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

LISA HUNTER, *et al.*,

Plaintiffs,

v.

MARGE BOSTELMANN, in her official capacity as Secretary of the Wisconsin Elections Commission, *et al*.,

Defendants.

Civil Action No. 21-cv-512-jdp-ajs-eec

HUNTER PLAINTIFFS' OPPOSITION TO JOHNSON INTERVENORS' SECOND MOTION TO STAY PROCEEDINGS

INTRODUCTION

Intervenor-Plaintiffs Billie Johnson, Eric O'Keefe, Ed Perkins, and Ronald Zahn (the "Johnson Intervenors") have renewed their motion to stay, repeating the same mistaken arguments that this Court already has correctly rejected. They contend that because the Wisconsin Supreme Court has accepted jurisdiction of a related redistricting case, there is no more for this Court to do and all proceedings should be stayed. That is wrong, both procedurally and substantively. First, a second motion to stay is an inappropriate vehicle to raise these concerns because the Court has instructed the parties to air precisely these disputes in their joint proposed discovery plan and pretrial schedule. Second, the Court's scheduling parameters already provide as much time as is reasonably possible for state institutions to adopt redistricting plans in the first instance, and so proceeding under that framework does not risk any unnecessary disruption of state efforts. And third, there especially is no basis to stay claims related to congressional districts that are not properly before the Wisconsin Supreme Court at all. For all of these reasons, the Johnson Intervenors' Second Motion to Stay Proceedings should be denied.

BACKGROUND

Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, and Kathleen Qualheim (the "Hunter Plaintiffs") filed this action on August 13, 2021, bringing federal law claims related to the unconstitutional malapportionment of Wisconsin's legislative and congressional districts. *See* Compl., Dkt. No. 1. Ten days later, the Johnson Intervenors filed a petition for original action in the Wisconsin Supreme Court, seeking to challenge the malapportioned legislative districts under Article IV of the Wisconsin Constitution, and seeking to challenge the malapportioned congressional districts without reference to any cause of action. *See* Pet., *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Sup. Ct. Aug. 23, 2021).

The Johnson Intervenors then sought intervention in this Court and immediately requested a stay of proceedings. *See* Mot. to Intervene, Dkt. No. 21. The Court granted intervention but denied the requested stay, explaining, "If the Wisconsin Supreme Court grants the [Johnson Intervenors'] petition, the parties should inform the court and the court will consider the Supreme Court's action in setting the schedule." Sept. 16 Order, Dkt. No. 60 at 8, n.3. The Court has since ordered the parties "to confer and submit a joint proposed discovery plan and pretrial schedule," with the option to "submit alternatives on points of unresolvable disagreement." Sept. 21 Order, Dkt. No. 75 at 3. After the Wisconsin Supreme Court granted the petition on September 22, this Court further noted that "the proposed schedule should also take into account the [S]upreme [C]ourt's decision." Sept. 23 Order, Dkt. No. 80.

ARGUMENT

I. Every scheduling dispute does not warrant a stay of proceedings.

The Johnson Intervenors' latest motion to stay should be summarily rejected for the same reasons as their first one: all scheduling disputes can and should be presented for the Court's consideration in the parties' joint scheduling proposal. Twice now, the Court has explicitly invited the parties to propose a discovery plan and pretrial schedule for this case. *See* Aug. 27 Order, Dkt. No. 24 at 4; Sept. 21 Order. The Johnson Intervenors' eight-paragraph notice and motion to stay easily could have been incorporated into that joint submission, which also provides the appropriate forum for the parties to confer and propose the appropriate length for any such stay. Gumming up these proceedings with redundant motions and their attendant briefing schedules merely wastes judicial resources and inappropriately interposes inefficient delays. For that reason alone, the motion to stay should be disregarded.

II. Preparations for a January trial must continue.

The Johnson Intervenors' argument rests entirely on a misapplication of considerations derived from *Growe v. Emison*, 507 U.S. 25 (1993). In *Growe*, the Supreme Court determined the district court overstepped its bounds when it "actively prevented" the state court from issuing its own redistricting plan by (1) staying the state court panel's proceedings, (2) enjoining the parties to the state proceedings from implementing the state court's remedial redistricting plan, and (3) proceeding to adopt its own districting plans even when the state court was otherwise ready to timely implement a plan. *Id.* at 36, 30-32. Nothing of this sort has ever been proposed or requested here.

Growe's rule is simple: "Absent evidence that the[] state branches will fail timely to perform that [redistricting] duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* at 34. The Johnson Intervenors have failed to conjure even a hypothetical scenario by which this Court would be asked to "affirmatively obstruct state reapportionment." Nor have they identified any possibility that proceedings in this Court would "impede" the Wisconsin Supreme Court. The Hunter Plaintiffs have not requested this Court to stay any concurrent state court proceedings; nor have they sought to enjoin any state-drawn map; nor have they requested that this Court adopt any districting plans before the last possible moment when it may reasonably do so ahead of the start to next year's election process.

