESSMEN GLENN GROTHMAN,
MIKE GALLAGHER, BRYEN STEIL, TOM TIFFANY,
and SCOTT FITZGERALD,

Intervenor-Defendants.

Three-Judge Court

BLACK LEADERS ORGANIZING FOR
COMMUNITIES, VOCES DE LA FRONTERA,
the LEAGUE OF WOMEN VOTERS OF
WISCONSIN, CINDY FALLONA, LAUREN
STEPHENSON, and REBECCA ALWIN,

Plaintiffs,

v.

21-cv-534-jdp-ajs-eec

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, and MEAGAN WOLFE, in her
official capacity as the administrator of the Wisconsin Elections
Commission,

Defendants.

Three-Judge Court

**NOTICE OF POSITION OF
PROPOSED PLAINTIFF-INTERVENOR CITIZEN DATA SCIENTISTS
ON MATTERS RAISED IN THE COURT’S SEPTEMBER 23, 2021 ORDER**

Proposed Plaintiff-Intervenors Stephen Joseph Wright, Jean-Luc Thiffeault, Somesh Jha, Joanne Kane, Michael Switzenbaum, and Leah Dudley (together, “Citizen Data Scientists”) respectfully submit this Notice to inform the Court of their position with respect to the matters raised in the Court’s September 23, 2021 Order (Dkt. 80)—namely, “how the [Wisconsin Supreme Court’s] decision should affect” the proposed schedule in these consolidated cases and whether the Court should grant the Motion to Stay Proceedings (“Motion to Stay”) filed by Intervenor-Plaintiffs Billie Johnson, Eric O’Keefe, Ed Perkins, and Ronald Zahn (together, the “Johnson Plaintiffs”) (Dkt. 79). Citizen Data Scientists recognize that they are not “parties” at this time because their unopposed Motion to Intervene remains pending.¹ However, in light of the Court’s Order granting participation of the Citizen Data Scientists at its hearing on September 21, 2021 (Dkt. 70), and given that there has been no opposition to the Citizen Data Scientists’ proposed intervention, they respectfully offer their position on these matters for the Court’s consideration.

Citizen Data Scientists submit that Justice Scalia’s opinion for the unanimous Supreme Court in *Grove v. Emison*, 507 U.S. 25 (1993), charts the path this Court should follow with respect to both the pending Motion to Stay and the schedule for proceedings in this Court. *Grove* specifically addressed the situation at issue here: “the propriety of the District Court’s pursuing reapportionment of . . . state legislative and federal congressional districts in the face of . . . state-court litigation seeking similar relief.” *Id.* at 27. *Grove* built upon and reaffirmed the Supreme Court’s unanimous opinion in *Scott v. Germano*, 381 U.S. 407 (1965) (*per curiam*). As set forth

¹ Citizen Data Scientists’ Motion to Intervene (Dkt. 65) remains pending. No oppositions were filed by any party by the Court’s Monday, September 27, 2021 deadline. *See* Dkt. 70.

below, under the principles of *Grove* and *Germano*, the Johnson Plaintiffs’ Motion to Stay this Court’s proceedings indefinitely should be denied, and the Court should provide the Wisconsin Supreme Court with “a time by which it should decide on reapportionment, legislative [and] congressional, if it wishe[s] to avoid federal intervention.” *Grove*, 507 U.S. at 36. Citizen Data Scientists suggest **February 1, 2022**, as the time by which the Wisconsin Supreme Court should decide on reapportionment and **April 1, 2022**, as the time by which final redistricting plans must be adopted.

