

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

LISA HUNTER, et al.,

Plaintiffs,

v.

MARGE BOSTELMANN, et al.,

Defendants,

and

WISCONSIN LEGISLATURE, et al.,

Intervenor-Defendants.

21-cv-512-jdp-ajs-eec

BLACK LEADERS ORGANIZING FOR
COMMUNITIES, et al.,

Plaintiffs,

v.

ROBERT F. SPINDELL, JR., et al.,

Defendants.

21-cv-534-jdp-ajs-eec

**JOINT SUBMISSION ON STATUS OF PROCEEDINGS IN THE WISCONSIN
SUPREME COURT**

In accordance with the Court's October 6, 2021, order staying discovery until at least November 5, dkt. 103,¹ counsel for the plaintiffs and defendants in the consolidated actions conferred via email to provide a joint status update to the Court.

I. Interim proceedings

A. Federal proceedings

Since this Court issued that order, briefing has been completed on the intervenor-defendant Wisconsin Legislature's motions to dismiss, dkt. 86 and 87, as well as Congressmen Glenn Grothman, Mike Gallagher, Brian Steil, Tom Tiffany, and Scott Fitzgerald's ("Congressmen") motion to dismiss the *Johnson* Plaintiffs' complaint, dkt. 105, 107, 112. Those motions remain pending before this Court. Briefing has also been completed at the United States Supreme Court on the Wisconsin Legislature's Petition for a Writ of Mandamus and Petition for Writ of Prohibition, dkt. 82. According to the Supreme Court's distribution schedule, the petition and responses will be distributed for conference in November or December. *See* Sup. Ct. R. 20.5.

B. Wisconsin redistricting efforts

On October 20, 2021, Senate Bills 621 and 622, and Assembly Bills 624 and 625, with proposed legislative districts, were introduced.² Committee hearings have occurred, and according to the Legislature, legislative leadership expects that there will be a floor vote on the redistricting bills during the floor period ending on November 11, 2021.

On November 2, 2021, the People's Maps Commission announced its final proposed redistricting maps.

¹ All docket references are to the '512 case docket unless otherwise noted.

² *See* "Proposed Maps," <https://drawyourdistrict.legis.wisconsin.gov/ProposedMaps>.

C. Wisconsin Supreme Court proceedings

In the Original Action before the Wisconsin Supreme Court, *Johnson et al. v. Wisconsin Elections Commission et al.*, No. 2021AP1450-OA, the court has issued additional orders since granting the petition for original action on September 22, 2021. Described below, all parties participating in these consolidated federal cases are now also parties to the state supreme court proceedings as petitioners, intervenor-petitioners, respondents, or intervenor-respondents, except for some of the *BLOC* individual plaintiffs. The orders and briefing in the Wisconsin Supreme Court proceedings include:

1. On September 22, 2021, the Wisconsin Supreme Court directed all parties and prospective intervenors to submit simultaneous letter briefs addressing the following question:

When (identify a specific date) must a new redistricting plan be in place, and what key factors were considered to identify this date?

Order of Sept. 22, 2021, *as amended*, Sept. 24, 2021.³ In accordance with that order, on October 6, all parties and prospective intervenors submitted letter briefs informing the court when a new redistricting plan must be in place. They then submitted response letter briefs on October 13 that responded to other parties' submissions. All letter briefs are on file with the Wisconsin Supreme Court.

2. On September 22, 2021, the Wisconsin Supreme Court also directed all prospective intervenors to file motions to intervene. On October 14, 2021, the Court granted intervention to multiple parties, almost all of whom are parties to the action before this Court. The parties in the Wisconsin Supreme Court case now include: the *Hunter* Plaintiffs; a subset of the *BLOC*

³ The Wisconsin Supreme Court's orders discussed herein were previously filed as exhibits in dkt. 111-1, 111-2, 111-3.

