

No. 21-474

In The
Supreme Court of the United States

IN RE WISCONSIN LEGISLATURE,
Petitioner.

On Petition for Writ of Mandamus and Petition for
Writ of Prohibition to the United States District
Court for the Western District of Wisconsin

**BRIEF FOR RESPONDENTS
BILLIE JOHNSON, ERIC O'KEEFE,
ED PERKINS, AND RONALD ZAHN**

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INTRODUCTION

Respondents Billie Johnson, Eric O’Keefe, Ed Perkins, and Ronald Zahn (the “Johnson Respondents”), four Wisconsin voters living in malapportioned congressional and state legislative districts, are the Petitioners in the redistricting case currently pending before the Supreme Court of Wisconsin, *Johnson v. Wis. Elections Comm’n* (Wis. S. Ct. No. 2021AP1450-OA).

As intervenors before the federal District Court that is the subject of the Wisconsin Legislature’s petition, the Johnson Respondents have focused their efforts on obtaining a stay of those proceedings under this Court’s decision in *Grove v. Emison*, 507 U.S. 25 (1993). Those efforts have been largely unsuccessful.

The Wisconsin Legislature may well be entitled to a writ ordering dismissal of the federal proceedings. But the Johnson Respondents submit this brief to argue that if this Court declines to provide the requested relief, it should at least order a true stay of the federal proceedings. A stay is appropriate under this Court’s case law, the District Court’s current “stay” is wholly insufficient, and that Court is already “permit[ting] federal litigation to be used to impede” state apportionment.¹

¹ The Johnson Respondents believe that these arguments are fairly encompassed by the second issue raised by the Petitioner, which asks in part whether “a federal court clearly and

SUPPLEMENTAL STATEMENT OF THE CASE

The Johnson Respondents will briefly supplement the Wisconsin Legislature’s statement of facts with facts particular to them as well as relevant events that have occurred since the filing of the Legislature’s petition to this Court.

On August 23, 2021, the Johnson Respondents petitioned the Supreme Court of Wisconsin to grant them leave to commence an original action concerning the malapportionment of Wisconsin’s congressional and state legislative districts. *See* Pet.App. 91. They asked the Court to take jurisdiction of the matter, immediately stay it to give the Legislature time to adopt a new apportionment plan, and then draw its own apportionment plan if the legislative process failed. *See id.*

The Johnson Respondents then moved to intervene in the ongoing federal redistricting

indisputably transgress[es] . . . principles of federalism and comity[] when it refuses to defer consideration of a redistricting dispute to the legislature and state supreme court on the assumption that multiple branches of state government will fail to timely redistrict.” Pet. at i. The Petition, further, cites *Grove* dozens of times. *See also, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721, 730 (1996) (indicating that staying and dismissing an action may both involve the application of “abstention principles”).

proceedings, asking the District Court to stay the proceedings under *Grove v. Emison*, 507 U.S. 25 (1993), in light of the Respondents’ pending state original action petition. *See* Pet.App. 3-4. The Court permitted intervention but refused to stay the case. *Id.* at 4, 8-10.

Then the Supreme Court of Wisconsin accepted jurisdiction of the Johnson Respondent’s lawsuit. Pet.App. 90-126. The Johnson Respondents notified the federal District Court of the development and again asked it to stay the federal case under *Grove* until it was clear that the Supreme Court of Wisconsin, following the failure of the state political branches, had decided that it would not, or shown that it could not, complete redistricting. *See Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Sept. 23, 2021), ECF No. 79; *see also* ECF No. 101-1 (Oct. 5, 2021) (reply).² They suggested an informational status conference in November or some later date. ECF No. 101-1:5 n.3 (Oct. 5, 2021). Shortly thereafter, the Legislature filed its Petition to this Court.

In response to that motion, and with the Legislature’s petition pending, the District Court issued a limited—and, for reasons discussed below, wholly insufficient—stay until November 5, 2021. *See* BLOC Respondents’ Addendum (“B.R.Add.”) 3-8.

² All ECF citations in this brief are to the *Hunter* case.