This Court has already indicated it will proceed cautiously, leaving room to the extent possible for the state's legislative and executive branches to preempt these proceedings by adopting a new plan and for the state courts to adjudicate in the first instance any redistricting claims properly before them. But there is no reason for the Court to depart from its stated intention

to "set a schedule that will allow for the timely resolution of the case should the state process languish or fail." Sept. 16 Order at 8. This is precisely as *Growe* instructs. According to *Growe*, "It would have been appropriate for the District Court to establish a deadline by which, if the [state court panel] had not acted, the federal court would proceed." 507 U.S. at 36; *see also Scott v. Germano*, 381 U.S. 407, 409 (1965) (remanding a redistricting case "with directions that the District Court enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, may validly redistrict the Illinois State Senate").

As the Hunter Plaintiffs have proposed, and as this Court already has signaled it is inclined to do, the scheduling order should work backwards to provide as much time as reasonably possible for state institutions to act first. As the Wisconsin Elections Commission has explained, final maps must be in place by March 1, 2022. *See* Answer, Dkt. No. 41. To ensure judgment is entered by that date, trial must conclude no later than January 28, 2022. Sept. 21 Order at 3. Continuing to work backwards from that deadline, the Hunter Plaintiffs have proposed pretrial deadlines corresponding to the minimum amounts of time necessary for the parties to submit and respond to potential redistricting maps. Because this schedule already defers substantive proceedings for as long as possible, any further stay would threaten severe injuries to the Hunter Plaintiffs' constitutional rights—and worse, there would no longer be any opportunity for those injuries to be prevented or otherwise remedied. Should redistricting efforts in the Legislature or in the Wisconsin Supreme Court languish or fail, the pretrial schedule entered here must guarantee that this Court will have sufficient time to adopt lawful state senate, state assembly, and congressional maps. Further abstention beyond the Hunter Plaintiffs' proposed deadlines would perilously threaten that critical objective.

III. Claims related to congressional districts are properly before this Court alone.

The Johnson Intervenors' second motion to stay is premised on a faulty assumption: that they have pleaded state law claims before the Wisconsin Supreme Court that will necessarily remedy all of the federal law claims that the Hunter Plaintiffs have brought here. While this may be true for claims related to Wisconsin's legislative districts, the Johnson Intervenors have plainly failed to allege any state law claims related to Wisconsin's congressional districts. Because there remains "no indication" that parallel congressional redistricting claims will be submitted to and heard by any state court, Sept. 16 Order at 7, there is no basis for this Court to defer or abstain from adjudicating those brought by the Hunter Plaintiffs here.

The Johnson Intervenors' state court petition purports to challenge Wisconsin's legislative and congressional districts, and their entire legal basis for these claims is provided in a single sentence:

> In *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 564, 126 N.W.2d 551 (1964), this Court said, with respect to redistricting cases, that such cases involve a denial of voting rights under art. IV of the Wisconsin Constitution (as well as the equal protection clause of the U.S. Constitution).

Pet. ¶ 2. In a footnote, they add, "The Petitioners do not raise a claim under the federal constitution in this proceeding." *Id.* n.1. It is thus abundantly clear that the Johnson Intervenors have failed to present any colorable challenge in state court to Wisconsin's congressional districts.

Article IV of the Wisconsin Constitution plainly does not support a congressional redistricting claim. That Article creates the state's legislative branch, providing for a senate and assembly organized according to the prescribed rules. As relevant here, section 3 provides: "At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." This section—along with the U.S. Constitution's Equal Protection Clause, as the

Johnson Intervenors note—has been interpreted to require equally populated *state legislative districts*. *See Zimmerman*, 22 Wis. 2d at 564; *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). No other interpretation is remotely plausible. The text of the section refers to districts for members of "the senate and assembly"; the section is housed in an article that is concerned exclusively with the state legislature; and the section has been interpreted in *Zimmerman* to apply only to legislative map-drawing.

Tellingly, nothing in Article IV—indeed, nothing in Wisconsin's Constitution at all—mentions congressional districts, let alone prescribes a rule for their apportionment. The equal population requirement for congressional districts is supplied instead by Article I, section 2 of the U.S. Constitution, as the Hunter Plaintiffs and Johnson Intervenors have alleged here, and here alone. *See* Dkt. No. 1 at ¶¶ 44-49; Dkt. No. 21-1 at ¶¶ 40-42. Indeed, the Johnson Intervenors have expressly disclaimed all federal constitutional claims in the state court proceeding. Pet. ¶ 2 n.1. This action is thus the only active case in any court where plaintiffs have alleged any justiciable claims relating to Wisconsin's congressional districts. Accordingly, *Growe*'s federalism and comity interests do not apply, and this Court's adjudication of those claims should proceed as previously ordered.

CONCLUSION

For the foregoing reasons, the Hunter Plaintiffs respectfully request that the Court deny the Johnson Intervenors' Second Motion to Stay Proceedings.

Dated: October 1, 2021

Respectfully submitted,

/s/ Aria B. Branch

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2021, I served the foregoing document with the Clerk of the Court using the Court's CM/ECF system, thereby serving all counsel who have appeared in this case. *See* Fed. R. Civ. P. 5(b).

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