Plaintiffs⁴; the Congressmen; “Citizen Mathematicians and Scientists” Gary Krenz, Sarah J. Hamilton, Stephen Joseph Wright, Jean-Luc Thiffeault, and Somesh Jha (whose motion to intervene in this case was denied, were granted leave to intervene as petitioners in the state court action); the Wisconsin Legislature; and Governor Tony Evers, in his official capacity; and Wisconsin Senator Janet Bewley, Senate Democratic Minority Leader of the Wisconsin Legislature, on behalf of the Senate Democratic Caucus (who is not a party to this action). The remaining parties to this action, the Johnson intervenor-plaintiffs and the Wisconsin Elections Commission, already were parties to the original action. Consequently, all seven parties to the consolidated federal cases are now parties to the state court action.

3. Also in the same October 14 Order, the Wisconsin Supreme Court directed the petitioners and intervenor-petitioners to file a single controlling, omnibus petition, and directed the Respondents and Intervenor-Respondents to file an answer. In accordance with that order, Petitioners and Intervenor-Petitioners filed an omnibus petition on October 21, 2021. That omnibus amended petition is now on file with the Wisconsin Supreme Court and supersedes the previously filed petition in that action. Respondents and Intervenor-Respondents each filed an answer to the omnibus amended petition on October 28, 2021.

4. Also on October 14, the Wisconsin Supreme Court ordered all parties to “identify and list disputed facts” and to “suggest a procedure for resolving them,” as well as to brief “what litigation process should [it] use to determine a constitutionally sufficient map” by November 4. *See* Dkt. 111-2, 111-3, Orders of Oct. 14, 2021. In accordance with that order, on November 4,

⁴ Black Leaders Organizing for Communities, Voces de la Frontera, the League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson and Rebecca Alwin (all plaintiffs identified in the original BLOC complaint, ‘534 case dkt. 1) moved to intervene at the Wisconsin Supreme Court. The remaining BLOC plaintiffs did not seek intervention at the Wisconsin Supreme Court, and intend to pursue their Voting Rights Act Section 2 claims in federal court.

2021, all parties submitted a joint stipulation of facts and law, as well as a list of disputed facts and suggested procedures for resolving such disputed facts. The joint submission is on file with the Wisconsin Supreme Court.

5. The Wisconsin Supreme Court issued a second order on October 14, 2021, directing all parties simultaneously to file on October 25 briefs addressing the following four issues, with simultaneous response briefs filed on November 1:

- 1.) Under the relevant state and federal laws, what factors should we consider in evaluating or creating new maps?
- 2.) The petitioners ask us to modify existing maps using a "least-change" approach. Should we do so, and if not, what approach should we use?
- 3.) Is the partisan makeup of districts a valid factor for us to consider in evaluating or creating new maps?
- 4.) As we evaluate or create new maps, what litigation process should we use to determine a constitutionally sufficient map?

Consistent with that order, all parties filed briefs addressing each of these questions on October 25 and response briefs regarding the same on November 1. All briefs are on file with the Wisconsin Supreme Court.

II. The schedule of the original action before the Wisconsin Supreme Court.

Briefing in response to the above-referenced orders by the Wisconsin Supreme Court has now concluded. That briefing included submissions by each of the parties on the process and timing they each proposed for resolution of the original action. Yesterday's joint stipulation of facts and law was the final filing directed by the court's recent orders.

The *Hunter* and *BLOC* plaintiffs note that the Wisconsin Supreme Court has not yet ruled on any of the issues briefed by the parties in that court. No schedule for further briefing or evidentiary hearings has been set.

The Legislature, the *Johnson* plaintiffs, and the Congressmen note in response that they expect that the Wisconsin Supreme Court will soon order a schedule and guidance regarding proposed remedies based on the parties' extensive briefing regarding the same and that the court will also decide various questions it has asked the parties to brief, which will inform the parties' proposed remedies submitted to that Court.

III. The scope of any factual development process.

The parties' joint November 4 filing at the Wisconsin Supreme Court sets forth stipulations of fact and law as requested by the Wisconsin Supreme Court, as well as the parties' proposed disputed stipulations of fact. As noted above, the parties' briefs filed on October 25 and November 1 proposed litigation processes that the Wisconsin Supreme Court should "use to determine a constitutionally sufficient map."

The *Hunter* and *BLOC* plaintiffs note that the court has not yet identified a process for factual development by the parties or the process that it will follow for fact-finding.