In the meantime, proceedings before the Supreme Court of Wisconsin are well underway. The Court has conducted and completed briefing on motions to intervene and on the question of when a new redistricting plan must be in place; pursuant to its direction, an amended original action petition has been filed and will be answered as of the date of this brief; a joint stipulation of facts and law, paired with a recommended procedure for resolving disputed facts, is due to the Wisconsin Supreme Court November 4, 2021; and the parties are in the process of submitting briefs, due November 1, on issues relating to the factors relevant to the creation of new maps and the procedure by which the Court should accomplish this task (if required to do so). *See* Pet.App. 90-126; Johnson Respondents’ Appendix (“J.R.App.”) 1a-16a.

ARGUMENT

- I. **If this Court declines to dismiss the federal proceedings, it should order the District Court to stay them.**

The Wisconsin Legislature’s request that this Court order dismissal of the federal proceedings may be warranted. Especially given that, as the Legislature notes, *Growe* did not have the opportunity to address standing and ripeness questions, dismissal may be the best way to vindicate the important jurisdictional and federalism principles at stake. If this Court declines to do so, however, it

should at least order the District Court to stay proceedings.

In *Grove v. Emison* this Court reaffirmed that “reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court,” and ordered federal courts to “defer” to state redistricting, including state judicial redistricting, until that process failed. *Grove*, 507 U.S. at 33-34 (first quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). The Court was not ambiguous about what deferral requires in the context of state efforts to redistrict. It explained that it means that “federal courts should not prematurely *involve themselves* in redistricting,” a sweeping phrase. *Grove*, 507 U.S. at 32 n.1. Put differently, federal courts are barred even from “consideration” of redistricting disputes while state legislative or judicial redistricting is pending. *Grove*, 507 U.S. at 33. The *only* trigger for federal action is where there is “evidence that the[] state branches will fail timely to perform [their] duty,” that is, to “develop a redistricting plan in time for the primaries.” *Id.* at 34, 36.

Despite this language, and despite the fact that all three branches of Wisconsin government are timely engaged in redistricting, the District Court is apparently of the impression that *Grove* requires only that federal courts refrain from issuing a *final judgment* in the face of state redistricting; otherwise, federal proceedings can continue at the speed desired

by the District Court, just in case the state branches should fail. Throughout the process, the District Court apparently plans to modify the aggressiveness of its approach based on whether the District Court believes that the Supreme Court of Wisconsin is performing to the District Court's expectations. *See, e.g.*, B.R.Add. 6 (noting, following the Wisconsin Supreme Court's decision to accept jurisdiction of redistricting action, that although "responsibility for redistricting falls first to the states," the Wisconsin Supreme Court had not yet "commit[ted] to drawing new legislative or congressional maps, and has not yet set a schedule to do so, or even to decide whether it will do so").

This flips 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 District Court is, by continuing federal proceedings, *presuming* failure and wants the Wisconsin Supreme Court to prove to its satisfaction that it will *succeed*. This undercuts all notions of federalism and comity. There is absolutely zero evidence that the Legislature, Governor, and Wisconsin Supreme Court will fail to enact redistricting maps in advance of the 2022 primaries. Indeed, all evidence is to the contrary.

Further, this "just in case" exception to deferral or abstention is limitless. For example, in *Grove* this Court analogized to "*Pullman* 'deferral,'" the doctrine

under which “federal courts should not prematurely resolve the constitutionality of a state statute.” *Grove*, 507 U.S. at 33 n.1.³ “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 the District Court, it seems, in future cases where *Pullman* 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 District Court’s interpretation will incentivize continued federal forum shopping in redistricting cases and thus produce continued state-federal friction in an area of law that belongs uniquely to the States. Interested parties will rush to ensure that each state redistricting case is overseen by a lower federal court supervisor. But *Grove* does not authorize a federal Court to sit in judgment of, and manage, the high court of a separate sovereign in this manner. This Court should foreclose this state of affairs by—at the very least—reaffirming that “defer” means “defer.”

³ See *Railroad Comm’n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

II. The District Court’s current “stay” is wholly insufficient.

Certain of the other Respondents may argue “nothing to see here” because on October 6 the District Court purported to stay proceedings. But that “stay” does not satisfy *Growe*, for several reasons.