I. *Grove* Directs Deferral, Not an Indefinite Stay.

As *Grove* noted, and as this Court previously recognized, the State bears “primary responsibility for apportionment of [its] federal congressional and state legislative districts.” 507 U.S. at 34; *see also* Dkt. 60 at 7 (recognizing “the state government’s primacy in redistricting its legislative and congressional maps”).² This includes not only the State’s legislative and executive branches, but also its judicial branch. *See Grove*, 507 U.S. at 33 (emphasizing the “Court’s teaching that state courts have a significant role in redistricting”); *Germano*, 381 U.S. at 409 (“The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.”). However, while *Grove* and *Germano* make clear that the State (including the State judiciary) have primacy in redistricting, this does not require a federal court to dismiss or abstain from a redistricting dispute. Instead, federal courts should simply “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 in original).

² All docket citations are to entries in Case No. 21-cv-512, unless otherwise indicated.

Here, in its September 22, 2021 order, the Wisconsin Supreme Court has indicated that it may begin to “embark on the task” of redistricting the current congressional and legislative plans in the event the Legislature and the Governor cannot together enact new plans. Order at 2, *Johnson v. Wis. Elections Comm’n*, No. 2021AP1450-OA (Wis. Sup. Ct. Sept. 22, 2021) (available at Dkt. 79-1 and Dkt. 81-1). Accordingly, given the Wisconsin Supreme Court’s assumption of original jurisdiction over the current redistricting dispute, the proper course—as *Grove* holds—is to “establish a deadline by which, if the [Wisconsin Supreme Court] ha[s] not acted, the federal court would proceed.” 507 U.S. at 36.

Without proposing any such deadline, the Johnson Plaintiffs have asked this Court to indefinitely “stay these proceedings while the Wisconsin Supreme Court resolves the original action now before it.” Dkt. 79 at 4. But that is not what *Grove* requires. Instead, *Grove* requires deferral to a date certain. During that time of deferral to a date certain, the federal court “must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.” 507 U.S. at 34. However, the federal court can make necessary preparations for when the deferral period ends. For example, in *Arrington v. Elections Board*, 173 F. Supp. 2d 856 (E.D. Wis. 2001) (three-judge court), where plaintiffs filed a complaint alleging that the existing Wisconsin congressional districts were malapportioned and unconstitutional, the federal court determined that comity required it to “refrain from initiating redistricting proceedings . . . until the appropriate state bodies have attempted—and failed—to do so on their own.” *Id.* at 867. Accordingly, it stayed “all substantive judicial proceedings” until February 1, 2002, but in the meantime ordered the parties to submit a “a proposal regarding the schedule and administrative plan” by December 19, 2001, and scheduled a January 7, 2002 “status/planning conference with

counsel for the parties for the purpose of creating an administrative plan for further proceedings.”
Id. at 867–68.

This approach of setting a deadline for the State of Wisconsin to adopt constitutional redistricting plans is consistent with this Court’s previous ruling, which denied “motions for an indefinite stay” on the basis that a schedule in this Court is necessary to ensure “the timely resolution of the case should the state process languish or fail.” Dkt. 60 at 8.³

II. Deadlines of February 1, 2022 for the State of Wisconsin to Act and April 1, 2022 for Final Adoption of Maps Accord with *Grove* and Other Precedents.

The question then becomes, what is the appropriate deadline for the State of Wisconsin, including the Wisconsin Supreme Court, to act? The State, of course, has an obligation to “adopt a constitutional plan ‘within ample time to be utilized in the upcoming election.’” *Grove*, 507 U.S. at 35 (quoting *Germano*, 381 U.S. at 409) (internal alterations omitted). Here, the Wisconsin Fall Partisan Primary is scheduled for August 9, 2022, with the candidate filing period opening on April 15, 2022. *See* Wis. Stat. § 8.15(1). Citizen Data Scientists respectfully suggest that, given these dates, final plans must be adopted by **April 1, 2022**.⁴ Accordingly, the State of Wisconsin,

³ This is also consistent with the approach taken by other district courts that have adopted the principles of deferral set forth in *Grove*. *See, e.g.*, Order, *Balderas v. State*, No. 01-cv-158 (E.D. Tex. July 23, 2001) (three-judge court), Dkt. 30 at 4–5 (deferring proceedings pursuant to *Grove* “until the state fails to develop a redistricting plan by a reasonable deadline imposed by this court,” and setting a deadline “for the conclusion of any state efforts, including but not limited to judicial proceedings, to correct any malapportionment of legislative and Congressional districts”).