The Legislature, the *Johnson* plaintiffs, and the Congressmen note in response that the Wisconsin Supreme Court has specifically asked the parties to "identify and list disputed facts" and to "suggest a procedure for resolving them," as well as to brief "what litigation process should [it] use to determine a constitutionally sufficient map." *See* Dkt. 111-2, 111-3, Orders of Oct. 14, 2021. All parties have responded to those questions in briefs filed on October 25, November 1, and a joint submission filed on November 4. All of those briefs propose various procedures for resolving the same malapportionment at issue here, including any questions of disputed fact that could arise with respect to proposed remedies.

IV. The scope of the legal issues that the parties intend to raise.

The omnibus petition submitted to the Wisconsin Supreme Court presents claims alleging malapportionment of state legislative and congressional districts in violation of the Wisconsin and U.S. Constitutions. The petition further alleges that the Wisconsin legislature and governor are likely to reach an impasse on new districts, and that the Wisconsin Supreme Court will be required to determine new state legislative and congressional districts that comply with state and federal law.

The *BLOC* Plaintiffs note that Voting Rights Act Section 2 claim raised by *BLOC* Plaintiffs in this consolidated federal action is not before the state court.

The Legislature notes that the *BLOC* Plaintiffs' Voting Rights Act claim pending here challenges the *existing* districts, which all three branches of the Wisconsin government are working to redraw. *See* Dkt. 110, Legislature's Reply in Support of Mot. to Dismiss. With respect to what is before the state court, every party participating in the Wisconsin Supreme Court proceedings has agreed, as part of briefs filed on October 25 and November 1, that the court is required to comply with section 2 of the Voting Rights Act as part of any remedy to redress Petitioners' and Intervenor-Petitioners' malapportionment claims.⁵

⁵ *See Johnson* Petitioners Br. 20-21, *Johnson v. Wisconsin Election's Comm'n*, No. 2021AP1450-OA (Oct. 25, 2021) ("This Court may be asked to consider the requirements of the VRA in approving maps for Wisconsin, as other State Courts have done in reviewing a redistricting plan."); *BLOC* Intervenor Br. 7-8, *Johnson v. Wisconsin Elections Comm'n*, No. 2021AP1450-OA (Oct. 25, 2021) ("In evaluating or creating new maps, this Court must also consider whether those maps comply with Section 2 of the Voting Rights Act."); *Hunter* Intervenor Br. 20-23, *Johnson v. Wisconsin Elections Comm'n*, No. 2021AP1450-OA (Oct. 25, 2021) ("legislative districts must provide minority groups with an equal opportunity to participate in the political process and elect a candidate of their choice, whether alone or in a coalition with others"); Evers Br. 5, *Johnson v. Wisconsin Elections Comm'n*, No. 2021AP1450-OA (Oct. 25, 2021) ("maps must comply with the federal Voting Rights Act"); Citizen Mathematicians & Scientists Br. 10-11, *Johnson v. Wisconsin Elections Comm'n*, No. 2021AP1450-OA (Oct. 25, 2021) ("this Court should focus not on the percentage of minority citizen voting-age population in a particular district, but rather on actual electoral opportunity for minority voters—a track record of effectiveness in elections"); Congressmen's Br. 4, *Johnson v. Wisconsin Elections Comm'n*, No. 2021AP1450-OA (Oct. 25, 2021) ("any remedial map must comply with Section 2 of the Voting Rights Act"); Legislature's Br. 27, *Johnson v. Wisconsin Elections Comm'n*, No. 2021AP1450-OA ("The Court will also have to confirm that any remedy complies with the Fourteenth Amendment and the Voting Rights Act.").

Further, the Congressmen note that the *BLOC* Plaintiffs' Voting Rights Act Section 2 claim challenges only Wisconsin's state legislative districts, not Wisconsin's congressional districts. *See generally* Dkt. 44.