First, it was not a stay at all—the Court maintained a briefing schedule on motions to dismiss and ordered a joint status report on the state proceedings, “setting out points of disagreement,” to be filed within a few weeks. *See* B.R.Add. 8; ECF No. 105 (Oct. 7, 2021) (additional, later-filed motion to dismiss); B.R.Add. 8 (requiring the parties to explain in the status report “the schedule of the action; the scope of any factual development process; and the scope of the legal issues that the parties intend to raise”). Its brief stay of discovery will expire on November 5 unless extended. *See* B.R.Add. 8.

Second, rather than remove itself from the redistricting process as *Growe* demands, the District Court has effectively communicated to the Supreme Court of Wisconsin that it will be closely vetting its actions to ensure they meet the District Court’s requirements, and that it will be immediately ready to act if those actions, in the District Court’s opinion, fall short. For example, it reaffirmed its ruling that “March 1, 2022, is the deadline by which the maps must be available,” daring the Wisconsin Supreme Court to disagree on this question of state law that is

currently being resolved in state court. B.R.Add. 7; *see* Pet.App. 94. It declined to remove a trial date in January 2022 from its calendar. B.R.Add. 7. It indicated that it needed more information on the scope of the state proceedings—such as whether they will raise Voting Rights Act claims—before it would decide on whether to permit federal discovery, *see id.* at 7-8, despite this Court’s ruling in *Grove* that “the federal and state-court complaints [need not be] identical” to require federal deferral, *Grove*, 507 U.S. at 35 (lack of a Voting Rights Act claim in the state court action was irrelevant to the deferral question).

In sum, rather than simply “stay[ing] its hands,” *id.* at 33 (quoting *Pullman*, 312 U.S. at 501), and at most requesting an update as to whether new maps are in place, the District Court has maintained a presence in the state proceedings that is difficult to describe as anything other than invasive. As will now be shown, this presence has already negatively affected the state redistricting process.

III. Federal proceedings are already harming the state redistricting process.

The District Court tellingly observed in its recent order that it “recognize[d] . . . that [it] should minimize any interference with the state’s own redistricting efforts.” B.R.Add. 6. That is incorrect. *Grove* calls for *no* interference, not “minim[al]” interference: “Absent evidence that these state branches will fail timely to perform [their] duty, a

federal court must *neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.*” *Grove*, 507 U.S. at 34 (emphasis added).

Whatever the rule, although Wisconsin’s redistricting proceedings are still relatively young, there are already multiple examples illustrating how the District Court’s refusal to dismiss or stay the proceedings before it has harmed state efforts.

First, certain of the Respondents asked the *District Court* to answer a question of state law, namely whether the Wisconsin Supreme Court had a state constitutional congressional redistricting claim before it in the state proceedings. ECF No. 93 at 6 (Oct. 1, 2021) (arguing, erroneously, that a stay of the federal cases was unnecessary as to congressional districts because the Johnson Respondents had “plainly failed to allege any state law claims related to Wisconsin’s congressional districts”). Obviously, the proper route would have been to obtain an answer on that question from the Wisconsin Supreme Court. Instead, the parties were forced to prematurely address the question before the District Court, who was apparently supposed to rule on the scope of the *Wisconsin Supreme Court’s* order accepting jurisdiction of the Johnson Respondents’ case. The District Court, far from rejecting the invitation, acknowledged that the “question of whether the Wisconsin Supreme Court action will address malapportionment of the congressional map” had

been raised and ordered the parties to address it in their November 5 status report. *See* B.R. Add. 8 (“The status report should address: . . . the scope of the legal issues that the parties intend to raise.”).⁴

Second, the parties were required 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 was still ongoing and while that state case (and the claims and parties it would involve) was still taking shape. *Compare* Pet.App. 16 (Sept. 21 order of District Court requiring parties to “confer and submit a joint proposed discovery plan and pretrial schedule” by Sept. 28), *with* Pet. App. 93-94 (Sept. 22 order of Wisconsin Supreme Court accepting jurisdiction and ordering letter briefs due Oct. 6 addressing the date by which a redistricting plan must be in place). But under *Grove* it is the *state* proceeding that is supposed to take primacy.

⁴ To be clear, there is no serious question that the proceedings before the Wisconsin Supreme Court now involve congressional redistricting. *See, e.g.*, Pet.App. 91 (grant by Wisconsin Supreme Court of petition of “four Wisconsin voters who claim that the results of the 2020 census show that Wisconsin’s congressional and state legislative districts—including the voters’ districts—are malapportioned and no longer meet the requirements of the Wisconsin Constitution”; J.R.App. at 3a-4a (grant by Wisconsin Supreme Court, after the District Court’s October 6 order, of intervention of five Congressmen who themselves raised congressional redistricting claims)).