⁴ April 1, 2022 is still two weeks before the candidate filing period opens. *See* Wis. Stat. § 8.15(1). However, should some adjustment of the filing period be necessary, it is well within the Court’s jurisdiction to so order. *See, e.g.*, *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 639 (E.D. Wis. 1982) (three-judge court) (ordering that “[a]ll deadlines, relating to such matters as notice of elections, and the circulating and filing of nomination papers for the full election are relaxed to the extent necessary to permit the elections to take place as scheduled” and that the “Elections Board, if necessary, may set new dates that are not inconsistent with the purpose of this order”); *see also, e.g.*, *Perez v. Perry*, No. SA-11-CV-788, 2011 WL 5904716, at *4 (W.D. Tex. Nov. 25, 2011) (three-judge court) (instituting “a temporary stay . . . of candidate filing and qualifications deadlines for all elective offices”), *as amended* (Nov. 26, 2011); *Larios v. Cox*, 305 F. Supp. 2d 1335, 1342–43 (N.D. Ga. 2004) (three-judge court) (noting that the “court has broad

including the Wisconsin Supreme Court, should be given a deadline of **February 1, 2022** as the “time by which it should decide on reapportionment, legislative [and] congressional, if it wishe[s] to avoid federal intervention.” *Grove*, 507 U.S. at 36.

The schedule proposed by Citizen Data Scientists would allow the State—acting through all three branches—almost six months to adopt constitutional redistricting plans (from the U.S. Census Bureau’s release of the redistricting data on August 12, 2021, until February 1, 2022), while affording the federal court two full months either to “adopt[] its own plan” if Wisconsin’s three branches fail to “develop a redistricting plan” or, in the event Wisconsin *does* adopt plans, to entertain any federal challenges to those plans. *Id.* at 36. This gives the Wisconsin Supreme Court sufficient time under *Grove* to perform its duties should the other State branches fail to act, while also ensuring that this Court has ample time to address any federal issues that may remain and to guarantee that constitutional plans are in place for the primary election on August 9, 2022.⁵

An April 1, 2022 deadline for final plan adoption would ensure that a plan is in place 130 days before the August 9, 2022 Fall Partisan Primary. In the last four redistricting cycles—as displayed below—final plans have been adopted between 97 and 125 days before the primary.

equitable power to delay certain aspects of the electoral process if necessary” and finding “no reason why the court could not extend [the candidate qualifying] period if this proves to be necessary to ensure constitutional elections”).

⁵ Compare, e.g., Order, *Balderas v. State*, No. 01-cv-158 (E.D. Tex. July 23, 2001) (three-judge court), Dkt. 30 at 5 (ordering deferral of federal court proceedings that “gives the state ample opportunity to resolve [any malapportionment] issues and at the same time grants th[e] [federal] court the time it needs to act should a resolution in the state arena not be forthcoming”).

Timing of Prior Redistricting Plans and Primary Elections			
Date of Final Plans	How Plans Were Adopted	Date of Primary	Days Between Adoption of Final Plans and Primary
April 11, 2012	Congressional and legislative plans enacted by Legislature; legislative plan amended by federal court order. ⁶	August 14, 2012	125
May 30, 2002	Congressional plan enacted by Legislature; legislative plan established by federal court order. ⁷	September 10, 2002	103
June 2, 1992	Congressional plan enacted by Legislature; legislative plan established by federal court order. ⁸	September 8, 1992	98
June 9, 1982	Congressional plan enacted by Legislature; legislative plan established by federal court order. ⁹	September 14, 1982	97

⁶ 2011 Wisconsin Act 44 (congressional redistricting plan); 2011 Wisconsin Act 43 (legislative redistricting plan); *Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 862 F. Supp. 2d 860 (E.D. Wis. 2012) (three-judge court) (order amending two assembly districts).