V. Parties' respective positions regarding the continued proceedings in this Court.

Hunter and BLOC Plaintiffs' Position: The start to the 2022 election season is fast approaching, and the Wisconsin Supreme Court has yet to give any indication that it will complete its parallel proceedings in advance of the March 1 deadline for final maps, let alone in advance of the trial dates that this Court has reserved. Besides inviting briefing on preliminary matters—resulting in hundreds of pages of filings from parties taking all manner of inconsistent positions—the state court has not decided which claims it will address, how it will address them, or, most importantly, when that litigation will be resolved. Moreover, even in their November 4 filing with the Wisconsin Supreme Court, all parties to that action other than the Congressmen expressly stated their positions that additional discovery and record development (including expert reports and proposed district maps) is necessary before that court may rule on the merits.

Contrary to the Legislature's suggestion, this Court must not merely assume that the Legislature will adopt timely redistricting plans, or that the state court will complete its own process expeditiously. Those institutions are free to continue their efforts, but “[f]ederal rights are at stake.” Oct. 6 Order, Dkt. No. 103 at 3. Accordingly, this Court should continue to follow “a schedule that will allow for the timely resolution of the case should the state process languish or fail.” Sept. 16 Order, Dkt. No. 60 at 8. A logical next step would be for the parties to file proposed map(s) and briefs in support in this Court by December 3, which will not cause any disruption to the state proceedings. And while the Legislature may prefer a different forum, its arguments for dismissal have already been rejected, *id.*, and its intervention in this case was premised on the

understanding that it would not prejudice the original parties with undue delay. *See* Dkt. No. 9 at 4. Plaintiffs recommend that litigation in this Court continue along the schedule that Plaintiffs proposed in their October 1 Joint Proposed Discovery Plan and Pretrial Schedule, Dkt. No. 98 at 20-22, with additional status updates on the state proceedings provided as appropriate.

The parties have expressly reserved the right to further develop the record in the state-court proceeding. The record before the state court is not complete and the parties are not limited or bound in any way from further developing the record there. The Legislature argues below that the *BLOC* Plaintiffs' Voting Rights Act claim is focused on the existing districts, which will be redrawn shortly. But so is the malapportionment claim, and the Legislature offers no reason why the two should be treated differently. As explained in the *BLOC* Plaintiffs' brief in response to the Legislature's motion to dismiss, dkt. 109, *Scott v. Germano* and its progeny expressly authorize federal courts to retain jurisdiction over redistricting cases, even while the redistricting process is playing out among state actors. The Legislature fails to understand what federal courts all recognize: *Germano* abstention is a *deferral* abstention doctrine, not a *dismissal* abstention doctrine. *See, e.g., Benavidez v. Eu*, 34 F.3d 825, 832-33 (9th Cir. 1994) (collecting cases); *Bianchi v. Griffing*, 393 F.2d 457, 461 (2d Cir. 1968) ("Following the practice sanctioned in *Scott v. Germano*, we direct the District Court to fix a reasonable time within which the appropriate state agencies may devise a constitutionally valid plan of reapportionment. The District Court should retain jurisdiction and if a valid plan is not adopted expeditiously it may enter such orders as it deems appropriate.")

Legislature's Position: The Legislature opposes the *Hunter* and *BLOC* Plaintiffs' suggestion that the parties submit proposed remedial maps and briefs (and presumably accompanying expert reports) on December 3 or at any point in this Court.

For the reasons previously stated, there is no federal subject-matter jurisdiction to adjudicate this case. Plaintiffs continue to misunderstand or misstate the jurisdictional defects here. They assert that “[f]ederal rights are at stake,” but federal rights are not justiciable in the abstract. There must be an Article III case or controversy. And here, there is none. There is no “realistic danger” that the existing districts, the basis of Plaintiffs’ malapportionment and VRA claims, will be re-used in next year’s elections. *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979); *see also Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013). The recent orders by the Wisconsin Supreme Court make exceptionally clear that the state court is positioned to resolve any malapportionment claims by whatever date that court deems necessary under Wisconsin law (on which that court has the final word) to hold next year’s elections. *See* Dkt. 111-1, 111-2, 111-3 (Wisconsin Supreme Court Orders of September 22, 2021 and October 14, 2021).⁶ Further, the proceedings in the Wisconsin Supreme Court have progressed well beyond those in this Court; all pleadings have been filed; there are no challenges to jurisdiction; there is full agreement that the Wisconsin Supreme Court, in the event of an impasse, can order a remedy based on both state and federal law, *cf. Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106