Third, while there is no way of knowing how the federal court's involvement is affecting the Wisconsin Supreme Court's deliberations, the Johnson Respondents submit that it would be unrealistic to simply assume that the District Court's repeated questions and concerns go unnoticed. Other than this Court, no federal court should be permitted to subtly steer a state redistricting process in this manner.

All of this is just what has occurred to date. As noted, this case is still young but—if both cases are allowed to proceed simultaneously as the District Court intends—there will be multiple conflicts, contradictions, inconveniences, and inconsistencies to follow. To take just one example, how are the parties to comply with conflicting discovery orders?

Of course, no illustration of actual state-federal conflicts is necessary. The mere need to double all litigation requirements, rather than let the forum whose responsibility it is to adjudicate redistricting do so as efficiently as possible, constitutes an impermissible “imped[iment]” under *Grove*. *Grove*, 507 U.S. at 34.

This Court should halt this federal interference with state proceedings before it worsens.

CONCLUSION

The Johnson Respondents respectfully request that, if this Court does not issue a writ ordering the District Court to dismiss the federal proceedings, it order the District Court to stay the cases.

Respectfully submitted,

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October 28, 2021

APPENDIX

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Appendix A: Order of the Supreme Court of Wisconsin, *Johnson v. Wisconsin Elections Commission*, No. 2021AP1450-OA (Oct. 14, 2021) ..1a

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APPENDIX A

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You are hereby notified that the Court has entered
the following order:

No. 2021AP1450-OA
Johnson v. Wisconsin Elections Commission

On September 22, 2021, this court granted the petition for leave to commence an original action filed by petitioners Billie Johnson, et al., and invited intervention motions to be filed no later than October 6, 2021.

On September 24, 2021, the court received a notice of motion and unopposed motion to intervene as petitioners filed by Black Leaders Organizing for

Communities, et al. (plaintiffs in Black Leaders Organizing for Communities v. Spindell, No. 21-CV-534 (W.D. Wis. Aug. 23, 2021), consolidated with Case No. 21-CV-512) together with a supporting brief.

On October 6, 2021, the court received additional intervention motions and supporting documents from proposed-intervenor-petitioners Congressmen Glenn Grothman, Mike Gallagher, Brian Steil, Tom Tiffany, and Scott Fitzgerald (“Congressmen”); proposed-intervenor-petitioners Gary Krenz, Sarah J. Hamilton, Stephen Joseph Wright, Jean-Luc Thiffeault, and Somesh Jha (a group of Wisconsin voters who identify themselves as the “Citizen Mathematicians and Scientists”); proposed-intervenor-petitioners Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, and Kathleen Qualheim (plaintiffs in Hunter v. Bostelmann, No. 21-CV-512 (W.D. Wis. Aug. 13, 2021)); proposed-intervenor-respondent the Wisconsin Legislature; proposed-intervenor-respondent Governor Tony Evers, in his official capacity; and proposed-intervenor-respondent Janet Bewley, Senate Democratic Minority Leader, on behalf of the Senate Democratic Caucus.

On October 13, 2021, the court received responses pertaining to the intervention motions from the petitioners Billie Johnson, et al.; proposed-intervenor-petitioners Congressmen; proposed-intervenor-petitioners Citizen Mathematicians and Scientists; proposed-intervenor-petitioners Lisa

Hunter, et al.; and proposed-intervenor-respondent the Wisconsin Legislature.¹

Wisconsin courts view intervention favorably as a tool for "disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." See Helgeland v. Wis. Municipalities, 2008 WI 9, ¶38, 307 Wis. 2d 1, 9, ¶44, 745 N.W.2d 1 (quoting State ex rel. Bilder v. Delavan Twp., 112 Wis. 2d 539, 548-49, 334 N.W.2d 252 (1983)). We have evaluated each intervention motion and determined that all are timely; each movant claims an interest relating to the subject of this redistricting action; each is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and that each movant has demonstrated that its interest is not adequately represented by existing parties. See Wis. Stat. § 803.09. Therefore,

IT IS ORDERED that each of the pending motions to intervene is granted;

¹ The court also received letter briefs responding to the question of the timing of a new redistricting plan from the petitioners Billie Johnson, et al.; respondents Wisconsin Elections Commission, et al.; proposed-intervenor-petitioners Congressmen; proposed-intervenor-petitioners Black Leaders Organizing for Communities, et al.; proposed-intervenor-petitioners Citizen Mathematicians and Scientists; proposed-intervenor-petitioners Lisa Hunter, et al.; and proposed-intervenor-respondent the Wisconsin Legislature.

