

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

LISA HUNTER, JACOB ZABEL, JENNIFER
OH, JOHN PERSA, GERALDINE SCHERTZ,
and KATHLEEN QUALHEIM,

Plaintiffs,

Case No. 3:21-cv-00512

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.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY PROCEEDINGS

The Intervenor-Plaintiffs, Billie Johnson, Eric O'Keefe, Ed Perkins and Ronald Zahn, are Wisconsin citizens who, based upon the most recent census results, reside in state and congressional voting districts that are over-populated and, as a result, have a diluted vote relative to the votes of others who live in less populated districts. They have filed a Petition for an Original Action in the Wisconsin Supreme Court to seek relief based upon the legal principle of "one person, one vote" under the Wisconsin Constitution. *See* Ex. D to Motion to Intervene.



They have intervened in this action: (1) to request that this Court stay the action under *Grove v. Emison*, 507 U.S. 25, 34 (1993), because neither the Wisconsin Legislature nor the Wisconsin courts have yet made decisions regarding new voting maps for Wisconsin, and (2) to be heard on the merits, if this Court should ever be in a position to rule on the merits, of their one person, one vote claim. This memorandum is submitted in support of their motion to stay.

ARGUMENT

Although the federal and state courts have concurrent jurisdiction to decide redistricting matters, the law is clear that under principles of federalism and comity the states' role is primary. *Grove v. Emison*, 507 U.S. 25, 34 (1993); *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Scott v. Germano*, 381 U.S. 407, 409 (1965).

As noted in *Grove*, 507 U.S. at 34:

“[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.” *Chapman v. Meier*, 420 U.S. 1, 27, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975). Absent 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.

Grove specifically requires federal courts “to 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 added).

Here the census results needed for redistricting have only been available for about two weeks and the Wisconsin Legislature has begun the task of addressing the “highly political task” of redistricting. In addition, the Intervenor-Plaintiffs have

asked the Wisconsin Supreme Court to take their one person, one vote claim if the Legislature does not complete the task.

Thus, if it should come to pass that the Wisconsin Legislature does not approve new maps which are agreed to by the Governor (as the Plaintiffs predict) then the task can still be handled by a state (as opposed to a federal) institution, namely the state courts and *Grove* specifies that any redistricting plan judicially “enacted” by a state court would be entitled to presumptive full-faith-and-credit legal effect in federal court. *Id.* at 35–36.

And while someone might argue that the Wisconsin Supreme Court need not accept the Petition before it, that Court, itself, has previously said that “[t]he people . . . have a strong interest in a redistricting map drawn by an institution of state government—ideally and most properly, the legislature, secondarily, this court.” *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶17, 249 Wis.2d 706, 639 N.W.2d 537. That Court has further said that “there is no question” that redistricting actions warrant “this court’s original jurisdiction; any reapportionment or redistricting case is, by definition, *publici juris*, implicating the sovereign rights of the people of this state.” *Jensen*, 249 Wis. 2d 706, ¶17.

In *Grove*, the Supreme Court explained that federal courts are *required* to stay their hand while either the state legislature or a state court is addressing the task of redistricting. *Id.* at 34. Here, the census results are only two weeks old and both are involved. Under *Grove*, this Court has no option except to defer and stay its hand.

In their complaint, the Plaintiffs apparently seek to get around *Grove* by arguing that the Legislature will not be able to adopt maps which will be approved by the Governor and, as a result, this Court must intervene. But even if the Plaintiffs are correct about that and it comes to pass that the Governor vetoes the maps approved by the Legislature, then the primary place for resolution of that dispute is the state courts and the Intervenor-Plaintiffs have sought such relief in the state courts.

The U.S. Census Bureau did not release the census information to the states which is necessary for the Legislature to commence the redistricting process until August 12, 2021. It is not the proper role of a federal court to intercede mere weeks after the release of that data when neither the state legislature nor the state courts have had a chance to act.

CONCLUSION

The Intervenor-Plaintiffs respectfully request that this Court stay proceedings in this matter until such time as the Wisconsin Legislature and the Wisconsin courts have completed their work relating to the redistricting process.

Dated this 26th day of August, 2021.

Respectfully submitted,

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