

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| Michael Gonidakis, <i>et al.</i> , | : | |
| | : | Case No. 2:22-cv-773 |
| Plaintiffs, | : | |
| | : | |
| v. | : | Chief Judge Algenon Marbley |
| | : | |
| Frank LaRose, | : | Magistrate Judge Elizabeth Deavers |
| | : | |
| Defendant. | : | |
| | : | Three-Judge Panel Requested |
| | : | |

PLAINTIFFS' MEMORANDUM CONTRA BENNETT PARTIES' MOTION TO STAY

Plaintiffs are weeks from a primary election for statewide legislative districts. But those districts are malapportioned: either the old districts apply despite population changes or there are no districts at all. As a result, Plaintiffs are suffering an ongoing constitutional violation.

The Bennett Parties claim that they are similarly suffering from malapportioned or unclear districts. (ECF No. 58, Complaint, ¶ 59). Yet they argue that this Court should stand aside so the violations may continue. (ECF No. 59). Not so. This Court, as authorized by the U.S. Supreme Court, should proceed in parallel with the Ohio Supreme Court litigation. This way, this Court has enough time to step in should Ohio's institutions continue to fail.

There is no downside to proceeding in parallel. But staying the proceedings, as requested by the Bennett parties, would introduce chaos and uncertainty, and push the primary election even further behind, and create additional harm, such as multiple primary elections, or other unpredictable results. For these reasons, the Bennett Parties' motion should be denied.

I. RELEVANT FACTS

A. Ohio’s fixed election deadlines.

By statute, Ohio’s statewide primary election is scheduled for May 3, 2022. Ohio Rev. Code §§ 3501.01, 3501.32. Against this backdrop of an impending primary, Ohio still lacks state legislative districts based on the 2020 census. As a result, Ohioans either lack state legislative districts altogether or still live within the state legislative districts drawn based on the 2010 census (“2010 Districts”). Plaintiffs and the Bennet Petitioners are among the Ohioan’s living in 2010 Districts that are unconstitutionally malapportioned based on Ohio’s current population. (ECF No. 8, First Amended Complaint, ¶¶ 7-8; ECF No. 59, Bennett Parties’ Complaint, ¶ 16.)

B. Ohio’s failed statewide legislative redistricting process.

It was not supposed to be this way. On September 16, 2021, the Ohio Redistricting Commission adopted a state legislative redistricting plan based on 2020 census data. Multiple parties, including the Bennett Parties, immediately challenged that plan in the Ohio Supreme Court, and the matter remains unresolved nearly six months later. The Ohio Supreme Court has thus far rejected the Redistricting Commission’s initial redistricting plan as well as a second plan that the Redistricting Commission approved on January 22, 2022.

The Redistricting Commission adopted a third plan on February 24, 2022. Multiple challengers—including the Bennett petitioners—objected to that plan as well. The Ohio Supreme Court has not indicated when or how it will rule on the latest challenge. If the Ohio Supreme Court rejects the third plan, the Redistricting Commission will have to start over on a new, fourth plan.

Plaintiffs, as well as the Bennett Parties, lack statewide legislative districts until the Ohio Supreme Court approves districts first approved by the Redistricting Commission.

C. Secretary of State moves forward, costing millions of dollars.

Despite the lack of an approved redistricting plan, preparations for the May 3 primary are proceeding apace, against the recommendation of elections officials and at significant taxpayer expense. On February 28, 2022, the Ohio Association of Election Officials sent a letter to Ohio State Senate President Matt Huffman requesting postponement of the May 3 primary.¹ In the letter, Ohio elections officials stated that their “ability to administer a fair and accurate election” has been compromised due to the lack of any state legislative and Congressional maps. However, the Ohio General Assembly has thus far declined to move the primary.² Similarly, the Department of Defense recently rejected a request from Defendant, Ohio Secretary of State Frank LaRose, to extend the federal deadline for sending ballots to military and overseas voters.³

Despite this chaos and uncertainty, Secretary LaRose has directed local elections officials to move forward with preparing ballots for the primary based on state legislative maps that have not been and may never be approved by the Ohio Supreme Court. (*See* ECF No. 53-1) At Secretary LaRose’s request the Ohio General Assembly appropriated \$9 million in taxpayer funds to prepare for the primary, heedless of the lack of final maps.

¹ Andrew J. Tobias, *Ohio Elections Officials Say Redistricting Delays Have ‘Compromised Planning for May Primary, Ask Lawmakers to Postpone It*, CLEVELAND PLAIN DEALER, (Feb. 28, 2022), <https://www.cleveland.com/news/2022/02/ohio-elections-officials-say-redistricting-delays-have-compromised-planning-for-may-primary-ask-lawmakers-to-postpone-it.html>.

