

**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,

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

21-cv-512-jdp-ajs-eec

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, and REBECCA ALWIN,

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

21-cv-534-jdp-ajs-ec

Defendants.

**JOHNSON INTERVENOR-PLAINTIFFS' MOTION FOR LEAVE TO FILE
REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS**

Intervenor-Plaintiffs Billie Johnson, Eric O'Keefe, Ed Perkins, and Ronald Zahn respectfully request that this Court grant them leave to file the attached short reply in support of their motion to stay proceedings, ECF No. 79. Given the number of responses filed to this motion, as well as motions for leave to file additional responses by certain of the parties, permitting the Johnson Intervenor-Plaintiffs to submit a brief reply to address these numerous counterarguments is appropriate and will aid the Court in its decision-making.

For the foregoing reasons, the Johnson Intervenor-Plaintiffs respectfully request that this Court grant them leave to file the attached reply.

Dated this 5th day of October, 2021.

Respectfully submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Intervenor-Plaintiffs

/s/ Anthony LoCoco

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and

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Intervenor-Defendant.

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**JOHNSON INTERVENOR-PLAINTIFFS' REPLY
IN SUPPORT OF MOTION TO STAY PROCEEDINGS**

The *Grove* Court did not leave it to the lower courts to guess at what deferral requires in the context of state efforts to redistrict. It went to great pains to define the term, explaining that it means that “federal courts should not prematurely *involve themselves* in redistricting,” a sweeping phrase. *Grove*, 507 U.S. at 33 n.1 (emphasis added). It also analogized to “*Pullman* ‘deferral,’” the doctrine under which “federal courts should not prematurely resolve the constitutionality of a state statute.” *Id.* “In succeeding cases that have applied the *Pullman* doctrine, the common practice has been for the district court to retain jurisdiction but to stay proceedings while awaiting a decision in the state courts.” *United States v. Michigan Nat. Corp.*, 419 U.S. 1, 4 (1974) (per curiam). Yet under the conception of those parties who oppose a stay in this case, it seems, in future cases where *Pullman*

abstention is invoked federal courts should proceed with discovery, briefing, and argument relating to the constitutional issue while state litigation plays out—just in case.

The idea that this Court should not alter these proceedings at all until trial is not feasible. In fact, this Court has already been presented with two illustrations of exactly how allowing federal redistricting litigation to proceed without a stay “impede[s]” concurrent state litigation. *Grove*, 507 U.S. at 34.

First, the *Hunter* Plaintiffs have asked this federal court to determine whether, as a matter of state law, the Wisconsin Supreme Court has a state constitutional congressional redistricting claim before it. Obviously, the proper route would be to obtain an answer on that question from the Wisconsin Supreme Court. Instead, the parties are now forced to brief the question before this Court, and this Court is apparently supposed to rule on the scope of the *Wisconsin Supreme Court’s* order accepting jurisdiction. Let us hope the Wisconsin Supreme Court did not wish to have a say in the matter!¹

Second, the parties have been asked to file—and thus to commit to—proposed schedules for getting maps in place while briefing before the Wisconsin Supreme Court on that very question is still ongoing and while that case (and the claims and

¹ The state constitutional congressional redistricting claim is indisputably before the Wisconsin Supreme Court. The original action petition repeatedly asks whether the congressional district maps violate the Wisconsin Constitution’s one person one vote principle. *See, e.g.* ECF No. 21-4:1 (issue statement). The Wisconsin Supreme Court granted the petition without limiting the issues. ECF No. 91-1:2. The *Hunter* Plaintiffs’ complaints amount to improper merits arguments about what the Wisconsin Constitution requires.

parties it will involve) is still taking shape. But under *Grove* it is the *state* case that is supposed to take primacy.

Those who have opposed the motion for a stay do not even attempt to grapple with the multiple conflicts, contradictions, inconveniences, and inconsistencies to follow from litigating the same issues in two courts at the same time. How are the parties to comply with conflicting discovery schedules and orders? In which court are the parties to file procedural, discovery and other motions? The *BLOC* Plaintiffs unseriously suggest as a “solution” that the Legislature, Governor, and Johnson Intervenor-Plaintiffs simply withdraw from the federal litigation. ECF No. 95:10. They do not have a real answer and instead ignore the obvious solution, which is for this Court to stay this matter and await the judgment of the Wisconsin Supreme Court. Doing anything else would be a statement by this Court that it does not believe the Wisconsin Supreme Court will perform its constitutional duties—a statement that undercuts all notions of comity and federalism.

Nor have the opposing parties adequately explained why requiring concurrent federal litigation does not constitute an “imped[iment]” under *Grove*. This Court has been told for weeks now that time is of the essence. Yet the same parties calling for speed now wish to double all litigation requirements rather than let the forum whose responsibility it is to adjudicate redistricting do so as efficiently as possible.²

² Seemingly unaware of the irony, the *Hunter* Plaintiffs *do* take the time to voice concern about “wast[ing] judicial resources,” “inefficient delays,” and “redundan[cies],” ECF No. 93:2—not with respect to the Herculean undertaking of unnecessarily litigating two competing redistricting cases, but the fact that the Johnson Intervenor-Plaintiffs filed a second stay motion. The Johnson Intervenor-Plaintiffs thought it appropriate to immediately inform this Court about the grant of their original action petition as they were ordered to do and, in the same notice, asked again for a stay. The *Hunter*

These parties have flipped the *Grove* standard on its head. Rather than awaiting “evidence that [the] state branches will fail timely to perform [their] duty,” *Grove*, 507 U.S. at 34—evidence of *failure*—the parties want this Court to order the Wisconsin Supreme Court to prove to its satisfaction that it will *succeed*. *Grove* does not authorize this Court to sit in judgment of, and supervise, the high court of a separate sovereign in this manner. That was the mistake the Minnesota district court made in *Grove*. Instead, this Court should act at all only when the Wisconsin Supreme Court (following the political branches) has decided that it will not, or shown that it cannot, complete redistricting. Until then, this Court should stay federal proceedings.³

Dated this 5th day of October, 2021.

Respectfully submitted,

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Plaintiffs would have preferred that the Intervenor-Plaintiffs bury their request within the parties' later-filed proposed scheduling order. Of course, this assumes that the creation of the proposed scheduling order itself is not something that should have been stayed. This Court may disagree with the Johnson Intervenor-Plaintiffs on this question, but that alone is not reason to deny the motion to stay, as the *Hunter* Plaintiffs request.

³ As the the Johnson Intervenor-Plaintiffs indicated in their motion, an informational status conference, whether in November or some later date, would be consistent with *Grove*. *Grove* contemplates federal action when certain conditions are reached, and in order to know when those conditions are reached the federal court should be apprised of them.