⁷ 2001 Wisconsin Act 46 (congressional redistricting plan); *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (three-judge court) (order establishing legislative redistricting plan), *amended*, No. 01-C-0121, 2002 WL 34127473 (E.D. Wis. July 11, 2002) (three-judge court).

⁸ 1991 Wisconsin Act 256 (congressional redistricting plan); *Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992) (three-judge court) (order establishing legislative redistricting plan).

⁹ Michael Gallagher, Joseph Kreye & Staci Duros, *Redistricting in Wisconsin 2020*, at 59 (2020), https://docs.legis.wisconsin.gov/misc/lrb/wisconsin_elections_project/redistricting_wisconsin_2020_1_2.pdf (Legislature, “with the governor’s approval . . . enacted a congressional redistricting plan”); *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982) (three-judge court) (order establishing legislative redistricting plan).

Having final redistricting plans in place about three or four months before the primary is normal not just in Wisconsin, but also in many other States.¹⁰

Two months—from February 1 to April 1, 2022—is likely sufficient time for this Court to act if either the State fails to adopt plans or the State does adopt plans but federal challenges remain. Other federal courts have adjudicated redistricting disputes in two months or less when needed. *See, e.g., Stenger v. Kellett*, No. 4:11CV2230 TIA, 2012 WL 601017, at *2, *13 (E.D. Mo. Feb. 23, 2012) (three-judge court) (Missouri federal court completed discovery and trial within two months’ time, and adopted a new districting plan that met all federal and state constitutional requirements); *Order, Session v. Perry*, No. 2:03-CV-354 (E.D. Tex. Oct. 30, 2003), Dkt. 19; *Mem. Op., Session v. Perry*, No. 2:03-CV-354 (E.D. Tex. Jan. 6, 2004) (three-judge court), Dkt. 162 (Texas congressional redistricting adjudicated in just over two months where plaintiffs’ challenges were filed in mid-October, an October 30 court order set trial for December 8, and the court issued an extensive ruling on the multiple constitutional and statutory issues involved on January 6).¹¹ Further, the Court can set a status/scheduling conference before the February 1, 2022 date so an expedited schedule is in place as of February 1, 2022 in the event it is needed.

Citizen Data Scientists respectfully submit that this proposed schedule reflects appropriate deference to the State legislative, executive, and judicial branches, while still ensuring that this Court has ample time to resolve any outstanding issues well in advance of the August 9, 2022 primary election.

¹⁰ *See All About Redistricting, Maps Across the 2010 Cycle, available at <https://redistricting.ils.edu/resources/maps-across-the-cycle-2010-congress/>.*

¹¹ Citizen Data Scientists do not anticipate any need for factual discovery on the issue of liability with respect to the malapportionment claims.

CONCLUSION

Citizen Data Scientists respectfully submit for the Court's consideration that the Motion to Stay should be denied and the Court should establish February 1, 2022, as the date for the State's legislative, executive, and judicial branches to finish their processes, and April 1, 2022, as the date to adopt final redistricting plans.

Dated: October 1, 2021

Respectfully submitted,

/s/ Sarah A. Zylstra

Michael P. May (State Bar No. 1011610)

Sarah A. Zylstra (State Bar No. 1033159)

Tanner G. Jean Louis (State Bar No. 1122401)

Boardman Clark LLP

1 South Pinckney St.

Suite 410

Madison, WI 53701

(608) 286-7161

(608) 283-1741

mmay@boardmanclark.com

szylstra@boardmanclark.com

David J. Bradford (*pro hac vice*)

Jenner & Block LLP

353 N. Clark St.

Chicago, IL 60654

(312) 923-2975

dbradford@jenner.com