² Andrew J. Tobias, *Why Ohio’s Legislative Leaders Haven’t Moved the May Primary Election Date as Deadlines Pass*, CLEVELAND PLAIN DEALER (March 5, 2022) <https://www.cleveland.com/news/2022/03/why-ohios-legislative-leaders-havent-moved-the-may-primary-election-date-as-deadlines-pass.html>.

³ Jessie Balmert, *Feds Deny Ohio’s Request for Delay Sending Military Ballots as Primary Chaos Continues*, CINCINNATI ENQUIRER (March 5, 2022) <https://www.cincinnati.com/story/news/politics/elections/2022/03/05/ohio-redistricting-feds-deny-ohios-request-delay-military-ballots/9384587002/>.

Despite Ohio’s continuing failure to adopt constitutional legislative districts, the Bennett Parties request this Court to stay these proceedings pursuant to *Grove v. Emerson*, 507 U.S. 25 (1993).

II. LAW AND ARGUMENT

A. *Grove* does not require a stay when, as here, an unconstitutional election is imminent.

Fortunately, *Grove* does not require federal courts to abstain from intervening in a redistricting process when, as here, an unconstitutional election is imminent. Generally, “the [Supreme] Court has required federal judges 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 in original.) However, states must adopt a Constitutional redistricting plan “within *ample time* . . . to be used in the [upcoming] election.” *Id.* at 35, quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965). Thus, deferral is required pursuant to *Grove* only “[a]bsent evidence that these state branches will fail to timely perform that duty.” *Grove* at 34.

In *Grove*, a federal district enjoined the parallel redistricting proceedings of the Minnesota Supreme Court and implemented its own redistricting plan even though the state court had *already adopted* a redistricting plan for the state’s upcoming primary and general and would have implemented it but for the federal court’s intervention. *Grove* at 29–32. The Supreme Court found this intervention inappropriate, but specifically noted, “Of course, the District Court would have been justified in adopting its own plan if it had been apparent that the state court, through no fault of the District Court itself, would not develop a redistricting plan in time for the primaries.” *Id.* at 36.

Consistent with this reservation in *Grove*, the Supreme Court blessed the intervention of a federal district court in *Branch v. Smith*, 538 U.S. 254, (2003). In *Branch*, the district court did not interfere with the Mississippi redistricting process, but allowed parallel federal court proceedings to go forward in light of “serious doubts” that the state process would be complete in time for upcoming elections. *Id.* at 260. The district court adopted its own redistricting plan but withheld implementing the plan until it became apparent that Mississippi could not implement its own plan in time for the election. *Id.* The Supreme Court affirmed the district court’s action. *Id.* at 266.

The facts of this case are easily distinguishable from *Grove* and far more analogous to *Branch*. Simply put, Plaintiffs are running out of time. The status quo is unquestionably unconstitutional, and the facts of this case evince a strong possibility, that the Redistricting Commission and Ohio Supreme Court will not have a constitutional plan in place in time for the fast-approaching primary. Accordingly, *Grove* is inapplicable and cannot serve as the basis for a stay.

B. The Court should allow proceedings to continue in this case so that Plaintiffs are not stranded in malapportioned or nonexistent districts on Election Day.

When, as here, there is evidence that state institutions will *not* enact a constitutional redistricting plan in time for an election, district court intervention is appropriate to ensure that constitutional legislative districts are in place for that election. *See id.* at 261–262. Even if there is evidence that state institutions *may* implement a state redistricting plan before an election, federal district courts can proceed to hear a constitutional challenge to the existing state legislative districts, “to prepare for the possibility that statute institutions will be unable to fulfill their duty in a timely manner.” *Brown v. Kentucky*, No. 13-cv-68 and 13-cv-25, 2013 U.S. Dist. LEXIS 90401, at *17 (E.D. Ken. June 27, 2013).

Accordingly, the federal courts have allowed redistricting challenges to proceed parallel to the state redistricting process when it appears that state institutions may fail to complete redistricting in time for the next election. Such was the case in *Brown*, where the District Court declined to stay a malapportionment challenge while the Kentucky legislature met in a special session for the purpose of adopting new legislative district maps. *Brown* at * 7. While recognizing the Kentucky legislature’s “primary responsibility to enact a constitutional redistricting plan” the district court also recognized that it was “secondarily responsible for timely providing constitutional maps should the legislature fail.” *Id.* at * 18-19. Accordingly, the district court decided to proceed with its case and prepare a constitutional legislative district map to implement in case the legislature failed. *Id.* at * 19. As the court recognized, “if the legislature were to fail in passing constitutional legislative districts and the Court were not prepared to do so, the fundamental voting right of both the Plaintiffs and the general public would be severely threatened.” *Id.* at 18.