⁶ The Voting Rights Act claim does not cure the jurisdictional defect, nor is it a basis for ignoring *Grove* and requiring all parties to waste substantial resources and litigate two cases about existing districts at the same time. *See Grove v. Emison*, 507 U.S. 25, 34-35 (1993) (“It is true that the Emison plaintiffs alleged that the 1983 legislative districting scheme violated the Voting Rights Act, while the Cotlow complaint never invoked that statute. *Germano*, however, does not require that the federal and state-court complaints be identical; it instead focuses on the nature of the relief requested: reapportionment of election districts. Minnesota can have only one set of legislative districts, and the primacy of the State in designing those districts compels a federal court to defer.”). Including for the reasons stated in the Legislature’s briefs filed in the Wisconsin Supreme Court and in this Court, there is no reason to assume that there will be a basis for follow-on litigation in this Court to litigate the Voting Rights Act claim about the *existing* districts that will soon be redrawn, or any future Voting Rights Act claim (a claim that has *not* been raised in the pending federal complaint). *See* Dkt. 110 at 5-6. The *BLOC* plaintiffs who have intervened in the state supreme court have averred that any new map ordered by the court must comply with the Voting Rights Act, as has every other party, *supra*. And the state court is fully capable of applying that federal law. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (“We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.”).

(1984); issues of fact and law have been agreed upon; issues of law with respect to any future remedy have been fully and extensively briefed; and orders regarding remedial submissions and a hearing date, if necessary to resolve disputed facts once the parties submit proposed remedies, are forthcoming. In light of these ongoing proceedings in the Wisconsin Supreme Court and in light of the Legislature's pending Petition for Writ of Mandamus or Prohibition, the Legislature will seek any and all available emergency relief from any order in this case other than a dismissal or continued stay of these federal proceedings.

Johnson Plaintiffs' Position: The Johnson Intervenor-Plaintiffs continue to believe that federal proceedings must be stayed until there is evidence that the state branches of government will fail timely to redistrict. See *Grove v. Emison*, 507 U.S. 25, 34 (1993). As this report shows, not only is there a complete lack of such evidence, but all evidence is directly to the contrary.

The Congressmen's Position: The Congressmen oppose in the strongest possible terms the *Hunter* and *BLOC* Plaintiffs' request that this Court order the parties to submit proposed map(s) and supporting briefs while the Wisconsin Supreme Court is actively engaged in redistricting. Requiring those submissions would be the equivalent of this Court concluding that the Wisconsin Supreme Court "will fail timely to perform" its redistricting "duty," despite all indications that it is "fully prepared to adopt a congressional plan in as timely a manner as the District Court." *Id.* at 34, 37. Any such action would be an unprecedented violation of federal-state comity and gravely disrespectful to the Wisconsin Supreme Court, whose Justices are elected by the people of Wisconsin to serve as the highest judicial tribunal in the State. See Wis. Const. art. VII, §§ 3-4. So, consistent with the Congressmen's previously filed motions to dismiss in this case, the Congressmen continue to respectfully submit that this Court must dismiss this case. Dkts. 30-2, 105, 112. Finally, as the *Hunter* and *BLOC* Plaintiffs reference, the Congressmen's position before

the Wisconsin Supreme Court is that, if the court follows a “least-change” approach to adopting a remedial map, the court “may well be able to choose a ‘least-change’ remedial congressional map without need for further factfinding.” Resp. Br. of the Congressmen at 26–27, *Johnson v. Wis. Elections Comm’n*, No.2021AP1450-OA (Wis. Nov. 1, 2021).⁷

Governor’s Position: As stated in previous filings, the Governor believes that this Court should continue with the case via an appropriate schedule to ensure new maps are in place by March 1, 2022, in the event Wisconsin’s branches are unable to do so.

WEC’s Position: The WEC joins the Governor’s position.

Dated: November 5, 2021

Respectfully submitted,

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By: /s/ Douglas M. Poland

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⁷ Available at <https://acefiling.wicourts.gov/document/uploaded/2021AP001450/448986>

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