The intervenor-petitioners have each submitted with their motions to intervene a proposed complaint for declaratory and injunctive relief/petition for original action. The court wishes to have one controlling petition, rather than multiple petitions in this action. Therefore, no later than 12:00 noon on October 21, 2021, the petitioners and the intervenor-petitioners shall file a single omnibus amended petition that, in numbered paragraph form, restates the previously asserted allegations and claims advanced by petitioners Billie Johnson, et al., and states the allegations and claims of each intervening petitioner as provided in its proposed complaints/petition, with those claims and allegations consolidated to the extent possible. No additional memorandum of law shall accompany the omnibus amended petition. This omnibus amended petition shall supersede the previously filed petition in this action;

IT IS FURTHER ORDERED that no later than 12:00 noon on October 28, 2021, the respondents and intervenor-respondents shall each file an answer to the omnibus amended petition;

IT IS FURTHER ORDERED that no later than 12:00 noon on November 4, 2021, the petitioners, intervenor-petitioners, respondents, and intervenor-respondents shall prepare and submit a joint stipulation of facts and law; and shall identify and list disputed facts, if any, and suggest a procedure for resolving them; and

IT IS FURTHER ORDERED that all filings in this matter shall be filed as an attachment in pdf format to an email addressed to clerk@wicourts.gov. See, Wis. Stat. §§ 809.14, 809.70, 809.80, and 809.81. A paper original and 10 copies of each filed document must be received by the clerk of this court by 12:00 p.m. of the business day following submission by email, with the document bearing the following notation on the top of the first page: “This document was previously filed via email;” and

IT IS FURTHER ORDERED that requests for additional briefing or extensions will be viewed with disfavor.

Sheila T. Reiff
Clerk of Supreme Court

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APPENDIX B

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No. 2021AP1450-OA
Johnson v. Wisconsin Elections Commission

On September 22, 2021, this court granted a petition for leave to commence an original action filed by petitioners Billie Johnson, et al. On October 14, 2021, this court granted motions to intervene filed by Black Leaders Organizing for Communities, et al. (“BLOC”); Congressmen Glenn Grothman, Mike Gallagher, Brian Steil, Tom Tiffany, and Scott Fitzgerald (“Congressmen”); Gary Krenz, Sarah J. Hamilton, Stephen Joseph Wright, Jean-Luc

Thiffeault, and Somesh Jha (“Citizen Mathematicians and Scientists”); Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, and Kathleen Qualheim; the Wisconsin Legislature; Governor Tony Evers; and Janet Bewley, Senate Democratic Minority Leader, on behalf of the Senate Democratic Caucus.

If new maps are not enacted into law, we may be called upon to award judicial relief. Anticipating that possibility, we require all parties to brief the four questions below. Therefore,

IT IS ORDERED that the parties (including all intervenors) shall file simultaneous briefs addressing the following questions:

- 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?

IT IS FURTHER ORDERED that each party shall file an initial brief on or before 12:00 noon, October 25, 2021, and each party may file a response brief on or before 12:00 noon, November 1, 2021. The form, length, pagination, appendix, and certification requirements shall be the same as those governing standard appellate briefing in this court for a brief-in-chief and a response brief;

IT IS FURTHER ORDERED that all filings in this matter shall be filed as an attachment in pdf format to an email addressed to clerk@wicourts.gov. See Wis. Stat. §§ 809.70, 809.80 and 809.81. A paper original and 10 copies of each filed document must be received by the clerk of this court by 12:00 noon of the business day following submission by email, with the document bearing the following notation on the top of the first page: "This document was previously filed via email"; and

IT IS FURTHER ORDERED that requests for additional briefing or extensions will be viewed with disfavor.

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