Such a severe threat exists here. With weeks to go before the election, Plaintiffs and other Ohioans cannot afford for this Court to delay in the hopes that a state redistricting process that has been ongoing for nearly six months—and that the challengers in the Ohio Supreme Court would have go on even longer—will finally soon end with constitutional maps. Unlike the *Grove* plaintiffs, Plaintiffs in this case are not asking the Court to intervene in the state process. They are asking for a backstop if that process fails. There is no harm in the Court moving forward toward creating that backstop while simultaneously hoping for the best from the state proceedings. But if the state process fails and the Court is unable to provide a backstop in time for the election, the harm to Ohio voters’ constitutional rights will be grievous.

C. The Bennett Parties argue there is “no evidence” that Ohio’s process has failed, yet concede that process has failed for months.

Given the severe threat of even further injury to Plaintiffs’ and the Bennett Parties’ constitutional rights and the clear precedent for parallel proceedings to ensure those rights are protected, there is no basis for the Court to continue to stay these proceedings to wait a on a state process that has continuously failed.

The Bennett Parties ask this Court to ignore their injury because there is “no evidence that Ohio will be unable to carry out its constitutional duty” to provide statewide legislative districts. (ECF No. 59, PageID # 850). Not so. First, as alleged by the Bennett Parties, Ohio has already failed to carry out its constitutional duty because they live in malapportioned districts. (ECF No. 58, ¶¶ 78–80). Second, as also alleged by the Bennett Parties, this failure has continued for more than six months—and there has been no change in election deadlines. (*Id.*, ¶ 5). Finally, there have now been three volleys between the Redistricting Commission and the Ohio Supreme Court with no districts in place. (*See id.*).⁴ In other words, there is overwhelming evidence that Ohio has failed to carry its constitutional duty.

Despite this ongoing failure, the Bennett Parties bury their head ask that this Court allow the “state process to play out.” (ECF No. 59, PageID # 853). The process has played out. And the ongoing delay continues to deprive Plaintiffs and others of their right to meaningfully participate in the political process, threatens to deprive Plaintiffs and others of their rights to vote in properly apportioned legislative districts, and wastes millions of taxpayer dollars preparing ballots that may never be used. (*See* ECF No. 53-1). In contrast, the Court can ensure that Ohioans constitutional rights are protected at the polls in May while *still allowing the state process one last chance to*

⁴ Despite filing on March 7, the Bennett Parties omitted from their Motion to Stay and Complaint that Ohio Supreme Court is reviewing a third plan adopted by the Redistricting Commission.

play out. Plaintiffs are simply asking the Court to introduce some much-needed efficiency to this process by moving in parallel to the Ohio Supreme Court. An indefinite pause, as suggested by Bennett Parties, cannot be the solution.

Finally, the Bennett Parties' request to stay these proceedings pending the outcome of the state redistricting process is particularly disingenuous because they are actively contributing to the *further delay* of that process. While telling this Court that there is "no evidence" Ohio will be unable to enact a new legislative redistricting plan in light of "[a]ctive, highly expedited litigation" the Bennett Parties are prolonging that very same litigation. On February 28, 2022, the Bennett Parties, among others, filed objections in the Ohio Supreme Court to the Redistricting Commission's third, most recent plan. If the objections are successful, the Redistricting Commission will have to start again from square one.

The Bennett Parties have no basis to ask the Court to delay this litigation to await the outcome of another proceeding they are also delaying. If, indeed, the Ohio Supreme Court approves a constitutional redistricting plan before this Court issues an order, then the Court can defer to that state resolution. That is no reason to delay parallel proceedings to ensure that Plaintiffs' constitutional voting rights are protected if the state process continues to fail. The clock is ticking.

Therefore, this Court should deny the Bennett Parties' motion to stay.

III. CONCLUSION

FOR THE FORGOING REASONS, Plaintiffs respectfully request the Court ensure that Plaintiffs' constitutional rights remain secure and deny the Bennett Parties' motion to stay so this case can move forward.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2022 a copy of the foregoing was filed electronically.

Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Parties may access this filing through the Court's system.

/s/Donald C. Brey

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